

SOUTH AFRICA / JUDGMENT

R.J.I v A.B.L N.O and Another (50748/10) [2011] ZAGPJHC 222 (2 December 2011)

[2011] ZAGPJHC 222

COURT

South Gauteng High Court, Johannesburg

BEFORE

Meyer

CASE / FILE NUMBER

50748/10

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IN

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE

NO: 50748/10

DATE: 02/12/2011
In

the matter between: R.J
I [...]
APPLICANT
and
A.B
L [...] N.O:
1st RESPONDENT
H.P
I
[...] 2nd RESPONDENT

JUDGMENT**MEYER J:**

- [1] The applicant seeks the review and setting aside of an order of the first respondent sitting as an acting additional magistrate in Randburg, as well as the setting aside of a warrant issued for his arrest. The first respondent abides the decision of this court.
- [2] The applicant and the second respondent were previously married. Two children were born of their marriage. They were divorced in terms of an order of this court on 13 September 2002. It is common cause that the applicant communicated his decision to emigrate to the United Kingdom to the second respondent a few months before he actually left the Republic of South Africa permanently on or about 7 or 8 September 2010.
- [3] On 13 August 2010, a subpoena in terms of S 9(2) of the Maintenance Act 99 of 1998 ('the Maintenance Act') was served on the applicant to attend an enquiry at the Maintenance Court, Randburg, on 27 August 2010. On this date the first respondent postponed the matter to 1 September 2010.
- [4] On 1 September 2010, the parties appeared before the first respondent. The applicant's attorney made an application that the matter be removed from the roll. The contention on behalf of the applicant was that the matter should be dealt with in terms of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1983 and not in terms of the provisions of the Maintenance Act. This application was opposed on behalf of the second respondent. The first respondent ordered that the matter proceed in terms of the Maintenance Act. Neither the applicant's attorney nor the second respondent's attorney was available to commence with the enquiry before the

applicant had left South Africa permanently. The first respondent therefore postponed the matter to 21 October 2010 for an enquiry to be held in terms of S 6 of the Maintenance Act.

- [6] S 6(1) of the Maintenance Act enjoins a maintenance officer to investigate complaints relating to maintenance. Regulation 3 of the Regulations Relating to Maintenance that were made under S 44 of the Maintenance Act (GN R. 1361 of 15 November 1999) provides that a maintenance officer may in investigating a complaint 'direct' the complainant and the person against whom a maintenance order may be or was made to appear on a specific time and date 'before him or her' and that such direction 'may be given in the manner the maintenance officer deems fit.' After investigating the complaint, the maintenance officer may, in terms of S 6(2) institute an enquiry in the Maintenance Court. S 10 deals with an enquiry by the Maintenance Court. S 9(1) empowers a maintenance officer who has instituted an enquiry in a Maintenance Court to cause any person to be subpoenaed *inter alia* to appear before the Maintenance Court and S 10(1) provides that '[t]he maintenance court holding an enquiry may at any time during the enquiry cause any person to be subpoenaed as a witness or examine any person who is present at the enquiry, although he

or she was not subpoenaed as a witness, and may recall and re-examine any person already examined.’ The language of the relevant sections of the Maintenance Act to which I have referred is clear and unambiguous and effect must be given to them.

- [7] The issue and service upon the applicant of the subpoena in terms of section 9(2) of the Maintenance Act that called on him to attend an enquiry in terms of S 10 at the Maintenance Court that had been ‘instituted by the maintenance officer’ is irregular. The complaint relating to maintenance had at that stage not been investigated by the maintenance officer and the maintenance officer had not yet instituted an enquiry in the Maintenance Court. The maintenance officer should, in terms of regulation 3, have directed the complainant to appear on a specific time and date before him or her. The issue and service of the subpoena cannot be construed as such a directive.
- [8] It is in terms of S 6(2) of the Maintenance Act the prerogative of the maintenance officer to institute an inquiry under S 10. The order made by the first respondent on 1 September 2010 that the matter proceed in terms of the Maintenance Act was also given at a stage when the maintenance officer had not yet instituted the enquiry in terms of S10 of the Maintenance Act. The first respondent had no power to grant such order at that stage of the proceedings and the granting thereof is irregular. It accordingly follows that the authorisation of the warrant of arrest by the first respondent on 21 October 2010 is irregular.
- [9] I am of the view that the irregularities to which I have referred constitute grave or gross irregularities that occurred during the course of the proceedings in the court below within the meaning of S 24 of the Supreme Court Act 59 of 1959, and they should be reviewed and set aside by this court.
- [10] In the result I make the following order:
- 1) The review succeeds.
 - 2) The subpoena issued with reference number 14/3/2-74/09 and served upon the applicant on 13 August 2010, is set aside.
 - 3) The order made by the first respondent on 1 September 2010, that the matter proceed in terms of the Maintenance Act 99 of 1998, is set aside.
 - 4) The warrant of arrest authorised by the first respondent on 21 October 2010, is set aside.
 - 5) The second respondent is ordered to pay the applicant’s costs of this application.

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