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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 15617/2022

In the matter between:

M[...] O[...]

Applicant

And

R[...] O[...]

First Respondent

DISCOVERY LIMITED

Second Respondent

JUDGMENT DELIVERED: FRIDAY, 05 JANUARY 2024

NZIWENI, J

Introduction

[1] In this urgent application, the applicant applies for an order in terms of section 26 (4) of the Maintenance Act, Act 99 of 1998, (“the Act”) read with section 37 D (1)

(d) (iA) of the Pension's Fund Act 24 of 1956. The applicant seeks to attach the first respondent's members' benefit in his Discovery Classic Retirement Annuity, alternatively, or in addition from the first respondent's Discovery Retirement Optimiser; for the purpose of satisfying arrear maintenance. The facts which gave rise to this case are as follows.

The applicant and the first respondent are married to each other, out of community of property with the inclusion of accrual. There are three minor children of the marriage. The applicant instituted divorce proceedings against the first respondent in late September 2022.

[2] On 06 October 2023, Cloete, J granted an order in terms of Rule 43 ("Rule 43 order"). Amongst others, the Rule 43 order required the first respondent to pay maintenance in respect of the applicant and the children and the amount was set at an amount of R18 000. 00 per month. The first payment for maintenance was on 1 November 2023, and thereafter on the first day of every month. The first respondent failed to pay for the maintenance.

[3] On 16 November 2023, the applicant filed a contempt application. The contempt application sought to declare the first respondent to be in contempt of the Rule 43 order.

[4] On 28 November 2023, at the unopposed hearing of the contempt application, the parties ultimately settled the contempt application, and obtained an order by mutual agreement. I consider it necessary to recite the terms of the order that was granted on 28 November 2023. The order states that:

“ ...

1. The Respondent shall pay to the Applicant, by no later than 17h00 on 28 November 2023, the amount set out below which are currently in arrears in respect of Rule 43 Order granted by the Honourable Ms Justice Cloete on 6 October 2023:
 - 1.1. R 3000.00 in respect of arrear maintenance;
 - 1.2. R24 000.00 in respect of arrear rental;
 - 1.3. R1000.00 in respect of the rental penalty; and
 - 1.4. R3 250.00 in respect of arrear occupational therapy fees for the minor child C[...] R[...] O[...].
2. In the event that the Respondent fails to comply in any respect with the terms of the Rule 43 Order referred to above, the Applicant is granted leave to approach this Honourable Court on the same papers duly supplemented if necessary, on 2 days' notice to the Respondent. . .”

On 8 December 2023, the first respondent launched a Rule 43(6) application seeking reduction in the maintenance amount.

[5] At the time of the hearing of this current application, no amount of maintenance was paid. As a result, the first respondent fell behind on his maintenance payments. Thus, it is common cause that the first respondent still owes arrear maintenance under the Rule 43 order.

[6] Several considerations arise in connection with the application. This is so because the application is strenuously opposed by the first respondent based on the following points:

- The application had been prematurely filed by a day;
- The first respondent cannot afford to comply with the Rule 43 order as Orsom Africa Distributors (Pty) Ltd has been placed under final liquidation. To this end, the respondent has brought an application in terms of Rule 43 (6) for the variation of Rule 43 order.
- The Rule 43 order indicates that in the event of a final order of liquidation of Orsom Africa Distributors (Pty) Ltd being made, this may constitute a material change in respondent's circumstances for purposes of Rule 43 (6).
- Section 26 of the Maintenance Act 99 of 1998 ("the Act), is meant for a recalcitrant defaulter. As it is a drastic measure.
- The first respondent is not a recalcitrant defaulter.

[7] In response, it was contended on the applicant's behalf that the application is ripe for hearing and the requirements of Section 26 of the Act have been met.

[8] The statutory requirements for these applications are found in section 26 of the Act. Section 26 (2) (a) of the Act reads as follows:

"(2) (a) If any maintenance order made under this Act or any order made under section 16(1)(a)(ii), 20 or 21(4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was

made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where any such order was made—

(i) for the authorisation of the issue of a warrant of execution referred to in

section 27(I):

(ii) for an order for the attachment of emoluments referred to in section 28(1); or

(iii) for an order for the attachment of any debt referred to in section 30(1) . . .”

[9] Section 26 (4) of the Act states as follows:

“Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.”

Is the application prematurely filed?

[10] The terms of the Act are plain. Under the Act, such an application may not be brought unless the maintenance order has remained unsatisfied for a period of ten days from the day on which the maintenance amount became payable or any such order was made. (Own underlining). As indicated above, non-compliance with the ten-days waiting period is not admitted by the applicant.

[11] In terms of the Act a maintenance order means any order for the payment, including the periodical payment, of sums of money towards the maintenance of any

person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person.

[12] The order by agreement, did not seek to vary the maintenance order. It is merely stated as to when the first respondent was supposed to make payments in respect of arrears he owed under the maintenance order, granted in terms of Rule 43. Thus, the order of 28 November 2023, was in aid of the enforcement of the Rule 43 order.

The trigger event for initiating the ten-day timeframe

[13] In terms of the order of 28 November 2023, the arrear amount became payable by no later than 17h00 on 28 November 2023. From 28 November 2023 to 19 December 2023, the order of 28 November 2023, has remained unsatisfied for more than ten days after it was issued. However, if the days are calculated from the day of the issuance of the order granted on 28 November 2023 [07 December 2023], the order would remain unsatisfied for less than ten days. Clearly, there was a delay between when the agreed timeframe as to when the amount became payable and the issuance of the order.

[14] The question that aptly arises is whether the clock started running upon the issuance of the order or on the agreed day of payment. When reading the plain

language of the relevant provision of the Act, it becomes clear that the Act envisages two scenarios when the ten-day time frame set forth in section 26 begins to run.

[15] As noted earlier, there is no question that to date the Rule 43 order remains unsatisfied. Concerning the trigger event, it is my firm view that as far as the Act is concerned, the terms of the Act are unambiguous. In the first scenario, the clock starts running from the day the amount becomes payable and the second scenario is from the day such order was made.

[16] The parties reached an agreement as to when the amount in arrears becomes payable. Put otherwise, in the present case, the parties agreed as to when the clock began to run. As mentioned previously, it was strenuously suggested on first respondent's behalf that the ten-day count down did not commence to run until the issuance of the order [07 December 2023].

[17] It should also be borne in mind that the timeframe agreed upon the parties as the date upon which the arrear amount became payable, happens to coincide with the date of the order. It is obvious that this order of 28 November 2023 stipulates when the arrear amount was payable. This makes the order in compliance with the provisions of section 26, as far as the triggering event is concerned.

[18] More importantly, the fact that the issuance of the order was delayed, does not affect the count down as contemplated in the Act, nor in any way delays when

the amount becomes payable as agreed to between the parties. Thus, 28 November is the proper date for the commencement of the countdown of the ten-day period.

[19] Even if I were to err regarding what constitutes the trigger event; I still hold the firm view that the applicant's contention that the payment in terms of Rule 43 order was due on 1 December 2023 thus the earliest date on which this application could be brought was on 14 December 2023; and that the application was duly issued and served on the first respondent on 14 December 2023, cannot be faulted.

Consequently, this application was not brought prematurely as the period for executing the order had expired.

Is it relevant that there may be a possibility that the first respondent cannot afford to comply with the Rule 43 order as Orsom Africa Distributors (Pty) Ltd has been placed under final liquidation?

[20] First and foremost, it is significant to keep in mind that the arrear maintenance that has become due is not by any stretch of imagination future maintenance; but maintenance that is due and payable. Similarly, section 26 (4) of the Act caters for maintenance arrears that had accrued.

[21] No application was brought by the first respondent before the accrual of the arrears to have the Rule 43 order varied. Furthermore, in this application it is not contended on behalf of the first respondent that there are no retirement funds to

satisfy an order in terms of section 26 (4) of the Act. Likewise, the first respondent does not assert that the arrears have been settled.

[23] The application filed by the first respondent in terms of Rule 43 (6) seeks to vary the order that was granted by Cloete J on 06 October 2023. It is of some significance that the Rule 43 (6) application has absolutely nothing to do with arrear maintenance. However, it [the Rule 43 (6) application] may perhaps suggest that the respondent has no other means than the retirement benefits to satisfy the arrear maintenance.

[24] It may be so that a defaulter does not have cash at hand to make him financially able to meet his maintenance obligations. But, in the instant case, the applicant asserts that there are other means to satisfy the arrears. The applicant's claim in this application is predicated on the assertion that the first respondent has funds in the form of retirement annuity to satisfy the arrear maintenance.

[25] There can be no gainsaying that the first respondent is indeed a defaulter. Most importantly, when the application for contempt was brought, the first respondent did not seek to explain the failure to pay the arrears promptly. Similarly, the first respondent did not seek variation of the Rule 43 order before the arrears accrued. Instead, when the applicant brought the application for contempt, seeking enforcement of the Rule 43 order; the parties sought an order by agreement, wherein the first respondent undertook to pay the arrear maintenance on the very same date of the order [28 November 2023 order].

[26] This Court is the first to admit that by all accounts, even a defaulter of maintenance is also entitled to due process. Inasmuch as the first respondent has every right to demonstrate that he no longer possesses the ability to pay maintenance; an application for a variation of Rule 43 order in itself without more is not a good cause for suspending enforcement of arrear maintenance.

[27] The upshot of this is that, in the circumstances of this case the mere fact that there is an impending application for the variation of the Rule 43 order and the fact that the company has been liquidated has nothing to do with this present application for the attachment of the retirement benefits. Even if the only remaining asset to fund the maintenance has been liquidated, that does not mean that this application [section 26 application] is a still born. Of course, I should not be mistaken as saying that inability to pay maintenance is not a defence. A mere inability-to-pay or lack of income does not translate to mean or suggests lack of assets from which to pay the court-ordered maintenance or arrear maintenance.

[28] What is of significance and relevance in this application is the fact that the first respondent has failed to satisfy the Rule 43 order for a period of ten days, and that the first respondent has retirement annuity funds. Given the fact the first respondent is in arrears with his maintenance obligations, and he does not offer other means to satisfy the order, the applicant is left with no other option but to seek the relief sought in terms of section 26. Thus, the existence of the retirement annuity funds

demonstrates an ability on the part of the first respondent to pay the arrear maintenance.

[29] Hence, the applicant seeks attachment of the retirement annuity, and or retirement optimiser. In response to the applicant's request to have the retirement benefits attached, the first respondent asserts that the relief sought by the applicant is a drastic one which is ordinarily reserved for recalcitrant defaulters.

Is the relief sought by the applicant a drastic measure?

[30] It is hard to imagine what would be more drastic than not attaching the only funds that seem to be available to satisfy arrear maintenance.

[31] While there is no settled set of criteria for determining whether a maintenance defaulter is a recalcitrant defaulter or not, the plethora of authorities provide guidelines and guidance. From the myriad of cases, it is clear that a recalcitrant defaulter is someone who callously, persistently and wilfully fails to pay his maintenance obligation.

[32] At the time of this hearing the first respondent's arrear maintenance was in excess of two months. There is no evidence that the first respondent ever actually or attempted to pay his maintenance obligation, since the issuance of the Rule 43 order. This is not even a case where a respondent made sporadic payments. In this instance, a lawful court order, in the form of Rule 43, ordered the first respondent to

pay maintenance. The evidence in this matter evinces that the first respondent has actual knowledge of its terms. Since then, not a single penny was paid towards that maintenance obligation. In my mind, this clearly demonstrates a recalcitrant view of an obligation.

[33] Section 26 has been described as cumbersome. The question that then begs to be asked is: can it be said that the relief that is sought by the applicant is cumbersome? While mindful of the consequential effects of section 26; undoubtedly, section 26 of the Act is a procedural safeguard that is meant *inter alia*, to vindicate the rights of the people who are supposed to receive maintenance, by ensuring that individuals who are entitled to receive maintenance recover it. Section 26 is also meant to ensure that the parent or a partner fulfils his or her actual obligation. See *Magewu v Zozo* 2004 3 All SA 235 (C) at para14 -16.

[34] I am mindful of the fact that the applicant in this application does not seek attachment for future maintenance, as it was the case in *Magewu supra*. I bear in mind that the applicant is also not alleging that the first respondent intends to dissipate the funds to frustrate his maintenance obligations. I have considered the first respondent's submissions carefully. In all the circumstances, the authorities that the first respondent seek to rely on cannot be used to defeat the applicant's claim. In the particular circumstances of this case, I am satisfied that the facts are distinguishable.

[35] I also bear in mind that, for the applicant to succeed in such applications there is no need to meet a higher threshold. Particularly, in such situations where arrear

maintenance has accumulated. The applicant and the children have a right to do everything to make sure they receive what they are rightly due. Section 26 is in no way meant to be onerous or cause hardship for the person who is supposed to pay for the maintenance. To the contrary, it serves *inter alia*, to enforce an obligation that should have been fulfilled already.

Conclusion

[36] The grounds raised by the first respondent to oppose this application rest mainly on technical points. Nevertheless, none of the points raised have any merits. As such they do not withstand any scrutiny.

[37] The applicant has requested that the first respondent should pay cost on the scale as between attorney and client. I am not persuaded that there is a case made out for such punitive scale.

[38] Consequently, I make the following order:

- (1) The second respondent is directed to deduct the amount of R29 500.00 together with interest on the aforesaid amount to be calculated *a tempore mora*, at rate of interest permissible, from the date 01 December 2023 to date of final payment from the first respondent's member's benefit in his Discovery Classic Retirement Annuity (policy or fund number: 856[...]), and /or from the first respondent's Discovery Retirement Optimiser (policy or fund number 882[...])

- (2) The second respondent is directed to transfer the aforesaid amount into the trust account of the applicant's attorney of record, Maurice Phillips Wisenberg.
- (3) In addition, it is directed that in the event that the first respondent fails to timeously comply with any maintenance obligations as set out in the order granted by the Cloete J on 6 October 2023 or any amendment of the order:
 - 3.1 The applicant shall notify the Head of Legal Department of the Second Respondent in writing of the first respondent's failure to comply with the relevant provision(s) of the order, setting out the amount that is due and providing the necessary vouching documentation where relevant;
 - 3.2 The second respondent shall within 5 (five) days of receipt of the notification in 3.1 above, make payments from the Discovery Classic Retirement Annuity (policy or fund number: 856[...]), and /or from the first respondent's Discovery Retirement Optimiser (policy or fund number 882[...]) ("the funds") to the applicant, into a bank account to be nominated in writing by her, of the amount due by the first respondent, in accordance with the provisions of the order;
- (4) In alternative to paragraph 3, the applicant is granted leave to approach this Court, on the same papers, duly supplemented if necessary, for an order directing the second respondent to make the relevant deduction(s) from the funds as set out in paragraph 3;

- (5) It is directed that the deductions by the second respondent from the funds as contemplated herein, shall be allocated proportionally across the subsidiary funds as invested in by the fund.
- (6) It is directed that the second respondent shall be entitled to effect payment from the funds of any tax liabilities that become due by the first respondent to the South African Revenue Service, consequent upon the deductions from the funds as contemplated herein.
- (7) The first respondent shall pay the costs of this application on a scale as between party and party.

**NZIWENI J
JUDGE OF THE HIGH COURT**

Appearances

Counsel for the Applicant:	Adv. JH McCarthy
Instructed by:	MAURICE PHILLIPS WISENBERG.
Ref:	B Preller
Counsel for First Defendant:	Adv. L Van Zyl
Instructed by	JJB ATTORNEYS
Ref:	RYO-004