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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO. CA 127/2018

Date heard: 17 May 2019

Date handed down: 6 August 2019

In the matter between:

P[...] **N[...]**

Appellant

and

T[...] **M[...]**

Respondent

JUDGMENT

RUGUNANAN, AJ:

[1] This is an appeal against a maintenance award for the amount of R1 000 per month payable by the respondent to the appellant (the parties being divorced) in respect of their biological child K[...] N[...] N[...] born on 7 February 2006 (hereinafter “the child”). The award was made by the Port Elizabeth magistrate on 22 December 2017. The respondent did not file a notice to oppose this

appeal nor did he appear in person or through a legal representative acting on his behalf.

- [2] In substance the grounds of appeal amount to a grievance that the magistrate's error in making the award was informed by an improper evaluation of evidence relating to the parties' financial standing and that the maintenance enquiry before the magistrate was not preceded by a proper investigation¹ by the maintenance officer into their financial affairs.

LEGAL PRINCIPLES

- [3] Tritely, parents (including divorced parents) have a duty to provide maintenance and support as may reasonably be required for the living and upbringing of their child.² The incidence of the duty attaches to both parents jointly but the extent or apportionment of each parent's duty depends on their relative financial resources, their station in life, standard of living and personal circumstances.³ The duty is not discharged where one parent earns substantially more than the other.⁴
- [4] Mindful of these principles and the fact that this Court as the upper guardian of minor children should act in the best interests of a child in the light of the specific circumstances of each case,⁵ the issue in this appeal is whether it is competent to refer the matter back to the court *a quo* with a directive that the maintenance officer be ordered to conduct a proper investigation for the purpose of a further enquiry before the magistrate or whether it is competent

¹ Sections 6 and 7, Maintenance Act No. 99 of 1998, as amended

² The duty is codified in section 15 of the Act

³ *Burse v Bursey and Another* 1999 (3) SA 33 (SCA) at page 36 C; *Herfst v Herfst* 1964 (4) SA 127 (W) at page 130 B-D

⁴ *Magewu v Zozo and Others* 2004 (4) SA 578 (C) at paragraph [12]

⁵ *Nel v Byliefeldt and Another* (27748/2015) [2015] ZAGPPHC 386 (11 May 2015) at paragraphs [27]; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at page 243 D-E

for this Court, on the information available in the record, to make an order in respect of the child's maintenance as it may think fit.⁶

BACKGROUND

- [5] On 19 December 2016 the appellant lodged with the maintenance officer an application for a maintenance order in which she claimed an amount of R5 000 per month from the respondent as maintenance for the child.⁷ During her testimony in the enquiry before the magistrate she adjusted this amount to R5 500 but on appeal to this Court her counsel Mr Abduroaf contended that R5 000 was reasonable. Prior to the formal enquiry taking place before the magistrate the parties agreed that interim maintenance of R500 per month shall be paid by the respondent.
- [6] The maintenance enquiry commenced on 12 September 2017. The parties represented themselves and were assisted by the maintenance officer. At the conclusion of the enquiry on 14 November 2017 the maintenance officer submitted that a maintenance award of R1 000 to R1 200 would be competent. Cognisant that the respondent did not make full disclosure of his financial circumstances, the magistrate directed him to provide the following documents no later than 11 December 2017: (i) a statement from the respondent's provident fund managers;⁸ (ii) a statement of rental income and agent costs including the lease agreement in respect of his fixed property in Vincent; (iii) a statement incorporating details of the companies he does work for; and (iv) bank statements of his own consultancy. Following the respondent's failure to provide these documents the magistrate handed down her judgment and

⁶ Section 25(2) read with section 9 of the Children's Act No. 38 of 2005, as amended and section 28(2) of the Constitution of the Republic of South Africa Act No. 108 of 1996, as amended

⁷ Per Form J101E, Application for Maintenance Order, record pages 1-5 at page 2

⁸ Known as the Glacier Preservation Provident Fund

ordered the respondent to pay to the appellant an amount of R1 000 as and for maintenance for the child.

THE PARTIES' FINANCIAL STANDING

- [7] The appellant is a chartered accountant. She conducts her profession through a chartered accounting company and on occasion does work for the office of the A[...] G[...]. She resides in Port Elizabeth together with the child who attends W[...] C[...] as a learner. She testified that her approach to the magistrate was necessitated by a diminished workload due to ill-health and a series of surgical procedures. In support of the claim for maintenance the appellant submitted documentation detailing her financial and asset standing, such documentation comprising of bank statements and a spreadsheet of income and expenditure.⁹ The detail contained in the documents was amplified by the appellant in her oral testimony. It is considered unnecessary to recapitulate the full breadth of such testimony or the contents of each document, it being expedient for purposes of this judgment to recapitulate the globular figures in relation to which we were addressed by appellant's counsel during argument.
- [8] The appellant's personal monthly income from her employment is R50 000. In addition she derives a monthly income from two other sources, namely (i) rental income of R68 270 from various fixed properties in the country, and (ii) rental income of R13 250 by providing student accommodation from part of her residential premises in Port Elizabeth. The expenses comprising of bond repayments, municipal rates and insurance in relation to her various fixed properties amount to R129 429,87. Although these properties have a total value of R9 420 000, the equity in total amounts to R41 701. The appellant's personal monthly expenses amount to R32 977 and those of the child are

⁹ Exhibits A, B and C, record pages 120-149

R20 460. On these figures the appellant is left with a deficit or shortfall of R9 645,87.¹⁰

- [9] The respondent holds a legal qualification and resides in Butterworth. For most of his working life he held employment in the government sector but at the time of the enquiry he stated that he operates a consultancy known as “2[...] C[...]” which does consultancy work in labour relations and in training teachers. The respondent also applies for tenders from time to time. During his testimony the respondent proffered no details of his personal income except that he is the recipient of a monthly pension of R4 000 and that he receives a further R9 000 as rental income from a fixed property owned by him in Vincent. He disclosed that as at 2012 he had a provident fund investment of R1 309 399,81.¹¹ His total monthly expenses in respect of groceries, water and electricity, rates, insurance, medical aid and other consumables are in the amount of R19 431. He has no rental and accommodation expenses where he lives in Butterworth. He also services an overdraft debt of R40 000, the monthly repayment of which is unknown. The respondent offered to pay an amount of R250 a month as maintenance which he said he could barely afford. As at the date of the hearing of this appeal the respondent has made no maintenance payment in respect of the interim amount of R500 nor in respect of the amount of R1 000 awarded by the magistrate. A mere glance at the information provided by him suggests that the respondent is in a considerably better financial position than the appellant once regard is had to his provident fund investment, this notwithstanding his failure to have acceded to the magistrate’s directive to provide the additional documentation.

¹⁰ Calculated as : the sum of all income and equity (R50 000 + R68 270 + 13 250 + R41 701 = R173 221) less the sum of expenses (R129 429.87 + R32 977 + R20 460 = R182 866.87). Expenses of R182 866.87 set off against income of R173 221 leaves a deficit of R9 645.87

¹¹ Invested with an entity known as “Glacier Living Annuity” as *per* exhibit D, record page 150

THE MAGISTRATE'S JUDGMENT

[10] Mr Abduroaf submitted that the magistrate did not demonstrate how the award of R1 000 per month was fair and equitable with reference to the financial means of the respective parties. Moreover, absent evidence relevant to the respondent's financial position that could have been elicited from the further documentation required by the magistrate, he submitted that the magistrate's order is improper¹² for the reason that the magistrate was seized with a legal obligation to conduct a thorough enquiry¹³ and had an *onus* to ensure that evidence was properly placed before the court.¹⁴ I am in full agreement with the submissions made by Mr Abduroaf as well as his criticism of the magistrate's approach to the evaluation of the evidence presented by the parties, which criticism I need not dwell upon in this judgment. Presumably, the magistrate might have been influenced by the submission made by the maintenance officer regarding what the latter believed would be a just and equitable award for maintenance. In any event, it is clear that the magistrate did not give effect to the underlying principle of the child's best interests.

REMEDY

[11] On the issue to be decided in this appeal, it resides with this Court to determine what would be an expedient remedy to accentuate the child's best interests. To my mind the principle would be undermined, conceivably by delay, if the matter were referred back to the court *a quo*, either for further investigation by the maintenance officer and/or further enquiry by the magistrate. The Maintenance Act incorporates several provisions which are designed and

¹² S v Bedi 1971 (4) SA 501 (N) at page 503 E

¹³ Mgumane v Setemane 1998 (2) SA 247 (Tk) at page 250H

¹⁴ Buch v Buch 1967 (3) SA 83 (T) at page 87 D-F

intended to ensure the recovery of maintenance.¹⁵ To quote the sentiments expressed by Webster J in *S v Seroke*:¹⁶

"[Their] primary objective is not the wielding of the awesome powers that judicial officers are granted by law but a dedicated and focussed objective of the recovery of maintenance for the child. Courts should be unswerving in their resolution in achieving this."

[12] The respondent has not been maintaining the child for a substantial period of time. He is also in default of the order which forms the subject matter of this appeal. Insofar as that default has been in existence for 20 months, the respondent's provident fund is in a position to make good the arrears.

[13] In the circumstances the following order issues:

[13.1] The appeal is upheld with costs.

[13.2] The magistrate's order of 22 December 2017 is set aside and replaced with the following order:

(i) It is declared that the child K[.] N[...] N[...] born on 7 February 2006 is entitled to share in the respondent's provident fund investment known as "Glacier Living Annuity" managed by the "Glacier Preservation Provident Fund" for her equitable maintenance and support for such period as the child is in need of such support and maintenance.

(ii) The respondent is ordered to forthwith ensure that he and/or the manager of the aforesaid fund makes equitable and proper provision for the support and maintenance of the said

¹⁵ Sections 16, 17, 26, 27, 28, 29, 40 and 41 see *S v Seroke* 2004 (1) SACR 456 (T) at paragraph [7]

¹⁶ 2004 (1) SACR 456 (T)

child in the amount of R5 000 per month payable on or before the 1st day of every month.

(iii) The respondent shall pay the applicant's party and party costs of suit on the Magistrates' Court scale."

[13.3] The aforesaid order shall operate from the date of this judgment.

[13.4] The respondent is ordered to forthwith ensure that he and/or the "Glacier Preservation Provident Fund", alternatively the "Glacier Living Annuity" pays to the appellant (the mother of the child), a sum of R100 000 within 60 days from the date of this order.

S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered.

I. T. STRETCH

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:

Adv. M Abduroaf

Instructed by Netteltons Attorneys

Makhanda / Grahamstown

For the Respondent:

No Appearance