

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 50975/2008

In the matter between:

V

V

Applicant

and

S

S

Respondent

JUDGMENT

MAGARDIE AJ:

1. This is an application in terms of Rule 46(1)(a)(ii) for the issuing of a writ of execution in respect of the respondent's immovable property following upon the failure of the respondent to comply with the terms of the divorce settlement agreement which was made an order of this court on 29 October 2010.
2. The crux of the application is that the respondent failed to pay maintenance for the minor child and has been in arrears since the date of the order. It is not in dispute that the respondent failed to pay maintenance for a period of almost five (5) years to date. The minor

child who is the beneficiary of the maintenance payment is currently 6 years old.

3. It appears from the papers before me that as at 17 February 2014, the respondent was in arrears of R306 550.81 thereby prompting the applicant to obtain a warrant of execution against the respondent's movable property. On 22 February 2014, on visiting the respondent's place of abode, it appears the respondent arranged with the sheriff to issue a *nulla bona* return thereby confirming that the respondent had no movable assets to satisfy the amount owed to the applicant.

4. The respondent signed a note, which he handed to the sheriff, confirming that he neither had money nor movables to satisfy the amount of the writ. Further, the said note stipulated that the respondent only had immovable property.

5. After the service of the warrant of execution the Respondent made an application to this court to set aside the warrant of execution. On 11 November 2014 the Respondent's application was dismissed with costs. It appears that the respondent has not paid costs. As at the date of the current application, the respondent was in arrears in the amount of approximately R450 000.00.

6. The basis of the respondent's opposition of this matter is premised on two grounds, namely, the Respondent alleges that there was a non-joinder of Standard Bank Ltd as the bond holder and that the applicant failed to make out a cause of action.

7. During argument, the respondent's counsel correctly conceded that there was no requirement for the applicant to join a bond holder in the process of obtaining a writ of execution against immovable property in terms of Rule 46(1)(a)(ii). It is correct that there is no obligation on an applicant to join the bond holder, in this case Standard Bank Ltd, at this stage; what Rule 46(5) requires, is that a notice must be given to all preferent creditors, which will include the bond holder, after a writ of execution is issued.¹

8. Although a point of non-disclosure of the cause of action was raised, the respondent's counsel did not address this point at all. It must be mentioned that the respondent did not dispute the fact that he was in arrears as asserted by the applicant. For this reason, it is unfathomable how the respondent could even begin to dispute the existence of the cause of action.

9. Mention must be made of the fact that the respondent alleged that he failed to pay maintenance because he did not have the applicant's banking details for a period of two years when the latter was stationed in the United States of America. The respondent's version in this regard is tantamount to cocking a snoot on the applicant and even proceed to the court in this regard. Nowhere in the answering papers or oral submission was I told that the respondent attempted to obtain the applicant's banking details. In addition, the respondent did not say what prevented him to pay the money into the original account furnished to him at the time of the settlement agreement. In any event, logic has it that if the respondent was unable to find the applicant's banking details, he could have put the money in a separate account on a monthly basis whilst attempting to find such banking detail.

10. I am satisfied that the respondent is in wilful breach of the maintenance order and has not even attempted to present any facts to sway me that his failure was not due to any fault on his part.

11. It is apposite to state that section 9 of the Children's Act² (the Act) provides that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied. Section 7 of the Act also provides for various factors to be taken into account in applying the best interest of the child standard.

12. When called upon to exercise a balancing act between the two competing constitutional rights, namely the children's rights in section 28 and the right to housing in section 26 of the

Constitution,³ section 28(2) of the Constitution stipulates that the child's best interests are of paramount importance in every matter concerning the child.

13. There can be no denying that maintenance of a child is an aspect that goes into the best interest of a child. When ordered to provide maintenance for a child, a parent is required to prioritise the interest of such child above all other financial obligations he/she may have. It does not avail a parent to say that he/she does not have money to pay maintenance, whilst at the same time the parent is able to pay for holidays, cars and all else.

14. In this matter, apart from stating that he required time to get money to pay maintenance, the respondent failed to take the court into his confidence by disclosing the nature and extent of his financial hardships. It must be borne in mind that the maintenance amount was agreed between the parties at the time of their divorce; so, it was not an amount forced down his throat. The very fact that the respondent failed to even make the first payment and that such failure persisted for almost five years to date is certainly disconcerting.

15. The respondent offered a once off payment of R100 000.00 towards reducing the arrear maintenance and sought a payment plan for the remainder. I consider the offer of the respondent to be demeaning to the applicant and the minor child. It cannot be that the applicant and the minor child had to wait for almost five years to be promised a once off payment of R100 000.00 and negotiating the payment of the balance owing on the arrears. The respondent's attitude in this regard is in fact consistent with his obstructive and lackadaisical approach to his parental obligations. Such conduct cannot be countenanced by this court. To add salt to the wound, the respondent has neither seen the minor child nor made any attempts to do so for almost five years. Such is consistent with his attitude of failure to pay maintenance.

16. When the respondent informed the sheriff that he only had his immovable property to

satisfy the payment of the arrear maintenance, it was clear that by such conduct the respondent was offering his property for attachment.

17. The respondent also went on a tirade against the applicant accusing her of various forms of shenanigans for example, he accused her of being in cahoots with the sheriff and bribing a pathologist.

18. Having considered the facts before me and various submissions made by the respective counsel, I am of the considered view that the only appropriate remedy is one of granting the relief as sought by the applicant. I do so in full recognition of the respondent's constitutional right to housing. My considered view is that the respondent's constitutional right cannot take precedence of the best interests of the child. Nowhere in the papers before me or during argument advanced by counsel for the respondent has it ever been suggested that the respondent disputes the right of the minor child to maintenance, let alone his obligation to pay for such maintenance.

19. In **Bannatyne v Bannatyne**⁴ it was *inter alia* held that:

"the enforcement of maintenance payments therefore are not only to secure the rights of children, it is also to uphold the dignity of women and promotes the foundational values of achieving equality and non-sexism".

20. The court stated further, in discussing the Maintenance Act, that:

"As reflected in the preamble to the Act, our country has committed itself to giving high priority to the constitutional rights of children. It has provided the legal infrastructure through the Act thereby giving effect to the imperative contained in section 28 of the Constitution. The Act is a comprehensive piece of legislation designed to provide speedy and effective remedies at minimum costs for the enforcement of parents'

*obligations to maintain their children.*⁵

21. Having taken account of the respondent's revolting attitude towards the applicant and the minor child as well as his elaborate efforts aimed at frustrating compliance with his maintenance obligations, it cannot be said that the applicant should be disadvantaged insofar as costs are concerned. In fact, I take a dim view that after the respondent arranged for a *nulla bona* return with the sheriff, it was again the respondent who decided to approach the court to set aside the writ of execution. The respondent's application in that regard was dismissed with costs. In this court, the respondent fervently opposed the application against him, even going to an extent of disputing the existence of a cause of action against him despite his admission that he had failed to pay maintenance. I also take into account the fact of the respondent's failure to pay maintenance from the date the divorce settlement agreement was made an order of court. The respondent has not even demonstrated any shame upon himself for having even required the applicant to submit the minor child for paternity test and same having confirmed that he was indeed the father, he persisted with his attitude of depriving the minor child of care and maintenance.

22. When all is considered, I am of the view that the applicant has made out a proper case for the relief sought in the Notice of Motion. In the result, the application succeeds and I make an order in accordance with prayers 1 and 2 of the Notice of Motion.

MAGARDIE AJ

1 Neveling v Reichmans (Pty) Ltd & Another 2014 JDR 1809 KZP.

2 Act 38 of 2005 as amended

3 Act 108 of 1996 as amended.

4 **2003 (2) SA 363 (CC).**

5 ~~Apr~~a 25.