

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A3008/2021

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**

REVISED

Head on: 2 November 2022

Delivered on: 1 February 2022

In the matter between:

L[....] J[....] B[....]

Appellant

and

L[....] T[....]

Respondent

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] This is an appeal against the decision handed down by the learned Magistrate Ms Rughoo-Nadan (hereinafter “the court *a quo*”), sitting in the Maintenance Court for

the District of Johannesburg North on 3 March 2020. The decision concerns maintenance payments for the parties' two minor children.

[2] Accordingly, the applicant seeks an order in the following terms:

- 2.1. Condonation of the late noting of the appeal is granted;
- 2.2. The appeal is upheld with costs;
- 2.3. That the order of the court *a quo* is substituted with an order substituting the order of the Maintenance Court dated the 21 September 2015 as follows:
 - 2.3.1. Each party is ordered to pay one half (50%) of the school fees, schoolbooks, school stationery, school uniforms, extra mural activities and extra lessons for Z[....] L[....] and for S[....] A[....] L[....];
 - 2.3.2. Each party's half share of the fees for schooling, for extra mural activities and for extra lessons is to be paid directly to the relevant service provider;
 - 2.3.3. The appellant will retain Z[....] L[....] and S[....] A[....] L[....] on his medical aid or hospital plan; and
 - 2.3.4. Each party is ordered to pay one half (50%) of any reasonable excess medical expenses for Z[....] L[....] and for S[....] A[....] L[....].

[3] On 27 May 2019 the appellant (who was the applicant in the court *a quo*) approached the Maintenance Court in terms of section 6(1)(b) of the Maintenance Act 99 of 1998 for a substitution of the maintenance order granted in September 2015 in respect of the maintenance of the two minor children. This application led to the maintenance officer instituting of an enquiry in the Maintenance Court in terms of section 6(2) of the Act.

[4] In terms of the September 2015 order the appellant was required to pay R10 000.00 each month to the respondent towards the maintenance of the two minor children.

FACTUAL BACKGROUND

[5] Mr and Mrs L[...] who are the parties herein divorced in 2012. There are two minor children born of the marriage: Z[...] L[...] born 2004 and S[...] A[...] L[...] born 2006.

[6] Included in the divorce order was a settlement agreement that was made an order of court. The settlement agreement included an agreement on maintenance for, and residence of, the minor children. Primary residence was awarded to Mrs L[...] (the respondent) while Mr L[...] (the appellant) was ordered to make a payment of R10 000.00 in respect of maintenance of the children. It is this very settlement agreement that was made an order of court, now referred to as the September 2015 order.

[7] The 21 September 2015 order required the appellant to pay a sum of R10 000.00 monthly to the respondent for the maintenance of the minor children (R5000.00 for each child). Effectively between 2015 and 2018, the respondent incurred the bulk of the costs of the children's day to day expenses as they primarily resided with her. Over and above the R10 000.00, the appellant paid the children's medical aid. At this time the appellant was earning more than the respondent.

[8] From 2015 to 2018 and in compliance with the September 2015 order, the appellant paid the R10 000.00 amount directly to the respondent.

CONDONATION

[9] The appellant seeks condonation for the late noting of the appeal, citing both the provision of the written judgment in terms of Rule 51(1) of the Magistrate's Court Rules on 29 June 2020 and the transcripts of the court *a quo* enquiry on 2 September 2020 as the reason for the delay. He submits that the obtainment of the transcript was a necessary precursor for the noting of this appeal given that the evidence given under oath was necessary. He further submits that the delay in the prosecution of this appeal has not prejudiced the respondent.

[10] The respondent submits that she objects to the application for condonation yet state she does not have anything to say.

[11] In the premises, having considered the submissions by both parties, I am satisfied that the late noting of the appeal was not created by appellant but by the systematic processes that first had to take place before the appellant could proceed to note his leave to appeal. On the other hand, I am satisfied that the respondent did not suffer any prejudice due to the delay.

[12] In the result I am satisfied that the appellant has shown good cause for condonation. Accordingly, the condonation application is granted.

ISSUES FOR DETERMINATION

[13] The appellant raises the following issues for determination:

- 13.1. The 'clarification' of the September 2015 order;
- 13.2. The failure to take into account the changed living arrangement of the children; and
- 13.3 The order that ought to have been made as it is fair by taking into account all the circumstances of the case.

APPLICATION IN THE COURT A QUO

[14] In May 2019 the appellant approached the court *a quo* for substitution of the September 2015 order in terms of section 6(1)(b) of the maintenance Act 99 of 1998. Section 6(1)(b) provides for a substitution or discharge of an existing maintenance order on the basis that good cause exists to do so. The appellant raised two grounds for the substitution:

- 14.1. The living arrangement of the minor children had changed such that instead of only visiting the appellant, the children were now living with the appellant half of the time and the parties are thus alternating weeks with the children.

14.2. The appellant is unable to bear the total education costs for both minor children due to the downturn in the economy.

[15] Following the above section 6(2) complaint by the appellant culminating in the section 6(1)(b) enquiry, the respondent did not lodge a complaint nor a counterclaim.

[16] In its determination of the application for substitution, the court *a quo* found that the appellant's decline in earnings constituted good cause to reduce the monthly cash contributions required of him from R10 000.00 to R2000.00. Despite this finding, it (the court *a quo*) however declined to factor in the changed living arrangement regarding the minor children. In so doing the court *a quo* did what it describes as 'clarifying' the September 2015 order which the appellant sought to substitute. It then ordered that the appellant was to also pay in full for both minor children:

16.1 school fees;

16.2 medical aid;

16.3 transport costs; and

16.4 half the reasonable expenses not covered by the medical aid.

[17] The following submissions were made by the appellant before the court *a quo* for the substitution application/enquiry:

17.1. In 2019 the children's school contacted him and advised that the school fees were in arrears, totaling around R140 000. 00 by the end of 2019. The respondent had not been paying any school fees from the amount paid over to her by the appellant. In order to keep the children in school the appellant agreed to sign an acknowledgment of debt for arrears. The appellant then began paying the R10 000. 00 per month that he had been paying to the respondent directly to the school (that is, R7 000. 00 in respect of current fees and R3000. 00 in respect of the arrears).

17.2. The children had expressed a desire to spend more time with the appellant. The parties decided that the children would spend half of their time

with the appellant and half with the respondent by alternating custody of the children each week.

17.3. Resultantly, the natural corollary of the changed living arrangement was that the appellant took on half of the expenses associated with the children's day to day maintenance, whilst the respondent's expenses in this regard were reduced.

17.4. The above living arrangement came during 2019 when the appellant's business was affected by the economic downturn. This meant the appellant could no longer make as much money as he did before. His income was very marginally higher than the respondent's, almost the same.

[18] The appellant argued before the court *a quo* that following the above arrangement, each parent resultantly shoulders the children's day to day living expenses in roughly equal shares. This invariably meant a reduction of the respondent's financial burden whilst increasing the appellant's. The appellant has continued to pay the children's medical aid contributions and is paying the children's school fees and all school-related expenses following the respondent's failure to make payments in this regard. The appellant's financial contribution is accordingly much higher than the respondent's despite the fact that the parents now earn very similar incomes. Based on this, the appellant sought a substitution of the Maintenance Order to reflect the more equitable state of affairs.

COURT A QUO's FINDINGS, ORDER AND REASONS FOR ITS JUDGMENT

[19] The court *a quo* found during the maintenance enquiry that:

19.1. both parties earn similar amounts;

19.2. the appellant has a monthly income of R22 500.00 whereas the respondent's is R20 000.00;

19.3. the children reside for equal periods of time at each parent's place of abode;

19.4. the children's school fees of R7000.00 are being paid solely by the appellant;

19.5. the children's extra mural activities are being solely paid for by the appellant;

19.6. the medical aid contributions for the children are being paid by the appellant;

19.7. the children's school transport costs are being paid for by the appellant;

19.8. the appellant is paying off the arrear school fees, the sum of which is as reflected in the acknowledgment of debt;

19.9. The September 2015 order ordering the appellant to make payment of R10 000.00 to the respondent towards the maintenance of the children was an all-inclusive sum, that is, it did not include money for the payment of school fees;

19.10. Both parents should be equally liable for the maintenance of the children.

[20] Having found as it did in the preceding paragraph, the court *a quo* ordered as follows:

"That the applicant (Mr L[....]) shall pay with effect on the 1st April 2020 on a monthly basis towards the maintenance of the complainant and or of the following children the sum of R1000.00 in respect of Z[....] L[....], born on the 11th August 2004 and a R1000.00 in respect of S[....] A[....] L[....] born on the 25th of February 2006. The following order is made as per annexure A. Mr L[....] is ordered to pay the school fees of both the minor children. The cost of the medical aid or hospital plan - hospital cover for both minor children. The cost of the transport fees for the minor children and half of the cost of the reasonable expenses or medication not covered by the medical or hospital plan for both minor children. The first payment is to be made on the 1st April 2020 and after that on or before the 7th of each month succeeding to Mrs L[....] into her bank account."

[21] In its written reasons, the court *a quo* stated that:

21.1. In regard to the downturn of the economy reason advanced by the appellant, it (the court *a quo*) reduced the component from R10 000.00 to

R2000.00 since it would not have been just to discharge the cash component completely since the appellant was still earning an income.

21.2. In regard to the minor children arrangement living half the month with each parent by alternating, the respondent made it her very clear that she did not consent to that nor to the 50% *re* the school fees, books, uniforms, stationery, extra mural activities, extra lessons, medical expenses and transport as proposed by the appellant.

21.3. Looking at the issue relating to school fees, stationery, books, uniform, extra mural activities, extra lessons, medical expenses and transport, it did not find it just that these expenses be shared especially since the 50% living arrangement with the minor children was an informal one. Afterall, the appellant had been paying for all these since the 21 September 2015 court order, and further that the appellant even stated that he could put the children on a hospital plan.

[22] The court *a quo* further accepted that the appellant's monthly expense calculations in respect of the children totaled an amount of R31 376.00.

GROUND OF APPEAL

[23] The appellant raises the following grounds of appeal:

23.1. The court *a quo* erred in fact by assuming that the appellant's individual monthly expenses totaling over R37 000.00 were the total expenses incurred by both parents towards the children's maintenance, which mistake constituted a material misdirection on the court *a quo*'s part.

23.2 The court *a quo* further erred when it made no finding in regard to the respondent's present contributions. Despite the respondent having provided the court *a quo* with a list of her monthly expenses in relation to the children which came to R1 700.00, it (the court *a quo*) viewing the list as "insufficient" and disregarding it entirely.

23.3 The court *a quo* erred in law in that:

23.3.1. It took into account that the respondent is under debt review but failed to take into account the fact that she lives with her partner who contributes to her expenses.

23.3.2. It failed to make any finding concerning the respondent's deliberate investment of R2 million off-shore in an inaccessible financial vehicle.

23.3.3. It found that '*in the absence of a court order it cannot be party to the informal agreement [pertaining to shared residence] which is subject to change*'.

23.3.4. it accepted the respondent's argument that the R10 000.00 maintenance payable by the appellant in terms of the September 2015 order did not include school fees and that the appellant had stopped paying maintenance.

THE APPELLANT'S CASE ON APPEAL

[24] In regard to the 'clarification' of the September 2015 order by the court *a quo*, the appellant submits that it stands to be set aside in that the Magistrate acted *ultra vires* her powers as provided for by legislation. The appellant further argues that the court *a quo*'s reliance on **M v M** below is wrong in law and the 'clarification' itself is misleading since **M v M** involves maintenance that was being paid by an ex-spouse to another post-divorce whereas this matter deals with maintenance of minor children. It is common cause that the nature of an enquiry into maintenance at divorce will differ from that of a subsequent enquiry into variation, which thus makes it distinguishable. **M v M** does not concern children. It is only section 15 of the Maintenance Act that sets out considerations to be taken into account by the Maintenance Court when determining not what is just but fair in all the circumstances of the case. In terms of the Maintenance Act, all that the appellant had to show was good cause for the substitution, which he did and the court *a quo* also found to that effect. Despite the court *a quo* having found good cause to reduce the R10 000.00 in the September 2015 order to R2000.00, it failed to mention if there is good cause to increase the appellant's obligations.

[25] In regard to the failure by the court *a quo* to take into account the changed living arrangement of the children, the appellant argues that it is not a requirement that the change in the circumstances must have been brought about by a court order. The court *a quo* should have found that the changes in the living arrangement constitute good cause to discharge the cash portion of the maintenance order in its entirety; and to consider substitution of the order with one that provided for the half share of payments sought by the appellant.

[26] In regard to the argument that the court *a quo*'s order has to be fair by taking into account all the circumstances of the case, the appellant submits that once a party has shown good cause, all that a court has to do is to have regard to the prescripts of section 15(3) of the Act as appears below herein regarding what needs to be considered by the Maintenance Court for determining the amount to be paid as maintenance in respect of a child. Section 15(3)(b) of the Act provides that "*Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case*". The court *a quo* acknowledged that his income was R22 500.00 because of the downturn and the respondent's R20 000.00. Whereas the court *a quo* took into account the fact that the respondent was under debt review, it however failed to factor in the fact that she was living with a partner who was contributing towards her expenses including at least half her rent as well as her off-shore R2 million investment.

[27] The April 2020 order effectively means that the appellant was ordered to pay over R15 400.00 in respect of maintenance whilst the respondent was not ordered to pay anything. Instead, the court *a quo* overemphasized the respondent being placed under debt review which left her with an income of R14 429.00 whilst on the other hand failing to take into account the appellant's other expenses, for example, car repayments. In regard to the respondent's off-shore investment of approximately R2 million, the court found that she had no access to it. He argues that by investing her money off-shore, the respondent had deliberately cut down her legal obligations towards her children which should not be countenanced. He argues that the amount determined by the court *a quo*

is not fair given all the circumstances of the case. He argues that a fair order would been the one prayed for in terms of the relief he seeks.

THE RESPONDENT'S CASE ON APPEAL

[28] THE RESPONDENT RAISES TWO POINTS *IN LIMINE*:

28.1. She argues that the appellant's attorney was not authorized to sign the Power of Attorney; and

28.2. That the appellant's attorney commissioned his affidavit, both of which constitutes a technical irregularity.

[29] In regard to the first point *in limine*, the appellant argues that the attorney had the power to sign his Power of Attorney by virtue of the Power of Attorney he (the appellant) had previously signed authorizing her to do so.

[30] In regard to the appellant's attorney commissioning his affidavit, the appellant argues that the technical irregularity which it allegedly constitutes does not require a substantive application and asks for condonation by the court in the event the court is not satisfied with his submissions.

[31] In regard to the two points *in limine* raised by the respondent, I find that the two points *in limine* raised by the respondent are valid, yet not to the extent to bring fatality to the merits of the appeal. Accordingly, condonation for the non-compliance by the appellant is granted. In the result, both points *in limine* are dismissed with no order as to costs.

THE RESPONDENT'S CASE ON MERITS

[32] The respondent argues that to date the appellant has not paid her the R2000.00 maintenance for the minor children as per the 3 March 2020 order, which order he is appealing. She argues that the court *a quo*'s order is not wrong since it is very reasonable, especially in light of the fact that she never agreed to the 50% shared expenses or payment arrangement with the appellant. The reason why the school fees

are in arrears is because the appellant never paid her the R10 000.00 for this expense, so it is the appellant who brought the R140 000.00 arrear account upon himself by failing to comply with the September 2015 order. She also pays for extra school lessons, including the children's dental braces. Regarding the off-shore investment, she used at the time she was unemployed.

[33] The respondent further argues that the appeal should not succeed since she cannot afford the 50% costs per child, unless the appellant first paid her the outstanding maintenance amount of approximately R140 000.00.

STATUTORY FRAMEWORK

[34] Section 36(1)(c) of the Magistrate's Court Act 32 of 1944 provides, in relevant part, that:

"The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu-

(c) correct patent errors in any judgment in respect of which no appeal is pending;."

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

[36] The Supreme Court of Appeal's decision in **Punell v Purnell 1993 (2) SA 662 (A) at 667 A - D** made it clear that in such a case the old order ceases to operate, while the new order operates in its place.

[37] In **Thompson v Thompson 2010 (3) SA 211 (W) at 19** the court stated that:

"To the traditional common-law criteria (the need for maintenance and the ability to pay) can now be added the principles of fairness, equity and sensitivity, which, as amended, were introduced by the new Act".

[38] Professor JL van Zyl in **Joubert (ed) The Law of South Africa vol 6 (first reissue) at 21a** describes 'good cause' as follows:

"As far as the meaning of "good cause" (or sufficient reason)" is concerned, it is the view of the courts that a precise definition of the term is neither possible nor desirable, but that the particular circumstances of each case must be considered".

[39] Section 15 of the Maintenance Act provides:

"(3)(a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration –

(i) that the duty of supporting a child is an obligation which the parents have incurred jointly;

(ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and

(iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first subsequent marriage.

(b) Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.

[40] In **M v M (A301/17) [2018] ZAGPPHC 607**at para 12, the court held that:

"It is trite that the court....makes a maintenance order which it finds 'just'....In considering what is just, this in effect signifies that the court exercises a judicial discretion when coming to a conclusion what is correct and appropriate and fair and reasonable in the circumstances of the case....".

[41] In **Mentz v Simpson 1990 (4) SA 455 (A) at 456 E -J**, the court held that a court of appeal does not readily interfere with a maintenance order awarded in a trial court, but will if there is a misdirection or irregularity.

[42] In **Bordihn v Bordihn 1956 (2) PH B32 (A)** the court held that the approach to an appeal of the present kind should be along the lines adopted in compensation cases, which approach was outlined in **Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 200:**

'But it does not follow that a court of Appeal must renounce its functions as a Court of Appeal by deferring to the estimate of the trial court in a case of doubt or difficulty....Seeing that an appeal is a hearing of all the questions involved in the action, including the quantum of damages, a Court of Appeal must necessarily decide upon the figure which it thinks should have been awarded. When it has done that, if the figure arrived at, considered from all aspects, differs substantially from the figure awarded, the Court of Appeal must give effect to it. If it does not do so, it is deferring to the judgment of the trial Judge and not carrying out its functions as a Court of Appeal by exercising its own judgment upon a matter which is before it on appeal.'

[43] In **Roos v Roos 1945 TPD 84 at 88**, Schreiner J (as he then was) stated that:

"Variation will be ordered not only in cases of breach by either party but because there has been such a change in the conditions that existed when the order was made, that it would now be unfair that the order should stand in its original form".

ANALYSIS

[44] It is common cause that a court of appeal does not readily interfere with a maintenance order awarded in a trial court, but will if there is a misdirection or irregularity, as was held in **Mentz** above.

[45] Section 15 of the Maintenance Act provides the conditions that give rise to parental duty to support a child. From these and as relates to the determination for a substitution of an existing maintenance order and to the extent that good cause exists for the sought order, it will grant same by having regard to the relevant considerations.

[46] In regard to the issue of substitution 'clarification' by the court *a quo*, I am of the satisfied that it exceeded the bonds entitling it to do same in light of what section 36(1)(c) of the Magistrate's Court Act ("MCA") permits, this constituting a misdirection on its part. Before the court *a quo*, there were circumstances which I find justified its discharge or variation of the September 2015. When regard to section 36(1)(c) of the MCA and the facts of the matter, there was no occasion justifying the court *a quo*'s order *suo motu* September 2015 order clarification.

[47] Furthermore, the court *a quo*'s import and reliance on *M v M* above to justify its March 2020 order is incorrect, primarily because *M v M* is distinguishable given that it deals with maintenance by an ex-spouse post-divorce whereas *in casu* the matter involves the maintenance of children. The court *a quo*'s failure to justify an increase in the maintenance obligations of the appellant despite a finding of good cause for a substitution is untenable.

This it did without even trying to give reasons in its impugned order for the decrease in relation to the respondent's maintenance obligation. This approach contravenes the purport of section 15 of the Maintenance Act in the following respects:

- 47.1. the parents have a joint obligation to support their children;
- 47.2. the parents' respective shares are to be apportioned according to their respective means;
- 47.3. the determination of an amount for maintenance must be fair; and that
- 47.4. all circumstances of the case must be considered.

[48] When regard is had to what the court *a quo* notes in its *ex tempore* judgment, namely, that the R10 000.00 towards maintenance of the children was an all-inclusive amount, one fails to understand why it would have in the result ordered the appellant to pay all the other additional expenses.

[49] In so far as failure by the court *a quo* to take into account the changed living arrangement of the children and taking into account what the court held in *Roos v Roos*

above, I am satisfied that the court *a quo* misdirected itself by reasoning that unless it is the change in the circumstances have been brought about by a court order, same is unenforceable by a court. Accordingly, the court *a quo* should have found that the changes in the living arrangement constitute good cause for at least substitution.

[50] In regard to the argument that the court *a quo*'s order ought to be fair by taking into account all the circumstances of the case pursuant to section 15(3)(b) of the Maintenance Act, I am satisfied that the court *a quo* failed to take into all the relevant and existing circumstances that would have enabled it to come to a fair conclusion. For the court to over-amplify the respondent's monthly obligations and understate the appellant's cannot be countenanced. It would have been fair for the court *a quo* to also factor in both the respondent's off-shore investment and the appellant's expenses to reach a fair payable maintenance. By failing to strike a balance between the parties' respective means and expenses in a fair, just and transparent manner, such conduct constitutes a misdirection on the part of the court *a quo*. It misapplied the law. Contrary to the provisions of section 15 of the Maintenance Act and as relates to her off-shore, it appears the respondent is being allowed to extricate herself of her maintenance obligation at the expense of the appellant. The court *a quo* also failed to take into account the contribution the respondent was receiving by staying with her partner, which omission does not evidence fairness at all.

[51] for the court *a quo* to order the appellant to bear almost 95% of the maintenance expenses of the children is not only unfair but also unequitable. The court *a quo*'s reasons and findings, including its order, do not explain the legally acceptable reasons why they should withstand the scrutiny raised by the appellant.

[52] When regard is had to the respondent's case, she insists that but for the respondent neglecting to pay the R10 000.00 school fees as per the September 2015 order, the arrear amount would not have been existent. This she argues in contradiction of the court *a quo*'s finding that the September 2015 order in respect of the R10 000.00

maintenance payment was an all-inclusive one. Other than that, nothing much turns on her arguments.

[53] In the premises I am satisfied that the court *a quo*'s clarification stands to be set aside in that the Magistrate acted *ultra vires* her powers as provided for by legislation. Furthermore, I am satisfied that the appellant has made out a case that sustains the other two issues he raises in his grounds of appeal.

[54] For the above stated reasons, this court is enjoined to interfere with the court *a quo*'s order and accordingly grants the relief sought by the appellant.

[55] In the result I make the following order:

ORDER

1. The appeal is upheld with costs.
2. The court *a quo*'s order is set aside and substituted with the following order:
 - “2.1. Each party is ordered to pay one half (50%) of the school fees, schoolbooks, school stationery, school uniforms, extra mural activities and extra lessons for Z[....] L[....] and for S[....] A[....] L[....].
 - 2.2. Each party's half share of the fees for schooling, for extra mural activities and for extra lessons is to be paid directly to the relevant service provider.
 - 2.3. The appellant will retain Z[....] L[....] and S[....] A[....] L[....] on his medical aid or hospital plan.
 - 2.4. Each party is ordered to pay one half (50%) of any reasonable excess medical expenses for Z[....] L[....] and for S[....] A[....] L[....].”

L. B. VUMA

ACTING JUDGE OF THE GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered:

A. MAIER-FRAWLEY

JUDGE OF THE GAUTENG DIVISION, JOHANNESBURG

Heard on: 2 November 2021

Judgment delivered: 1 February 2022

Appearances

For Appellant: Adv. A.F. Ashton

Instructed by: SALCO Attorneys Inc.

For Respondent: Ms L[....] T[....] (In Person)