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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A06/2023

Hermanus Magistrates' Court Case No:32608MAI000437

In the matter between:

T[…] G[…] Appellant

and

B[…] J[…] G[…] Respondent

(Electronically delivered on 23 March 2023)

JUDGMENT

1. This is an appeal against the rulings made by the magistrate sitting in the maintenance court for the district of Hermanus on 06 June 2022. The parties are in the midst of an application brought by the respondent to discharge him from his maintenance obligation. The court a quo decided to reject the affidavit filed by the appellant in her answering affidavit, opposing the respondent's application to be discharged from paying maintenance to their adult dependent child. Accordingly, the appellant approached this court for an order in the following terms:

1.1 Condonation for the late filing of the appeal.

1.2 This court to set aside the ruling made by the court a quo on 6 June 2022 and 20 January 2023 respectively.

1.3 This court to uphold this appeal with costs.

2. The appellant first seeks condonation for the late noting and filing of the appeal. The appellant cited administrative delays and various mis-happenings as the reasons for the delay. The respondent opposed the condonation application. Respondent made an issue and raised a question whether this court should entertain this appeal at this stage because the maintenance enquiry in the magistrates' court is still pending and these proceedings are sui generis in nature. It was astonishing to hear counsel for the respondent arguing that this appeal must be dismissed and considered to be pre-mature. This court to order that the appellant must return to the maintenance court to seek condonation and then file another appeal. Appellant's counsel argued that this court has inherent jurisdiction and the authority to hear all three grounds of appeal. He went further to argue how the appellant has been frustrated in her endeavour to defend the application for the discharge of the respondent from his maintenance obligation. Further, that this court should consider it to be in the interest of justice to deal with this appeal.

3. Having considered the papers and appreciated the systematic (administrative) processes that the appellant went through to execute this appeal which I am not going to delve into as it appears on record. This appeal is now before this court and cannot be ignored; the respondent's attitude lacks credence. I am satisfied that the appellant has shown good cause for condonation. Accordingly, the application for condonation is granted.

Background history

4. The appellant and the respondent were married and a girl child, now a major was born out of that marriage relationship. However, on 27 October 2004 this court ordered the dissolution of the bonds of the marriage that existed between the appellant and the respondent. Included in the divorce order was a settlement agreement that was made an order of court. Relevant to this case is clause 2 of the consent paper whereby the respondent consented to pay R2 350.00 per month to maintain their daughter. The respondent, further agreed to continue with maintaining their daughter until she either turns 21 or is self-supporting, whichever comes first. The respondent agreed to continue supporting their daughter beyond the age of 21 if she is studying in a tertiary institution/ higher education.

5. It is also not in dispute that sometime in February 2021 the respondent brought an application at the Hermanus Maintenance Court seeking a discharge from the obligations of the maintenance order. The main reason for bringing such an application by the respondent is because their daughter attained the age of majority and that she is allegedly capable of maintaining herself or at least finding alternative means to be self-supporting.

6. The appellant is opposing the application by the respondent to discharge himself from maintaining their daughter. However, before that application was heard, the respondent raised the following three points *in limine*:

   6.1 The appellant's opposing affidavit does not meet the legal requirements of an affidavit as prescribed in regulation 3 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 as amended, in that the affidavit

was not signed before a commissioner of oaths because the commissioner referred to the appellant as a “he” whereas it’s a “she”.

6.2 Their child, now a major, should be the one applying for maintenance or opposing the application for discharge filed by the respondent. Therefore, the appellant lacks jurisdiction to oppose the respondent’s application to discharge him from paying maintenance.

6.3 The third and the last point *in limine* is for this court to set aside the costs order dated 20 January 2023 to be borne by the appellant. The court ordered that the costs on an attorney and own client scale.

7. The court *a quo* upheld the first two points *in limine* and found that:

7.1 The answering affidavit was found to be defective and therefore was rejected.

7.2 The appellant lacks *locu standi* to oppose the respondent’s application to be discharged from his maintenance obligation. The court *a quo* found that their daughter has attained majority, she should be in a position to defend the application. The court *a quo* decided further, that their daughter should file a fresh maintenance application and execute it herself.

7.3 The order as to costs was granted by another court sitting on a different day in the same maintenance matter.

GROUNDS FOR APPEAL

8. The court *a quo* erred in finding that the appellant's answering affidavit was defective. The appellant argues that the results of this finding by the court a quo will render inadmissible the evidence contained in that answering affidavit. The appellant contends that the refusal by court of the answering affidavit will deprive her of an opportunity to defend the respondent's application to be discharged from maintenance. The appellant supports her argument by submitting that her answering affidavit does refer to her as "a well-known female" and "an adult female". The appellant contends that it is apparent from the affidavit itself that when the appellant argued that the use of a wrong pronoun could only be an error and not an indication that she was not before the Commissioner of Oaths during the commissioning of the answering affidavit.

9. The court *a quo* erred in finding that the appellant has no *locu standi* to oppose the respondent's application to be discharged from maintaining their daughter. This, the appellant argued that she is cited as a party in the respondent's application for discharge. Her exclusion as an interested party from the application for discharge will be prejudicial to her. The appellant's interest is to be a party in the proceedings. Appellant submitted that if she is excluded from the proceedings and judgment is granted in favour of the respondent, consequently she will be responsible for the maintenance of their dependant daughter. The appellant contends that the court's ruling is in violation of section 34 of the Constitution to have her dispute resolved before the court, applying law in a fair public hearing.

10. Arguing the appellant's first point *in limine*, the respondents submitted that it is pointless, there was no need no need for the answering affidavit in any event. Counsel for the respondent makes the above submission knowing very well that the respondent's case was initiated by an affidavit and the court accepted

same. Respondent argued that the rejection by the court *a quo* of the appellant's answering affidavit will not prejudice the appellant on the basis that the court a quo will afford her an opportunity to state her case by testifying orally under oath in an open court in terms of section 10 (2) of the Act.

11. The respondent alleges that the court did not make a finding that the appellant lacks *locu standi*. Counsel for the respondent persisted with the argument that these are sui generis proceedings, appellant can attend court as a witness. Respondent 's counsel further argued that the court *a quo* did not exclude the appellant, it only advised that their daughter and not her should be opposing the discharge application and that she, (the daughter) should initiate her own maintenance application.

12. The respondent opposed the third ground of appeal as being improper before this court. He alleges that the magistrate who granted the costs order was not properly served with the notice to appeal. Respondent alleges, further, that the court has no jurisdiction to hear an appeal arising from a decision by a different magistrate. Counsel for the respondent argued that this court's jurisdiction does permit this court to interfere with the costs order. Arguing in defence of this point in limine, the appellant submitted that this costs order was wrong, that the order should have been left for later determination pending the finalisation of the appeal application. Appellant argued that it will be in the interest of justice for this court to deal with the issue of costs. If this court dismisses the issue of costs, the appellant will be prejudiced, she is a single mother who is struggling to raise her major dependant daughter and granddaughter. Appellant's counsel contended that the appellant served the relevant magistrate with the notice to appeal as well as the request for reasons. However, due to unreasonable lapse of time waiting for the

magistrate's reasons, the appellant decided to launch this appeal without the reasons and/or response from the magistrate.

LAW AND ANALYSIS

13. The papers in this matter were unnecessarily voluminous and covered a range of issues that were not immediately relevant to the prosecution of the appeal. In this judgment I set out only those facts that I consider relevant to the determination of the appeal application. Also, for the reasons that will become clear later on, I do not deal with all the details dealt with by the appellant.

14. Regulation 4 (1) provides that: "Below the deponent's signature or mark, the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration". The commissioner of oaths identified the deponent as a "he" as opposed to a "she" as she is female. As a result of this error, the respondent raised an objection that the affidavit is defective and the court a quo agreed with the respondent. The provisions of regulation 4 (1) are directory and not peremptory. This means therefore, that failure to comply with them can be condoned at the discretion of the court where it is clear from other indications that an oath was indeed administered. When one looks at the appellant's answering affidavit where the deponent states that "she is a well-known" female and "an adult female", it is evident that the deponent is a female. Except for the erroneous use of the pronoun "he" instead of "she" by the commissioner of oaths, there is no other evidence presented to suggest that the deponent was not before the commissioner when the oath was administered. I have looked at the entire answering affidavit and considered its substance and the intention or reasons for the

deponent to want it to form part of record in the court *a quo (application for discharge)*. I agree with the appellant when she says that if it is rejected it will prejudice her and infringe her right to a fair trial or enquiry as is the case in this instance. It is form over substance.

15. I am satisfied that the error does not render the plaintiff's affidavit fatally defective in the sense that the court would be unable to give effect to the presumption of regularity for the purposes of assuming that the oath was sworn to and signed by the deponent in the presence of the commissioner of oaths. Context and content are very important when considering this issue. The appellant is cited as a party to the respondent's application for discharge. Until the maintenance court makes a finding that their daughter is now a self-supporting major and discharges her from the initial maintenance proceeding, she remains an interested party in the initial maintenance proceedings. The defect is condoned and not to be raised as an issue in the enquiry.

16. I now turn to the second point *in limine*, that the appellant lacks *locu standi* to prosecute their daughter's maintenance cases (original maintenance case and the respondent's discharge application). The respondent denies that the court a quo upheld this point *in limine.* In his contention, counsel for the respondent equates the appellant's attendance during court appearances as being a party with active participation. When the matter was postponed, the court a quo did not indicate the role of the appellant on the next appearance. The respondent argued that she would have been a witness, which submission is an assumption. It is an undisputed fact that a witness and a party in the proceedings have a different role and are affected differently by the consequential results of the proceedings.

17. The respondent denies that the appellant has been excluded from participating as a party in the respondent's application in the court a quo. It bases this argument on the court a quo's recording of appearance where the appellant was warned to appear again on 20 July 2022. To illustrate this fact, the court *a quo* went further to say that the mother can only deal with arrears in the initial maintenance file as if she does not have substantial interest in the matter.

18. On page 113 at 16 of the judgment, the court a quo held that "Therefore, the points *in-limine* as it has been raised by Mr van Vuuren (respondent's attorney), the court does consider such in his favour and this application will need to be dealt with by the child who now has since become a major". The effect of that finding is to exclude her from these proceedings as a party. She needed to participate as a party with substantial interest.

19. I accept that the court has a discretion, however, I do not agree with the court's exercise of its discretion when it upheld this point *in limine*. The court *a quo* erred in the exercise of it discretion in the following:

    19.1 The appellant is a single mother, who lives with their daughter making her a primary care giver.

    19.2 The allegation that their daughter is an independent adult still needs to be investigated, until then, she is now a dependant major who has a child and is unemployed.

20. Section 6 (1) (b) of the Maintenance Act provides for the substitution or discharge of an existing order on the basis that "good cause exists to do so"

21. In my view, the court should have held an enquiry to establish the “good cause” before concluding that the appellant does not have *locu standi* to prosecute the maintenance application on behalf of her daughter. A fact finding mission by the court assisted by the maintenance investigator was necessary under the circumstances. The fact that she has attained the majority age is not in itself sufficient without evidence of self-dependence, the court needs to give regard to the circumstances. The court a quo failed to take into account that the now major child resides with the appellant. As correctly pointed out by the appellant, if she is not given an opportunity to be a party to the maintenance application, she will be prejudiced: The court a quo failed to recognise that her non-participation infringes her Constitutional right to have her dispute resolved by the application of law decided in a fair public hearing before the court. I accept that the child is now a major, but could this be a justification to deprive the appellant participation in the maintenance proceedings when she is cited as a party? Certainly not. Moreover, at the time of ruling on the point *in limine*, the court had not established if the child is not a major that is still dependant on her parents for support or not. It is trite law that legal proceedings are initiated against a party. It is my view that the removal of the appellant form the application brought by the respondent rendered the proceedings invalid because the appellant was the only respondent cited in the respondent’s application. Further, their daughter was not joined as an interested party to the application for discharge. Having considered everything, I am convinced that the appellant has satisfactory established the need to participate as an interested party in both maintenance applications.

22. I disagree with the respondent’s submission that this court does lacks jurisdiction to hear the third point *in limine* for the following reason; firstly, we

are dealing with a single mother who is supporting her unemployed, adult dependent child and a grandchild; it is apparent from the record that she struggled to secure a legal representative to assist her with this matter. She unsuccessfully applied for Legal-Aid. It was undisputed that only through her family's intervention that she was able to prosecute this appeal. The above struggles are an indication of someone who is financial challenged to pursue justice, I therefore, I agree with the appellant's submission that it will not be in the interest of justice for this court to dismiss this point *in-limine*. In *Leibowitz and Others v Schwartz and Others 1974 (2) SA 661* it was held that "The Court has inherent powers to grant relief where an instance upon exact compliance with a rule of Court would result in substantial injustice to one of the parties" This inherent authority of the superior courts was later endorsed by the SCA in *Toubie v S 2012 4 ALSA 290 (SCA)* where it was stated that "The intention is for a Court of Appeal to dispense justice. An appeal court cannot close its eyes to a patent injustice simply because the injustice is not a subject of appeal". The refusal to by this court to hear the issue of costs will amount to miscarriage of justice.

23. Accordingly, the respondent's argument that this court lacks jurisdiction has no merit and is untenable. There are no reasons advanced by the respondent to justify the granting of this punitive costs order. In my view, the costs order is flawed, besides the fact that there are no reasons provided, the magistrate does not have the jurisdiction to order "attorney and own client costs" as it was never sought. The only remedy to correct this costs order was for the appellant to appeal and I find it just for this court to deal with the appeal and correct costs order which was wrongly granted.

24. Therefore, I propose the following order:

24.1 The appeal is upheld with costs.

24.2 The court a quo's order is set aside with the following:

(i) The affidavit is proper before court

(ii) The court a quo's ruling that the appellant has no *locu standi* is set aside. She is re-entered into the maintenance proceedings (original maintenance and the discharge application) to participate as a party.

(iii) Punitive costs are set aside and replaced with "no order as to costs".

24.3 The matter is remitted back to the court a quo and directed:

(i) to investigate the allegations of the major child's dependence or independence.

(ii) to hold an enquiry to establish "good cause" and determine the respondent's application for a discharge from his maintenance obligation.

NYATI AJ

I agree; it is so ordered

BAARTMAN J

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