

CHILD LAW MATTERS

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EXCLUSIVE JURISDICTION OF THE HIGH COURT IN GUARDIANSHIP MATTERS:*EX PARTE SIBISI*, CASE NO. 2115/10 [2010] ZAKZPHC 56 (UNREPORTED)

The Children's Act 38 of 2005 has substantially increased the range of matters that can be heard under the jurisdiction of the Children's Courts.¹[1] Matters concerning the parental responsibilities and rights of care and contact of children can now be heard by the Children's Courts.²[2] This is a welcomed improvement and enhances access to justice. It remains a concern that the jurisdiction with regard to matters relating to guardianship of children remains exclusively under the High Courts.³[3]

In the recent unreported case of *Ex Parte Sibisi*, Case no. 2115/10 [2010] ZAKZPHC 56, the court found that the matters regarding the guardianship of children remain in the exclusive jurisdiction of the High Courts. The Applicant in this matter was a grandmother who initially approached the High Court for an order for "sole full parental responsibilities and right of care, contact, guardianship and maintenance", as defined in section 18 of the Children's Act. The High Court Judge declined to deal with the matter and ordered that the matter be referred to the Children's Court for determination. The Presiding Officer in the Children's Court sent, as a response to the order, a written memorandum to the High Court submitting that the Children's Court does not have jurisdiction to hear matters of guardianship. The matter was put back on the High Court roll and heard by a Full Bench for a decision.

Section 24 (1) of the Children's Act states that

"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."

Whilst section 29(1) of the Children's Act, which the court identified as the source of confusion regarding jurisdiction, states that

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

The Applicant's legal representative argued that the Children's Court has concurrent jurisdiction with the High Court, to deal with the matter concerning guardianship. While the State Attorney, on the request of the Judge, submitted that only the High Court may hear applications for

1[1] See section 45 for the matters that the Children's Court may adjudicate.

2[2] See section 22; 23 and 45(1)(b).

3[3] See section 23; 24 and 29.

guardianship. After an assessment of the provisions of the Children's Act, the court found that indeed, as the law stands, the High Court has exclusive jurisdiction in matters concerning guardianship of children.^{4[4]} According to Swain J, section 29 of the Children's Act is concerned solely with issues pertaining to territorial jurisdiction of the named courts and therefore, it must be read with those other specific sections, such as section 24(1) in this case. Another provision which, according to the court, was definitive on the fact that the High Court has exclusive jurisdiction with regard to matters of guardianship of children is 45(3) of the Children's Act. Section 45(3) states that

"Pending the establishment of Family Courts by an Act of Parliament, the High Court and the Divorce Courts have exclusive jurisdiction over the following matters in this Act:

(a)Guardianship of a child"...

The court remarked that since the family courts have yet been established it is clear that in so far as Children's Courts are concerned, the High Court has exclusive jurisdiction in matters concerning guardianship of a child. A further notable provision mentioned by the court is section 45(4) of the Children's Act which states that

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

The effect of section 45(4) is that even if the Children's Court had jurisdiction, which it does not have, to hear matters concerning guardianship of children, the High Court would still have jurisdiction. This, though not stated in the judgment, implies that the matter did not have to be sent to the Children's Court as the High Court is the upper guardian of all children. In conclusion the court remarks that it may be necessary for the Legislature to clarify the jurisdiction of the Children's Courts and Divorce Courts with regard to matters of the guardianship of children. This is a clarification not only necessitated by the ambiguous nature of the aforementioned provisions of the Children's Act, but also the recently enacted Jurisdiction of Regional Courts Amendment Act^{5[5]}, which amended section 29 of the Magistrates' Court Act 32 of 1944, and states that:

"(1B)(a) A court for a regional division, in respect of causes of action, shall, subject to section 28(1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to a divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act 120 of 1998.

(b) A court for the regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such matter."

^{4[4]} The court looked at sections 22; 23;24;26 28 and 29 which deal with the acquisition, amendment or termination of the parental responsibilities and rights.

^{5[5]} 31 of 2008, which came into operation on 31 August 2010.

Two questions arise from an analysis of these provisions and those of the Children's Act. Firstly, how does section (1B)(a) relate to section 22(7) and 24 of the Children's Act, which clearly state that only the High Court have jurisdiction in matters of guardianship of children? Secondly, does section (1B)(b) attempt to confer upper guardianship on the regional courts and thus enable them to hear matters concerning guardianship of children?

The *Ex Parte Sibisi* judgment confirms a *prima facie* position which is clear from the Children's Act; that the High Courts have exclusive jurisdiction in matters concerning the guardianship of children. However the aforementioned related provisions on the jurisdiction of courts, are indicative that this is not a clear cut issue and that some thought needs to be given to how the different provisions of the different mentioned Acts affect each other.

The Centre for Child Law is in favour of a position that allows the Children's Courts jurisdiction in matters concerning the guardianship of children and has made written submissions to the State Law Advisors that an amendment be considered in order to provide the Children's Court with jurisdiction in matters concerning the guardianship of children. It remains to be seen whether the amendment will be considered. The current situation is out of step with the aims of the Children's Act, particularly the expansion of the Children's Court jurisdiction in order to make the courts and justice accessible more accessible to the majority of South Africans. Clarity on the related provisions of the Jurisdiction of the Regional Courts Amendment Act and section 45(3) of the Children's Act is also necessary to avoid a situation such as the one in *Ex Parte Sibisi* where a litigant is sent from one forum to another.
