

SOUTH AFRICA / JUDGMENT

M.J.B v J.S.J.B (A130/2021) [2021] ZAFSHC 18 (28 January 2021)

[2021] ZAFSHC 18

COURT

Free State High Court, Bloemfontein

BEFORE

Jordaan, Reinders

CASE / FILE NUMBER

A130/2021

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE BLOEMFONTEIN

Case number: A130/2021

In the matter between

M[....] J[....] B[....]

Appellant

And

J[....] S[....] J[....] B[....]

Respondent

CORAM: JORDAAN AF et REINDERS C, JJ JUDGMENT BY: C REINDERS, J HEARD ON: 18
JANUARY 2021 DELIVERED ON: 28 JANUARY 2021

- [1] The appellant and respondent were previously married to each other. The dissolution of their marriage was ordered on 1 March 2011 and a deed of settlement entered into between the parties was made a court order. This included that the present appellant was ordered to pay spousal maintenance to the respondent in the amount of R 14 000-00 per month for the duration of her life or until she remarries.

- [2] The respondent in the magistrate's court applied for an increase of the aforesaid amount and on 13 December 2019 the maintenance court found that good cause had been shown for the upward variation of the maintenance order dated 1 March 2011. The court found that appellant is able to afford an upward escalation but qualified this finding on the basis that appellant will have to reduce his standard of living to a more appropriate level for his income and financial position. The maintenance court issued orders

directing the appellant (as respondent in the trial court) to pay maintenance in the amount of R 24 000-00 per month, taking effect on 1 January 2020 and thereafter on or before the 7th day of every succeeding month. It was directed that the maintenance will escalate on a yearly basis.

- [3] It is against the aforementioned orders that this appeal is directed. Mrs Ferreira appearing on behalf of appellant stressed two main grounds of critique against the learned magistrate's judgment and submitted that the magistrate should have played a more active role in the enquiry and in particular should have acquired more information regarding the appellant's income with reference to a close corporation known as [...] ("[...]") from which appellant derives income. The judgment was criticized in that findings made was inconsistent with the evidence placed before court which includes that the magistrate undertook an audit of her own without evidence verifying same.
- [4] From the judgment delivered by the learned magistrate it is evident that she was well appraised thereof that good cause had to be shown for a variation of the existing maintenance order, and whether the respondent had shown a need for the maintenance order to be increased as well as the affordability of the envisaged increase of the amount of maintenance to be paid by the appellant.
- [5] The appellant is a senior financial advisor with Sanlam whose income is derived from commission earned. In evidence he described [...] as the instrument used by him to conduct business and earn an income. It was the amount of income derived from this legal entity which formed the source of critique against the judgment. The trial court found that "(H)his personal finances and that of [...] are intrinsically and deeply intertwined to such an extent that the two cannot be successfully divorced from each other."
- [6] In summarising the financial position of the parties, the trial court explained her methodology used for the calculation thereof. Reference is made to the voluminous bundles of discovered documents (which included bank statements of both parties), and the magistrate expressed her view that despite these "the evidence of the "real income and expenditure" of the parties, especially that of Mr Bester left much to be desired." The magistrate then stated that she embarked on an "audit" of the income and expenditure reflected in the bank statements. It was submitted that the magistrate did not seek or take into account any explanation as to the incomes and expenses but rather prepared her own comparative tables whilst being in a position where direct evidence from the parties could have been adduced.

[7] This court can only interfere with the findings of the trial court if satisfied that the magistrate erred. It is evident from the record that the trial court went to great lengths to prepare the comparative tables in respect of the income and expenditure of the parties. As aforementioned the magistrate referred to this as an audit which formed the basis of her reasons for increasing the maintenance. Unfortunately, in doing so the trial court made calculation errors. Under the heading "Other Expenses" a miscalculation occurred when the sub-total of the amounts listed by the magistrate was indicated as R 36 1096-60 instead of R 22 110-37. This resulted in the incorrect calculation of appellant's net monthly expenditure

reflecting the amount of R 473 773-18, whilst the correct amount should have been R 134 786-95. The net result of these incorrect

calculations caused the magistrate to arrive at the amount of -R 363 667-73 compared to the shortfall of the respondent in the amount of R 5 882-22. Based on this calculated monthly shortfall of the appellant's income, the ability to afford an increased amount could not have been found to be proven. The above miscalculation is a good example of why it is undesirable that the presiding officer undertakes an audit instead of hearing

evidence. It was after all possible for the magistrate to call or cause to be called the relevant bookkeeper or auditor who have

compiled the financial statements and who could have guided the court in these calculations by way of his or her expertise.

[8] Authority suggests that it is competent for a court to embody an escalation clause in a maintenance order in the event that both parties so agreed.

See: *Georghiades v Janse van Rensburg* 2007 (3) SA 18 (C) at paragraphs [16] and [20]

In casu there was clearly not such an agreement and making such an order *mero motu* was impermissible.

[9] Quite correctly Mr Buys for the respondent had to concede that the trial court could have requested additional documentation and evidence, and in his words "it would have been easier" had all the documentation reflecting the income and expenses of [...] been placed before the trial court. He submitted that he was unsure how the trial court arrived at the amount of R 24 000-00. He calculated and submitted that an amount of R 22 000-00 is an appropriate amount and stressed that respondent testified that she would be satisfied with such an amount.

[10] It is trite that in a maintenance enquiry a presiding officer does not necessarily adopt a passive roll and if need be, examines or cross-examines parties and persons. Such court has a responsibility to ensure that the necessary relevant evidence is put before it.

See: *Beukes v Beukes* 1995 (4) SA 429 (O)

The Maintenance Act, 99 of 1998 Section 10

[11] In the absence of sufficient evidence regarding appellant's income and in particular that of [...], this court cannot adjudicate the ability of the appellant to afford any proposed increase in maintenance. Without being prescriptive, the proposal of an increase

in the maintenance amount that was awarded in 2011 seems to be an attractive proposal simply based on inflation.

See: Komissaris van Binnelandse Inkomste v Steyn NO [1991] ZASCA 104; 1992 (1) SA 110 (A)

However, this remains subject to the affordability which this court cannot on the papers ascertain. I intend to refer the matter back to the magistrate for reconsideration and trust that the matter will receive the earliest possible attention of the maintenance court.

[12] The result is that the appeal succeeds. It does not succeed to the extent sought by the appellant. To a certain extent the appellant has also himself to blame in that it was expected of him to fully disclose the income and expenses of [...] duly supported by all financial statements available. The result is that each party should pay their own costs.

[13] I therefore make the following orders.

[13.1] The appeal is upheld.

[13.2] The orders of the maintenance court dated 13 December 2019 are set aside.

[1 3.3] The matter is remitted back to the magistrate to hear evidence and receive documentation with regards to the income of the appellant derived from the legal entity registered as [...] ("[...]") and having received the evidence to adjudicate the application for an increase in spousal maintenance afresh.

[1 3.4] Each party to pay its own costs.

C REINDERS. J

I concur.

AF JORDAAN, J

On behalf of Appellant:

Adv J Ferreira

Instructed by:

Bezuidenhouts Inc.

BLOEMFONTEIN

On behalf of Respondent: Adv JJ Buys

Instructed by:

AP Pretorius Prokureurs

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Prepared on 9 October 2026 · Esheria