

SOUTH AFRICA / JUDGMENT

## A.H v J.H and Another (A84/2019) [2020] ZAFSHC 74 (19 March 2020)

[2020] ZAFSHC 74

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane, Ramlal

CASE / FILE NUMBER

A84/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

### Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been  
redacted from this document in compliance with the law  
and SAFLII

Policy

FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Case

No: A84/2019

In

the matter between:-

A

H

APPLICANT

and

J

H 1st

RESPONDENT

MAGISTRATE

J

LEROTHOLI 2nd

RESPONDENT

HEARD:

24 FEBRUARY 2020

**JUDGMENT**

BY: MOLITSOANE, J

DELIVERED: 19 MARCH 2020

- [1] In these review proceedings, the applicant seeks the following relief:
- a) That the decision of the Second Respondent discharging the maintenance order against the First Respondent in favour of the Applicant's minor children be reviewed and set aside;
  - b) That the maintenance order dated 1 July 2014 for the payment of maintenance in the amount of R500 per month per child in respect of the two minor children of the Applicant and the First Respondent in favour of the Applicant be reinstated;
  - c) That the First Respondent be ordered pay the costs of this application.
- [2] The First Respondent does not oppose the substantive relief sought by the Applicant save for an order of costs. The Second Respondent abides by the decision of this court.
- [3] The Applicant was the Respondent in the court a quo while the First Respondent was the Applicant. The Applicant and the First Respondent were previously married to each other. Their marriage relationship was dissolved by this Court on 7 May 2010. A deed of settlement of the parties was incorporated into the divorce order. In terms of the divorce order primary residence of the two minor children of the parties was awarded to the Applicant. The First Respondent was ordered to pay maintenance in the amount of R2 000 per month per child.
- [4] On 14 April 2014 both children were placed in the temporary safe care of the First Respondent by the Children's Court following certain recommendations by the Office of Child and Family Welfare, Bloemfontein. The children are still in the care of the First Respondent. The children, however, visit the Appellant at certain set times.
- [5] The original maintenance order in respect of the two minor children was varied to R500.00 per month per child with effect from 1 July 2014 after the children came to stay with the First Respondent.
- [6] On 13 December 2018 the First Respondent brought an application (the variation application) in the Maintenance Court for the variation of the order of R500.00 of the maintenance of the children. He sought the discharge of the said order and also sought an order to the effect that the Applicant should pay an amount of R1 000.00 per month per child in respect of the maintenance of each child.

- [7] The parties appeared before the Second Respondent in the Maintenance Court on 6 March 2019 for the variation application. It is not in dispute that prior to 6 March 2019 the First Respondent indicated that he was abandoning the maintenance claim against the Appellant and that he intended to seek the discharge of the existing order of R500.00 per month per child.
- [8] When the matter appeared before the Second Respondent, the Applicant, applied for the postponement of the variation application. The reason for seeking a postponement was twofold, firstly, it was to enable the Applicant to obtain the necessary documents in order to oppose the discharge of the then existing maintenance order. Secondly, it was to enable the Applicant to bring an application to seek permission to proceed with an application to increase the then existing order of maintenance in spite of the fact that the maintenance due, was still in arrears.
- [9] The First Respondent opposed the postponement. The objection to the postponement was premised on the fact that it was communicated to the Applicant's attorney, during the week preceding the hearing that the First Respondent would no longer seek substitution of the maintenance order but would only seek the discharge of the order. During the submissions on the postponement the legal representatives

also alluded to the facts of this matter, specifically that the children concerned are no longer staying with the Applicant but were with the First Respondent.

- [10] Following the submissions on the question of whether to grant postponement or not, the Second Respondent adjourned the proceedings

for a while. When the court resumed, the Second Respondent instead of ruling on the application for a postponement simply discharged the maintenance order. The discharge of the maintenance order was done based on the submissions of the legal representatives of the parties. It is this order discharging the maintenance order which prompted the Applicant to launch these review proceedings.

- [11] The only issue for determination between the Applicant and the First Respondent is whether the First Respondent should be liable for the costs of this application or whether the Applicant should be ordered to pay the First Respondent's costs from the time of filing the answering affidavit.
- [12] It is contended on behalf of the Applicant that the discharge of the maintenance order by the Second Respondent was grossly irregular as no evidence was led by any of the parties. It is the case for the Applicant that the First Respondent had ample opportunity before the Applicant could issue the review application to abandon the order granted by the Second Respondent, either through common law abandonment or s86 of the Magistrate Court Act, 32 of 1944.

- [13] By failing to abandon the judgment, so the argument goes, the First Respondent ‘kept the proverbial gun to the Applicant’s head ’ and only three months after the review application was launched did the First respondent indicate that he would not oppose the application if no costs were claimed. It is thus contended that Applicant had no choice but to bring the review application and the First Respondent ought to bear the costs.
- [14] It is, on the other hand, contended on behalf of the First Respondent that it is not the case for the Applicant that the First Respondent either requested the court a quo to dispose of the case without hearing the merits or that the First Respondent contributed to the irregularity committed by the court. It is submitted that the Applicant failed to make out a case in support of her claim for costs.
- [13] It is not in dispute that instead of making a ruling on the application for a postponement, the Second Respondent discharged the maintenance order without hearing any evidence. The Honourable Magistrate thus committed an irregularity when she discharged the maintenance order without hearing evidence from any of the parties. Her decision thus constitutes a decision which this Court may review in terms section 21(1)(b) and 22(1)(c) of the Superior Courts Act, 10 of 2013. It is clear from the papers before me that the First respondent also accepts that the Second Respondent committed an irregularity.
- [14] The record of the proceedings clearly indicates that the First Respondent is not to blame for the wrong order. His legal representative did not mislead the court and had no hand in the disposal of the merits without the leading of evidence.
- [15] Apart from abandonment in terms of the common law, section 86 read with Rule 51(11) (a) of the Magistrate Court Act, 32 of 1944 provides a legislative framework in terms of which a judgment may be abandoned. These procedures make for the speedy and cost effective ways of reversing judgments. The court in *Van Rensburg v Reid*[1] said the following:

*“if a party wishes to avoid the costs of appeal against a judgment obtained by him by abandoning his judgment he must take the result*

*prescribed by sec .86 if he abandons in terms of that section, or must get his opponent to accept an abandonment outside that section.”*

- [16] In my view this also holds true where matters are sought to be reviewed in terms of Uniform Rule 53. In this case the First

Respondent never intended to abandon the judgment. Even when the review application was launched he did not deem it fit to abandon the judgment. He thus forced the Applicant to proceed with these proceedings. He is hiding behind the veil that it was through no wrongful conduct on his part that the maintenance order was discharged. The judgment irregularly obtained benefitted him. He was no longer required to pay maintenance.

- [17] The First Respondent had an option to abandon the judgment or where the review application to set aside the judgment that had been launched like in this case, to choose not to oppose such an application. The choice he, however makes, may have cost implications. In my view he should have abandoned the judgment in order to obviate the necessity of the Applicant to seek this court to review and set aside the judgment and thus spare unnecessary costs for the Applicant. I cannot find a reason why the First Respondent cannot be ordered to pay the costs when he could have avoided same by abandoning the judgment.
- [17] The First respondent informed the legal representative of the Applicant after the application was served that he did not intend to oppose the application unless the Applicant persisted to seek a cost order against him. At that stage costs had already been incurred. Even at that stage the First Respondent could have proceeded to abandon the judgment. If the Applicant persisted with the application, notwithstanding the abandonment, then in that case, the court would have been called upon to decide if the Applicant was entitled to costs of this review application after the abandonment. This is not the case in the matter before us. As indicated the First Respondent is liable for the costs of this application.
- [18] Although I made a finding that the First Respondent is liable for costs, I also alluded to the fact that he played no part in the granting of the erroneous order. He also indicated, albeit at a belated stage that he did not intend to oppose the application. These should in my view count in his favour. It would not be in the interests of justice that he be mulct with costs on an opposed basis. I accordingly make the following orders:

## ORDERS

1. The decision of the Second Respondent, in the judgment delivered on 6 March 2019 regarding the discharge of the maintenance order, under case number 01411MAI000013 is hereby reviewed and set aside;
2. The maintenance order with effective date 1 July 2014, for payment of maintenance in the amount of R500 per month per child by the First Respondent to the Applicant is reinstated;
3. The First Respondent is liable for costs of this application on an unopposed basis.

-----  
P.E. MOLITSOANE, J

I agree

-----

A.K. RAMLAL, AJ

On behalf of the Applicant: Adv. G.S Janse Van Rensburg

Instructed by:

Rosendorff Reitz Berry

BLOEMFONTEIN

On behalf of the 1st Respondent Adv. C.D Pienaar

Maree and Partners

On behalf of the 2nd Respondent The State Attorney

[1] 1958(2) SA 249 at 251

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZAFSHC/2020/74.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/ah-v-jh-and-others-unknown-topic-afshc-2020>

Prepared on 14 October 2026 · Esheria