

SOUTH AFRICA / JUDGMENT

R.K v M.K (03/2017) [2017] ZANWHC 102 (24 October 2017)

[2017] ZANWHC 102

COURT

North West High Court, Mafikeng

BEFORE

J.T. Djaje, A.M. Kgoele

CASE / FILE NUMBER

03/2017

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
HIGH
COURT REF NO: 03/2017
In

the matter between: K.
R.
APPLICANT
And
K.
M.
RESPONDENT
REVIEW

JUDGMENT

DJAJE J

[1] This matter was sent for special review on 30 August 2017 by the Magistrate of Molopo with the following request:

“This matter came before court and the maintenance officer applied for a warrant of arrest as respondent was in default. There was proper personal service of directive by a maintenance officer.

The presiding officer declined the application for a warrant of arrest but instead granted order by default with return date of 01/09/2017.

The decline of authorising a warrant of arrest attracted resistance from the maintenance officer.

The maintenance officer is of the view that an order by default can only be made if a subpoena was used to secure attendance.

The view of the presiding officer to make an order by default is on the promise that if a warrant of arrest was issued the consequences thereof may be incarceration of the respondent while serving sentence and thereby defeating and frustrating the intention of getting maintenance from respondent. Further view of presiding officer is that respondent will not be prejudiced as he will have opportunity to present his case on the return date of 01/09/2017.

This matter is placed before the honourable Judge for guidance.”

[2] On the same day a query was forwarded to the Magistrate stating as follows:

“1. This matter was sent on special review for guidance in a maintenance matter.

2. There seem to be two different arguments advanced by the maintenance officer and the magistrate. There are no authorities stated by either to substantiate their argument.

3. The magistrate is requested to indicate the authority relied on for the decision to grant an order by default instead of a warrant of arrest as applied for by the maintenance officer.”

[3] The Magistrate replied to the query on 26 September 2017. This reply was received by the office of the registrar on 13 October 2017 and only forwarded to me on 16 October 2017. The Magistrate’s reply is as follows:

“ The respondent in this matter was in default on 01/08/2017, and there was a proper service. The presiding officer relied on Section 18.1 (b) Act 99 Of 1998. There is an applicant for maintenance of R700.00. The presiding officer relied on the above stated authority.”

- [4] The Maintenance officer in this matter issued a directive in terms of Regulation 3(1) read with section 6 and section 44 of the Maintenance Act 99 of 1998 (“Maintenance Act”). The directive called upon the Respondent to appear in person before the said Maintenance officer at the Magistrate’s Court on 1 August 2017 at 08:00 and to remain in attendance until excused by the Maintenance officer. On 1 August 2017 the Respondent was in default and the Maintenance officer applied for a warrant of arrest to be authorised against the Respondent. The Magistrate declined the application for a warrant of arrest and instead granted an order by default against the Respondent for an amount of R700 with a return date of 1 September 2017. The Maintenance officer addressed the Court and indicated that an order by default can only be granted where the Respondent was served with a subpoena and in this case the Respondent was only served with a directive. The only penalty is a warrant of arrest. It was as a result of this address that the Magistrate decided to send the matter on special review for guidance.
- [5] Attached to the record is a return of service indicating that the directive was served on the Respondent personally at his place of employment on 12 June 2017. There was proper service of the directive on the Respondent and the Magistrate states that as a result of proper service of the directive he acted in accordance with section 18(1) (b) of the Maintenance Act.

“

44. Regulations.-

(1) The Minister may make regulations-

- (a) as to the powers, duties and functions of a maintenance officer, the clerk of the maintenance court or a maintenance investigator;
 - (b) prescribing the procedure to be followed at or in connection with a maintenance enquiry;
 - (c) prescribing guidelines for, or prescribing the factors to be taken into account by, a maintenance court when making a maintenance order;
 - (d) as to the execution of maintenance or other orders of maintenance courts;
 - (e) as to any matter required or permitted to be prescribed by regulation under this Act;
 - (f) in general, as to any matter which the Minister may consider necessary or expedient to prescribe in order that the objects of this Act may be achieved.
- (2) The Minister shall cause a copy of regulations made under this section to be tabled in Parliament as soon as possible after the publication thereof.

(3) Regulations made under this section may prescribe penalties for any contravention thereof or failure to comply therewith not exceeding imprisonment for a period of three years.

(4) Any regulation made under this section which may result in financial expenditure for the State shall be made in consultation

with the Minister of Finance.”

[6] Regulation 3(1)(a) and (b) of the Maintenance Act provides that:

“(1) A maintenance officer may, in investigating a complaint and with due consideration to expediting the investigation of that complaint, direct the

complainant and the person against whom a maintenance order may be or was made to –

(a) appear on a specific time and date before him or her; and

(b) produce to him or her on the date of appearance information relating to the complaint and documentary proof of the information, if applicable.

(2)

(a) A direction contemplated in subregulation (1) may be given in the manner the maintenance officer deems fit.

(b) The maintenance officer shall keep record of the manner in which the direction was given.

[7] In terms of Regulation 3(3) of the Maintenance Act

[8] Section 18(1) (a) (b) and (2)(a)(b) and (c) of the Maintenance Act provides that:

“18. Orders by default:-

(1) If a maintenance court is satisfied on the grounds of sufficient proof or otherwise-

(a) that any person against whom an order may be or has been made under section 16 (1) (a) or (b) or that any person in whose favour such an order has been made-

(i) has knowledge of a subpoena issued under section 9; or

(ii) has appeared before the court and was warned by the court to appear at a later date, time and place before the court; and

(b) that he or she has failed to appear before the maintenance court on the date and at the time and place-

(i) specified in such subpoena; or

(ii) in accordance with a warning referred to in paragraph (a) (ii), the maintenance court may, on application of the maintenance officer for an order by default, call upon the person who has lodged the complaint to adduce such evidence, either in writing or orally, in support of his or her complaint as the maintenance court may consider necessary.

(2) After consideration of the evidence, the maintenance court may-

- (a) make any order by default which the maintenance court could have made under section 16 (1) (a) or (b);
- (b) make such other order as the maintenance court may consider appropriate in the circumstances of the case; or
- (c) make no order.”

[9] The Regulations created in terms of section 44 of the Maintenance Act are part of the Act and considered to be binding. The meaning and purport of Regulation 3 (3) is that a criminal offence is created and criminal proceedings must follow on non-compliance with a directive from the Maintenance officer. There are different ways of having this done which can be left at the discretion of the Maintenance officer.

[10] On the other hand in terms of section 18 of the Maintenance Act the Maintenance Court can only make an order by default if it is satisfied that the Respondent has knowledge of a subpoena or appeared

before Court and was warned to appear at a later stage. Alternatively that the Respondent failed to appear on the date specified in the subpoena or in accordance with the warning by Court. None of these factors are applicable in this matter. The Respondent in this matter was not subpoenaed to appear before Court or warned by Court to appear on a specified date and time. Section 18 further provides that an order by default may be granted on application of the Maintenance Officer. The Maintenance Officer in this matter has not made such an application. It is also not clear if the Maintenance Court had considered any evidence before granting an order by default as it is required by Section 18 of the Maintenance Act.

Order

[11] Consequently, the following order is made:

1. The order by default is set aside;
2. The matter is referred back to the Maintenance officer to ensure the speedy finalisation of the maintenance complaint.

J. T. DJAJE

JUDGE OF THE HIGH COURT

I agree

A. M. KGOELE

DATE: 24 October 2017

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Prepared on 23 October 2026 · Esheria