

**IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA**  
**HELD AT LOBATSE**

**Court of Appeal Civil Appeal No. 1 of 2002**  
**High Court Miscellaneous Application No. 399 of 1998**

In the matter between:

**FRANCIS MAGIBISELA**

**APPELLANT**

**AND**

**NORAH MOGOBE**

**RESPONDENT**

Mr Y D Petkar for the Appellant  
Mr M Kadye for the Respondent

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**J U D G M E N T**

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**CORAM: N W Zietsman J.A.**  
**C Plewman J.A.**  
**F H Grosskopf J.A.**

**ZIETSMAN J.A.**

The appellant is the father of an illegitimate child born to the respondent in February 1987. On 11 August 1993, by order granted in the Magistrate's Court at Gaborone, the appellant was, in terms of the Affiliation Proceedings Act (Cap 28:02) ordered to pay maintenance for the said child in the sum of P40.00 per month.

At the time relevant to this matter the Affiliation Proceedings Act ("the Act") provided in such a case for the payment of a maximum sum of P40.00 per month up until the child reached the age of 13 years. The respondent, being unable to properly maintain the child, applied to the High Court for an order to increase the maintenance from P40.00 per month to P600.00 per month. Such an order could not be granted in view of the statutory limit of P40.00 per month imposed by the Act. However, the learned Judge (Dow J), exercising the common law powers of the Court as upper guardian of minors, granted an order for the payment of a sum of P560.00 per month for maintenance of the child, and ordered at the same time that the Magistrate's Court order for the payment of P40.00 per month would continue to operate. The Magistrate's Court order would, in terms of the Act, cease to operate when the child reached the age of 13 years.

There were thus two orders requiring the appellant to pay maintenance for the said child - a Magistrate's Court order requiring him to pay P40.00 per month until the child reached the age of 13 years, and a High Court order requiring him to pay P560.00 per month. It was not specified in the order of the High Court when the obligation to pay the P560.00 per month would cease.

No appeal was noted by the appellant against the order granted by Dow J. The appellant fell into arrears in respect of the said payments but he eventually made up the arrears. On 28 July 1999, for example, he, through his attorney, paid to the respondent the sum of P4 480.00 "in respect of the High Court order dated 14 December 1998." It is common cause on the papers that the appellant has paid all sums due in respect of both the Magistrate's Court order and the High Court order up to the time when the said child reached the age of 13 years. He accordingly accepted and complied with the High Court order up until the child reached the age of 13.

After the child reached the age of 13 years the appellant stopped paying all maintenance in respect of the child. The respondent then applied for an order for his committal to prison for contempt of court. The application was heard by Kirby J. It was clear from the papers that the appellant had been advised that the High Court order for payment of maintenance also ceased to operate when the child reached the age of 13 years. He acted on this advice and he was clearly not in contempt of the court order. Kirby J accordingly refused the order for his committal for contempt of court. He then considered whether the High Court order for payment of maintenance ceased to operate when the child reached the age of 13 years. His conclusion was that this was not the case and he then ordered the appellant to pay the arrears, and to continue to pay

P560.00 per month. It is against this order that the appellant now appeals.

During the course of this argument Mr Petkar sought to question whether the High Court could make any order for the payment of maintenance in such a case at a time when a magistrate's court order was in existence. It was however pointed out to him that no appeal had been lodged against the order granted by Dow J, and if it was now sought to appeal against her order an application for condonation of the late filing of the notice of appeal would have to be brought. The order was granted by Dow J in 1998 and as pointed out above the appellant accepted and complied with the order and by so doing would have preempted an appeal. It is against the later order granted by Kirby J on 27 September 2001 that the appeal is noted, and the only point at issue is whether the High Court order for maintenance ceased to operate when the child reached the age of 13 years.

In terms of the Roman Dutch common law, which is the common law applied in Botswana, both the mother and the father of an illegitimate child are obliged to support that child according to their respective means. This is also the law in South Africa. See e.g. Lamb v Sack 1974(2) S.A. 670(T) and Louw v van Rensburg 1982(3) S.A. 36 (SWA).

The obligation to support the child lapses when the child reaches the age of 21 years, or marries, or becomes self-supporting.

While it is clear that the High Court order was made in terms of the common law Mr Petkar nevertheless submitted that Section 9 of the Affiliation Proceedings Act applied and that the order lapsed when the child reached the age of 13 years. The Act applies to orders granted in the Magistrate's Court and there is no provision in the Act excluding the jurisdiction of the High Court in such matters, or limiting its jurisdiction in any way. The High Court order was granted in terms of the common law and it is the common law that applies. The argument that the obligation to pay maintenance in terms of the High Court order lapsed when the child reached the age of 13 years is accordingly without merit.

In the result the appeal is dismissed with costs.

**DELIVERED IN OPEN COURT AT LOBATSE THIS 19<sup>th</sup> ..... DAY OF JULY 2002.**



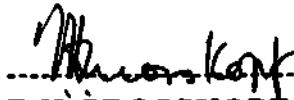
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**N W ZIETSMAN**  
**(Judge of Appeal)**

I agree



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**C PLEWMAN**  
**(Judge of Appeal)**

I agree

  
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**F H GROSSKOPF**  
**(Judge of Appeal)**