

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Edited	YES/NO



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

COURT A QUO: 61/2021
COURT IN CASU: CA&R 68/23
DATE DELIVERED: 26 JANUARY 2024

Ex parte:

DPP, NORTHERN CAPE

In re:

THOMAS, CENTRICIA GOMOLEMO

Applicant

and

BALEPILE, GOITSEMODIMO GODFERY

Respondent

Coram: Nxumalo J

JUDGMENT

NXUMALO J:

1. This matter has been referred to me as a so-called special review of the court *a quo*'s impugned default order against the respondent *a quo*, dated 21 July 2022. The referral is at the behest of the Director of Public Prosecution, Northern Cape.
2. The relevant background facts pertaining to this matter may be surmised from the opinions of the learned Acting Chief Public Prosecutor, Upington Cluster, Mr AC Damarah and the Chief Magistrate, Mr OM Krieling. It is therefore not imperative to repeat same here, suffice it only to point out that it appears to be common cause that the impugned order was erroneously granted by the said court, in the absence of the respondent *a quo*.
3. The learned Chief Magistrate in sum is of the opinion that, regard being had to the facts and circumstances of this case, the respondent should be advised to file an application to set aside the impugned order in terms of Section 18(4) of the Maintenance Act 99 of 1998.¹ In the premise, he maintains that it was therefore not necessary to send the matter on special review at this stage.
4. For his own part, Mr Damarah is, in sum, of the opinion that even though Section 18 provides for a procedure which the respondent may follow to set the impugned order aside, same does not find application in this instance. According to him, this is simply so because the learned Magistrate had no "*locus standi*" to deal with the matter and the impugned proceedings were not in accordance with justice.
5. That it therefore follows that the matter falls to be submitted for special review for the default order to be set aside and be referred back to the relevant Maintenance Officer to conduct a proper investigation in terms of the Act.
6. *Locus standi* in our law concerns the sufficiency and directness of a person's interest in the litigation to be accepted as a litigating party. It is also related to

¹ Hereinafter referred to as "*the Act*".

the capacity of a person to conclude a jural act.² It does not concern the jurisdiction of a court.

7. It is so that every Magistrate Court is a Maintenance Court within its area of jurisdiction for the purposes of the Act; regard being had to Section 3 thereof. Jurisdiction in this context means the power invested in a court by law to adjudicate upon, determine and dispose of a matter.³
8. Section 18(4)(a) of the Act, expressly and unambiguously authorises a person in respect of whom a Maintenance Court has made an order by default to apply to it for the variation or setting aside of the impugned order. Section 18(4)(b) of the Act, for its own part, expressly and peremptorily requires the said application to be made in a prescribed manner within 20 days after the day on which the person became aware of the order by default or within such further period as the Maintenance Court may, on good cause shown, allow.
9. Any person who wishes to make an application under Section 18(4)(a) of the Act, is required to give notice of his or her intention to make the application to the person who lodged the complaint, which notice shall be served at least 14 days before the day on which the application is to be heard.⁴ The Maintenance Court, for its own part, is empowered to call upon the person who has made the application to adduce such evidence, either in writing or orally, in support of his or her application as it may consider necessary. The person who has lodged the complaint may, in turn, adduce such evidence, either in writing or orally, in rebuttal of the application as the Maintenance Court may consider necessary.
10. Of significance is that Section 18(6) of the Act contemporaneously permits any person in whose favour an order by default has been made to consent in writing to the variation or setting aside of such an order. The consent in writing

² *Gross v Pentz* 1996 (4) SA 617 (A); see also *Jacobs v Waks* 1992 (1) SA 521 (A) p. 534D.

³ *Communication Workers Union and Another v Telkom SA Ltd and Another* 1999 (2) SA 586 (T).

⁴ Section 18(4) (c) of the Act.

shall be handed in at the hearing of the application for the variation or setting aside of the order by default.

11. It is thus only after consideration of the evidence, that the Maintenance Court may make an order confirming the order by default referred to in Section 18(2)(a) of the Act; or vary same, if it appears to it that good cause exists for such variation; or set aside same, if it appears to it that good cause exists for such setting aside, and convert the proceedings into a maintenance enquiry.⁵
12. Whilst it is conceded that rules, like maxims, are not all-embracing but admit of modifications and exceptions, and whilst there are several cases where, although a statute created a new duty or obligation and provided a particular remedy, such remedy would be considered by our Courts to be merely cumulative. It is so, that whether on the creation of a new statutory duty, the new remedy likewise created by statutes is to be regarded as sole and exclusive or cumulative, depends upon the scope and meaning of the particular statute. It is a question of the intention of the Legislature.
13. In ***South African Maritime Safety Authority v McKenzie*** 2010 (3) SA 601 (SCA), thus:

“[16] Where a statute creates both a right and a means for enforcing that right the position is that:

‘We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded.’

⁵ Section 18(5) of the Act.

If on a proper interpretation of the statute in question the legislature has confined a person harmed by a breach of the right conferred therein to the statutory remedy, then resort to other means of enforcement is excluded. Accordingly, both the scope of the right itself and the means of enforcing that right are determined by the intention of the legislature as ascertained on a proper interpretation of the legislation."⁶

14. In **National Industrial Council of the Leather Industry of SA v Parshotam & Sons (Pty) Ltd** [1984] 3 All SA 25 (D), the court aptly observed thus:

*"...it is a general rule of construction that if it be clear from the language of a statute that a legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy. An exception to this general rule is, however, found in the right of the court to grant (unless the legislature has expressed a contrary intention) an ancillary remedy by way of interdict. (Madrassa Anjuman Islamia v Johannesburg Municipality 1917 AD 718.)"*⁷

15. In **Madrassa**, the court observed:

"Now there is abundance of authority in the English Courts for the proposition that, as a general rule, where a Statute, as here, creates a special obligation and prescribes special remedies, no other remedy is available. This rule was laid down by Lord Tenterden in Doe v Bridges (1 B. & Ald. 847).

16. It is so that it is not clear how it came about that the impugned order be granted, as there are no records of proceedings of that day made by the presiding Magistrate. It is also so that, according to Mr Damarah who postponed the matter in his capacity as the Maintenance Officer, at all material times hereto there was no application whatsoever by him for an order by default either, serving before the learned Magistrate.

⁶ Emphasis supplied.

⁷ Emphasis supplied.

17. It is further so that the Chief Magistrate is of the view that some irregularities may have occurred in this matter and that the impugned order might have been erroneously granted because the respondent was present earlier and later excused.
18. It can be deduced from the foregoing that the Act expressly and peremptorily prescribes special remedies for persons against whom Maintenance Courts have made orders by default to apply to the said courts for variation or setting aside of the said orders. Put differently, on a proper interpretation of the Act, it is clear from its language that the Legislature has confined a party who seeks to impugn an order granted by default to the particular remedy contemplated in Section 18 of the Act.
19. It is only after consideration of the evidence that the Maintenance Court may determine these permutations and make an order either confirming the order by default referred to in Section 18(2)(a) of the Act; or vary same, if it appears to it that good cause exists for such variation; or set aside same, if it appears to it that good cause exists for such setting aside, and convert the proceedings into a maintenance enquiry. I am unfortunately not in a position to do so.
20. Everyone is equal before the law and has the right to equal protection and benefit of the law.⁸ The parties in this matter have the right to have their dispute resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.⁹
21. I am therefore of the considered opinion that regard being had to the scope and meaning of the Act, the intention of the Legislature was to create a new remedy for persons against whom Maintenance Courts have made orders by default to apply to the said courts for variation or setting aside of such orders.

⁸ Section 9 of the Constitution of the Republic of South Africa, 1996.

⁹ Section 34, *ibid.*

ORDER:

22. In the premise:

1. THE SPECIAL REVIEW APPLICATION IS HEREBY REFUSED.



JUDGE APS NXUMALO
HIGH COURT OF SOUTH AFRICA
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