

SOUTH AFRICA / JUDGMENT

## M.E.M v L.N.M (A2023/070387) [2024] ZAGPJHC 1069 (22 October 2024)

[2024] ZAGPJHC 1069

### COURT

South Gauteng High Court, Johannesburg

### BEFORE

S. Potterill, B. Mostert

### CASE / FILE NUMBER

A2023/070387

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#### IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER

JUDGES: NO.

(3) REVISED.

2024-10-22

#### Case

Number: A2023-070387

#### In

the matter between:

M[...]

E[...] M[...]

Appellant

and

L[...]

N[...] M[...]

Respondent

This

judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the

Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing

down is deemed to be 22 October 2024.

## JUDGMENT

POTTERILL J

- [1] The appellant is appealing against a maintenance order granted in terms of s30 read with s26 of Act 99 of 1998, the Maintenance Act [the Act], on 28 July 2022. The appeal seeks this Court to set aside the maintenance order and that this Court alter the maintenance

order. The respondent opposes the appeal.

- [2] It is common cause that on 5 May 2023 the appellant applied for a substitution of the existing order in terms of section 16(1)(b) of the Act. In this matter the Court a quo found that the substitution application was in fact a disguised appeal or review of the original order and that one maintenance court cannot set aside the order of another maintenance court. Furthermore that the appellant had not shown good cause for the substitution of the original maintenance order.

- [3] There is no dispute that the appeal before us has lapsed. Rule 50(1) of the Uniform Rules of Court reads as follows:

*“(1) An appeal to the court against the decision of the magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.”*

The judgment was handed down on 28 July 2022 and the notice of appeal was filed on 18 July 2023, far exceeding the 60 days within which to appeal. An application for condonation signed on 14 May 2024 was only filed in response to the respondent’s heads of argument submitting that the appeal had lapsed.

The condonation application

- [4] The reason for the delay proffered is that the appellant was at the maintenance application and hearing unrepresented. He in fact made payments in terms of the order, but then fell behind on other payments. A once-off attachment order for arrear maintenance was effected from his FNB account. Thereupon the appellant approached the Maintenance Court for a substitution order that was dismissed on 7 July 2023. With this approach the appellant was earnestly endeavouring to exhaust all available avenues within the lower court. It was submitted that the respondent will suffer no prejudice whereas the appellant will suffer immense prejudice if the appeal is not heard. Furthermore, there are prospects of success that the appeal will succeed.
- [5] The respondent served an opposing affidavit to the condonation application the day before the appeal hearing, but it did not serve before the Court. The respondent elected to oppose the matter purely on argument. It was submitted that the delay is extreme and the appellant is not a layman and has an LLB qualification. The application for condonation was only brought subsequent to the respondent raising the fact that it had lapsed. The appeal has no prospects of success.

#### Decision on condonation

- [6] The extent of the delay in bringing this appeal far surpasses the time-frame within which to bring an appeal and is in itself unacceptable.
- [7] The explanation for the delay is ill-founded because the appellant cannot ignore the judgment granted by the court a quo in the substitution application. The applicant must either bring a new substitution application in the Maintenance Court or appeal the substitution order granted. The appellant's substitution application was incorrectly framed as an appeal or review of the original maintenance order and did not have sufficient detail of income, expenditure and need for the court to consider whether

substitution should be granted. On those grounds it was dismissed. The appellant cannot utilise the High Court to decrease a maintenance

amount. This Court, can only refer the matter back to the Maintenance Court if the appeal was to succeed simply because there is

insufficient evidence before us and viva voce evidence may be required.

- [8] The appellant concedes that he must pay child maintenance, but that it must be decreased. Having regard to the prospects of success there is little prospect of success against the original order. If his circumstances has changed since the order was granted then he must approach the Maintenance Court for a substitution order.
- [9] It is not in the interests of justice to grant condonation as it would be procedurally incorrect.
- [10] The following order is made:
- [10.1] The application for condonation is refused.

[10.2] The appeal has lapsed.

[10.3] The appellant is to carry the costs of the appeal.

S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

B. MOSTERT

ACTING JUDGE OF THE HIGH COURT

CASE NO: A2023-070387

HEARD ON: 17 October 2024

FOR THE APPELLANT: MR. S.W. KHALISHWAYO

INSTRUCTED BY: Wiseman S. Khalishwayo Attorneys

FOR THE RESPONDENT: ADV. N.Q.H. MABENA

INSTRUCTED BY: Phala Attorneys

DATE OF JUDGMENT: 22 October 2024

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