

SOUTH AFRICA / JUDGMENT

## X.E.G v G.E.R (2014/11362) [2023] ZAGPJHC 893 (10 August 2023)

[2023] ZAGPJHC 893

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

2014/11362

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: 2014/11362

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

10.08.23

In the matter between:

G, X E  
Applicant  
and  
R, G E  
Respondent

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**JUDGMENT**

YACOOB J:

1. The parties in this matter were divorced from each other on 23 June 2014. The applicant seeks the variation of the maintenance portion of the settlement agreement made on that date, and also the setting aside of warrants of execution issued against his Retirement Annuity Fund. At the same time as this matter was heard, I heard an application for contempt, brought by the respondent in this matter under a different case number. That application has already been dismissed.
2. The parties have two children, born in 2002 and 2004. At the time of the divorce they were 12 and 10 years old, and are now 21 and 19 years old, respectively. The maintenance clauses in the settlement agreement that was made an order of court when the parties were divorced provides for the applicant to pay to the respondent maintenance for the children as follows:
  - 2.1. R5 000 per child per month, until the children are self-supporting or no longer resident with their mother.
  - 2.2. The R5000 is to increase annually by the lesser of the Consumer Price Index and the applicant's salary increase.
  - 2.3. The applicant is to be liable for all educational expenses, including tertiary, and extra-mural activities, as well as the necessary equipment.
  - 2.4. The applicant is to retain the children as dependants on his medical aid until they are self supporting.
3. The clause also provides that either party may approach the Maintenance Court for a variation.
4. The applicant seeks the deletion of all the maintenance clauses save for that providing for an approach to the Maintenance Court, and instead that he be ordered to pay a flat amount of R5 000 per month per child, until the child is self-supporting or no longer lives in the respondent's home, and no more.
5. The basis for this relief, according to the applicant, is that the respondent now has a better income than she did when the agreement

was entered into, and he, the applicant, has had a reduction in income. He approaches this court, because he submits that his attempts to mediate and to obtain relief in the Maintenance Courts have not been successful because according to him the respondent is drawing the matter out. According to the applicant, the respondent is also incurring additional expenses for the children without

consulting him as required by the agreement, despite knowing of his reduced circumstances, and when he is unable to pay, issues warrants of execution, which are the basis of the second category of relief sought in this application.

6. The respondent raises two points in limine: one, that the elder child, who was a major at the time the application was launched, was not joined, and two, that the applicant

comes to court with “dirty hands” because he admits he has not been paying maintenance in accordance with the original court order. She also submits that the applicant’s failure to comply with the 2014 order is deliberate and mala fide. She denies that it is due to a lack of funds.

7. I am not satisfied that the applicant is required to join the children once they become majors. The court order does not require him to pay to them directly, although it is for their benefit. It still requires him to pay to the respondent, and the settlement agreement is still between him and the respondent, so it is sufficient that he joins only the respondent. The children are not self-supporting yet, and the question of who maintains them is between the applicant and the respondent.
8. I also disagree that the applicant’s admission that he has not been paying maintenance in accordance with the 2014 order results in a conclusion of “dirty hands”. The applicant contends that he has not been paying because he cannot, and that is why he approaches this court. If the court finds that he has established that he cannot pay, then his non-compliance with the court orders is reasonable. The court has to determine the matter in order to make that finding. There is no question of a finding of “dirty hands” before that determination is made.
9. The respondent submits that the matter should be dealt with in the Maintenance Court in accordance with the Maintenance Act, 99 of 1998, as the Maintenance Courts have been specifically designed for the purpose. However, the respondent does not contend that this court does not have jurisdiction.
10. The parties have appointed two parenting coordinators, one to deal with maintenance disputes and one to deal with “the children’s

psychological issues”. It is clear from the papers that the parties have continued since the divorce to have an extremely

acrimonious relationship. The parenting coordinator tasked with resolving maintenance disputes has been unable to resolve the issues

in mediation. The applicant contends that this is the fault of the respondent, and the respondent contends the contrary.

11. Essentially, the respondent contends that the applicant is not making full disclosure of his financial position, while the applicant contends that the respondent prevents the finalisation of any process by constantly requiring more information from him. The respondent also points out that the applicant was unsuccessful in the mediation proceedings.
12. The applicant attaches no proof of his income, or assets, to his founding affidavit. There are no bank accounts. There is no original

documentary evidence at all. The court is expected to simply accept his say so. As far as a reduction in income is concerned, all he attaches is a letter from his employer which states that all employees will be subject to a reduction of 40%, a copy of an addendum to an employment agreement agreeing that his salary will be R100 000.

13. The applicant suggests that because execution of the warrants on his Investec account was unsuccessful because it had no money in it, and the respondent then had to execute on his pension fund, this demonstrates his straightened financial position. In my view it does not. The applicant does not make any effort to prove that that Investec account is his only bank account. In the papers there is reference to an FNB account which he shares with his current wife, which he has declined to disclose details of to the maintenance officer. There is no indication of which account his salary is paid into. No conclusions can be drawn from the Investec account.
14. It is clear from the annexures to the applicant's own papers that, far from the respondent being obstructive by asking for further information, the applicant has been remarkably coy in what he has made available in his various attempts to have the maintenance order amended. He has decided for himself what is relevant. That is not his decision to make.
15. Although the respondent's changed position is also relevant to whether a maintenance order must be amended, it is not the only issue. The applicant has to also be open about his own financial position, and the decision maker must take both into account in making the decision. The applicant has not taken the court into his confidence, nor does it appear he has taken the Maintenance Court or the Parenting Coordinator into his confidence.
16. The applicant attaches in reply an analysis of his and his wife's joint account. This again is a secondary document. It is unclear why the applicant is so coy about producing primary source material. In my view this document does not assist the applicant.
17. In my view the applicant simply has not established his financial position sufficiently clearly to allow the court to make any finding about whether the 2014 order should be amended.
18. The second question is the setting aside of the warrants. The applicant contends that the respondent executed on the warrants in bad faith because it was while the mediation and Maintenance Court proceedings were pending.

19. The applicant has not demonstrated that there was any basis for his failure to pay maintenance. He was unsuccessful in the mediation, and has not demonstrated that he placed the Maintenance Court in a position to make a decision. He has not placed this court in a position to make a decision regarding the maintenance. There is no basis on which to conclude that his failure to pay was not mala fide, or that the respondent's execution on existing court orders was mala fide. The applicant submits that he did not have to pay the amounts that the respondent executed on, but does not provide sufficient proof of the allegation.
20. The applicant also relies on Rule 66(1) of the Uniform Rules, suggesting that the order has become superannuated by effluxion of time because it was not executed upon within three years. However that Rule no longer exists, and has not since 2014. It does not appear, in any case, as if the principle could apply to an order that has continuing obligations, as opposed to an order for a once-off payment.
21. This portion of the applicant's relief must also be dismissed.
22. For these reasons, I order that:

*"The application is dismissed with costs."*

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant:

C Boden

Instructed by:

Anthony Rome Attorneys

Counsel for the respondent:

L Grobler

Dercksens Attorneys Incorporated

Date of hearing: 1 December 2022

Date of judgment: 10 August 2023

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**CASE PAGE**                <https://chat.esheria.ai/case-law/south-africa/xeg-v-ger-unknown-topic-agpjhc-2023>

Prepared on 11 October 2026 · Esheria