
SOUTH AFRICA / JUDGMENT

FS v ES (A3038/2020) [2021] ZAGPJHC 487 (18 June 2021)

[2021] ZAGPJHC 487

COURT

South Gauteng High Court, Johannesburg

BEFORE

Maier-Frawley, Fisher

CASE / FILE NUMBER

A3038/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3038/2020

Reportable No

Of interest to other Judges No

Revised: Yes

Date: 18/06/2021

In the matter between:

FS

Appellant

and

ES

Respondent

J U D G M E N T

MAIER-FRAWLEY J (FISHER J CONCURRING):

Introduction

1. The appellant and the respondent are the biological parents of a minor child, a boy, presently aged 12, who resides with the appellant (mother) and is in her primary care. It is thus the appellant who carries the day to day responsibility of paying for the maintenance needs and requirements of the minor child, 365 days a year, it being common cause that the respondent has, for reasons not relevant to this appeal, not exercised or maintained physical contact at all with the minor child since 2011. The amount ordered by the court below to be payable by the respondent (father) as a pro rata contribution in respect of the minor child's monthly maintenance requirements, is what informs the present appeal.
2. During November 2018, the appellant lodged a claim for maintenance against the respondent in the Maintenance Court, Randburg, seeking a pro-rata contribution from the respondent in respect of the minor child's monthly maintenance requirements, the total cost of which amounted to R28,077.82 per month, on the basis that the respondent was liable to pay, proportional to the parties' respective means, two thirds of the total cost, equating to R19,342.64 per month.
3. In April 2019, the Maintenance Court granted a provisional order for payment of maintenance by the respondent in the amount of R5024.00 per month, excluding medical aid.
4. A full maintenance enquiry in terms of s10 of the Maintenance Act was thereafter conducted in the Maintenance Court, pursuant to which the magistrate ordered the respondent to pay the sum of R6000.00 per month in respect of maintenance on behalf of the minor child. A further (and rather curious) order was granted to the effect that the respondent is to "retain the minor child on his medical aid until the Applicant informs the Respondent in writing 30 days prior to the transfer of the minor child from the Respondent's medical aid to the Applicant's medical aid, Should the minor child be transferred to the Applicant's medical aid, the Respondent shall contribute 50% of the medical aid premium."
5. Aggrieved by the monetary order, the appellant lodged an appeal on various grounds, amongst others, that the court below had misdirected itself in finding that: (i) the respondent was unable to afford payment of more than R6000.00 per month, in circumstances where the respondent had unequivocally testified under oath that he was able to afford payment of any amount that he may be ordered to pay in respect of his son's maintenance, and had left it to the court to determine a fair and reasonable amount for such purpose; and (ii) the appellant earned 'far more' than R40,000.00 per month as claimed by her in her evidence. Further, the complaint is that the court below erred in law or fact in disallowing or not including, in the computation of its award, several expenses such as those pertaining to the minor child's accommodation and transport requirements,[1] including excess medical costs incurred in respect of the minor child (which are not covered by the respondent's medical aid) and more specifically, in not taking into account the full ambit of expenses pertaining to the minor child's monthly educational costs, most of which were not

disputed by the respondent as being either unreasonable or unnecessary,[2] in arriving at a fair and reasonable award.

Factual

Background

6. The background facts are uncontentious. The parties were previously married to each other in terms of Islamic law. The minor child was born during the subsistence of the marriage, in 2008. The parties divorced in 2009, where after the appellant relocated from Kwa-Zulu Natal to take up residence in Gauteng. Whilst the respondent retained ownership and possession of two immovable properties, one of which included the erstwhile matrimonial home situate in Durban, the appellant was obliged to purchase a new home in Gauteng, which was financed by means of a home loan. According to the applicant, her new home was purchased with a view to accommodate the minor child living in close proximity to the school he was to attend.
7. After the parties' divorce, the respondent remarried, from which marriage, a further child was born. The respondent presently lives with his wife, their son and the respondent's step-daughter in Durban in the erstwhile matrimonial home of the parties. The appellant lives with her life partner together with the parties' minor child in Johannesburg. Both parties are property owners. The respondent's step-daughter attends a private school, as does the parties' minor child. Both the applicant's partner and the respondent's wife are in gainful employ and contribute financially towards household expenses incurred in the parties' respective homes.
8. The respondent is employed in an executive position at Nedbank in the position of Head of Corporate Investment for Kwa-Zulu Natal, earning a net income of R76,714.83 per month. In addition to his salary, the respondent receives an annual bonus. Whilst the bonus is discretionary and dependant on the bank's performance as well as the respondent's own performance every year, the respondent has, save for the year 2013, received such bonus every other year during the course of his employment at Nedbank. The bonus is made up of a cash component (ranging between R500,000.00[3] to R680,000.00[4] or more per annum)[5] as well as a share component whereby the respondent is allocated Nedbank shares to which he obtains a right after the lapse of a 3 year vesting period in respect of each annual share bonus. The value of his vested shares was not disclosed by the respondent in the maintenance proceedings conducted in the court below.
9. Until March 2018, the applicant was employed at Vodacom in the position of sales manager/ area manager, earning a nett income of R45,000.00 per month. According to the applicant, she resigned from such employment due to an inability to cope with work demands whilst having to attend to all the minor child's daily needs, including the management of her household, all of which (on her unrefuted version) put her personal health under strain. She however continued to derive an income in an amount of R40,000.00 per month from renting

out two trucks owned by her. In addition, she obtains a further sporadic income, the amount of which was not disclosed, in respect of private 'ISP' consultancy work that she performs 'as and when' she 'gets it.' She also receives 'gifts' comprising of cash monies in some months from her partner, which are bestowed at his discretion.

10. As is apparent from their respective lists of monthly expenses and disclosed assets, the parties live comparatively similar lifestyles

and enjoy a comparatively similar standard of living. The applicant's declared monthly household expenditure (including amounts which she expends on the minor child's monthly requirements), as at the time of the maintenance enquiry, amounted to the sum of R69,296.21,[6] whilst that in respect of the respondent's household amounted to R76,455.00 per month. [7] The parties each maintain immovable properties, which are respectively equipped with a garden and swimming pool; they each employ domestic workers in their homes, drive luxurious motor vehicles and afford vacations away from home from time to time, albeit not every year. The value of the respondent's disclosed assets during the maintenance enquiry, comprising of a fixed property, investments, tax free savings, and motor vehicle (including Nedbank shares, the value of which, however, remained undisclosed), totalled R2 851 737.00, whilst the value of the applicant's disclosed assets, comprising of a fixed property, investments, savings and 2 private motor vehicles owned by her – a BMW and Etios, totalled R1 091 036.00, which amount excludes the value of the trucks owed by her from which she generates a monthly income, as earlier mentioned.

11. Just as the respondent has gifted his present wife with cash monies monthly from time to time, so too, the applicant's partner has gifted her with cash monies from time to time, to do therewith as she pleases.
12. On the appellant's undisputed and unrefuted version, the minor child has, to date, excelled academically at school; he has furthermore shown creative aptitude by having one of his poems published, and has otherwise adapted to the separation and divorce of his parents. He is a growing adolescent, who, according to the appellant, eats as much as any adult does and who utilises and partakes in all the benefits and amenities available in the home in which he resides. Both parties share the common view, as is apparent from the record of their evidence, that their son deserves a quality standard of education, commensurate with that which is offered in the private sphere, and which, as conceded by the respondent in evidence at the maintenance enquiry, he is able to financially contribute towards. [The evidence in any event revealed that the financial resources of the parents allow for the minor child to attend a private school].

Evaluation of grounds of appeal in the light of relevant legal principles

13. Section 28(2) of the Constitution dictates that the best interests of a child are of paramount importance in every matter concerning the child.

14. It is the duty of both parents to support their child. Their obligations in this regard are to be apportioned between them according to their respective means.[8] Support includes that which a child reasonably requires for his or her proper living and upbringing, which includes the provision of food, clothing, accommodation, medical care and education.[9] In determining the amount reasonably required by a child for his or her support, having regard to the financial means of the parents and the apportionment of liability between them according to their respective means, the Maintenance Court is enjoined by statute to award an amount which it considers what fair in all the circumstances of the case.[10]
15. To the extent that the appellant asks this court to interfere with the Maintenance Court's award – the making of which involved the exercise of a discretion - the approach adopted in Vedovato [11] is to be followed, namely, that an appeal court will not interfere with the discretion of the lower court if it has given proper consideration to all relevant factors.
16. The circumstances in which an appeal court may interfere with the factual findings of a lower court have been held to be a misdirection on the facts and/or a finding that is clearly wrong.[12]
17. The long established common law principle, namely, that maintenance is considered to be a first charge against a parent's estate, was aptly restated in VVS,[13] where the following was said:

“ There can be no denying that the maintenance of a child is an aspect that goes into the best interests of the child. When ordered to provide maintenance for a child, a parent is required to prioritise the interests of such child above all other financial obligations he/she may have. It does not avail a parent to say that he does not have the money to pay maintenance whilst at the same time the parent is able to pay for holidays, cars, and all else.” (emphasis added)
18. The evidence revealed that the respondent received a substantial cash bonus in the amount of R680,000.00 in March 2019, which he chose to repay to his present wife, notwithstanding that maintenance proceedings were then pending in the Maintenance Court in respect of the minor child. The magistrate appears to have been significantly influenced by the small surplus available to the respondent on a monthly basis, after subtracting the amount of his declared monthly expenses (R76,455.00) from the amount of his net monthly salary (R76,714.83), without, however, taking account of the fact that the respondent had received additional and substantial annual cash bonuses every year since 2013, which were reflected in the respondent's declared income to SARS.[14] The magistrate's approach was made plain during an oral discourse in court when she endeavoured to explain to the parties how she had arrived at the amount of the award. The following extract from the record is illustrative of the point: The magistrate

explained that “Now the reason for the R6000, I know ma'am you had asked for quite a bit more is because the respondent is already over indebted. His expenses are equivalent to how much he earns, and I have gone through his bank statements and as much as he lives rather lavishly,

he needs to cut it down. This unfortunately is not an insolvency court. It is not a debt review court. I cannot tell him stop paying

his credit card and now pay the maintenance to the minor child. He needs to make arrangements so that he can lesson (sic) his debt and you can apply again in 6 to 8 months for an increase in the maintenance. Right now, he is over indebted. I cannot draw blood from a stone. The court has to look at the reasonable and necessary expenses of a minor child which I have discussed in my judgment and thereafter it is weighed against the affordability of the other side. In as much as he does earn R77 000 his expenses are the same amount of money that [he] earns. So he is currently over indebted, and he needs to cut down on it.” (own emphasis)

19. In her written judgment, the magistrate reasoned that “the court assesses the needs of the children against the affordability of the parent liable for the maintenance. If an order is granted in an amount that the parent cannot pay, it, in essence is an ‘empty order’ if he cannot afford to fulfil his financial obligations as per the Order of Court.”
20. The respondent’s direct testimony at the enquiry, namely, that his ‘affordability to pay maintenance’ was not in dispute in that he could afford to pay whatever amount the court deemed appropriate – whether it was R20,000.00 or R25,000.00 or R15,000.00 - by the re-arrangement of his expenses, was in sharp contradistinction to the conclusion arrived at by the magistrate, namely, that the respondent was over-indebted and thus unable to afford paying any higher amount than that which was awarded by the court. The conclusion of the court below was in any event not grounded in fact. The facts plainly showed the extent of the additional source/s of income available to the respondent through cash bonuses paid to him annually. He had also obtained a salary increase in 2019, despite a demotion in title at the bank. In this regard, the magistrate committed a material misdirection on the facts and thereby reached a conclusion that the respondent was unable to pay more than R6,000.00 per month in maintenance, which was clearly wrong.
21. It bears mentioning that the respondent reflected a monthly expense in the amount of R15,407.69, referred to as ‘Mortgage Bond Instalments/Rent’, on his schedule of expenses. The evidence, however, revealed that the respondent’s bond liability had been discharged in full by February 2019 and that the alleged rental expense was not in fact being incurred by him on a recurring monthly basis. The evidence further revealed that the respondent had sold his immovable property to a family Trust for ‘estate planning purposes’ in circumstances where the Trust could not afford the relevant purchase price and had not paid any monies to the respondent, notwithstanding which, the respondent deemed it appropriate to assume liability for payment of rental to the Trust in the sum of R15,407.69 whilst at the same time retaining liability for all expenses associated with the upkeep of the home.[15] Whilst the shifting of assets into the name of the Trust may have occurred for beneficial estate planning reasons, the timing thereof was questionable, given that the respondent was facing a pending claim for an increase in maintenance payable by him, in which proceedings his monthly expenses would ordinarily be scrutinised for purposes of assessing his ability to pay. The inference is inescapable that the amount so stipulated as a

rental expense was contrived for the sole purpose of inflating the respondent's monthly expenses.

22. The applicant's schedule of expenses, as confirmed in her evidence, reflects that the minor child's educational expenses alone amount to R8,243.33 per month.[16] The amount of R8,243.33 includes provision for the purchase of new uniforms annually at a cost of R400.00 per month. Accepting that new school uniforms could more reasonably be budgeted for every two years (as opposed to annually), even in respect of a growing child, the monthly cost amounts to no less than R8,043.33. Whilst the respondent testified that he had not initially consented to the minor child attending a private school, he readily conceded that the quality of education his son currently enjoys is not something on which the parties should compromise.[17] This was an important concession, which was wholly overlooked by the magistrate when making her award. In that regard, the magistrate

failed to have regard to the largely undisputed evidence of the applicant vis-a-vis this item of expense and in so doing, she erred.

23. The magistrate reasoned in her judgment that the 'parties do not agree on whether the child shall attend a private school. The Court therefore will not assess the school fees that are claimed but will assess the monthly maintenance payable by the Respondent which will incorporate a contribution towards school fees'. A reading of the judgment reveals that the magistrate considered an amount of "R3,800.00" to be reasonable in respect of the (proportionate) expenses incurred on behalf of the minor child for groceries (R1500.00), water and electricity (R400.00), lodging (R1500.00), Telkom (R300.00), vitamins (R200.00) and clothing (R400.00).[18] These amounts in fact total the sum of R4300.00 and not R3800.00 as erroneously calculated by the magistrate in the judgment. The magistrate disallowed several expenses that were apportioned by the applicant to the minor child's proportionate usage, enjoyment or benefit therefrom, on the basis that such costs 'would have accrued to the applicant irrespective of the child's purported usage',[19] thereby excluding an amount of R6142.04 appearing on the applicant's schedule of expenses for purposes of computing the award.
24. Since the total amount of R6000.00 was awarded in the judgment, one is left to speculate as to what the balance of the award in the sum of R1700.00 (i.e., $R6000 - 4300 = R1700$) was meant to cover. Items such as the cost of Islamic education (which both parties agreed were necessary and reasonable), the cost of domestic assistance (which both parties utilise in their respective homes), reading materials for the minor child and all the various components included in the minor child's educational costs were not specifically mentioned or apparently considered by the magistrate when making her award. As indicated above, the minor child's reasonable monthly educational costs alone amount to R8043.33 per month. Even on a 50:50 pro rata split, the respondent's liability would amount to R4121.66 per month in respect of this requirement alone. Assuming that the amount of R1700.00 was meant to cover the respondent's pro rata liability in respect of the minor child's educational expenses, and given that the respondent agreed, during the course of his testimony, to pay

an amount of R3000.00 in respect of school fees alone, the magistrate's decision to order the respondent to pay only an amount of R1700.00 in respect of the minor child's educational costs is thus manifestly clearly wrong, entitling this court to interfere with the award apropos such item.

25. As regards the amount of each party's pro rata liability in respect of maintenance, the appellant contends that an apportionment of one-third (for appellant) and two-thirds (for respondent) is fair and reasonable. She argues that her income was correctly disclosed by her as being no more than R40,000.00 per month. On her own version, however, she failed to disclose the amount she earns from performing private consultancy work, albeit on 'as and when' she 'gets it' basis. In addition, she receives cash payments from her partner from time to time, in undisclosed amounts, the full extent of which is incapable of precise assessment, given that financial disclosure in respect thereof was made for a limited period only and without specificity of detail. The record reveals that an amount of R1 million rand was deposited into one or another of the appellant's banking accounts during an 8 month period between January 2018 and September 2018. According to the appellant, the amount of R1 million incorporated: (i) savings given to her by undisclosed person/s for her sister's wedding; (ii) cash monies given to her by her partner; (iii) income derived from her employment at Vodacom; (iv) maintenance paid by the respondent; and (v) income derived from renting out her trucks.[20] Whilst the various payments do not all comprise employment earnings, the fact that the appellant receives cash payments from different

sources from time to time, cannot simply be ignored. Such cash injections form part of her overall means. The magistrate's

conclusion, namely, that the appellant earns more than the amount of R40,000.00 claimed by her, was therefore not entirely unjustified on the evidence.

26. By the same token, as indicated earlier, the evidence revealed that the respondent has been receiving large lump sums in respect of his annual performance bonus, in addition to his monthly salary, albeit that the amount thereof fluctuates from year to year. The respondent contends that as such bonuses are not 'guaranteed' they should therefore be left out of account. This reasoning is flawed. On the respondent's own version, he has from time to time, invested amounts so received over the years in an investment account or has utilised such monies as and when needed. Amounts so obtained by him likewise form part of his overall means. In his written argument, the respondent contended that an apportionment of two-thirds (for appellant) and one-third (for respondent) is aposite on the basis that the applicant's monthly income, as calculated by him in reference to debits and credits appearing in her bank accounts, amounts to R144,000.00 per month. The respondent's calculations in this regard were not found by the magistrate to be either accurate or reliable in the judgment. Had they so been, no doubt this would have been mentioned in the judgment. As this argument was not pursued during oral argument presented at the hearing of the appeal, it need not detain us further.

27. Having regard to the misdirections highlighted above, including the palpably wrong finding apropos the respondent's ability to pay maintenance, and taking account of the error in calculation in the judgment of the aggregate total amount considered by the court below to be reasonable in respect of certain of the minor child's apportioned expenses, we are at liberty to interfere with the amount awarded by the court below.
28. The record reflects that various expenses appearing on the appellant's schedule of expenses were demonstrated in the court below to be unreasonable. Certain other expenses were not objectively verified by the documents submitted into evidence by the appellant.
29. In our view, upon a consideration of all the relevant circumstances,[21] a fair and reasonable amount that ought properly to have been awarded in respect of maintenance, is the sum of R12 000.00 per month. The amount so determined is not capable of precise mathematical calculation (on a strict pro-rata apportionment basis) given that the appellant's means are incapable of determination with any measure of precision.
30. The appeal should accordingly succeed. There was no real dispute that the order we intend making should have retrospective effect.[22] In our view, the effective date should be the date on which the maintenance court finally determined the factual position relating to the maintenance needs of the minor child, i.e., 13 March 2020.
31. The general rule is that costs follow the result. We see no reason to depart therefrom. Both parties were able to afford legal representation, both in the court below and in the appeal. Moreover, the respondent had the benefit of and indeed took advantage of a bargain award to which he has since been found not to have been entitled to. It is common cause that the respondent has paid R6,000.00 per month in respect of maintenance since the grant of the maintenance order.
32. For all the reasons given, the following order is granted:

ORDER:

1. The appeal is upheld with costs.
2. The order of the maintenance court is set aside and replaced with the following order:

"The Respondent is hereby ordered to pay:-

 - (i) An amount of R12 000.00 per month, as a cash portion of maintenance on behalf of the minor child, commencing on the 30th June 2021 and thereafter on the last day of each and every succeeding month, which amount is to increase annually in accordance with the consumer price index;
 - (ii) The respondent is to retain the minor child on his medical aid and is to pay the monthly premiums associated therewith. In the event

that the applicant wishes to transfer the minor child onto her medical aid, she is to give the respondent 30 days' notice of her intention to do so. Should the minor child thereafter be transferred onto the applicant's medical aid, the respondent

shall contribute 50% of the cost of the monthly premium payable by the applicant in respect thereof. ”

3. The respondent is ordered to pay an amount of R96,000.00 in respect of accrued past maintenance, calculated at the rate of R6000.00 per month and which amount is payable retrospectively from 3 March 2020 to date of judgment (16 months).
4. The respondent is to pay the amount referred to in paragraph 3 above to the applicant within a period of 90 days from date of this

judgment.

A. MAIER-FRAWLEY

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANESBURG

I agree, and it is so ordered:

D. FISHER

Date of virtual hearing:

31 May 2021

Judgment

delivered

18 June 2021

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on

Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 18 June 2021.

APPEARANCES:

Counsel for Appellant: Mr DJ Combrink

Attorneys for Appellant Du Toit Attorneys

c/o Keith Sutcliffe and Associates Inc

Counsel for Respondent: Mr AP Van Der Westhuizen

Attorneys for Respondent: K Govender Attorneys

- [1] The 'accommodation requirements' are made up of amounts apportioned by the appellant to the minor child's proportional use and enjoyment of the immovable property in which he resides, such as the monthly bond liability, house insurance, alarm and the like. 'Transport requirements' include expenses apportioned to the minor child in respect of the appellant's monthly vehicle costs, including petrol consumption, motor plan, car insurance and vehicle license.
- [2] The full scope or compass of these expenses were left out of account by the magistrate ostensibly on the basis that the respondent had not (on his version) agreed, at the outset, to the minor child attending a private school and, by extension, to being responsible for payment of the higher school fees and ancillary costs and charges levied by such an institution.
- [3] Amount (pre-tax) received by the respondent 2018.
- [4] Net Amount received by the respondent in March 2019.
- [5] In 2017, the pre-tax amount of the bonus was R1.18 million and in 2016 the pre-tax amount received by the respondent was R1.15 million.
- [6] Some of the expenses listed in the applicant's schedule, such as a motor plan for her BMW motor vehicle, which she uses to convey the minor child, including an education policy for the benefit of the minor child's future tertiary education and the cost of an e-device required by the minor child during his secondary schooling, whilst not yet incurred monthly, were included in her computation of the amount of R69,296.21.
- [7] The amount of R76,455.00 ostensibly includes amounts expended on the maintenance requirements of the two minor children who reside with the respondent but excludes the educational costs and other unspecified generalised expenses pertaining to his stepdaughter
 - in the aggregate total sum of R8500.00 per month – which the respondent's wife personally pays.
- [8] Section 15(3) of the Maintenance Act, 99 of 1998 ('the Act').
- [9] Section 15(2) of Act. The legislature listed the broad categories of provision that are required for the support of a child without

prescribing what a child's reasonable requirements for his/her proper living and upbringing may be, as this is determined on a case to case basis, depending on the standard of living and the financial ability of the parents to meet those requirements. This has always been the common law position. See, for example, Spiro, "The law of Parent and Child in South Africa"

(1985) 397 where the learned author points out that ‘maintenance does not only embrace the necessities of life, such as food, clothing and shelter, but also extends to education and care in sickness, and the child must be provided with all those things that are required for its proper upbringing.’ See too: Scott v Scott 1946 WLD 399 at 401; Watson v Watson 1979

(2) SA 854 (A) at 860D..

[9] Section 15(2) of Act. The legislature listed the broad categories of provision that are required for the support of a child without

prescribing what a child’s reasonable requirements for his/her proper living and upbringing may be, as this is determined on a case to case basis, depending on the standard of living and the financial ability of the parents to meet those requirements. This has always been the common law position. See, for example, Spiro, “The law of Parent and Child in South Africa”

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See too: Scott v Scott 1946 WLD 399 at 401; Watson v Watson 1979

(2) SA 854 (A) at 860D..

[10] Section 15(3) of the Act.

[11] Vedovato v Vedovato 1980

(1) SA 772 (TPD) at 774 where the court held that the approach on appeal in matters like the present is the same as when a court is asked to interfere with the estimate of the trial court in compensation cases

[12] See: Bernert v Absa Bank Ltd 2011

(3) SA 92 (CC), para 106, where the following was said: “ ... The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading “the cold printed word.” The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to “tie the hands of appellate courts”. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.” (footnotes omitted).

[12] See: Bernert v Absa Bank Ltd 2011

(3) SA 92 (CC), para 106, where the following was said:

“ ... The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading “the cold printed word.” The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to “tie the hands of appellate courts”. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.” (footnotes omitted).

[13] VVS v SES 2015 JDR 1770 Gauteng, at para 13

[14] During the 2016 tax year, the record reflects that the respondent’s declared income was approximately R3.08 million whilst that of the applicant was R751 180.00. During the 2017 tax year, the respondent’s declared income was approximately R3 million whilst that of the applicant was R847 023.00. During the 2018 tax year, the respondent’s declared income was approximately R4.1 million whilst that of the applicant was approximately R744 195.00. During the 2019 tax year, the respondent’s declared income was R3.3 million whilst the applicant testified that she was earning R40 000.00 per month (R480 000.00 per annum, excluding additional (undisclosed) income derived from consultancy work).

[15] In simple terms, the respondent sold an asset that was owned by him, in respect of which he was incurring no bond or rental liability, in order to incur a monthly rental liability without having received payment for the asset sold by him.

[16] This amount excludes a once off cost for an E Book device (excluding the cost of software and warranty) required for the minor child’s schooling in 2020, and also excludes the cost of mobile data utilised by the minor child for the completion of school assignments that require internet usage. Re mobile data, the magistrate allowed a composite sum of R300.00 for Telkom costs, as apportioned to the minor child’s reasonable usage, which was considered to be a reasonable amount for such item.

[17] The respondent however suggested that his son’s education costs should be measured against what his wife currently pays for his stepdaughter’s private schooling. This type of reasoning is flawed, firstly because the minor child and the respondent’s

step-daughter are not in the same grade; secondly, they attend different schools in different provinces where the costs levied at the different institutions are not necessarily equivalent. Thirdly, different schools have different prerequisites in respect of uniforms, text books and stationery requirements, to mention but a few differences relating to the educational costs of these children.

- [18] Presumably this was a reference to casual clothing, and not school uniforms where the cost is the fixed retail price charged by the particular school supplier.
- [19] Excluded expenses included apportioned costs: House alarm (R167.20); Car insurance (R516.84); BMW Motorplan (R537); BMW Motor vehicle licence (R350); Etios motor vehicle licence; Garden Services (R267); Old Mutual Insurance; household maintenance (R334); insurance homeloan (R83.09); and over the counter medication (R500).
- [20] The amounts so received by the appellant, on her own version (during the relevant 8 month period) are easily calculable: Trucking income ($R40\,000 \times 8 = R320,000.00$); plus maintenance from the respondent - an amount of R4740.00 was paid monthly by the respondent during
- 2018) i.e., ($R4740 \times 8 = R37,920.00$); plus Vodacom salary March 2018 (R45,000.00) - applicant left the employ of Vodacom at the end of March 2018. The aggregate total of these amounts equals the sum of R402,920.00. The balance of R1 million deposited therefore ostensibly comprises cash monies received by the appellant in the amount of R R597,080.00 (R1 million – R402,920.00 = R597, 080.00). This means that over an 8 month period the appellant's income was supplemented by receipt of an average monthly cash amount of R74,635.00 (R597,080.00 divided by 8 equals R74,645.00). According to the appellant, she utilized part of the cash, inter alia, to settle the outstanding liability on her BMW motor vehicle and to made a cash injection of R60,000.00 into her Old Mutual policy.
- [20] The amounts so received by the appellant, on her own version (during the relevant 8 month period)
- are easily calculable: Trucking income ($R40\,000 \times 8 = R320,000.00$); plus maintenance from the respondent - an amount of R4740.00 was paid monthly by the respondent during
- 2018) i.e., ($R4740 \times 8 = R37,920.00$); plus Vodacom salary March 2018 (R45,000.00) - applicant left the employ of Vodacom at the end of March 2018. The aggregate total of these amounts equals the sum of R402,920.00. The balance of R1 million deposited therefore ostensibly comprises cash monies received by the appellant in the amount of R R597,080.00 (R1 million – R402,920.00 = R597, 080.00). This means that over an 8 month period the appellant's income was supplemented by receipt of an average monthly cash amount of R74,635.00 (R597,080.00 divided by 8 equals R74,645.00). According to the appellant, she utilized part of the cash, inter alia, to settle the outstanding liability on her BMW motor vehicle and to made a cash injection of R60,000.00 into her Old Mutual policy.
- [21] Further relevant circumstances (apart from those mentioned in para 28 above) include the apparent lavish lifestyle enjoyed by both parties, the fact that the appellant has managed to maintain such a lifestyle with little assistance from the respondent since 2012, the reasonable requirements of the minor child, and the respondent's ability to pay maintenance.

[22] See in this regard: Horwitz v Horwitz 1976

(4) SA 586 CPD at 588 E.

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