

SOUTH AFRICA / JUDGMENT

Mitchell v Harte (10309) [2010] ZAWCHC 397 (11 May 2010)

[2010] ZAWCHC 397

COURT

Western Cape High Court, Cape Town

BEFORE

Dlodlo, Samela

CASE / FILE NUMBER

10309

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE, CAPE TOWN)

REVIEW CASE NO. 30205MAI 1010710

MAGISTRATE'S SERIAL NO. 10/10

HIGH COURT REF. NO. 10309

In the matter between:

LUCINDA MITCHELLAPPLICANT

And

JOHN VAN HARTERESPONDENT

REVIEW JUDGMENT DELIVERED ON TUESDAY, 11 MAY 2010

DLODLO, J

[1] I have been asked to review proceedings in this matter in terms of the provisions of the Supreme Court Act read with Uniform Rule 53. Magistrate Pangarker who made certain discoveries in this matter, had already perused the file and she drew my attention

to the following:

"On 6 February 2006, the Maintenance Court granted a maintenance order against the Respondent for R350, 00 per month in respect of the minor child, Blake. On 24 January 2008, the Applicant applied in terms of section 6 (1) (b) of the Maintenance Act 99/1998 (hereafter referred to as "the Act"), for a substitution of the 2006 order, that is, for an increase to R700, 00 per month. Correspondence and subsequent subpoenas were sent to the Respondent by the Wynberg Magistrate Office, and on 21 January 2009,

the Wynberg criminal court converted the criminal proceedings in terms of section 41 of the Act to a maintenance enquiry.

After several postponements in the maintenance court from January to May 2009, the parties were eventually warned to appear at the maintenance office on 8 June 2009, at 08h30. It seems from the record of proceedings that the parties did not appear on 8 June 2009, as the Respondent was ill and unfit for work until 9 June

2009. There seems to be no indication on record as to what transpired

on 8 June 2009 and why the matter was not brought before a Magistrate on this day. There is also no indication as to how the parties were informed of the next appearance date. In any event, the next appearance from the record was 30 June 2009, when the Respondent was present before the Magistrate, but the Applicant was absent. The matter was postponed to 13 August 2009 for the Applicant's

attendance. On the latter date, both parties were absent, and the matter was postponed by Mr. Taboshe for a default order and for the Applicant's attendance.

On 8 September 2009 (which seems to be the correct postponement date, not 8 October 2009), only the applicant and the maintenance officer, Ms Horn, were present before the presiding Magistrate, Mr Moolla. The record on the day reflects that at 14h35 a default order for R700, 00 was granted, with effect from 30 September

2009. No further record was kept by the Magistrate, but it is accepted that he granted a further order on the same day ("Final Order"), in terms of which the Cape Municipal Pension Fund was

ordered to pay R67 200, 00 to the Guardian's Fund as future maintenance for the minor child ("the anti-dissipatory order").

The Magistrate also ordered that the Respondent is entitled to the balance of the pension fund monies. It is clear from the Court file that the Guardian's Fund and the Pension Fund were subsequently served with the "Final Order" by facsimile.

The first concern raised is in respect of the default order granted on 8 September 2009. In terms of section 18 of the Act, a Respondent must have failed to appear after being served with a section 9 subpoena, before a default order may be considered. The Magistrate's record reflects that the default order is in respect of the Respondent's default on 30 June 2009. In this matter, the last subpoena issued for the Respondent, was on 19 May 2008, for an appearance on 19 June 2008 (a return of non-service is filed). No subpoena was issued for the Respondent for an appearance on 30 June

2009. From the record on 30 June 2009, the presiding Magistrate (Mr Yako) notes that the Respondent was present at Court on 30 June 2009 and that the Applicant was absent. It seems possible that the default order was intended to be in respect of 13 August 2009 as the record reflects that both parties were absent and that the matter was postponed for the

Applicant and a default order. On 13 August 2009, as both parties were absent, it is respectfully submitted that the matter should have been struck from the roll, or postponed in absentia, or a warrant of arrest could have been authorised for the Respondent, if requested.

If the Honourable Reviewing Judge is of the opinion that a default order could be requested where the Respondent had been warned by the Magistrate to appear on 13 August 2009 and failed to do so, then it is submitted that there is no record of an application by the maintenance officer in terms of section 18(1) (b) for a default order. There is also no indication of an application for a default order for 30 June 2009, 13 August 2009 or 8 September 2009. A Court faced with an application for a default order, may call on the Applicant to give evidence and has discretion to grant such order or not. In the circumstances, and with respect, it seems that the default order was granted in circumstances when it could or should not have been granted. It is thus humbly requested that the default order dated 8 September 2009, be set aside. If the Honourable Reviewing Judge is of the opinion that the default order was granted in the circumstances, then it is further pointed out that the default order substitutes the May 2004 order, and not the later maintenance order dated 6 February 2006.

The second concern is in respect of the "Final Order " granted by the Magistrate on 8 September 2009, which seems to be the anti-dissipatory interdict allowed in terms of section 26 of the Act, read with section 37 A (1) of the Pension funds Act 24/1956. There is no evidence on record of any application brought in terms of the

Maintenance Act for the relief granted by the Magistrate in the "Final Order". Even recognizing the fact that the best interests of the minor child are paramount, and the possibility that the Applicant may have made strong submissions supporting the granting of an anti-dissipatory order, the procedure in terms of the Maintenance Act was not followed. In this regard, reference is made to the case of *Magewu v Zozo and Others* 2004 (4) SA 578 (C), *Soller v Maintenance Magistrate, Wynberg and Others* 2006 (2) SA 66 (C), *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* 2004 (95) SA 388 (D) and *Burger v Burger and Another* 2006 (4) SA 414 (D). In these matters, applications were first brought for anti dissipatory interdicts. It is respectfully submitted that no such application was brought by the Applicant. The record also does not reflect submissions or evidence heard by the Magistrate.

In conclusion, it is respectfully and humbly requested that the default order and the 'Final Order " dated 8 September 2009, be set aside. If the Honourable Reviewing Judge is of the opinion that the default order was correctly granted, and should remain in effect, then it is requested that the 'Final Order" (anti-dissipatory order) be set aside. A copy of the Court file, numbered in sequence, is attached. "

[2] I have also taken time to read the whole file. I fully align myself with the observations made by the Magistrate and quoted above. Mr. Moolla, the Magistrate who made the order or orders in this matter has correctly regretted the error he made in his handling of the matter. It is not necessary to overburden this short Judgment with what is after all unnecessary

guidelines. The Maintenance Act makes it clear how such matters must be handled. This Division has also given direction in cases such as *Magewu v Zozo and Others* 2004 (4) SA 578 (C), *Soller v Maintenance Magistrate, Wynberg and Others* 2006

(2) SA 66 (C).

[3] It suffices to mention that in the instant matter there was a failure of justice in that the procedure was not followed at all. The proceedings in the instant matter are hereby reviewed and are set aside. The proceedings may be started de novo before a different presiding officer who obviously shall strictly follow the correct procedure laid

I agree.

SAMELA, AJ

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