SWARTS v SWARTS EN ANDERE 2002 (3) SA 451 (T)

Headnote : Kopnota

In terms of s 12(1) of the Child Care Act 74 of 1983 a policeman, a social worker or an authorised officer may remove a child from any place to a place of safety if that person has reason to believe that the child is a child in need of care, and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of the child. In terms of s 12(2) of the Act the official who removes the child must as soon thereafter as may be (a) inform the parent or guardian of the child or the person in whose custody the child was of the removal, if he or she can be traced without undue delay, and (b) inform the children's court assistant concerned of the reasons for the child's removal. These communications are made in a so-called 'Form IV', for which provision is made in the regulations framed under the Act. The regulations also provide that Form IV must be handed to the children's court assistant within 48 hours, who must thereupon submit it to the commissioner of child welfare. Section 13 of the Act provides for the bringing of a child before the children's court, which must hold an enquiry to determine whether the child is a child in need of care.

The mere fact that an existing order in terms of Rule 43 of the Uniform Rules of Court confers interim custody of a child upon a parent, does not preclude the issuing of a removal order in terms of s 12(1) of the Act. It is clear from the provisions of the Maintenance Act 99 of 1998 that a maintenance court has the express capacity to amend or revoke an existing maintenance order of the High Court, which includes a Rule 43 order. Once it is clear that the maintenance court, which is a specialised court of the magistrate's court, has the capacity to amend or revoke the provisions of a Rule 43 order in connection with maintenance, no legally valid argument can in principle exist why the children's court, which is also a specialised magistrate's court, cannot under appropriate circumstances amend or revoke the provisions of a Rule 43 order in respect of custody of a child. Any other view would be contrary to the best interests of the child or children in question, and would therefore be contrary to the provisions of s 28 of the Constitution of the Republic of South Africa Act 108 of 1996. (At 462A - E/F.)

The issuing of a removal order in terms of s 12(1) of the Act is administrative action which falls into the category of quasi-judicial acts and is accordingly subject to review by the High Court. The grounds of review for administrative acts, and especially quasi-judicial acts, have been considerably expanded in the present constitutional dispensation to include a consideration of the merits. Generally speaking the merits are not considered so that the reviewing Judge may substitute his or her opinion on the correctness thereof, but simply to determine whether the outcome of the administrative action is rationally justifiable in terms of the reasons given for it. However, in cases where the interests of children are involved, the Court must naturally be satisfied that the conduct in question is indeed in the best interests of the children. As upper guardian of the children concerned the Court is obliged to consider the merits to the extent that they are relevant to the interests of the children.(At 463B - C/D, I - I/J and 464C/D - E/F, paraphrased.)

It is clear that a removal order in terms of s 12(1) of the Act can be issued, and that children may be removed in terms thereof, without prior notice to the custodian parent or guardian. On the face of it this amounts to a violation of the parent's or guardian's right to just administrative action, as entrenched in s 33 of the Constitution and in s 3 of the Promotion of Administrative Justice Act 3 of 2000. However, it must be borne in mind that the Act intends to address precisely such cases, because it unfortunately happens frequently that the parents of children in need of care are not, or are not timeously, available to be advised of the proposed action. The so-called 'Form IV' procedure, which entails that the custodian parent is advised as soon as possible, and usually within 48 hours, of the action in the interests of the child, provides constitutionally sustainable protection of the parent's or guardian's interest in such a case, particularly because the action must be considered and confirmed virtually immediately by the commissioner and must thereafter be subject to a full enquiry. Accordingly, to the extent that conduct in terms of s 12 of the Act and the regulations thereunder constitutes a limitation of the parent's or guardian's right to administratively sustainable conduct, such limitation is undoubtedly justified. The parent's or guardian's right to timeous notice must yield to the child's right to immediate physical, emotional and psychological protection. (At 464H/I, 464J - 465B/C, 465H/I - 466A/B and 466H - 467A/B, paraphrased.)