HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6573/14

In the matter between:

[M……. E……. N……..] Applicant

And

[K……. E…… F….. B……] First respondent

THE MAINTENANCE OFFICER,
MAGISTRATES COURT, WYNBERG Second respondent

HEARD: 11 June 2014

DELIVERED: 19 JUNE 2014

JUDGMENT

BUTLER, AJ:

1. The applicant applies for an order reviewing and setting aside a directive issued by the second respondent in terms of regulation 3(1) of the Regulations made in terms of

section 44 of the Maintenance Act, 99 of 1998 (respectively "the Regulations" and "the Act").

2. Acrimonious and protracted divorce proceedings are pending between the first respondent and her husband. Two minor children were born of the marriage, of whom the first respondent appears to be the primary caregiver. It is common cause on the papers that the first respondent's husband has fallen on hard financial times. The divorce action has twice previously been postponed. No rule 43 application has yet been launched by the first respondent. The reason, I was informed, was that it made no sense to do so given the husband's financial position. The first respondent earns a modest income, but lives in the former matrimonial home. The home has a value slightly in excess of R3 million. A bond is registered in favour of a financial institution, with a remaining liability of R600 000.00.

3. The applicant is the mother of the first respondent's husband. She, according to her papers, receives an income which exceeds that of the first respondent, but which is itself also relatively modest.

4. On 6 January 2014 the first respondent lodged a complaint with the second respondent in terms of section 6(1)(a) of the Act. The first respondent asserted a claim against the applicant and her husband, Mr [N…..], for maintenance for the minor children. Paragraphs 2 and 3 of the complaint briefly stated the basis upon which the claim for maintenance is advanced. Pages 3 and 4 of the complaint set out the assets and means of the first respondent, and the needs of the minor children. The complaint disclosed the first respondent's interest in the matrimonial home and its value.

5. On 8 February 2014 the second respondent issued a directive in terms of regulation 3(1), as read with section 44 and section 6 of the Act. It directed the applicant and Mr [N…..], referred to therein as "Persons against whom a maintenance order may be/was made", to appear before the second respondent on 19 March 2014 and to produce certain documentation listed in the directive. The directive further informed the applicant and Mr [N…….] of the possibility of an inquiry being instituted in respect of the complaint.

6. An objection was taken to the joinder of Mr N….. to the directive. Mr N……, it transpired, is not the father of the first respondent's husband, nor is he married in community of property to the applicant. On that basis no maintenance order could ever be made against him. Proceedings were instituted for relief in that regard. They resulted in an order being granted by Yekiso J on 17 March 2014 declaring that the directive issued against Mr N……. was a nullity, and declaring further that the declaration did not affect the directive insofar as it related to the applicant.

7. This application was launched on 14 April 2014.

8. The applicant responded to the directive and appeared before the second respondent on 19 April 2014. She produce documentation as required by the directive. Presumably because by then the applicant had already made clear her position that the directive was invalid, before me the first respondent did not take the point that the applicant was by acquiescence precluded from pursuing her contention that the directive was invalid.

9. Against the facts set out above Mr Pretorius, who appeared for the applicant, presented an argument the essence of which is the following. Regulation 3(1) permits

a directive to be issued in respect of any person against whom a maintenance order "may" be made. The applicant is not a person against whom a maintenance order may be made. She is a grandparent of the minor children for whose benefit the order is sought. In the first instance, and in reliance on a judgment handed down by Kgomo J in De Klerk v Groepie NO and Others (31156/2012) [2012] ZAGPJHC 205 (28 August 2012), it was argued that the first respondent was required to obtain a court order against the parents prior to invoking the duty of support of a grandparent. The first respondent, it is common cause, has not obtained such an order. Second, alternatively, the liability of a grandparent cannot be invoked until and unless the parents are completely unable to support the minor children. On the basis of what was presented to the second respondent, it is clear that that stage had not been reached. The second respondent could thus not issue a directive under regulation 3(1). Further, it is unlawful and prejudicial to proceed against one grandparent alone. It is trite that the grandparents jointly are liable for the maintenance of a grandchild, when that duty can be invoked. Here, the first respondent proceeds only against the applicant. For those reasons the issuing of the directive was beyond the powers of the second respondent, and was unlawful. It is subject to review under the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), alternatively it was ultra vires in terms of the principles under the common law.

10. Ms Mc……, who appeared with Mr S……. for the first respondent resisted the argument. She accepted that if the decision in De Klerk is good law, then the application should succeed. However, she criticised the decision and urged me not to follow it. Further, she argued that it is not an absolute requirement that the parents be destitute prior to being able to invoke the duty of support of the grandparents. It is clear that if the parents have some means available, but which are insufficient to meet

the needs of the grandchildren, the duty can be invoked against the grandparents. The proper forum for this debate, she argued, is before the second respondent, who is best able to make that assessment of the facts. If she cannot, then the proper forum is a maintenance inquiry.

Complaints, investigations and enquiries

11. Sections 6 and 7 of the Act deal with the powers of the second respondent. Sections 6(1), 7(1), and 7(2) respectively provide as follows:

"6(1) Whenever a complaint to the effect-

(a) that any person legally liable to maintain any other person fails to maintain the latter person; or

(b) that good cause exists for the substitution or discharge of a maintenance order, has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.

…

7(1) In order to investigate any complaint relating to maintenance, a maintenance officer may-

(a) obtain statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of such complaint;

(b) gather information concerning-

(i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable;

(ii) the financial position of any person affected by such liability; or

(iii) any other matter which may be relevant concerning the subject of such complaint;

(c) request a maintenance officer of any other maintenance court to obtain, within the area of jurisdiction of the said maintenance officer, such information as may be relevant concerning the subject of such complaint; or

(d) require a maintenance investigator of the maintenance court concerned to perform such other functions as may be necessary or expedient to achieve the objects of this Act.

(2) A maintenance investigator shall, subject to the directions and control of a maintenance officer-

(a) locate the whereabouts of persons-

(i) required to appear before a magistrate under section 8(1);

(ii) who are to be subpoenaed or who have been subpoenaed to appear at a maintenance enquiry;

(iii) who are to be subpoenaed or who have been subpoenaed to appear at a criminal trial for the failure to comply with a maintenance order; or

(iv) accused of the failure to comply with a maintenance order;

(b) serve or execute the process of any maintenance court;

(c) serve subpoenas or summonses in respect of criminal proceedings instituted for the failure to comply with a maintenance order as if the maintenance investigator had been duly appointed as a person who is authorised to serve subpoenas or summonses in criminal proceedings;

(d) take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance;

(e) gather information concerning-

(i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable;

(ii) the financial position of any person affected by such liability; or

(iii) any other matter which may be relevant concerning the subject of such complaint; or

(f) gather such information as may be relevant concerning a request referred to in subsection (1)(c)."

12. The institution of an investigation, by way of a directive, is governed by the provisions of regulations 3(1) and 3(2). They provide:

"3 Investigation by maintenance officer

(1) A maintenance officer may, in investigating a complaint and with due consideration to expediting the investigation of that complaint, direct the complainant and the person against whom a maintenance order may be or was made to-

(a) appear on a specific time and date before him or her; and

(b) produce to him or her on the date of appearance information relating to the complaint and documentary proof of the information, if applicable.

(2)

(a) A direction contemplated in subregulation (1) may be given in the manner the maintenance officer deems fit.

(b) The maintenance officer shall keep record of the manner in which the direction was given."

13. In terms of section 6(2) of the Act the maintenance officer may institute an enquiry.

Section 6(2) provides:

"6(2) After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides with a view to enquiring into the provision of maintenance for the person so to be maintained."

14. The proceedings at an enquiry are dealt with extensively under section 8 and following. Section 8(1) provides:

"8(1) A magistrate may, prior to or during a maintenance enquiry and at the request of a maintenance officer, require the appearance before the magistrate or before any other magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information concerning—

(a) the identification or the place of residence or employment of any person who is legally liable to maintain any other person or who is allegedly so liable; or

(b) the financial position of any person affected by such liability."

15. Section 9 provides:

"9(1) (a) A maintenance officer who has instituted an enquiry in a maintenance court may cause any person, including any person legally liable to maintain any other person, to be subpoenaed-

(i) to appear before the maintenance court and give evidence; or

(ii) to produce any book, document or statement.

(c) A book, document or statement referred to in paragraph (a)(ii) includes-

(i) any book, document or statement relating to the financial position of any person who is affected by the legal liability of a person to maintain any other person; and

(ii) in the case where such person is in the service of an employer, a statement which gives full particulars of his or her earnings and which is signed by the employer.

(2) (a) Any person to be subpoenaed as a witness shall, subject to paragraph (b), be subpoenaed in the manner in which a person may be subpoenaed to appear before a magistrate's court in a criminal trial.

(b) The form of the subpoena shall be as prescribed.

(c) The provisions of section 181 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), are, subject to section 11(2), not applicable to any person against whom a maintenance order may be made under this Act."

16. Section 9 must be read with regulation 4, which provides for the form of the subpoena and the process for issuing it.

17. Section 21 of the Act contains a tailor-made provision relating to paternity disputes, which provides:

"(1) If the maintenance officer is of the opinion-

(a) that the paternity of any child is in dispute;

(b) that the mother of such child as well as the person who is allegedly the father of such child are prepared to submit themselves as well as such child, if the mother has parental authority over the said child, to the taking of blood samples in order to carry out scientific tests regarding the paternity of that child; and

(c) that such mother or such person or both such mother and such person are unable to pay the costs involved in the carrying out of such scientific tests,

the maintenance officer may at any time during the enquiry in question, but before the maintenance court makes any order under section 16, request the maintenance court to hold an enquiry referred to in subsection (2).

(2) If the maintenance officer so requests, the maintenance court may in a summary manner enquire into-

(a) the means of the mother of the child as well as the person who is allegedly the father of the child; and

(b) the other circumstances which should in the opinion of the maintenance court be taken into consideration.

(3) At the conclusion of the enquiry referred to in subsection (2), the maintenance court may-

(a) make such provisional order as the maintenance court may think fit relating to the payment of the costs involved in the carrying out of the scientific tests in question, including a provisional order directing the State to pay the whole or any part of such costs; or

(b) make no order.

(4) When the maintenance court subsequently makes any order under section 16, the maintenance court may-

(a) make an order confirming the provisional order referred to in subsection (3)(a); or

(b) set aside such provisional order or substitute therefor any order which the maintenance court may consider just relating to the payment of the costs involved in the carrying out of the scientific tests in question."

18. Finally, parties aggrieved by a decision of the Maintenance Court have a right of appeal to the High Court, in terms of section 25.

19. The Act and the Regulations thus contemplate three distinct steps in a complaint be made, and thereafter.

20. In the first instance, a complaint may be made. Section 6(1) requires only that a complaint to the effect specified in subsections (1)(a) and (1)(b) be made. The Act does not require that the complaint be true or otherwise verified. The complainant requires no legal assistance in doing so. The complaint need make only the basic averment referred to in section 6(1).

21. The second stage involves the investigation of the complaint. Sections 6 and 7 of the Act apply to such investigation. The maintenance officer has no discretion whether or not to investigate a complaint. Section 6(1) provides: "the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act". Neither the Act nor the Regulations require that there necessarily be a formal hearing at that stage. The manner of investigating the complaint is left in the discretion of the maintenance officer, who may invoke the powers, in section 7. One of the powers conferred on the maintenance officer is the power to issue a directive under Regulation 3(1). The decision whether to invoke that power is also a matter in the

discretion of the maintenance officer. One of the purposes served by conferring the power is to act expeditiously. The investigation, it seems to be accepted, is inquisitorial, and not adversarial (see Belinda van Heerden, Alfred Cockrell & Raylene Keightley (general editors) Boberg's Law of Persons and the Family 2 ed (1999), page 285 and Schäfer Family Law Service, page 49, para F38).

22. Third, after investigating the complaint the maintenance officer has the power, under section 6(2), to institute an enquiry. It is axiomatic that if the maintenance officer forms the view that the complaint has no merit, he or she may decline to institute an enquiry. Such a decision would put an end to the matter.

The word 'may' in Regulation 3(1)

23. Implicit in the applicant's case is the proposition that on the facts before her at the time that she issued the directive the second respondent could not form the view that the applicant was a person against whom a maintenance order may be made. A question that arises is whether the second respondent was limited to the facts available at the time, or whether she could permissibly have regard to facts that might possibly emerge in due course.

24. Section 6(1)(a) and 6(1)(b) of the Act and the preamble to regulation 3(1), quoted above, should be read together. It is apparent that the structure of regulation 3(1) follows the structure of section 6(1), in the sense that the words in regulation 3(1) "against whom a maintenance order may be … made" correlate with the words in section 6(1)(a), while the words "against whom a maintenance order … was made" correlate with the words in section 6(1)(b). Thus seen, the words "against whom a

maintenance order may be … made" were intended to relate to the person against whom a complaint was lodged for failing to pay maintenance.

25. The jurisdictional requirement is objective. This is reinforced by the consideration that responding to the directive would inevitably involve inconvenience to the defendant to the process, and possible breaches of privacy. I therefore accept, as argued by Mr Pretorius, that some basis must exist for the maintenance officer to issue a directive.

26. There are however a number of other indications as to the meaning of the expression. In the first instance, section 6(1)(a) requires only that a complaint have been made. The Act is explicit in requiring that the complaint only be that a person liable to pay maintenance has not paid maintenance. Second, a complainant often does not have actual proof of liability on the part of the defendant. He or she may have no more than a belief that, given the need of the minor children, and the position of the respondent, the respondent should pay maintenance, and to that end, their liability should be investigated. Third, as noted above, the second stage in the process created under section 6 and 7 of the Act is a stage of investigation. It is not a trial. The complaint is not a pleading. A complainant may be an unsophisticated lay person. Fourth, the power to issue is a directive is designed to aid efficiency and expedition. It is part of an inquisitorial process, designed to elicit the facts. And finally, a directive may serve to protect the interests of the recipient. The recipient of a directive who has a ready answer to the complaint may wish to have, and therefore would invite, a speedy opportunity to demonstrate that the complaint is without substance, and thereby avoid the lengthy and costly process of a full enquiry. I therefore do not

accept that a maintenance officer is limited to the facts then available when deciding whether to invoke Regulation 3(1).

27. This approach is supported, I suggest, by the provision in section 21 relating to paternity. In many instances the complainant may believe the respondent to be the father of the minor children, but have no actual proof of that fact. The structure of the Act and the Regulations make it clear that an applicant is not precluded from presenting a complaint on the basis of a belief (mistaken as it might later turn out to be), or that the maintenance officer is precluded from issuing a directive based on that belief, without proof necessarily being provided.

28. I consider that the words "may be … made" in Regulation 3(1) require the maintenance officer have due regard to the available facts, but that he or she may permissibly invoke the power to investigate facts not yet available, provided only that the respondent is a person against whom a maintenance order might possibly in due course be made.

29. Mr Pretorius urged upon me the consideration that a low threshold at the stage of issuing the directive is open to abuse. Responding to a directive may be hugely inconvenient to the intended respondent, in circumstances where the respondent may consider that there is no possible basis upon which a maintenance order could be granted against him or her. It is invasive of the rights of the respondent. If, as here, the respondent is required to produce documentation of their own financial affairs, such disclosure necessarily impinges upon the respondent's rights to privacy. I accept those submissions from Mr Pretorius. At the same time, they are balanced by two other considerations which I regard as important. First, at the second stage all that is

undertaken is an investigation by the maintenance officer. The maintenance officer carries the primary responsibility of the process, and the State therefore carries the cost. At the investigation stage the respondent is able to place facts and argument before the maintenance officer as to why the complaint should not be taken further. The investigation process is thus limited, and presents an opportunity to the respondent to place his or her case before the maintenance officer. The maintenance officer is able to prevent abuses of the system. Second, what is at issue in this case are the interests of minor children. Those interests are given prominence in the Constitution. Apart from the rights of children per se, their further rights to dignity are at stake. Respecting and protecting those rights might inevitably lead to some inconvenience to other parties. That, like the duty of support, is however inevitable, and not in my view an unreasonable burden to be imposed, given the protections inherent in the investigation process.

The applicant's argument

30. This brings me to Mr Pretorius' first main argument. In reliance on the decision in De Klerk, he submitted that it is not legally competent to proceed against a grandparent for maintenance in respect of a grandchild without an order of court having been obtained against the parents. Given the centrality of this submission, it deserves some analysis.

31. At paragraphs [46] and [47] of his judgment Kgomo J stated:

> "[46] It is a well-established principle of the common law that although grandparents may have a reciprocal duty to support their grandchildren, such a duty does not come into operation or give rise to a claim in law, unless and until it is established that the parent(s) of those minor children are deceased or are unable to support them.

[47] A dependant may thus not claim support from a more remote relative such as grandparents before he/she has gone against the closer relative, in this case, their father, FW de Klerk Jnr. Such a claim against a far removed relative in my view only kicks in once a competent court has found that the parent is unable to support his children." (my emphasis)

32. The facts in De Klerk were similar to those before this Court. Briefly, the second respondent and her husband had been parties to lengthy and ongoing divorce proceedings. The applicant was the adoptive father of the husband. The second respondent and her husband had two minor children. Rule 43 proceedings had been instituted. An order had been made against the husband, compelling him to pay interim maintenance in respect of two children. The husband had defaulted, and proceedings under section 31(1) of the Act had been instituted against him. The second respondent had then laid a complaint under section 6(1) against the applicant. She sought an order that the applicant, as the adoptive grandfather, pay maintenance in respect of the minor children. The maintenance officer had issued a directive in terms of Regulation 3(1). The applicant had raised an objection to the directive. A 'magistrate' (presumably a reference to the maintenance officer) had declined to entertain the objection, on the basis that he or she had no authority to do so. A demand to withdraw the directive was refused. The applicant thereupon approached the High Court for an order reviewing and setting aside the directive.

33. At paragraphs [36] and [37] of his judgment Kgomo J stated:

"[36] The complaint lodged by Nicole against the applicant on 9 May 2012 corresponds with a complaint made in terms of section 6(1)(a) of the Act and is made on a form corresponding with Form A of the Annexure to the Regulations. In the absence of a complaint under section 6(1)(b), it is my considered view and finding that the first respondent was empowered under Regulation 3(1) to issue a directive only to a person against whom a maintenance order "may" or "might" be made.

> [37] A prima facie view exists that at the time that the directive was issued (i.e. 9 May 2012) the applicant was not the person against whom a maintenance order might be made because –
>
> 1. there was in force an existing maintenance order against FW de Klerk Jnr for the maintenance of the children; and
> 2. at the time, no competent court had found that the children's natural parents were unable to support them."

34. Against the background of those facts Kgomo J reached the conclusion in the passage at paragraphs [46] and [47].

35. It is however not clear on the basis of what authority Kgomo J came to the conclusion in paragraph [47], quoted and underlined above. Counsel before me were unable to find any authority to that effect. Counsel were also unable to find any authority referring to or approving Kgomo J's judgment, and I was unable to find any such authority either. (Kgomo J did not consider his judgment to be reportable.)

36. I was able to obtain a copy of the heads of argument of counsel who appeared for the applicant before Kgomo J. It is apparent from those heads of argument that the applicant relied on the decision in Miller v Miller 1940 CPD 466 where at p. 469 it was held:

> "In my view the duty to support which falls upon parents, grandparents, children and brothers and sisters only becomes operative so as to give rise to a claim at law when it is proved that the husband is dead or unable to afford support. Primarily the duty falls upon the husband, and it is only when he is dead or unable to provide support that a right to claim support from a parent or child or brother or sister arises. The whole trend of the treatment of the matter by Voet and Huber indicates that a legal right to claim support from a grandparent or brother or sister does not exist unless the parents fail."

In the heads of argument counsel then argued that an applicant is required first to have 'gone against' the parents before proceeding against the grandparent. That submission was presumably the basis for Kgomo J's conclusion in paragraph [46]. It is however

clear that counsel did not submit that an order of court was necessary before the obligation of a grandparent can be invoked, nor is there any suggestion to that effect in Miller v Miller.

37. Apart from the absence of authority for the proposition relied on, I have difficulty comprehending the logical basis for the conclusion reached. If it were correct, it would mean that in instances where one or other parent is already financially destitute and obviously unable to maintain a child, it would nonetheless be necessary to go through the process of issuing proceedings against the parent and obtaining a judgment before being able to proceed against the grandparent. There would be an inevitable waste of costs, a delay, and the possibility of the process being regarded as an abuse of court. The draining of financial resources in that way would also not be in the interests of the child.

38. I therefore find myself in respectful disagreement with the conclusion in paragraph [47] of De Klerk, and decline to follow it.

39. In the alternative to his main submission Mr Pretorius argued that a grandparent cannot in law be liable unless a parent is unable to maintain a grandchild. In this case when seeking the directive, on the papers before the second respondent, it was clear that the first respondent had assets in excess of R3 million, which were bonded only to the extent of R600 000.00. On those facts, as a matter of law, the applicant could never be a person against whom a maintenance order "may" be granted. The second respondent thus had no power to issue the directive.

40. Both counsel referred me to various authorities dealing with the duty of grandparents to maintain grandchildren, including Motan and Another v Joosub 1930 AD 61,

Barnes v Union & SWA Ins Co Ltd 1977 (3) SA 502 (E), Boberg (supra), Schäfer (supra) and Joubert (gen. ed.) LAWSA (vol. 16) para 212. To those might be added the decisions in Miller v Miller (supra), the judgment of Watermeyer J in Slabbert v Harmse 1923 (CPD) 187 at 189, and the judgment of Fourie J in Petersen v Maintenance Officer, Simon's Town Maintenance Court 2004 (2) SA 56 (C). From a review of all of the authorities, I understand the common law to be the following:

40.1. The primary duty of support rests upon the parents;

40.2. The extent of the duty depends on trite factors, including the means of the parents, the needs of the children, and the living standards of the parties;

40.3. The means of the parents are assessed not only by reference to their available income; their capital assets too are to be taken into account;

40.4. It is only if the parents are unable to maintain the grandchildren that the grandparents may be called upon to maintain them.

40.5. The liability of the paternal grandparents, when it can be invoked, is coextensive with the liability of the maternal grandparents.

41. It axiomatic that whether the parent is no longer able to maintain the child is a matter of fact, is to be decided on the facts of each case. While parents might be receiving an income, what would need to be investigated are the concomitant commitments that the parents may have. Similarly, if a parent has a valuable capital asset, this might be a strong indication that the parent is not indigent. At the same time, it might not

necessarily be correct to conclude that the parent is (at least temporarily) unable to support the child. All would depend on the facts.

42. Reverting to the facts of the matter, I accept, for the purposes of this application, that it may be difficult to understand how the first respondent could succeed in obtaining an order against the applicant, given that the parents possess an asset with an effective equity of about R2.4 million. It is also clear on the facts that it is the dispute between the parents that stands in the way of realising the asset. The dispute between them regarding the asset is also what appears to have delayed the finalisation of the divorce.

43. At the same time, the question is not (i) whether the first respondent will in due course succeed in her request for a maintenance order against the applicant, nor (ii) whether this Court would have made the same decision as was made by the second respondent. The question is whether on the facts it has been shown that the second respondent could not, on the information then available to her, have formed the view that a maintenance order might possibly in due course be made against the applicant. That is a low threshold. I do not consider that the disclosure of an asset meant that the second respondent necessarily had to conclude that a maintenance order could not in due course be made against the applicant. For all she knew, facts might emerge from her investigation to show that the parents were indeed at that stage unable to realise the asset, and that the applicant was well resourced and readily able to support to the children, at least on a temporary basis. The facts now ventilated before this Court were not ventilated before the second respondent.

44. Given the requirements of the common law, the second respondent inevitably needed to investigate the needs and means of the parents in order to reach a conclusion as to

whether a case for asserting that the grandparent can be called upon to maintain the grandchildren can be made out, and whether to institute an enquiry in that regard. In is common cause that when the applicant appeared before her on 19 April 2014 she requested the applicant's attorney to convey to the first respondent's husband that he was also requested attend the enquiry. This suggests that the second respondent was mindful of the common law test relating to the primary duty of parents to support their children.

45. I am thus unable to accept Mr Pretorius's second argument.

46. The third string to Mr Pretorius's bow was the argument that it is improper and unfair to proceed against the applicant as the sole grandparent, given that the liability of the grandparents is coextensive.

47. That the liability of the grandparents is coextensive is now established: see Petersen (supra). That however does not answer the question whether it was competent to issue a directive only against the applicant. The complaint lodged by the first respondent was only against the applicant. At the time of issuing the directive the second respondent may have been unaware of the other grandparents, or of their means. No further facts are available as matters stand. The applicant, in launching this application, did not invoke the provisions of Rule 53. The second respondent was thus not required to place the record of the process before her before this Court, nor was she called on to place her reasons before the Court. The lack of further facts can thus not serve as a basis for inferring that the second respondent misdirected herself.

48. Given those considerations, I am unable to accept the submission that the second respondent acted unlawfully when issuing a directive against the applicant alone.

49. The application can thus not succeed.

50. On the question of costs, there is no reason why costs should not follow the result. Ms McCurdie motivated an order for the costs of two counsel. Both the main heads and the supplementary heads in this matter were prepared by one counsel. While a court might be slow to deprive a party who has been prudent in employing two counsel, in this matter it seems that one counsel was considered sufficient for the purposes of preparing heads of argument, and it would in my view be inappropriate to burden the applicant with the costs of two counsel employed only at the hearing.

51. In the circumstances, the application is dismissed with costs, such costs to include the costs of one counsel.

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BUTLER, AJ

Appearances:

For the applicant: Adv W J Pretorius

Instructed by: Smit Kruger Inc.

For the first respondent: Adv J McCurdie and Adv R Steyn

Instructed by Fairbridges Attorneys

Second respondent: No appearance.