

SOUTH AFRICA / JUDGMENT

N v N (CA&R22/2013) [2014] ZAECHMHC 9 (26 February 2014) [2014] ZAECHMHC 9

COURT

Eastern Cape High Court, Mthatha

BEFORE

P.W. Tshiki, I.T. Stretch

CASE / FILE NUMBER

CA&R22/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

Case no: CA&R 22/2013

Date heard: 21.2.2014

Date delivered: 27.2.2014

In the matter between:

N. Appellant

vs

N. Respondent

APPEAL JUDGMENT

TSHIKI J:

- [1] On the 15th March 2013 the appellant herein was ordered by the Maintenance Court of Mthatha to pay a sum of R5 500.00 per month with effect from 31st March 2013 for the maintenance of his major child who was still at school having been born on [...]. At the time of the enquiry before the magistrate, the respondent (the child) was pursuing her studies at C [.....] at its E [...]. I shall refer to the parties as they are referred to in this appeal.
- [2] After all the evidence was led the magistrate concluded that the appellant was able to afford to pay the amount of R5 500.00

which he was subsequently ordered to pay.

[3] The appellant has appealed against the order of the magistrate on the grounds, mainly that:

- (a) there was not sufficient evidence to prove that the appellant would be able to afford the amount of maintenance he was ordered to pay. The magistrate had in fact ignored the appellant's evidence relative to his financial position and accepted what she was told by the respondent.
 - (b) the magistrate therefore failed to conduct a full enquiry into the financial position of the appellant who was the only parent who could be able to maintain the respondent. In the process the magistrate had denied the appellant a proper basis for an assessment of what amount the appellant would be able to afford to pay in the circumstances.
- [4] On the date of argument of the appeal Mr Mdeyide represented the appellant and there was no appearance for the respondent.
- [5] The only issue before the magistrate and even before this Court is how much the appellant can afford to pay for the maintenance of the respondent. Respondent's parents were [...] on [...]. Before the [...] appellant bought an immovable property in Tsolo which his [...] and he improved by building flats for rental purposes. The proceeds of the rental are currently paid to the appellant's attorneys in Mthatha, Messrs V.V. Msindo. According to the respondent, her mother is not employed and for a living she only sells clothes in the form of clothing bought from Presles Company. Respondent

also informed the Court that her father has a building construction company and would be awarded tenders by the government for building, renovating and/or fencing schools. The income derived from the rental of the flats in Tsolo is R 3850.00 per month. When she was asked if the appellant could afford R5 500.00 per month for maintenance her answer was:

"A: He can try to pay that amount as he did in 2010, I do not know what changed last year 2011.

Q: Do you have any information if he is getting any money from his business?

A: No"

- [6] The evidence of the respondent's mother is that the appellant has a shop in Nongoma in the rural areas. She testified further that the appellant has a house in Z [...] but she did not know how much income he derives from that house. She further informed the Court that the appellant had a Fungwa Woman Trading Co for tendering and from that business, appellant "gets jobs a lot." She testified that ever since it was decided that the income derived from the Tsolo flats be paid to the appellant's attorneys none of them (herself and the appellant) are getting income from those flats. She concluded by informing the Court that the appellant does have money but this could only be proved by way of his bank statements. According to her, the appellant is able to afford R8 000.00 for the instalments of his vehicle, intimating that for that reason he can afford the amount applied for by the applicant. The child's mother testified further that the appellant has a trading shop in Misty Mount from which he

earns a minimum amount of R6 000.00. She could not tell the Court the exact income amount of the shop in Misty Mount, the house in [...] as well as other businesses from which they contend that appellant is getting income.

- [7] With regard to the flats in Tsolo it seems to me that there is a Court action relating to the flats which resulted in the order

directing that the proceeds of those flats be paid to the attorneys. Respondent's mother in her testimony could not know the current profit derived from the appellant's shop currently leased to the foreign people known as Amakwerekwere.

- [8] In his evidence the appellant simply told the Court that he could only use the money with Msindo Attorneys for the maintenance of the respondent. However, the attorney would refuse. There may be a valid reason for the attorney to refuse which is not clarified in the evidence. Appellant further testified that he has no income to satisfy the needs and demands of the respondent. All his companies of which he is the director have no money. He owns an Isuzu single cab motor vehicle for which he pays instalments of R5 300.00 per month.
- [9] Both parties in the instant case who were legally represented but their legal representatives failed to convince the Court that the only proper route was to furnish proof of the appellant's income and not simply guess it without proof. The record before us also does not indicate fully how much per month the appellant's personal expenditure is in the form of obligations inclusive of rates, taxes etc. The appellant's defence necessitated that the maintenance officer and the attorneys for the parties should have made sure that the income and expenditure of the appellant was proved as accurately as possible. This could only have been possible if the records of the amounts allegedly received by the appellant were brought to Court as proof of his income. The Court could also have assisted the parties (especially the respondent), by issuing an order to any institution or place where the appellant's property is administered so as to establish his income as accurately as possible. In the absence of that evidence it was difficult if not impossible for the Court a quo to arrive at the accurate amount as to how much the appellant would be able to afford for the maintenance of the respondent and/or other children. The above issues on which the evidence given is either not clear or non-existent, relate to the respondent's need for maintenance which is a very important consideration in a maintenance enquiry. From quite early on, decided cases have indicated that there is an obligation on the magistrate to conduct a thorough enquiry on the ability of the errant parent and not play the role of an umpire (per Madlanga J (as he then was) in *Mgumane v Setemane* 1998(2) SA 247 (TK)). See also *Buch v Buch* 1967(3) SA 83 (T) where at 87D-E Claassen J remarked as follows:

"... it seems to me it is no longer correct to speak of an onus resting on a party in connection with proceedings before a maintenance court. The responsibility of placing evidence before the

court no longer rests only on the parties concerned, but is shared by the maintenance officer and the presiding judicial officer. Thus even where the parties are legally represented the maintenance officer and the presiding officer may have to call relevant evidence not called by the legal representatives. Then at the conclusion of all the evidence the presiding officer will decide whether to make an order to pay maintenance or vary an existing order to pay maintenance. In doing so he will no doubt consider all the relevant factors ... but in general he will look after the interests of children and see that justice is done between the parties in accordance with their means and ability to pay.”

[10] Maintenance depends on need and ability and in that case it is the duty of the Court saddled with the duty to hold the enquiry, to establish with great exactitude how much the errant parent should pay for the maintenance of his or her child. The maintenance

officer and the presiding magistrate have all the resources in their power to assist the parties in achieving that purpose. This should have been done in the present case. I am therefore of the view that they failed to assist the complainant in this regard. This is so because they were conducting a maintenance enquiry in which there is no particular party that has an obligation to prove other than for the maintenance officer and the magistrate who should ensure that the interests of the complainant, in this case the respondent, are protected by the Court.

[11] Insofar as the money entrusted to attorneys V.V. Msindo, is concerned the record reveals that some time in the past an order of the Court was made directing the said attorneys to pay a certain amount to the respondent’s school for fees she owes. I do not think it would not be in the interests of the respondent for this Court to direct the magistrate to make a similar order after she has established whether the money is still with the said attorneys. The magistrate’s order should take into consideration the available amount and the reason why it is kept in trust. In view of the failure by the magistrate to approach the maintenance enquiry in the manner suggested in this judgment, I am reluctant to mulct the respondent in costs. It is not her fault and therefore she should not be ordered to pay the costs of the appeal.

[12] In the result, I am of the view that the matter should be referred back to the maintenance Court for an accurate assessment of the ability of the appellant to pay the maintenance of the respondent.

[13] In the result, I make the following order:

[13.1] The matter is hereby remitted to the magistrate for the holding of a fresh enquiry in line with the suggestions made in this judgment.

[13.2] The magistrate is directed to enquire whether the money for the rental of the flats in Tsolo is still with the attorneys V.V. Msindo and if so, depending on how much, direct such amount as will be reasonable, to be paid to the respondent’s school to settle or partly settle the fees owed by the respondent.

[13.3] There shall be no order as to costs.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

Stretch J:

I agree.

I.T. STRETCH

Counsel for the appellant : Mr Mdeyide

Instructed by

: MTHATHA

Counsel for the respondent : No appearance

Instructed by

: No appearance

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