

SOUTH AFRICA / JUDGMENT

M.F.I v N.I (A431/2017) [2018] ZAWCHC 65 (11 June 2018)

[2018] ZAWCHC 65

COURT

Western Cape High Court, Cape Town

BEFORE

J I Cloete, G Salie-Hlophe

CASE / FILE NUMBER

A431/2017

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IN THE

HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case number: A431/2017

In the matter between:

M F

I

Appellant

and

N

I

Respondent

Coram:

Justice J Cloete et Justice G Salie-Hlophe

Heard:

8 June 2018

Delivered:

11 June 2018

JUDGMENT

CLOETE J:

[1] This is an appeal against the order of the Wynberg maintenance court dismissing the appellant's application to 'suspend and set aside' a warrant of execution for arrear maintenance of R160 000 payable in respect of his former wife, the respondent, in terms of their decree of divorce granted in this court on 9 November 2015 ("the High Court order").

[2] In essence, the magistrate found that the maintenance court lacked jurisdiction to set aside the High Court order because there was no application for such relief before it.

[3] In terms of the High Court order the appellant is liable to pay personal maintenance to the respondent of R10 000 per month until her death or remarriage, whichever occurs first.

[4] The appellant did not defend the divorce action. It is common cause that when the matter was called in motion court on 9 November 2015 the presiding judge enquired of the respondent's attorney whether

the appellant was aware that the matter was set down that day. On being advised that he was not aware, the presiding judge requested

the respondent's attorney to telephone the appellant in order to ascertain whether he had any objection to the divorce being

granted in terms of the prayers contained in the respondent's summons.

[5] The respondent's attorney duly contacted the appellant. According to the respondent, she was standing next to her attorney when this conversation took place and she heard the attorney's side of the conversation. All that she heard him discuss was that the former common home in Constantia (an asset of the erstwhile joint estate and in which the respondent still resided at the time) would not be sold immediately, but would be properly marketed and sold in order that the parties could obtain the best possible price. The respondent thereafter heard her attorney say that he would convey to the presiding judge that the appellant had no objection to the decree of divorce being granted in the terms sought, and she was present in court when the presiding judge was duly informed thereof.

[6] The appellant's version is that during that telephone conversation he objected to the respondent becoming entitled to personal maintenance of R10 000 per month. According to him, she received rental income from tenants who occupied a portion of the property, and he was continuing to pay the monthly mortgage bond instalments, as he had done since their separation in 2014, together with the municipal account and certain of the respondent's personal expenses. The appellant stated that he requested that the respondent's personal maintenance claim (as well as a maintenance claim for the parties' youngest child who was still a minor and residing with him) be deleted from the prayers

sought. He alleges that the respondent's attorney agreed thereto. This in turn is categorically denied by the respondent's attorney, who supports the respondent's version of that telephone conversation in all material respects.

- [7] Two days after the decree of divorce was granted, on 11 November 2015, the respondent's attorney addressed an email to the appellant, the relevant portion of which reads as follows:

'As discussed, the Court gave an order for division of the joint estate, but this will not entitle your ex-wife to immediately sell the property. She now has to negotiate with you as to what a fair division entails, and if this is totally unsuccessful she will then have to go back to the High Court to ask for a Receiver to divide the joint estate. You must try to avoid this happening as it is expensive, and it is better to negotiate with your ex-wife and reach agreement.'

- [8] On 23 November 2015 the appellant wrote to the respondent's attorney, in which he outlined a proposal to divide the net proceeds of the sale of the property. He estimated that the respondent's 50% share thereof would be R1.435 million. However he offered R1.2 million because, on his version, she had received rental income of some R420 000 from the tenants at the property as well as R60 000 worth of cash maintenance and expenses that he had paid in respect of her motor vehicle insurance premiums and cell phone. He also stated that 'she is also insistent upon a maintenance after the settlement'.

- [9] Accordingly, not only did the respondent's attorney make no mention in his email dated 11 November 2015 of the so-called agreement relating to the deletion of the prayer for personal maintenance, but the appellant himself by implication acknowledged that the respondent nonetheless required maintenance to be paid to her once she received her share of the proceeds of the sale of the property. If, as the appellant contends, the respondent had already agreed to abandon her claim to personal maintenance, he would not have mentioned that claim in negotiating how the sale proceeds were to be divided.

- [10] The appellant raised three additional defences to the warrant of execution in the proceedings

before the magistrate. First, he claimed set-off on the basis that he had continued to pay the mortgage bond instalments of R15 000

per month until the immovable property was sold during the first half of 2016, together with the other expenses set out above. However, apart from the monthly bond instalments, no details were provided by the appellant of the amounts so paid by him. His claim is thus unquantified. In any event, the respondent did not solely benefit from the payments that he made, given that the bulk of them, on his own version, related to the major asset in the erstwhile joint estate and he in turn directly benefited therefrom when the property was sold.

- [11] Second, the appellant alleged that subsequent to the divorce he expended R315 148 on renovations and improvements to the property so that it could be marketed at an optimal selling price. He contended that the

respondent was thus indebted to him for 50% of this amount, i.e. R157 574. This was denied by the respondent, whose version was that those renovations and improvements that had taken place were paid with funds drawn from the access bond, a liability of the erstwhile joint estate, long before the divorce was granted.

[12] Attached to the appellant's founding affidavit is the statement of the transferring attorneys dated 21 June 2016, reflecting that each of the parties received 50% of the net proceeds of the sale. If, as the appellant maintains, the respondent was indebted to him in any amount at the time, it is most improbable that he would nonetheless

have consented to her receiving 50% of those net proceeds. It is also undisputed that the appellant took no steps whatsoever against the respondent to recover any of the amounts which he claims are due to him prior to the warrant of execution being served on him.

[13] In short therefore the appellant failed to make out a proper case for either set-off or enrichment. Moreover, these so-called defences are not supported by the objective facts and the inherent probabilities.

[14] The third and last defence was that the respondent has income and assets sufficient to maintain herself without any assistance from the appellant, whereas the appellant is himself struggling financially. However, insufficient

details were provided by the appellant concerning the respondent's financial position. According to the respondent, she utilised her share of the proceeds of the sale to purchase a more modest home for herself, pay her debts and purchase a motor vehicle. She is only employed two days per week and supplements her income from what is left of her capital, which at the date of deposing to her answering affidavit in August 2017 amounted to R400 000. The appellant failed to disclose his current income and expenses or details of his assets and liabilities, and the court is left in the dark as to what exactly his financial position is. The respondent also disputes that the appellant is struggling financially.

[15] As previously stated the relief sought by the appellant was to 'suspend and set aside' the warrant, which had been issued in terms of s 27 of the Maintenance Act 99 of 1998 ("the Act"). The maintenance court was empowered to issue the warrant of execution, given that a "maintenance order" for purposes of the Act includes a High Court order: see *Turton v Turton* 2012 (2) SA 623 (WCC) at para [13] and *M v M and Another* 2014 (2) SA 403 (WCC) at paras [6] to [9].

[16] These two decisions, from single judges in this division, differ however on whether or not a High Court warrant of execution may still be obtained to enforce a maintenance order granted by the High Court, given the provisions of Chapter 5 of the Act. *Turton* concluded that it could not be obtained, whereas *M v M and Another* concluded that it could.

[17] Chapter 5 of the Act deals with the enforcement of maintenance orders by civil execution.

Sections 26 to 30 fall under Chapter 5. Section 27(1) authorises the maintenance court to issue a warrant of execution where it is alleged under oath that there has been a failure to comply with a maintenance order.

- [18] Where an execution creditor armed with a High Court order follows the procedure contained in Chapter 5, this does not change the character of the order itself. It remains a High Court order, and it is only the mechanism for enforcement thereof that falls under the auspices of the maintenance court. That this must be so is evident from the plain wording of the definition of “maintenance order” in the Act together with the absence of any provision in the Act itself to the contrary. The situation is different where a maintenance court, following upon an enquiry in terms of Chapter 3, discharges or varies an existing High Court maintenance order under s 16 or s 17 of the Act. In that event, the High Court order ceases to exist: see *Purnell v Purnell* [1993] ZASCA 22; 1993 (2) SA 662 (A).
- [19] Where an execution debtor wishes to challenge a warrant of execution in the maintenance court he or she has two options to pursue on application. The first is contained in s 27(3) and the second in s 27(4) of the Act.
- [20] Section 27(3) empowers a maintenance court to set aside a warrant of execution if it is satisfied that the execution debtor ‘has complied with the maintenance or other order in question’. In contradistinction s 27(4) empowers a maintenance court, in its discretion – hence the use of the word ‘may’ – to enquire in summary manner into the circumstances mentioned in s 27(5) and, following upon such enquiry, to suspend the warrant and make either an emoluments attachment or garnishee order. Section 27(3) does not provide for a s 27(5) enquiry to be held. Only s 27(4) does so.
- [21] Section 27(5) provides that:
- ‘At the enquiry the maintenance court shall take into consideration-
- (a) The existing and prospective means of the person against whom the warrant of execution has been issued;
 - (b) The financial needs and obligations of, or in respect of, the person maintained by the person against whom the warrant of execution has been issued;
 - (c) The conduct of the person against whom the warrant of execution has been issued in so far as it may be relevant concerning his or her failure to satisfy the maintenance or other order in question; and
 - (d) The other circumstances which should, in the opinion of the court, be taken into consideration.’
- [22] Importantly therefore the powers of the maintenance court – a creature of statute – in respect of an issued warrant of execution are statutorily curtailed. It cannot consider and determine, for example, whether the maintenance order itself should be varied or discharged, nor can it *mero motu* refer this issue for an enquiry under Chapter 3 of the Act.

It can only set aside a warrant if satisfied that the order giving rise to it has been complied with (which must necessarily mean full compliance). It can only suspend a warrant if it simultaneously makes an emoluments attachment or garnishee order. It cannot suspend a warrant on any other terms or conditions and it has no power, in terms of s 27, to deal with the warrant in any other manner.

[23] I am accordingly in respectful disagreement with the findings in Turton at paras [9] and [10] that:

‘9. ...the nature of the enquiry provided in terms of s 27(3) and (4) of the Maintenance Act is sui generis... It essentially creates an opportunity to have the question of not only the means of the debtor to pay investigated, but also to have his or her liability to do so revisited.

10. It is unlikely to have been the legislature’s intention that there should be two different systems of civil enforcement of high court maintenance orders in existence parallel to each other; the one with a 10-day moratorium on enforcement, the other having no such moratorium; the one providing for a statutory procedure to convert the enforcement process into an enquiry; the other attended by no statutory restraints. An ability by a maintenance creditor to choose between such alternative enforcement processes, if the choice were available, would introduce an arbitrariness in respect of the consequences for the debtor that would be difficult to reconcile with rationality and equality before the law. Moreover, having regard to the expressed intention of the Act, being the creation of a fair and equitable maintenance system under the framework of the statute, the achievement of that objective would not be assisted if s 26(1) were read as merely permissive or enabling in nature, and as allowing for disparate but parallel means of enforcement of high court maintenance orders – the one under the Act, and the other outside it.’

[24] I agree with the submission made on behalf of the respondent that, under Chapter 5 and in particular under s 27, the maintenance court does not have jurisdiction to revisit the original maintenance order for the

purpose of varying or substituting it, but can only ameliorate the circumstances in which the execution debtor finds him/herself by suspending the warrant of execution and then issuing either an emoluments attachment or garnishee order, whichever is deemed the most appropriate.

[25] The only instance in which a maintenance court may revisit a maintenance order, whether it be a High Court order or a previous maintenance court order, is in terms of s 6 of Chapter 3 of the Act which provides as follows:

Complaints relating to maintenance.---

(1) Whenever a complaint to the effect—

(a) that any person legally liable to maintain any other person fails to maintain the latter person;

- (b) that good cause exists for the substitution or discharge of a maintenance order; or
- (c) that good cause exists for the substitution or discharge of a verbal or written agreement in respect of maintenance obligations in which respect there is no existing maintenance order,

has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.

- (2) After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides, carries on business or is employed with a view to enquiring into the provision of maintenance for the person so to be maintained.'

[26] The manner in which the maintenance officer must investigate the complaint is contained in s 7. This includes obtaining affidavits and gathering information about the financial position of any person 'affected by such liability'. It is apparent from these sections of the Act that the enquiry contemplated therein (referred to in s 9 to s 14 of Chapter

- 3) can only take place once: (a) a maintenance officer has investigated the complaint in the prescribed manner as provided in the Act; and (b) after investigating the complaint the maintenance officer has instituted such an enquiry. It is well known that the maintenance courts are heavily overburdened, and while this process takes its course, the consequences to the affected parties may be profound.

[27] As was also stated in *M v M and Another* at paragraph [21], there is a common law presumption that a statutory provision does not alter or abrogate the existing law more than necessary, save in the case of clear inconsistency. Section 42(3) of the Superior Courts Act 10 of 2013 provides that a High Court has the power to execute its orders by the attachment of the execution debtor's property. A similar

provision existed in the now repealed Supreme Court Act 59 of 1959. Rule 45 of the uniform rules of the High Court gives procedural

effect to s 42(3). This rule has not been amended to exclude maintenance orders from its operation.

[28] In terms of s 173 of the Constitution, the Constitutional Court, Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. The High Court is thus at large, should it be inclined to suspend a warrant of execution, to impose whatever conditions it deems fit. It is not limited to the statutorily curtailed options contained in Chapter 5 of the Act.

[29] I therefore respectfully disagree with the conclusion in *Turton* at para [15] that:

‘I have been impelled to the conclusion that Chap 5 of the Maintenance Act is intended to comprehensively regulate the civil enforcement of maintenance orders (as defined) made by any court in the Republic.’

[30] I am instead in agreement with the findings in *M v M and Another* at paras [18] to [25] that:

30.1 The fact that a party is permitted to enforce a High Court maintenance order in the maintenance court does not lead to the necessary implication that the High Court is prevented from enforcing its own maintenance order;

30.2 As a general rule the court that grants an order retains jurisdiction to ensure that its order is complied with, although that jurisdiction is not exclusive;

30.3 Distinct remedies available to a party who seeks to enforce an order entitle that party to choose the remedy

which is considered most effective (referring to *Martin v Martin* 1997 (1) SA 491 (N) at 496 and *Duncan v Duncan* 1984 (2) SA 310 (C));

30.4 The distinctions that exist in the enforcement mechanisms available in the maintenance court and the High Court, rather than introducing arbitrariness, irrationality and inequality, are factors to be taken into account by a party in the exercise of their election; and

30.5 Were no such choice available, this would have the necessary consequence that all High Court maintenance

orders

would in all circumstances be subject to the moratorium and enquiry provisions contained in the Act upon steps being taken to enforce them; not only would this necessarily diminish the value of the order obtained, but it would have the potential to cause prejudice to the persons that such an order for maintenance seeks by its nature to protect where enforcement is pursued; and such a consequence could not have been intended by the legislature.

[31] Reverting to the present appeal. The relief sought by the appellant could not have been

granted in the terms sought for the simple reason that the maintenance court has no power to suspend and set aside a warrant of execution. The appellant’s counsel submitted that although the notice of motion refers to an application in terms of s 27(4) of the Act, when one looks at the substance of the relief sought it rather falls within the ambit of s 27(3)

thereof. He also submitted that it was not necessary for this court to consider the conflicting decisions in this division in *Turton and M v M and Another* because the appellant did not seek to have the maintenance order rescinded or set aside. However neither *Turton* nor *M v M and Another* dealt with an application to set aside a maintenance order. Both concerned the suspension or setting aside of a warrant of execution issued pursuant to a High Court order and it is in the interests of justice that there is clarity on this issue.

[32] Moreover, if it had indeed been the appellant's intention only to rely on s 27(3), the allegations in the founding affidavit would have been directed solely at whether or not he had complied with the High Court

maintenance order, directly or otherwise. He went further than that in making allegations – sparse as they might have been – about his inability to pay and the respondent's financial position which he maintained was more favourable than his. He must thus have envisaged some sort of enquiry by the magistrate for the purpose of revisiting the High Court maintenance order.

[33] Indeed, in her judgment the magistrate stated that the appellant's legal representative informed her that 'the respondent is not entitled to spousal maintenance, quoting section 27(4) of the Maintenance Act and the case of Turton and Turton'; and that the appellant's attorney 'has argued that the word "enquire" in subsection 27(4) should be read together with the enquiry referred to in Section 16'.

[34] In the result the appeal must fail. In dismissing the appellant's application the maintenance court made no order as to costs. The position is different on appeal. To my mind there is no reason why costs should not follow the result.

[35] Accordingly the following order is made:

"The appeal is dismissed with costs."

J I CLOETE

SALIE-HLOPHE J

I agree.

G SALIE-HLOPHE

For the Appellant: Adv Andre Walters – 4244104

Instructed by: M Z Solomon Attorneys – 7066029

For the Respondent: Mr Mark Elmes

Instructed by: Haydn Elmes & Elmes Attorneys – 4611227

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