

Sheriff's costs in Children's Court cases – who should pay?

Introduction

The disbursements in cases ProBono.Org refers to the legal practitioners ("LPs") are mostly sponsored by the LPs, such as their travel expenses and photocopies. But what about the sheriff's costs, which can be a substantial amount? We all know that the party who instructs service should pay for it. In terms of the Guidelines of ProBono.Org LPs may, if they choose, recover disbursements from the pro bono referred clients. However, it becomes a totally different ball game when we practise in the Children's Courts when we represent the child, or one of the parents who can barely afford a daily living, let alone paying sheriff's costs.

The question then arises whether service by the sheriff is always a requirement to secure the presence of the respondent or a witness in Children's Court proceedings. How is the presence of these persons secured?

The role of the Magistrates' Courts Act 32 of 1944 ("MCA")

In terms of section 42 of the Children's Act, 38 of 2005 every magistrate's court as defined in the MCA shall be a children's court. Section 43 of the Children's Act states that a children's court is a court of record and has a similar status to that of a magistrate's court at district level. Is rule 9 ("Service of process, notices and other documents") of the MCA thus the applicable rule to use should service be required? Or does the answer lie in the Children's Act, or in another statute, or in all of them?

The Regulations pertaining to the Children's Act

When we look for the answer in the Children's Act, we have to be aware of two sets of regulations:

1. The Regulations relating to Children's Courts and International Child Abduction 2010, also referred to as the Justice Regulations ("JR"), and
2. the General Regulations regarding Children, 2010 ("GR").

The JR came into effect on 1 April 2010 and were made by the Minister of Justice and Constitutional Development under sections 75 and 280 of the Children's Act. The reason is that the DoJ&CD is responsible for the Children's Courts (Chapter 4 – sections 42-75), Contribution Orders (Chapter 10 – sections 161-166) and Child Abduction (Chapter 17 – sections 274-280).

The GR were made by the Minister of Social Development under section 306 of the Children's Act. The GR cover sections 90,103, 142, 160, 179, 190, 212, 227, 253 and 280 of the Children's Act, as well as care centres and facilities; shelters and drop-in centres; appointment of staff at these places; and generally any other ancillary or incidental administrative or procedural matter that is necessary to prescribe for the proper implementation or administration of the Children's Act.

The Children's Act

Section 53 of the Children's Act ("Who may approach court")

Section 53 provides that when a child, or anyone acting in the interest of a child, or anyone acting on behalf of a child, or anyone acting as a member of, or in the interest of, a group or class of children, or anyone acting in the public interest, wants to approach the children's court, they may do so to the clerk of the Children's Court, who should prepare the referral to the court.

JR 6 prescribes how the clerk and the presiding officer must deal with it. JR 6 requires the completion of Form 2 of the Justice Regulations by any of the persons listed in section 53 of the Children's Act. Form 2 must be handed in to the clerk of the court who must within five (5) days of receipt thereof refer the case to a presiding officer.

JR 7(2) requires the clerk, when the presiding officer has assigned a court date to the case, to notify the parties (a party or a family member or a person who has an interest in the matter) in terms of Form 4 of the Justice Regulations, to attend the proceedings.

JR 7(3) prescribes that the notification of Form 4 must be served personally on a party by a sheriff, a clerk or a person authorised by the presiding officer; or submitted to a party by registered post, or served or submitted in any other manner as directed by the presiding officer. One assumes that the DoJ&CD will be responsible for any expense in this regard, as it is the court calling that person to appear, whether as a party or as a witness.

Form 4 provides for service of a copy of the subpoena personally on the party (presumably a parent or parents), or a family member, or a person who has an interest in the matter, or to a person apparently not younger than 16 years and apparently residing or employed at the residence/place of employment/business of such person as the person could not be conveniently found, or by affixing/placing it to/in the outer/principal door/security gate/post box of the residence/place of employment/business of such person as the person kept the residence/place of employment/business closed.

What is the position if one of these persons mentioned in JR 7(2) or the persons named in section 53 want to call a witness? Form 4, apart from warning of a warrant for arrest for failing to attend the proceedings, has an answer. It sets out the procedure to secure witnesses at court (one has to submit particulars of the witness/es to the clerk of the court within fourteen days before the date of the hearing). Form 4 states that the costs of the service of the subpoena of any witness will be borne by the person who requests the witness subpoena unless, in exceptional cases, the court directs that the state bear such costs. Neither the Act nor the Regulations define "exceptional cases", but one should certainly be able to argue that indigency, or acting pro bono for a child who has no known parent or carer, or an indigent carer, should be sufficient reason to invoke this mechanism. Form 4 does not refer to sections 58 and 59 of the Children's Act, neither to Form 6 of the JR, nor to JR 9, which all deal with witnesses.

Sections 56 ("Attendance at proceedings") and 57 ("Compulsory attendance of persons involved in proceedings") of the Children's Act

Section 56 (a)-(f) sets out who may attend the closed proceedings upon instruction by the clerk of the Children's Court in terms of section 57. Section 57 stipulates that the clerk may, by written notice in the prescribed manner, request a party, a family member or a person who has an interest in the matter, to attend the proceedings. One may assume that JR 6 ("Bringing matter to court" with reference to section 53 of the Children's Act) and JR 7 ("Attendance of proceedings" with reference to Form 4), and JR Form 4 (referring to JR 7) apply. Service should be done personally on a party by the sheriff, or by the clerk of the Children's Court, or by a person authorised by the presiding officer. Experience has taught us that it may be a social worker, a sheriff, a police officer or any other person such as a family member or a friend. The JR 6 and 7 and JR Form 4 further provide that the written notice may also be submitted to a party by registered post, or in any other manner as directed by the presiding officer. Again, experience has shown that Facebook or e-mail or facsimile may be the appropriate option. One assumes that the DoJ&CD will be responsible for any expense in this regard, as it is the court calling that person to appear, whether as a party or a witness. If one of these persons would like to call a witness, Form 4 sets out the procedure for calling a witness, which we discuss below.

Sections 151("Removal of child to temporary safe care with court order") and 152 ("Removal of child to temporary safe care without court order") of the Children's Act

Sections 151 and 152 deal with the removal of a child to temporary safe care and without a court order. GR 54(2) is applicable in these instances and it refers to Form 37 of the General Regulations. Form 37 contains the notification to a parent, a guardian or a care-giver of a child to attend the children's court if the proceedings are brought to court in terms of sections 151 or 152. Form 37 is issued by the clerk of the Children's Court. Form 37 is silent about how and by whom it should be served, and who should bear the costs thereof. One assumes that the state will bear the costs, and that the court may direct how and who should do the service.

Witnesses in the Children's Court

Section 58 of the Children's Act provides for the right to adduce evidence. This means that any party to the proceedings may call a witness. Section 59(1) of the Children's Act stipulates the procedure to secure the presence of a witness. The clerk must, in the prescribed manner, summons a person to appear as a witness on either the request of the presiding officer (section 59(1)(a)), the child or a person whose rights may be affected by an order in those proceedings (section 59(1)(b)), or the legal representative appearing for either the child or party/ies involved in the case (section 59(1)(c)).

A request to the Clerk for the issuing of a subpoena by any of the above-mentioned persons, other than the Presiding Officer, must:

- a) be made at least at fifteen (15) court days before the date of the hearing;
- b) be in writing on **Annexure O**; and
- c) filed in the specific Court file.

Annexure O is available from the clerk of the Children's Court.

Section 59(2) of the Children's Act requires the summons to be served as if it were a summons to give evidence or produce a book, documents or other written instrument at a criminal trial. This corresponds with rule 64(2) ("Procedure for securing the attendance of witnesses in criminal cases") of the MCA. Rule 64(2) provides for service by either the sheriff or "other person authorised to serve subpoenas in the area where the witness is residing". Section 13(4) of the South African Police Service Act 68 of 1995 provides that every member of the SAPS "shall be competent to serve or execute any summons, warrant or other process, whether directed to him or her or to any other member." Rule 64(2) refers back to section 15 ("Service of process by the police") of the MCA. Section 15(1)(b) of the MCA provides that fees payable in respect of, or in connection with, any such service to a messenger ("sheriff" according to section 15(1)(b) of the Pendlex) shall in any such case be chargeable but shall be paid into the Consolidated Revenue Fund.

JR 9 gives more information about the subpoena to witnesses. JR 9(1) permits the clerk to subpoena, at least ten (10) days before the date of the hearing, any person to appear as a witness in a matter in terms of Form 6. JR 9(2) permits a person referred to in section 59(1)(b) or (c) to request the clerk, within 15 days before the hearing, to issue a subpoena to the witness the person intends to call. JR 9(3) provides for personal service by either the sheriff, or a clerk, or a person authorised by the presiding officer. It provides also for service by registered post or any other manner as directed by the presiding officer. As JR 9(3) does not refer to service by the SAPS, one can argue that section 59(2) of the Children's Act makes provision for this option. Other options, as pointed out above, but only on authorisation by the court, may be service by a social worker; any other person, such as a family member or a friend; Facebook; e-mail, or facsimile. It is obvious that the court's authorisation should be in writing.

Form 6 indicates to the witness which person is requesting the presence of the witness. It further states that an allowance is permitted from state funds if the presiding officer has called for the witness, but not in other situations, unless the court orders so. It warns of a warrant of arrest for failing to attend the proceedings.

Form 6 provides for service of a copy of the subpoena personally on the witness; or to a person apparently not younger than 16 years and apparently residing or employed at the residence/place of employment/business of the witness as the witness could not be conveniently found; or by affixing/placing it to/in the outer/principal door/security gate/post box of the residence/place of employment/business of the witness as the witness kept the residence/place of employment/business closed.

Conclusion

There are various options available for the legal practitioner to secure the presence of a witness at court. Many of the options would be far more cost effective and affordable than service by the sheriff or the SAPS. The LP should only first obtain authorisation from the presiding officer by substantiating the reasons for the application to court. We conclude with the suggestion of one of our colleagues, Lesley Blake – should the sheriffs, being also officers of the court, not be required to do pro bono work as part of their social responsibility towards the public? After all, it is members of the public who pay their fees.

Adv. Elsabe Steenhuisen

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