



**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

|                              |     |
|------------------------------|-----|
| Reportable:                  | /NO |
| Of Interest to other Judges: | NO  |
| Circulate to Magistrates:    | NO  |

Case No. : 259/2018

In the matter between:-

**B K**

Applicant

And

**C K**

1<sup>st</sup> Respondent

**MAGISTRATE B. MLANGENI**

2<sup>nd</sup> Respondent

**MAGISTRATE HMJ BOTHMA**

3<sup>rd</sup> Respondent

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**CORAM:**

MHLAMBI, J *et* MOLITSOANE, J

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**HEARD:**

16 SEPTEMBER 2019

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**JUDGMENT BY**

MOLITSOANE, J

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**DELIVERED:**

17 DECEMBER 2019

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[1] This is application for review of two maintenance orders granted by the Bethlehem Magistrate Court. The applicant and the first respondent were married to each other and two minor children were born. They divorced on the 6<sup>th</sup> October 2016. The order of their divorce incorporated the deed of settlement the relevant terms of which are as follows:

1. The primary residence of the two minor children of the parties shall vest in the applicant;
2. The first respondent shall pay maintenance in the amount of R9 015.00 to the applicant until the minor children attain majority or become self-supporting, whichever occurs earlier;
3. The parties agreed that the maintenance referred to above shall be increased to R11 200.00 per month from the date the applicant delivers a vehicle, *to wit*, Kia Picanto to the first respondent as per clause 4.2 of the settlement agreement;
4. The parties placed it on record that the applicant averred that the amount of the maintenance payable for the minor children was not enough;
5. The first respondent averred that, at that stage he could not afford to pay more than the amount of the above maintenance;
6. The parties agreed that any of the parties shall have the right to approach the maintenance court for the variation of

the order relating to maintenance and that it will not be necessary to prove any change in the circumstances before the application is sought.

- [2] About nine months after the divorce the respondent approached the maintenance court for the variation of the maintenance order from R11 200.00 to R50000 per month for both children. On the 29<sup>th</sup> September 2019, when the application was enrolled, the attorney for the applicant requested an investigation by the Family Advocate to determine if it was still in the best interest of the parties' minor children that the applicant should remain their primary caregiver. For that purpose the case was postponed to the 9<sup>th</sup> October 2017 and the court ordered that the maintenance payment due on the 1<sup>st</sup> October 2019 should stand over until the issue regarding the primary residence of the minor children was resolved. This order of the 29<sup>th</sup> September 2017 staying the payment of maintenance, is the first order the applicant seeks to review and set aside.
- [3] On the remand date, the 9<sup>th</sup> October 2017, following a formal hearing the court *a quo* found in favour of the respondent and ordered the reduction of maintenance in respect of the minor children to R3 764.45 per month per child effective from the 1<sup>st</sup> October 2017. This is the second order the applicant seeks to review and set aside.
- [4] The applicant relies on the following grounds of review:

- a) In terms of s22(1)(b) of the Superior Court Act, 10 of 2013 (the Act) that the 2<sup>nd</sup> Respondent was biased against the applicant in favour of the respondent;
- b) In terms of s22(1)(c) of the Act gross irregularity occurred during the proceedings in that the 3<sup>rd</sup> respondent granted an arbitrary suspension of the maintenance payable by the respondent on the 29<sup>th</sup> September 2017;
- c) In terms of s22(1)(c) of the Act a gross irregularity occurred during the proceedings in that the 2<sup>nd</sup> respondent applied the wrong legal test to 1<sup>st</sup> respondent case in the judgment;
- d) In terms of s22(1)(d) of the Act the 2<sup>nd</sup> Respondent took into account irrelevant evidence which led to the order;
- e) In terms of s22 (1) (d) the 2<sup>nd</sup> respondent did not take relevant evidence into account, and attached too little weight to certain evidence which led to the order.

[5] In these proceedings the respondent raised the following issues in opposition to the granting of the order prayed for:

- 1. Whether the adjudication of the order granted on the 29<sup>th</sup> September has become moot;
- 2. Should the applicant have proceeded by way of an appeal or review process; if not
- 3. Whether the applicant has made out a case for review of the two cases.

**MOOTNESS OF THE ORDER OF THE 29<sup>TH</sup> SEPTEMBER 2019.**

- [6] As alluded above the applicant and the first respondent appeared before court on the 29<sup>th</sup> September 2019 in an application for the variation of the then existing order granted upon divorce. The proceedings were presided over by Magistrate Bothma. Both parties were legally represented. Mr Harrington for the respondent indicated to the trial court that there was uncertainty as to where the children were to reside. He also indicated that the parties had agreed to request the Family Advocate to investigate that aspect. He then proceeded to request the suspension of the order of maintenance pending clarity of where the children were to stay. .
- [7] In turn Mr Botha for the applicant confirmed the arrangements but indicated that he had no instructions as to the suspension of the order. The court granted a postponement and ordered the suspension of the payment of maintenance and further ordered an investigation as to where the children were to stay.
- [8] It is a general rule that a court sitting on appeal or review will be inclined to dismiss an appeal or review where the judgment or the order sought would have no practical effect or result. The court, however, still retains a discretion to hear matters when the interest of justice demand so.
- [9] The applicant was before court when an application for a suspension of the order of maintenance was brought. What is puzzling is the submission by her legal representative that he

had no instructions as to the suspension of the maintenance order when the applicant was present in court. Be that as it may it also transpired that at the time of this appearance the children were to go on holiday with the respondent. It is unnecessary to decide whether the 3<sup>rd</sup> respondent was correct or not in suspending the order in view of the decision I make later.

- [10] Upon granting the final order of variation about a month later, the trial court antedated its order to the 1<sup>st</sup> October 2017. By so doing the court ensured that the suspension of the payment of any due maintenance which occurred as a result of the order of the 29<sup>th</sup> September was catered for, although in a varied form. In this way the court dealt finally with the suspended order. The issue raised has become moot and would have no practical effect in its implementation. This issue should thus be upheld in favour of the first respondent.

### **APPEAL OR REVIEW**

- [12] It is contended on behalf of the respondent that careful reading of the case of the applicant would reveal that her gripe is that the second respondent came to a wrong conclusion on the facts as well as on the law. In my view careful scrutiny of the case of the applicant as pleaded may be susceptible to both review and appeal.
- [13] Firstly the applicant asserts that the order of the 29<sup>th</sup> September 2019 granted by the third respondent was arbitrary. The applicant avers that when the said order was

granted the third respondent failed to provide her with the opportunity to state her case. She asserts that the third respondent further failed to consider the impact of her order on the parties' minor children. Secondly with regard to the final order by the 2<sup>nd</sup> Respondent the applicant alleges 'bias' on his part (2nd respondent). Clearly these allegations would best be dealt with in a review as opposed to an appeal. In order to consider bias one would invariably consider the record itself and may take into account extraneous evidence not contained in the four corners of the record.

- [14] Mere allegation of bias is, however, not sufficient to invoke a review process. The allegation of bias must be substantiated by a proper basis. A factual basis must be fully set out in order to sustain the allegation. In this case the alleged bias is based on a comment by the 2<sup>nd</sup> respondent arising out of the Family Advocate's report. In the judgment the second respondent with reference to the said: report said the following:

*"The view of the Social Worker is buttressed by Family Advocate when she states that the respondent "is more concerned about the money than the emotional well-being of the children."*

The applicant contends that this remark 'coloured' the judgment of the 2<sup>nd</sup> respondent. I am unable to agree. Proper reading of the judgment does not indicate so. The 2<sup>nd</sup> respondent dealt fully with the reasons why he found that the reduction of maintenance was appropriate. Mere allegation of bias does not make a matter reviewable. The applicant has failed to lay a factual basis to sustain the allegation.

- [14] When it comes to the issues raised against the conclusions of the law it is clear that the applicant attacks the correctness of the judgment and its subsequent order. The applicant contends that the 2<sup>nd</sup> respondent committed an irregularity by applying a wrong test to the first respondent's case in his judgment. He further avers that the 2<sup>nd</sup> respondent failed to take into account certain evidence or attached little weight to the evidence while with the same breath he took into account irrelevant evidence in the judgment and the subsequent order.
- [15] It is clear from the reading of the case for the applicant that she challenges the end product of the order made by the 2<sup>nd</sup> respondent. She challenges the outcome made, namely, the reduction in maintenance. She contends that the 2<sup>nd</sup> respondent came to wrong conclusions on the facts and the law. In that respect she ought to have appealed the decision. In the review process the court is more concerned with the process embarked on towards reaching the process. In review proceedings the validity of the decision is the focal point. In my view the applicant should have proceeded by way of appeal in this case. For this reason the application ought to be dismissed. In view of the finding I made it is unnecessary to deal with the third issue in dispute.
- [16] Although the parties did not pursue the issue of jurisdiction before us, it appears that the minor children were no longer within the jurisdiction of this court. Such a determination was

necessary as the applicant's case was also that the expenses of the children were unknown as they had relocated to Gauteng. This matter deals with the best interests of the minor children and of the view that this is one of those cases where this court has to depart from the usual practice to order costs in favour of the successful party. I accordingly propose the following order.

[17] **ORDER:**

1. The application is dismissed.
2. Each party to bear his/her own costs.

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**P.E. MOLITSOANE, J**

I agree and it is so ordered.

M.J. MHLAMBI, J

On behalf of applicant: Adv. B. Bergenthuin  
Instructed by:  
Phatsoane Henny Inc  
Bloemfontein

On behalf of the First  
Respondent: Adv. W. A. Van Aswegen  
Instructed by:  
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## BLOEMFONTEIN