IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A564/2010

DATE: 25 JULY 2011

In the matter between:

EULOGY PELLISSIER Appellant

and

SAMUEL HENRI PELLISSIER Respondent

J U D G M E N T

DAVIS, J:

Introduction:

The appellant and first respondent were divorced on 21 June 2005. Pursuant to the marriage they had four children, who are minor sons aged between 12 and 18 years of age. The appeal which confronted the court this morning turned on both an application and a counter-application which had initially been brought before Allie, J in 2010, judgment having been delivered on 24 March 2010.

Briefly, it appears that on 6 August 2009, the respondent brought an urgent application to set aside a warrant of execution against movable property and attachments made in accordance with the warrant. This warrant of execution had been issued as a result of alleged non-compliance with maintenance obligations which the first respondent owed to appellant in relation to their four minor children.

On 10 September 2009, the appellant filed a counter-application seeking a variation of the order of divorce by removing joint decisions with regard to certain remedial assistance and extra tertiary which had been required for certain of the children. In addition, there was a further prayer which sought to remove the first respondent's liability to pay certain designated amounts and to be replaced with a liability for a global maintenance payment which amounted to an amount of approximately R9 500,00 per month per child relating to maintenance, school fees and certain prescribed medication.

Allie, J was faced with two separate issues. After an examination of the evidence, she came to the conclusion that insofar as the writ that had been issued, there was justification its issue, but in the amount of R1 700,00 only. She, therefore, set aside the writ in respect of all amounts exceeding the amount of R1 700,00. In essence, she came to the view,

particularly in relation to the school fees of some R24 100,00 per month, that the appellant was not entitled to claim that amount by way of a writ as:

> "[p]ayment of school fees to her as there is no right of recovery *inter partes* where she had no liability to pay." [Para 47 of the judgment of the court *a quo*]

There was a further discussion in the judgment regarding medical expenses. After examining the evidence, Allie, J came to the conclusion that the writ had been justified in respect of certain of these expenses, which is how, in the final analysis, the amount of R1 700,00 was formulated.

Insofar as the counter-application is concerned, Allie, J found that the essence of first respondent's defence, namely that, as an architect, there had been a dramatic reduction in his income as a result of the economic recession and thus a decline in the building industry were factors which were both plausible, and in her words "rung true". Accordingly, Allie J exercised her discretion and after examination of the evidence refused the counter-application and order the first respondent to pay a global amount as I have set it out earlier in the judgment.

In the final analysis, the appeal which came before this Court, turned on these two separate sets of questions, namely was Allie J justified in concluding that the writ could only legally be issued in the amount of R1 700,00 per month as opposed to R55 803,95 and, further, that the counter-application, both with regard to certain amendments, to joint decision making as set out in the consent paper, be altered in favour of decisions to be made solely by the appellant and for the award of a global amount should be dismissed.

The basis on which leave to appeal ultimately was granted (I accept readily that the manner in which the leave was formulated, left this court at large to deal with all of these questions, notwithstanding this formulation), was that subsequent to Allie J having given her decision with regard to the question of the obligation to pay the school fees of R24 100,00, the Supreme Court of Appeal had handed down a decision in Fish Hoek Primary School v GW 2010 (2) SA 141 (SCA) which held that the children's school is entitled to claim payment of school fees from either of the children's parents. Accordingly, the basis by which Allie, J dismissed the case for the writ in respect of the school fees, no longer held jurisprudential water and accordingly, to this extent, the judgment was incorrect.

Ms Gordon-Turner, who appeared on behalf of the appellant, sought to use this aspect to justify the need for the appeal, certainly in part. The point that she made was that, given the recalcitrance of a repeated nature of first respondent, there was a need for this Court to ensure that first respondent would not be able to rely, in his future conduct, on a judgment which had been based on an incorrect legal premise.

This point appear to me to be capable of rejection on a number of grounds. Suffice it to say, I propose to rely upon the following: Any court which deals with a dispute of this kind in the future, in this division, is compelled to follow the Fish Hoek Primary School case and there is no need for this court to say more about the incorrect premise upon which the Court *a quo* based its decision.

On appeal, the question which arose and was repeatedly put to Ms Gordon-Turner concerned the practicality of an appeal, when it was common cause that first respondent had settled the amount of R24 100,00 owed in respect of the children's school fees, albeit at a period which was later than the initial proceedings. It must follow that, having so paid those school fees, there would be no point served in traversing, as apparently the issues with regard to the R24 100,00 and its linkage to the writ.

This dispute was in effect dead, save for the submission which briefly ran along the following lines: It is important to discipline first respondent because he is a recalcitrant parent who refuses to pay his due share. In my view this is not reason sufficient to decide an appeal, the amount having been paid and in which the court on appeal is, as it were, frozen in time, given the facts which were placed before the court *a quo* and comprised the record upon which the appeal must be decided.

There is little more to be said insofar as this application is concerned. True, the initial amount was for R55 000,00 and I have only dealt with the R24 100,00 in respect of school fees and the R1 700,00 figure which was upheld by Allie, J. However, nowhere in counsel's heads was any further justification given as to where the balance of these funds could be compellingly justified in the evidence so as to compel this court to overturn the decision of Allie, J.

Indeed, in her heads Ms Gordon-Turner submitted that the writ ought to have been upheld, at least for the further sum of R24 100,00 and that such order may be substituted by this appeal court. There does not appear to be any basis by which the additional monies, which formed the subject matter of the

writ, was sufficiently showed to be necessary and reasonable expenses on this appeal so as to further disturb the finding of Allie, J.

This conclusion, therefore, brings into question the counter-application. I have to deal first with the issue of the global amount. It is extremely difficult for a court on appeal to overturn a decision of the court *a quo*, where the learned judge has exercised a proper discretion in terms of the evidence placed before her. Take this case. Ms Gordon-Turner referred to the record where an amount of approximately R37 000,00 per month was demanded by the appellant as a global sum which would fulfil first respondent's entire obligation to his children. She conceded that on the record, the best that this court could make of the evidence was to conclude that on average in 2008, arguably stretching into 2009, first respondent earned R63 000,00 per month. From this amount one would have to deduct expenses, which counsel accepted should be so deducted, together with tax so as to arrive at a net amount.

On a rough calculation during debate, it was put to Ms Gordon-Turner that there could be not much more than R40 000,00 per month as a net figure which had been earned by first respondent and possibly less than this amount. It, therefore,

became apparent that on this rough but relatively illuminating illustration, an amount of R37 000,00 was way beyond the means of first respondent and, therefore, could never be justified as a global sum. The question, therefore, was raised by Ms Gordon-Turner that the court might want to consider reducing the global sum, but increase it beyond the amount of approximately R15 000,00 per month, which first respondent claimed he was paying, inclusive of the school fees.

But how is this court to do this calculation on the available evidence? It would, to use the colloquialism, be shooting in the dark. There is no basis by which this Court could give a plausible and justifiable figure upon which first respondent's liability would then be predicated. Nothing on the evidence provides any evidential foundation which is sufficiently reliable to disturb the finding of Allie, J in the court *a quo*. There was some complaint about the difficulties which the appellant had experienced in procuring further figures and facts from the first respondent, but as is well known, there are discovery procedures which were available to litigants to compel that kind of information to be produced before the court.

Let me make it perfectly clear: I am not suggesting for one moment that first respondent should not fulfil his obligations. In argument before this court, my brother Dlodlo, J asked an

extremely pertinent question which bears repetition in a judgment. It was to the effect:

> "Do you not know (referring to first respondent) that as a father you owe an obligation to your children to ensure that they get the best possible life that is available to them in terms of your available resources?"

Any decent parent would obviously answer this question in the affirmative. Any conclusion which this court arrives at in a case of this kind, should not be construed as answering this question in any other way. However, the problem is that courts can only work with the available evidence. The available evidence in this case, most certainly during the relevant period and probably even more so given the difficult economic climate which architects surely encounter in a recession, is that there is no basis by which this court could come to a conclusion in favour of the appellant in respect of this component of the counter-application.

The balance of the counter-application was designed, in effect, to remove joint decision making insofar as the restricted range of activities concerned, in particular with regard to tutors and remedial education. Ms Gordon-Turner was correct to point to

the common law and the Children's Act did not provide for the existing regime. The joint decision making powers were, however, contained in a consent paper. The consent paper was presumably approved by the family advocate. It also reflected that it was "confirmed" by the preference of the children. There is no evidence that either the family advocate has had an opportunity to consider this aspect of the counter-application or that the children's wishes have so changed that they would wish this component of the consent paper to be altered as prayed for in the counter-application.

Before I conclude this judgment, it is, I think, incumbent upon me to say something about matters of this kind in general and this one in particular. This case has involved three judges of this Division having to read 1 146 pages of a record, together with heads of argument, which were produced, on the one hand by Ms Gordon-Turner on behalf appellant and by the first respondent, who represents himself. The case, as is evidence from the factual matrix that I sketch, turns on relatively small sums of money, yet the litigation has been conducted on so lavish a scale that will be more of a fitting of an intricate commercial dispute. The costs which have been incurred so far has been great. The time that has been taken by the judges to prepare for this case, to consider the evidence, had meant that litigants, who do have enormously pressing disputes which

need to be heard, have to stand further back in the queue.

At present there is no legislative framework which would empower this court to order mediation, even on appeal. This is a case which cries out even with a cursory examination of this record, for a court to be empowered to order that the parties subject themselves to a process of mediation and that, if necessary, the court could appoint a mediator. I accept that that is not what is contained in the rules of court at present, but this is precisely the kind of case that should never have come before this court, but should have been subjected to alternative dispute resolution as I have sketched it, albeit, briefly.

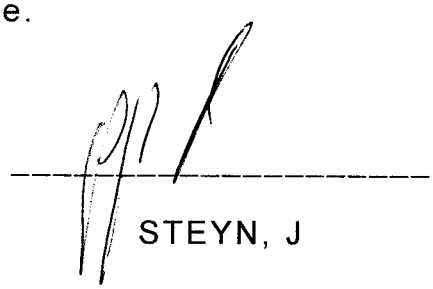
Indeed, the court was compelled, at least one point in these proceedings, to request the parties to engage earnestly between themselves so as to settle this matter and to obviate the handing down of a judgement. Regrettably, for reasons which we do not understand, an agreement could not be achieved. That in itself is a luminous illustration as to the need for a memo of alternative dispute resolution to be utilised in such a case.

In the final analysis, without this judgment being construed as any mitigation on the obligations of any parent to fulfil their

duties to their children, the evidence placed before this court does not justify interference by the court on appeal.

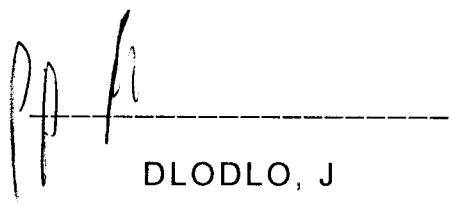
In the event, therefore, both the appeal and the appeal on the counter-application are dismissed. Obviously, given that the first respondent represented himself, there is no order as to costs.

STEYN, AJ: I agree.



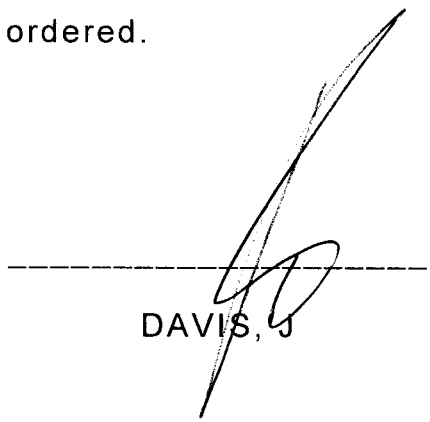
STEYN, J

DLODLO, J: I agree.



DLODLO, J

DAVIS, J: It is so ordered.



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