

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 32221/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

3 June 2021

In the matter between:

E.D

Applicant

And

**THE MAINTENANCE OFFICER,
MAGISTRATES COURT, KRUGERSDORP**

1st Respondent

J.D

2nd Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 June 2021.

JUDGMENT

BEZUIDENHOUT AJ:

[1] The application before me consists of a part A and a part B. Part A was brought as an urgent application where the applicant sought that the first respondent be directed to give reasons for his decision to institute an enquiry in the Maintenance Court in terms of section 6 (2) of the Maintenance Act 99 of 1998 and that the Maintenance Court be interdicted from proceeding with the enquiry.

[2] On 6 November 2020, the application came before Judge Maier-Frawley, who removed the application from her Court roll due to a lack of urgency. Written, reconstructed reasons for the removal were provided on 10 February 2021.

[3] In part B of the application the applicant wanted to review the first respondent's decision to refer the second respondent's complaint under section 6 (1) of the Maintenance Act for a variation or substitution of the R43 order, for a section 10 enquiry.

[4] When the matter came before me, I enquired as to which part of the notice of motion I was required to deal with, and the applicant indicated that part B was before me.

[5] The main nub of the dispute between the parties was whether the first respondent's decision was one that was capable of being reviewed under the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

BRIEF BACKGROUND

[6] The applicant and second respondent were married to each other on 4 February 1989, out of community of property with the application of the accrual system. The marriage disintegrated and the second respondent instituted divorce proceedings out of this Court under case number 2019/10262 in which he inter alia, sought a degree of divorce and a determination and division of the accrual.

[7] The applicant opposed the abovementioned relief and filed a counterclaim. According to the applicant the divorce action is complex in that it involves several companies and a Trust, all of which she joined to the pending divorce action.

[8] On 6 August 2019, as part of the pending divorce action, the applicant issued a R 43 application, seeking maintenance *pendente lite* for herself and their major but dependent son.

[9] On 22 October 2019, the parties were directed to deliver Financial Disclosure forms, including documentary proof of all expenses relied upon. The parties complied, however before the R43 application could be adjudicated upon, the second respondent filed a supplementary affidavit. In the affidavit he dealt with the termination of the ABSA Bank relationship and the effect it will have on his financial affairs.

[10] On 12 November 2019, the R43 application was adjudicated, and an order issued in terms of which the respondent paid interim maintenance (the R 43 order) to the applicant and their son. As part of the R43 order, the second respondent was granted leave to return to this Court on a R 43(6) application, in the event of any information concerning the closure of the ABSA Bank account having a prejudicial effect on the second respondent's financial affairs.

[11] On or about 29 June 2020, the second respondent instead of approaching this Court by way of a R 43(6) application, filed a complaint under section 6(1) of the Maintenance Act for a substitution of his maintenance obligation under the R43 order with the Maintenance Court, Krugersdorp.

[12] The applicant is aggrieved at the second respondent's decision to approach the Maintenance Court with a complaint to substitute the R 43 order instead of approaching this Court with a R 43(6) variation application. The applicant is furthermore aggrieved at the first respondent's decision to refer the second respondent's complaint for a section 10 enquiry.

[13] According to the applicant the first respondent had failed to apply his mind to the submissions made by the applicant and the physical evidence that was placed and / or not placed before him.

[14] The applicant claimed that the second respondent's substitution application before the Maintenance Court is vexatious, an abuse of the system, in effect an appeal of the R43 order and amount to forum shopping.

[15] In this regard the applicant claimed that the R43 application was a comprehensive application, thoroughly argued by both parties before Court and took the ABSA bank closure and the effect thereof on the second respondent's income into account. It is thus a waste of resources to reproduce same and go through the same issues in a trial before the Maintenance Court. If new evidence came to the fore which affected the second respondent's income, so the argument went, the second respondent should have placed that before this Court via a R 43(6) application which would be less expensive and yield quicker results.

[16] The applicant claimed that she should not be subjected to the harassment and embarrassment of the second respondent's unmeritorious litigation or lengthy and costly process of a section 10 enquiry on the same argument presented in the R 43 application.

[17] The second respondent opposed the application on the basis that the first respondent's decision is not subject to review under PAJA as:

[17.1] the Applicant's rights have not yet been negatively affected by the first respondent's referral of the complaint for a substitution for an enquiry under section 10 before the Maintenance Court, as the process is ongoing, and

[17.2] provision is made for an appeal process in the Act, which the Applicant can employ should she be dissatisfied with the order emanating from the Maintenance Court.

[18] The second respondent is furthermore of the view that the first respondent had conducted his investigation, engaged with the parties and gathered the information he required: he had thus complied with his duties under the Act. To this end the second respondent alleged that he, inter alia, provided the first respondent with a list of his income and expenditure and three months bank statements which supported his application for a substitution.

[19] The second respondent then furthermore, in a letter dated 14 September 2020, supplemented his reasons for seeking the substitution and alleged that a comprehensive and complete bundle had been handed to the applicant.

DELIBERATION

[20] The applicant referred me to the judgement of Acting Judge Butler in the matter of EN v FB 2014 JDR 1511 (WCC) where he dealt extensively with the Maintenance Act and regulations on a related but slightly different aspect to this one. I will not repeat the sections of the act and the regulations herein as Butler has set it out with great detail in his judgement.

[21] Butler indicated, and I agree with him, that the Act and the Regulations contemplate three distinct steps when a complaint is made. The first step is the making of a complaint. Section 6(1) requires only that a complaint be made to the effect specified in subsections (1)(a) and (1)(b). The Act does not require that the complaint be true or otherwise verified.

[22] The second step involves the investigation of the complaint by the maintenance officer. The maintenance officer has no discretion whether to investigate the complaint as section 6(1) provides that the maintenance officer shall investigate the complaint. Neither the Act nor the Regulations require that there be a formal hearing at this stage and the manner of investigating the complaint is left in the discretion of the maintenance officer. Sections 6 and 7 of the Maintenance Act apply to such an investigation.

[23] During the investigation stage the respondent may place facts and evidence before the maintenance officer and raise argument as to why the complaint should not be taken further. However, it must be kept in mind that the second step is an information gathering process and not a trial.

[24] The third step, after the maintenance officer has investigated the complaint is that he or she has the power, under section 6(2), to institute an enquiry. It is self-evident that if the maintenance officer forms the view that the complaint has no merit, he or she may decline to institute an enquiry. Such a decision would put an end to the matter and would be reviewable.

[25] The decision to refer the complaint to an enquiry rest with the maintenance officer and it is quite conceivable that litigants may have different views from the maintenance officer as whether there is sufficient information and reason to refer a complaint to an enquiry.

[26] The respondent referred me to the judgment of Acting Judge Nkosi-Thomas in the matter of CC v MM JDR 2187 (GJ) where the parties also sought to review the maintenance officer's decision to refer the complaint to an enquiry before the Maintenance Court under s 10. After much thought and deliberation, I find myself in agreement with the decision in CC v MM.

[27] The first respondent's decision to refer the matter to an enquiry has not affected the applicant's rights adversely and the Court would ordinarily be slow to interfere in incomplete proceedings.

[28] Even if I am wrong in my concurrence with the judgment in CC v MM, I am not persuaded that the first respondent had omitted to do something that he was required to do under the Act or Regulations.

[29] Even though I do not have the first respondent's reasons for him referring the matter to an enquiry it is evident from a reading of both parties' affidavits that the first respondent engaged with both parties' legal representatives, heard their

representations and argument and came to the conclusion that there are trailable issues which he should refer to an enquiry before a Magistrate.

[30] Judge Maier-Frawley, at paragraph 16 of her judgment in the urgent application, referred to the fact that the Maintenance Court would be the ideal Court to deal with the second respondents financial affairs and to determine whether there had indeed been a deterioration in the second respondent's financial position or not.

[31] One cannot prejudge the outcome of the Maintenance Court hearing and the parties can suggest and agree ways to shorten proceedings and provide the Maintenance Court with the R43 bundles and so forth. The applicant should have paid heed to Judge Maier-Frawley's judgment and not have forged ahead with part B of the application.

WHEREFORE THE COURT ORDERS THAT:

1. The application is dismissed with costs.

J M BEZUIDENHOUT AJ

Acting Judge of the High Court

<i>DATE OF HEARING</i>	:	<i>2 March 2021</i>
<i>DATE OF JUDGMENT</i>	:	<i>3 June 2021</i>
<i>APPLICANT'S COUNSEL</i>	:	<i>Adv PV Ternent</i>
<i>RESPONDENT'S LEGAL REPRESENTATIVE</i>	:	<i>Adv NGD Maritz SC</i>