

SOUTH AFRICA / JUDGMENT

M v M (A3076/2016) [2017] ZAGPJHC 279 (28 March 2017)

[2017] ZAGPJHC 279

COURT

South Gauteng High Court, Johannesburg

BEFORE

Modiba, Carelse

CASE / FILE NUMBER

A3076/2016

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NUMBER: A3076/2016

Reportable

Of

interest to other judges

Revised.

28

March 2017

In

the matter between:

M

C Appellant

and

M

J Respondent

JUDGMENT

MODIBA J (CARELSE J CONCURRING)

- [1] This is an appeal against the judgment of the Regional (Divorce) Court for the Division of Gauteng held at Roodepoort who held the appellant in contempt of a court order granted on 15 June 2011.
- [2] The appellant (respondent a quo) is J M (Mr. M). The respondent (applicant a quo) is Ms C M (Ms M). Ms. M is Mr. M's erstwhile wife. The parties' marriage was terminated by a decree of divorce incorporating a settlement agreement. This is the order granted by the court a quo on 15 June 2011. Ms M opposes the appeal.
- [3] The court a quo granted the contempt order on 6 May 2016 in the following terms:

"Accordingly, I make the following order:

1. That the respondent is guilty of contempt of court.
 2. That the respondent is sentenced to a period of 3 (three) months imprisonment wholly suspended for a period of 3 (three) years on the following conditions:
 - (i) That he is not again found guilty of contempt of court committed during the period of suspension.
 - (ii) That the respondent complies with the provisions of the court order granted by this court on 15 June 2011 under case number GP/RDP/RC 624/2011 ("the order") within 10 days of the granting of this order.
 3. That the sheriff of this court is instructed to sign all documents necessary to give effect to the transfer of the immovable property on behalf of the respondent in compliance of section 5.2.1 of the settlement agreement which was made an order of this court 15 June 2011, should the respondent fail to do so.
 4. That the respondent is directed to pay the applicant the costs of this application on attorney-and-client scale.
- [4] Mr. M had counter applied for the variation of the divorce order in the court a quo."

POINT IN LIMINE ON JURISDICTION

- [5] At the outset of the hearing, this court raised a point in limine, mero muto, on whether the court a quo being a creature of statute, has the jurisdiction to grant an order for civil contempt of court. We stood the matter down until Friday 3 February 2017 to give the parties an opportunity to settle the merits in respect of their dispute; failing which the court would hear argument on the point in limine. In the afternoon of 2 February 2017, my sister Carelse J and I received Ms M's heads of argument on the point in limine, signaling that the parties had not settled the merits and that the parties will present argument on the point in limine

on 3 February 2017. That is indeed what transpired.

- [6] Mr. M did not file heads of argument. He is an admitted advocate of this court. He appeared in person and argued the appeal. His attorney of record was present in court. He contended on the basis of the judgment in *Dreyer v Wiebols and Others*[1] that the Magistrate's Court lacks jurisdiction to grant an order for civil contempt of court because such a remedy falls within the exclusive and inherent jurisdiction of the High Court.
- [7] Counsel for the respondent contended that *Dreyer* was correctly decided in so far as it relates to orders in respect of causes of action based on contracts and delict. It is distinguishable in respect of divorce matters. In respect of divorce matters, he further contended, Regional Divorce Courts have the jurisdiction to grant an order for civil contempt of court. He relied on the following provisions:
- [7.1] Section 10 of the Native Administration Act 9 of 1929 (as amended).[2]
- [7.2] Section 9 of the Jurisdiction of Regional Courts Amendment Act 31 of 2008.[3]
- [7.3] Section 29(1B) (a) and (b) of the Magistrates' Courts Act 32 of 1944 (as amended).[4]
- [8] Act 9 of 1929 is the enabling legislation for the establishment of Divorce Courts at the level of Regional Courts in the Magistrates Court. It gives the President (of the Republic) the power to proclaim the establishment of these courts in the Government Gazette. This legislation has since been repealed. The wording of section 10 of that Act is analogous to that of section 29(1B) (a) and (b) of the Magistrates' Courts Act. However, section 1(a) (i) and (ii) of Act 9 of 1929 as amended is excluded from section 29(1B) (a) and (b) of the Magistrates' Courts Act. Section 9 of the Jurisdiction of Regional Courts Amendment Act 31 of 2008 deals with transitional arrangements consequent upon the establishment of the Regional Divorce Courts.
- [9] The hallmark of the respondent's contention is section 29(1B) (a) and (b) of the Magistrates' Courts Act. This section grants the Regional Divorce Courts jurisdiction to hear and determine matters relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom. Ms M's counsel elucidated that the contempt proceedings arise from the divorce action that was instituted in the Regional Divorce Court. Therefore in terms of section 29(1B) (a) and (b), the latter court has jurisdiction to hear such proceedings. (My emphasis)
- [10] Section 29 (1B) (a) clearly gives the Regional Court jurisdiction over divorce matters. In terms of section 29(1B) (b), the Regional Divorce Court has the same jurisdiction as the High Court in respect of matters referred to in section 29 (1B)(a).
- [11] The question to be determined is whether section 29 (1B) (a) and (b) gives the Regional Divorce Court jurisdiction in respect over civil contempt proceedings.

[12] It is trite that there is no statute that grants the High Court jurisdiction to grant an order for civil contempt of court – even in respect of divorce orders. To grant an order for civil contempt of court, the High Court invokes its inherent jurisdiction. Counsel for Ms M argued that section 29 (1B) (a) and (b) extends the inherent jurisdiction of the High Court to the Regional Divorce Court. For the reasons set out in paragraphs 13 to 19 below, I find that it does not.

[13] Inherent jurisdiction is an English common law doctrine in terms of which a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other tribunal. In the English case of *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*[5], Lord Diplock described the court's inherent jurisdiction as a general power to control its own procedure so as to prevent being used to achieve injustice. It applies to an almost limitless set of circumstances. There are four general categories for its use, namely to:

[13.1] ensure convenience and fairness in legal proceedings.

[13.2] prevent steps being taken that would render judicial proceedings ineffective;

[13.3] prevent abuses of process; and

[13.4] act in aid of superior courts and in aid or control of inferior courts and tribunals.

[14] In *Ex Parte Millsite Investments Co (Pty) Ltd*,[6] the court per Vieyra J said the following about inherent jurisdiction.

“... apart from powers specifically conferred by statutory enactments and subject to any deprivation of power by the same source, a Supreme

Court can entertain a claim or give any order which at common law it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgements courts have spoken of the inherent power of the Supreme Court. The inherent power is not merely one derived from the need to make the court order effective, and to control its own procedure, but to hold the scales of justice where no law provides directly for such a given situation.” (My emphasis)

[15] Pollak described it as follows:

“In short, therefore, the position is that unlike, say, the magistrates' courts or the industrial court, the power of the Supreme Court is not spelled out in a legislative framework and limited by its creating statute: it inherently has all such power as entitles it to entertain to hear 'all causes arising' within the area over which it exercises jurisdiction.[7]”

[16] The Constitution of the Republic of South Africa, 1996 has codified the doctrine of inherent jurisdiction. Section 173 of the Constitution reads:

“The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”[8]

- [17] When one considers the meaning and purpose of ‘inherent jurisdiction’ in light of the above authorities, it can never be conferred upon a court by statute. The Magistrate’s Court and in this instance the Regional Divorce Court, being a creature of statute, does not have inherent jurisdiction. Inherent jurisdiction is exclusively borne by the High Court. Such jurisdiction can never be conferred by statute. It may only be excluded by statute. By enacting section 29 (1B) (a) and (b), the legislature could not have intended to extend the High Court’s inherent jurisdiction to grant an order for civil contempt to the Regional Divorce Court as contended by Ms M’s counsel. If the legislature intended to give the Regional Divorce Court jurisdiction to grant an order for civil contempt of court in respect of orders granted by that court, it may only do so through a specific legislative provision. The legislature may not extend the exclusive inherent jurisdiction of the High Court to the Regional

Divorce Court. By its very nature, the doctrine of inherent jurisdiction excludes such a postulation.

- [18] Therefore any suggestion that section 29(1B) (a) and (b) gives the Regional Court jurisdiction to grant an order for civil contempt of court lacks any legal basis.
- [19] The respondent was not without a remedy in the Magistrate’s court. The Magistrate’s jurisdiction to hear an application for and to grant an order for contempt of court is set out in section 106 of the Magistrates’ Courts Act. This section gives the Magistrates’ Court jurisdiction over criminal contempt of court matters. This is the procedure that Ms M ought to have followed to enforce the divorce order. The remarks of my brother Coppin J in Dreyer are pertinent. He stated as follows at para 6:

“The Magistrates’ Court does not have the jurisdiction to grant the relief claimed in prayers 4, 5, and 6 by virtue of the limitation of its jurisdiction imposed by section 46(2)(c) of the Act, and the Magistrates’ Court is limited to imposing a criminal sanction in terms of section 106 of the Act. It was further submitted on behalf of the applicant that the procedure in the Magistrates’ Court entailed the laying of a charge with the police, where-after the matter would then be in the hands of the police and the prosecuting authorities, whereas the procedure in the High Court allowed the applicant to be in control of the process.”

- [20] Only the High Court, exercising its inherent jurisdiction may grant an order for civil contempt of court. Therefore if Ms. M desires to obtain an order for civil contempt of court, she ought to launch such proceedings in the High Court. An order for civil contempt of court is a discretionary remedy that will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that other court at the disposal of a party seeking such an order.[9] The High Court will only grant such an order in exceptional circumstances. To succeed in the High Court, Ms M will have to show that there is good and sufficient reason for the High Court to enforce the divorce order, being an order

of another court.

[21] In the premises, the order granted by the court a quo on 6 May 2016, holding Mr. M in contempt of an order that court granted on 15 June 2011, stands to be set aside.

COSTS

[22] It is appropriate that costs follow the costs of the appeal. However, such costs are to exclude the costs of the appellant's counsel as Mr. M did not brief counsel but argued the appeal in person.

[23] Therefore the following order is made:

ORDER

1. The order granted by the court a quo on 6 May 2016, holding the appellant (respondent a quo) in contempt of an order that court granted on 15 June 2011 is set aside.
2. The respondent shall pay the appellant's costs of appeal which costs shall exclude the costs of counsel.

MODIBA J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree and it is so ordered.

CARELSE J

APPEARANCES:

Appellant's Counsel: In person

Appellant's attorneys: Ndlovhu A.J. Inc

Respondent's Counsel: Mr. M Miller

Instructed by: Saders Attorneys

Date heard: 30 Jan - 03 Feb 2017

Date Judgment delivered: 28 March 2017

[1] 2013

(4) SA 498 (GSJ).

[2] Section 10 (1) Notwithstanding anything in any other law contained, the Governor-General may by proclamation in the Gazette establish native divorce courts which shall be empowered and have jurisdiction to hear and determine suits of nullity, divorce and separation between natives domiciled within their respective areas of jurisdiction in respect of marriages and to decide any question arising out of any such marriage which is not cognizable by a native commissioner's court established under section ten of the principal Act (2) The area of jurisdiction of any court established under sub-section (1) shall coincide with that of a native appeal court established under section thirteen of the principal Act. (3) Every such court shall be a court of law and shall consist of the person for the time being acting as president of the native appeal court exercising jurisdiction in the same area. The president may in his discretion summon to his assistance two persons holding the office of magistrate to sit and act with him as assessors in an advisory capacity on question of fact. (4) The provisions of sub-sections (5) and (6) of section thirteen and sub-section (1) of section sixteen of the principal Act in relation to native appeal courts shall mutatis mutandis apply in respect of native divorce courts established under this section. (5) An appeal from the judgment of a native divorce court shall lie to the provincial or local division of the Supreme Court having jurisdiction. (6) Such appeal shall be noted and prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter, and all rules applicable to such last mentioned appeal whether in respect of the hearing thereof or of the confirmation or setting aside of the proceedings appealed against, or otherwise, shall mutatis mutandis apply to an appeal under this section. (7) Nothing in this section shall be construed as in any manner divesting the Supreme Court of jurisdiction in respect of any matter specified in sub-section (1).

[2] Section 10

- (1) Notwithstanding anything in any other law contained, the Governor-General may by proclamation in the Gazette establish native divorce courts which shall be empowered and have jurisdiction to hear and determine suits of nullity, divorce and separation between natives domiciled within their respective areas of jurisdiction in respect of marriages and to decide any question arising out of any such marriage which is not cognizable by a native commissioner's court established under section ten of the principal Act
- (2) The area of jurisdiction of any court established under sub-section (1) shall coincide with that of a native appeal court established under section thirteen of the principal Act.
- (3) Every such court shall be a court of law and shall consist of the person for the time being acting as president of the native appeal court exercising jurisdiction in the same area. The president may in his discretion summon to his assistance two persons holding the office of magistrate to sit and act with him as assessors in an advisory capacity on question of fact.
- (4) The provisions of sub-sections (5) and (6) of section thirteen and sub-section (1) of section sixteen of the principal Act in relation to native appeal courts shall mutatis mutandis apply in respect of native divorce courts established under this section.

- (5) An appeal from the judgment of a native divorce court shall lie to the provincial or local division of the Supreme Court having jurisdiction.
- (6) Such appeal shall be noted and prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter, and all rules applicable to such last mentioned appeal whether in respect of the hearing thereof or of the confirmation or setting aside of the proceedings appealed against, or otherwise, shall mutatis mutandis apply to an appeal under this section.
- (7) Nothing in this section shall be construed as in any manner divesting the Supreme Court of jurisdiction in respect of any matter specified in sub-section (1).
- [3] 9 Transitional provisions (1) Any proceedings instituted in a court established under section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929), before the commencement of this section and which are not concluded before the commencement of this section must be continued and concluded in all respects as if this Act had not been passed. (2) On the date of the commencement of this section- (a) each court established under section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929), becomes a court of the

regional division designated by the Minister in respect of that court;

[3] 9 Transitional provisions

- (1) Any proceedings instituted in a court established under section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929), before the commencement of this section and which are not concluded before the commencement of this section must be continued and concluded in all respects as if this Act had not been passed.
- (2) On the date of the commencement of this section-
- (a) each court established under section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929), becomes a court of the

regional division designated by the Minister in respect of that court;

[4] "29 Jurisdiction in respect of causes of action (1B)

- (a) A court for a regional division, in respect of causes of action, shall, subject to section 28 (1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998). (b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter."

[4] "29 Jurisdiction in respect of causes of action

(1B)

- (a) A court for a regional division, in respect of causes of action, shall, subject to section 28 (1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).
- (b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter.”
- [5] [1981] AC 909,
- [6] 1965 (2) SA 582 (T) at 585 G-H
- [7] Pistorius Pollak on Jurisdiction 2 ed (1993) 28.
- [8] S. 173 substituted by s. 8 of the Constitution Seventeenth Amendment Act of 2012 (wef 23 August 2013).
- [9] See Dreyer at paragraph 9.

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