

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

Reportable:	YES/ <u>NO</u>
Circulate to Judges:	YES/ <u>NO</u>
Circulate to Magistrates:	YES/ <u>NO</u>
Circulate to Regional Magistrates:	YES/ <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case number: CA&R 16/2018

Date heard: 26.04.2019

Date delivered: 10.05.2019

In the matter between:-

N[....] Z[....]

Appellant

and

M[....] H[....]

Respondent

Coram: Tlaletsi JP et Phatshoane J

JUDGMENT

Tlaletsi JP

1. On 02 April 2015 the respondent lodged an application for the reduction of the amount of maintenance he was ordered to contribute towards the maintenance of his two children with the appellant in the Magistrate Court for the District of Upington. In terms of the existing order, which was made on 15 August 2013 by the magistrate, he was to contribute an amount of R1 500-00

for his 13 year old daughter. There was at the time already an existing order for him to contribute the amount of R750-00 per month for the other child. The total contribution for the maintenance of the two children was an amount of R2 250-00 payable with effect from 31 August 2013.

2. The respondent sought a reduction of the amount of R1 500-00 to R750-00. The appellant also brought an application for the increase of the respondent's contribution to R1 500-00 for the one child and to pay full tuition fees for the child concerned, whose maintenance he wanted reduced. On 13 February 2018 the court *quo* dismissed both the applications for the reduction and increase, respectively. The appellant is appealing against part of the judgment and order dismissing her application for increase of the respondent's maintenance contribution¹.
3. This matter has a troubled history which is characterised by inexcusable delays. Maintenance complaints are by their very nature urgent as they are intended to cater for the wellbeing of the affected children. Unnecessary delays defeat this object. The two applications were heard together by the maintenance court, presided over by an acting magistrate. An enquiry was scheduled to be heard on 18 August 2015. On this day the parties' legal representatives were not available and was postponed to 21 September 2015. It is not evident from the record what transpired on 21 September 2015.² The next entry on the record is the proceedings of 01 December 2015. On this day the appellant appeared with her private legal representative. The respondent appeared in person and successfully moved an application for the postponement of the enquiry to 07 December 2015 for him to enlist the services of a legal representative.
4. There is once again no entry on the record of what transpired on 07 December 2015. The next entry on the record is the proceedings of 07 March 2017, in which the respondent failed to appear. The appellant's attorney applied for a default judgment against the respondent. In her motivation for

¹ Section 25 of the Maintenance Act 99 of 1998 provided that any person aggrieved by any order made by a maintenance court may within such period and manner as may be prescribed, appeal against such order to the High Court having jurisdiction.

² There are gaps in the record regarding several dates in which the matter was on the roll. Most of the information is provided by the appellant's attorney in her address in support of the application for default judgment.

the application the following came to light:

- 4.1 On 02 November 2015 the respondent failed to attend court and the enquiry had to be postponed to 01 December 2015, which was subsequently postponed to 07 December 2015 for the respondent to engage a legal representative. On this date the respondent changed his mind and decided to conduct his own case. The enquiry was postponed to 16 February 2016 with an order that the respondent make available to the appellant all his documents containing his financial information on or before that date.
 - 4.2 On 16 February 2016 the respondent was absent and tendered a medical certificate indicating that he was indisposed. The enquiry was postponed to 08 March 2016. On this day the enquiry was postponed to 17 May 2016 for the parties to exchange documentary evidence and to arrange a date for holding of the enquiry. The matter was on that day postponed to 02 August 2016 for hearing.
 - 4.3 On 02 August 2016 the evidence-in-chief and cross examination of the appellant was entertained. The enquiry was postponed to 18 August 2016 for its continuation. On this day the maintenance officer was absent as he was attending a course. The respondent was also not available and a medical certificate was tendered on his behalf. The matter was postponed to 25 October 2016 for further hearing. On this day the maintenance officer as well as the respondent were absent and the enquiry was postponed to 24 January 2017. On 24 January 2017 the respondent appeared and the maintenance officer was once again absent. The matter was postponed to 07 March 2017 on which date the respondent was not available.
5. After the appellant's attorney's address to the court on the history of the matter and her submission that the respondent was deliberately delaying the matter, the acting magistrate was not inclined to grant judgment by default and postponed the matter to 15 May 2017 for the maintenance officer and the appellant's legal representative to address her on the evidence that had already been adduced. She further indicated that the application for the

increase of maintenance contributions would be decided on that day.

6. On 15 May 2017 the acting magistrate did not proceed with the application for judgment by default as initially planned. Instead, the respondent was given an opportunity to adduce his evidence and subjected to cross-examination. Following this, the matter was postponed to 26 June 2017 for the respondent to produce further documents in support of some of the expenditure items he disclosed in his evidence. On 26 June 2017 the matter was postponed to 27 July 2017 because the acting magistrate had to attend to other judicial engagements. The maintenance officer who had been handling the matters was not available on 27 July 2017 due to ill health. The matter was postponed to 12 October 2017.
7. It appears that the matter was erroneously reconvened on 10 October 2017 instead of 12 October 2017. Both parties were however present and the matter was postponed to 27 November 2017. On this day further evidence was tendered by the respondent at the instance of the presiding officer. All three parties namely, the appellant, the respondent and the maintenance officer addressed the court on the two applications. The matter was postponed to 05 February 2018 for judgment. The respondent was however directed to provide further documentary information relating to his loan accounts.
8. On 05 January 2018 the acting magistrate had not had the opportunity to go through the documents supplied by the respondent. The matter was postponed to 13 February 2018 on which date the magistrate traversed through the documents with the respondent. Thereafter, the respondent was once again given an opportunity to address the court which he did at length. The appellant's attorney was also afforded an opportunity to address the court. She took issue with the fact that the matter was on previous occasions postponed for judgment and instead, the acting magistrate reopened the respondent's case and admitted further evidence. She declined to make additional submissions to the court.
9. In her judgment the acting magistrate dealt first with the application for reduction brought by the respondent. She recognised that the judgment is being made three years from the day the application was lodged and that in the three year period the respondent ought to have received at least three

salary increases; that a reduction in maintenance contribution would not be in the interests of the two children; that the respondent had ample time to rearrange his financial affairs to enable him to comply with his maintenance obligations without a reduction of his contributions. The acting magistrate further held: "*I think that the increase that you got for 2015, 2016 and 2017 can make up for the maintenance of these children. The court is not going to interfere in that order, the existing order. With regard to the application to increase also Ms Kruger, I am not going to grant any increase.*" (SIC).

10. Having made the above conclusion the court advised the parties to open their communication channel for the sake of the children and urged the respondent to rearrange his financial obligations by *inter alia*, reducing his loan instalments, and do away with several funeral policies in which he covered his extended family members. The latter remark was in response to the respondent's claim that traditionally he had stepped into the shoes of his late father and carried the burden of funeral expenses of his extended family. It therefore worked better for him to take funeral policies for them so that he should not apply for financial loans to cover their funeral expenses.
11. It is significant that the appellant's evidence does not form part of the record of this appeal. Her evidence is also not referred to by the acting magistrate in her judgment. The judgment is also silent on the reasons why the application for the increase in maintenance contributions was dismissed. On 14 February 2018 a notice in terms of rule 51(1) of the Magistrates Court Rules was served on the Clerk of the Court, requesting the acting magistrate to provide *inter alia*, her reasons for the dismissal of the application for the increase of the maintenance contributions. On 02 March 2018 the acting magistrate replied that she stood by her judgment dated 13 February 2018 and had nothing further to add. In my view, this was a missed opportunity by the acting magistrate to reconsider her judgment and provide reasons for her dismissal of the application for the increase of the maintenance contribution by the appellant.
12. Section 16 of the Maintenance Act 99 of 1998 provides, that the maintenance court after consideration of the evidence adduced at the inquiry may *inter alia*, in the case where a maintenance order is in force, make an order in

substitution of such existing maintenance order; discharge such maintenance order or make no order. Absent the evidence of the appellant and there being no reference to such evidence in the acting magistrate's judgment we are unable to conclude that such evidence was considered by maintenance court as directed by section 6 of the Act. It therefore, cannot be said that the acting magistrate arrived at a correct decision.

13. This Court is also unable reconsider the entire evidence that was adduced in the court *a quo* so as to substitute the order of the acting magistrate if need be. Both counsel are *ad idem* that the logical course to follow would be to remit this matter to the maintenance court for a proper enquiry to be held by a presiding officer other than the acting magistrate who heard this matter. Such an enquiry must be disposed of expeditiously regard being had to the interest of the children.
14. Ms Tyuthuza, for the appellant, urged that the respondent be ordered to pay the wasted costs for the proceedings of 18 April 2019 when he sought an indulgence to engage the services of a legal representative, as well as the costs of 23 April 2019 when his counsel asked for further adjournment due to her belated receipt of the brief.
15. It is trite that appeals against the decisions of the maintenance court are considered to be civil proceedings. Costs may be awarded against an unsuccessful party. In **Govender v Maniku**,³ it was held that the correct approach which the court should adopt in regard to the costs of an appeal from a decision of a maintenance court is that there is nothing in the Act which interferes with the discretion vested in the Court of Appeal; that in the exercise of that discretion and because of the special nature of the maintenance enquiry, the Court should consider wider matters than those it would ordinarily consider in an civil appeal as regards of costs.
16. In my view, this is a matter where no order as to costs should be made. There has been an inordinate delay in the handling of the matter in the court *a quo*.
 - After all these delays the judgment rendered by the acting magistrate was inadequate. As a consequence of this, the matter ought to be referred back for rehearing. This cannot be attributed to any of the parties. Awarding costs

³ **Govender v Manikum** 1981(1) SA 1178(W) at 1184 E-G.

against the respondent for the two postponements would be to unfairly punish him. His requests cannot be classified as being unreasonable. They were merely intended to afford him an opportunity to place his case before court. Furthermore, the postponements have had no effect on the status of the matter.

17. Due to the delays already caused in this matter, the Head of the Magistrate Court, Upington, should ensure that this matter is disposed of expeditiously.

18. **In the result the following order is made.**

1. The orders granted by the acting magistrate on 13 February 2018 are set aside.
2. The matter is referred back to the Maintenance Court, Upington, for rehearing before a Magistrate other than the presiding acting magistrate.
3. There is no order as to costs.

LP TLALETSI

JUDGE PRESIDENT

Northern Cape Division, Kimberley

I concur.

V.M PHATSHOANE JUDGE

Northern Cape Division, Kimberley

<u>On behalf of Appellant:</u>	<u>Adv. T Tyuthuza</u> (Elliote Maris Wilmans & Hay Attorneys)
<u>On behalf of Respondent:</u>	<u>Adv. R.M.W Ngakantsi</u> (Matlejoane Attorneys, Kimberley)