Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: 10533/2014

Before: The Hon. Mr Justice Binns-Ward
Hearing: 28 April 2021
Judgment: 28 April 2021

In the matter between:

S[....] J[....] F[....] Applicant

and

T[....] V[….] First Respondent

THE SHERIFF OF THE HIGH COURT, BELLVILLE Second Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 14h15 on 28 April 2021.)

BINNS-WARD J:

[1] The marriage between the applicant and the first respondent was dissolved in terms of an order made by this court on 6 August 2014. The court order incorporated the terms of a

settlement agreement between the parties. The settlement agreement provided, amongst other matters, for the care and maintenance of the two children born of the marriage and for the parties' contact arrangements in respect of them. Those issues were addressed in a parenting plan that was annexed to the settlement agreement. A parenting plan is an agreement of the sort contemplated by s 33 of the Children's Act 38 of 2005. Section 33(3) provides that a parenting plan may determine any matter in connection with parental responsibilities and rights, including (a) where and with whom the child is to live, (b) the maintenance of the child, (c) issues concerning contact with the child, and (d) the schooling and religious upbringing of the child. The parenting plan in the current case provided that the applicant would pay maintenance in respect of each of the children in an amount of R5 000 per month, increasing annually from the date of divorce in line with the consumer price index.

[2] The court's order was amended by agreement on 27 March 2015. The purpose of the amendment was to regulate the situation in which the applicant became the primary caregiver to the parties' minor son and the first respondent the primary caregiver to their daughter. The maintenance provisions were varied to provide that the applicant would pay maintenance (to the first respondent) only in respect of the minor daughter in the agreed amount.

[3] The applicant stopped paying maintenance in terms of the amended court order from the end of August 2020. The first respondent obtained a writ of execution to enforce payment of the resultant arrears. Pursuant to the writ, certain movable property found at the applicant's place of residence has been attached. Some of the attached property is currently the subject of interpleader proceedings. The applicant has applied in the current proceedings for the setting aside of the writ of execution.

[4] It is contended that the writ falls to be set aside because the applicant's maintenance obligation was cancelled in terms of an order made by the Children's Court at Mashishing (Lydenburg) on 13 August 2020. The Children's Court order provided as follows:

> IN THE MAGISTRATE COURT FOR THE DISTRICT OF THABA CHWEU
>
> HELD AT MASHISHING — CASE NO:14/1/4-09/2019
>
> IN THE MATTER OF
>
> MTF [the parties' minor daughter] — FEMALE CHILD
>
> AND
>
> JF [the applicant in the current proceedings] — FATHER (BIOLOGICAL)
>
> TvD [the first respondent] — MOTHER (BIOLOGICAL)

COURT ORDER

After perusing the contents of the file and considering representation's (*sic*) made by the legal representative of both the applicant and the respondent, the court makes the following order

1. The recommendations contained in the report which was compiled by the social worker namely Karin Botes specifically at page no (36) thirty six till page no (43) forty three is made an order of the court
2. The court direct (*sic*) that the social worker must compile a progress report and submit to court (*sic*) on or before the last working day of September 2021 for evaluation of the circumstances of the interested parties i.e. the biological parents of the above mentioned child.
3. no further or alternative relief.

By order

[signed]

A D MOGALE
MAGISTRATE: CHILDRENS COURT

[5] The framing of paragraph 1 of the Children's Court order was most unfortunate. It requires any person seeking to establish the nature of the court's directions to have reference to an external document; in this case, moreover, a document of a discursive character. A court order should generally speak for itself. Its interpretation most certainly should not have to depend on sorting out the wheat from the chaff in one of the documentary exhibits in the case.

[6] It is common ground that the report mentioned in the court order is that of social worker Karin Botes dated 3 August 2020. It contains a section (§7) headed '*Recommendation*', which commences about a third of the way down page 36 and ends on page 43 of the document. The section is divided up under various subheadings (printed in smaller font); viz. '*Definitions*' (§7.1), '*The task of the Investigating Officer*' (§7.2), '*Recommendation*' (§7.3.1), '*Guardianship*' (§7.3.2), '*Care*' (§7.3.3), '*Contact*' (§7.3.4) and '*Maintenance*' (§7.3.5). As foreshadowed by their subheadings, §§7.1 and 7.2 of the social worker's report (which are from pages 36 to 39) do not contain any recommendations whatsoever. It is consequently a mystery why the magistrate included those parts of the report by reference in his order. Nothing in their content is capable of being transposed into a determinative order.

[7] The applicant relies for his contention as to the effect of the Children's Court order on §7.3.5 of the social worker's report, which reads as follows:

> **MAINTENANCE**
>
> The undersigned recognise (*sic*) that she is not a maintenance expert, but since there is substantial evidence that the maintenance issues is (*sic*) a source of conflict between the biological parents, and should the honourable court accept the undersigned's recommendation of assigning each parent the sole right to care over (*sic*) one of the minor children, she respectfully requests the honourable court to consider a variation in the current maintenance order that each parent is responsible for maintaining the child in their care.

I shall discuss this subsection in its contextual setting presently, but read on its own, §7.3.5 of the report is a request, not a recommendation. There is nothing in the order to suggest that the court acted on the request.

[8] The first respondent, who opposes the application for the setting aside of the writ of execution, asserts that the Children's Court order does not have the effect contended for by the applicant. She contends that it was in any event not within the jurisdiction of the Children's Court to make an order varying the extant maintenance order. She relied in this regard on s 1(4) of the Children's Act, which provides:

> Any proceeding arising out of the application of the Administration Amendment Act, 1929 (Act 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court.

Her counsel submitted, correctly so, that it is well-established that any order made by a court acting outside the limits of its jurisdictional authority is a nullity; cf. e.g. *Tadvest Industrial (Pty) Ltd. v Hanekom and Others and a Similar Matter* 2019 (5) SA 125 (SCA) at para 21, *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) at para 12-14 and *Enslin v Nhlapo* 2008 (5) SA 146 (SCA) in para 2.

[9] The applicant sought to counter the first respondent's contentions by asserting that the order had been made by agreement (thereby implying that the respondent had tacitly consented to the court's jurisdiction to make the order) and that it was in any event within the children's courts' jurisdiction to make an amendment to a parenting plan.

[10] The appropriate place to embark on the determination of this application is the proper construction of the court order; for one cannot properly tackle the argument whether it was within the court's jurisdiction to make it without knowing what the ambit of the order is. The construction of court orders falls to be undertaken in just the same manner as any other documentary memorial of a jural act; see *Firestone South Africa (Pty) Ltd v Gentiruco AG*

1977 (4) SA 298 (A) at 304D-*fin*, *Finishing Touch 163 (Pty) Ltd v Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49 (30 March 2012); 2013 (2) SA 204 (SCA) in para 13 and *Eke v Parsons* [2015] ZACC 30 (29 September 2015); 2016 (3) SA 37 (CC) in para 29 . One interprets the words used with regard to the context in which they are employed; cf. *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) in para 18. It is obviously important in construing a court order to be mindful of the nature of the proceedings in which it was made. In the current case it is common ground that the proceedings in the Children's Court concerned an application for the variation of the care and contact arrangements pertaining to the daughter of the applicant and the first respondent. A court will also, if possible, favour an interpretation of the document that upholds the validity of the jural act over one that would render it of no effect. By virtue of the manner in which the Children's Court framed its order, the document that has to be interpreted for present purposes is the social worker's report referred to in paragraph 1 of the court order.

[11] The scope of the report is recorded in paragraph 1 thereof, where the author stated that '(t)*he undersigned's scope* (sic) *is to render a care and contact assessment report*'. That suggests, consistently with the nature of the pending proceedings before the Children's Court, that an investigation of any changes to the maintenance regime did not fall within the social worker's mandate. ('Care', 'contact' and 'maintenance' are identified as discrete aspects of a parent's parental rights and responsibilities in s 18(2) of the Children's Act.) The social worker underscored the nature of her mandate in §7.2 of her report (at p. 39), stating '(t)*he task of an investigating social worker in a contact and care dispute is not to find one of the parties guilty of some misconduct, but to respectfully make a recommendation regarding what contact and care arrangements must be put in place so that the best interest of the minor child concerned is paramount*'. She provided further elucidation in §7.3.1 (at p. 40), where she stated (in bold font, with underlining and the use of upper case for emphasis) '***Based on the evidence collected through this assessment process the undersigned respectfully makes the following <u>recommendations</u> regarding the CARE and CONTACT arrangements concerning the minor children [TF] (age 14) and [MF] (aged 11) and respectfully requests that the following amendments to the assigning of parental responsibilities and rights must be made as following: ...***'. It is notable that the social worker emphasised that her recommendations pertained only to 'care' and 'contact'. Had her

recommendations extended to anything else one would have expected, having regard to the structure of the report, to find that said in §7.3.1.

[12] The author of the report then proceeded to deal in some detail, in §7.3.3 and §7.3.4 of the document with the matters of '*Care*' and '*Contact*', respectively. Those two subsections deal with the social worker's recommendations on the issues that fell within her acknowledged mandate. The subsection s.v. '*Maintenance*', quoted in paragraph [7] above, was treated discretely in the report from the issues that fell within the expressly acknowledged scope of her mandate. Furthermore, as I have already noted, the '*Maintenance*' subsection of the '*Recommendations*' part of the report (§7) is expressly couched as a request to the court to consider a variation of the maintenance regime, rather than a recommendation. It is notable that where the social worker intended to make a recommendation, she used language that made that clear, such as '*it is recommended that ...*', or peremptory language such as '[JF] *shall be the sole holder of ...*' or '[T] *will have the sole right to ...*'.

[13] A contextual consideration of the social worker's report accordingly impels the conclusion that §7.3.5 thereof was not a recommendation, but rather a request to the court to deal with a question that lay outside both the scope of her mandate and of her area of professional expertise. Paragraph 1 of the Children's Court's order falls to be construed accordingly, with the result that it does not have any bearing on the extant maintenance order of this court made in the divorce proceedings and subsequently varied on 27 March 2015. This conclusion is supported by the inherent improbability that the magistrate would have intended his order to deal with an issue that was not before the Children's Court in the case that he was determining. Compare in this regard *Eke v Parsons* supra, in para 25, where Madlanga J writing for the Constitutional Court, observed, with reference to *PL v YL* 2013 (6) SA 28 (ECG); [2013] 4 All SA, 41, in para 15, that '(f)*or an order to be competent and proper, it must in the first place, "relate directly or indirectly to an issue or lis between the parties*"'.

[14] In the result, the question whether the magistrate exceeded his powers does not arise because it is, correctly, not in issue that it was within the jurisdiction of the children's courts to make orders concerning care and contact in relation to children, but for completeness, I shall nevertheless consider the jurisdictional question on the hypothetical assumption (against my finding to the contrary) that the Children's Court order did purport to vary the maintenance order, as contended by the applicant. The issue is not altogether free from

difficulty as the ambit of the children's courts' jurisdiction is not as clearly delineated by the Children's Act as perhaps it should be. That much was pointed out more than 10 years ago by a full court of the KwaZulu-Natal Division in *Ex parte Sibisi* 2011 (1) SA 192 (KZP). The full court exhorted the legislature to consider clarifying amendments to the Act, but its suggestion seems to have fallen on deaf ears.[1] *Sibisi* was concerned with the question of guardianship,[2] but the jurisdiction of the children's courts in respect of questions of maintenance is even less clear. Children's courts are empowered to deal with certain child maintenance issues, but whether their remit is co-extensive with that of the maintenance courts seems unlikely.

[15] A maintenance order simpliciter is not listed in s 46 of the Children's Act as one of the orders that a children's court may make.

[16] Section 1(4) of the Children's Act excludes any proceedings arising out of the application of the Divorce Act 70 of 1979 or the Maintenance Act 99 of 1998 insofar as those Acts relate to children being dealt with under the first-mentioned Act. The maintenance order made by this court in respect of the children that was in force when the proceedings in the Children's Court were decided was made in terms of the Divorce Act. Section 6(1) of the Divorce Act provides that a decree of divorce shall not be granted until the court is a satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or the best that can be effected in the circumstances. Section 6(3) of Divorce Act provides for the divorce court to make ancillary orders to give effect to the obligation placed on it in terms of s 6(1). Such orders include orders in regard to the maintenance of a dependent child of the marriage being dissolved. A maintenance order made in terms of s 6(3) of the Divorce Act is a 'maintenance order' as defined in s 1 of the Maintenance Act. The Maintenance Act provides independently for the making of orders for the maintenance of dependent children (s 15). It provides a specially devised framework for the investigation and presentation of maintenance claims, and for their enforcement. A maintenance court is also expressly invested with powers to vary or rescind an existing maintenance order, including one made in the High Court. A children's court, by

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[1] *Sibisi* in para 14.

[2] The Children's Act's provisions concerning jurisdiction in respect of questions of guardianship are internally contradictory. Section 45(3)(a) records that '*the High Courts and Divorce Courts*' have exclusive jurisdiction, whereas s 29(1) read with s 24 indicates that an application can be brought by any person for the assignment of guardianship of a child '*before the High Court, a divorce court in a divorce matter, or a children's court, as the case might be, within whose area of jurisdiction the child concerned is ordinarily resident*'.

contrast, is not. These are all strong indicators that the rescission or variation of an extant maintenance order made by the High Court, a divorce court or a maintenance court are matters excluded by s 1(4) from the jurisdiction of the children's courts.

[17] The jurisdiction of one court to set aside or vary an order competently made by another court is in any event not lightly to be presumed. So, for example, in *FS v JJ and Another* 2011 (3) SA 126 (SCA) in para 36, Lewis JA expressed the view that Louw J had been correct to find that the Western Cape Division of the High Court did not have the jurisdiction to set aside or vary a care and contact order made in the Northern Cape Division, notwithstanding that the Western Cape Division had jurisdiction in respect of the person of the child concerned by virtue of its place of residence being in Paarl. At para 38, Lewis JA proceeded to say that *'... as a rule, since one is entitled to assume that any order has been made in the best interests of a child, should those interests change over time, the court that made the initial order should be approached for a variation*'. It seems to me that s 1(4) of the Children's Act may well have been framed with those considerations in mind.

[18] Section 45 of the Children's Act prescribes the matters that a children's court may adjudicate. Maintenance, in terms, is not one of them. Section 45(1)(b) does provide that a children's court may adjudicate any matter involving '*the care of a child*' and '*care*' is defined in s 1 to include '*where appropriate ... within available means, providing the child with ... the necessary financial suppor*t'. However, insofar as it might be contended that those provisions therefore connote that a children's court may make or vary maintenance orders made in terms of the Divorce Act or the Maintenance Act, such contention is rebutted by the qualification to s 45(1) inserted by the opening words of the subsection, viz. '*Subject to section 1(4) ...*'. The same considerations apply in respect of s 45(1)(d) in respect of matters involving '*the support of a child*'.

[19] A child maintenance order, such as might be made by the High Court, a divorce court or a maintenance court, falls to be distinguished from a 'contribution order', which is a special type of maintenance order that a children's court is empowered to make (s 46(1)(i) of the Children's Act). A contribution order is one that may be made in terms of Chapter 10 of the Children's Act. It relates to a sum of money or 'a recurrent sum of money' that a respondent may be directed to pay towards the maintenance or treatment of, or the costs resulting from the other special needs of a child placed in alternative care or temporarily removed by order of the court from the child's family for treatment, rehabilitation or counselling or as a short-term emergency contribution towards the maintenance or treatment

of, or the costs resulting from, the special needs of a child in urgent need. (Section 161 of the Children's Act.)

[20] If paragraph 1 of the Children's Court order in the current matter were to be construed as bearing on the maintenance of the parties' minor children by virtue of §7.3.5 of the social worker's report, it would not qualify as a 'contribution order'. It would constitute a variation of the High Court divorce order. The making of such an order does not appear to me to be within the jurisdiction of the children's courts. An order purporting to have that effect would therefore be incompetent and *pro tanto* of no legal force.

[21] Furthermore, there is nothing in the papers to suggest that the court was concerned with an application in terms of s 28 of the Children's Act for an order terminating or suspending the applicant's parental responsibility to contribute to the maintenance of his daughter; on the contrary the founding papers confirm that the application to the Children's Court was brought by the parties minor child for a variation of the contact arrangements with her. Applications in terms of s 28 are, in my view, in any event concerned more with parental status than with maintenance *per se*. In *GM v KI* 2015 (3) SA 62 (GJ), Fisher AJ opined that parental rights and responsibilities '*are, for the most part, two sides of the same coin*'. The learned judge proceeded '*Thus on a purposive interpretation of s 28(1)(a), an order which terminated rights but left in place responsibilities, would be difficult, if not impossible, of application. Such a result could never have been intended by the legislature*'.[3] I am in general agreement with that view.

[22] It is evident that the Children's Court's order, incorporating as it did the social worker's recommendations as to care and contact, did not suspend or terminate the applicant's parental rights. It merely constituted the first respondent as the primary caregiver in respect of the parties' daughter. It is difficult to conceive of how it could be in the best interests of a child to terminate a parent's responsibility, within the latter's means, to contribute towards its maintenance having regard to the reasonable needs of the child. These considerations tend to confirm my view that s 28, insofar as it pertains to the parental right and responsibility in respect of contribution towards a child's maintenance, does so conceptually or existentially rather than in the sense of defining the monetary extent of the obligation in the way that a maintenance order does.

[3] In para 14.

[23] In my view therefore, s 28 of the Children's Act does not vest a power in the children's courts to vary or rescind a child maintenance order while the affected parent's parental rights and responsibilities are left intact.

[24] The implication in the applicant's case that the parties could, by consent, invest a children's court with powers not entrusted to those courts by the Children's Act is misconceived. The children's courts are creatures of statute and their functions and powers are exclusively circumscribed by the Children's Act and various other statutory provisions such as in the Child Justice Act 75 of 2008 and s 46 of the Education Affairs Act (House of Assembly) 70 of 1988, for example. Children's courts do not have an inherent jurisdiction. My attention was not directed to any provision in the Children's Act similar to s 45 of the Magistrates' Court Act, by which the parties might consent to the jurisdiction of the court in respect of matters beyond its prescribed statutory jurisdiction. The first respondent in any event denies that she consented to an order terminating the applicant's maintenance obligations. In the context discussed above, the respondent's denial cannot be dismissed as far-fetched or fanciful and her evidence in that regard must consequently be accepted for the purpose of deciding this matter on the papers.

[25] In any event, the applicant's contention that it had been agreed that his maintenance obligations in terms of the extant High Court order be rescinded is contradicted by the content of an email from his attorney dated 13 August 2020 advising him of the outcome of the proceedings in the Children's Court. The email, a copy of which was attached to the applicant's replying affidavit, reported as follows in the relevant respect:

> '8. Maintenance needs according to the act (sic) is the duty and responsibility of both biological parents and has nothing to do with access and contact arrangements.
>
> 9. At most the maintenance court will look at the reasonable monthly needs of both children and then for biological parents, compare income and make a decision from there.
>
> 10. You may though use this recent order [i.e. the order of the Children's Court] to factor into the costs of the therapy of this the order, (sic) hence you need to make the maintenance court aware of same.'

The attorney is hardly likely to have reported back in those terms if he believed that the Children's Court had rescinded the order directing the applicant to pay maintencce for his daughter.

[26] For all these reasons, there is no merit in the applicant's contention that the order of the Children's Court cancelled or rescinded his obligation in terms of the divorce order (as

varied) in respect of the payment of maintenance for his minor daughter. His application to set aside the writ of execution must accordingly be refused.

[27] The first respondent asked for a punitive costs order against the applicant. I do consider that the applicant acted in a regrettably opportunistic manner in relying on an objectively untenable interpretation of the Children's Court order, but it must nevertheless be acknowledged that it was poor formulation of the order that gave rise to the opportunity. I have therefore, not without some hesitance, decided not to make a punitive order. There was no valid basis, however, in the applicant's counsel's submission that each party should bear their own costs. Costs will follow the result.

[28] The following order is made:

The application is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	M. De Wet
Applicant's attorneys:	E. Rowan Inc. Cape Town
First Respondent's counsel:	D.J. Rabie
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