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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case NO: A2923/005472

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
19 AUGUST 2024 _____	
DATE	SIGNATURE

In the matter between:

L[...] N[...]

Appellant

and

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

Respondent

ORDER

1. The appeal is upheld with costs.
2. The order of the maintenance court dated 12 December 2022 is set aside and replaced with the following:
 - “2.1 The respondent, Mr L[...] N[...], is ordered to pay an amount of R 6000 per month (R3000 per child) towards the maintenance of the two minor

children with effect from 20 August 2024 and every succeeding month until the children are self-supporting.

2.2 The said amount shall be paid into the bank account of the Applicant at Standard bank, Account Number 3[...]

2.3 The respondent is ordered to pay 50% of the children's monthly school fees from 20 August 2024."

3. The attachment of the appellant's 50% share of the pension fund held with Momentum (member number: 3[...]) in the sum of R 143 565.50, is set aside.

4. JAFS Maintenance and Other Employers and Individuals (JAFS M OE &I) being the name of the public recipient at any ABSA, FNB, NEDBANK, and STANDARD BANK with reference number 10002207533, is directed to pay the balance of the monies attached in terms of the court order of the Booyens Magistrate Court, dated 12 December 2022, over to the appellant's attorneys, Ramoromisi Attorneys' Trust Account within 7 days from date of order.

5. To the extent that the proceeds of the sale of the immovable property have not yet been paid over to JAFS Maintenance and Other Employers and Individuals (JAFS M OE &I), the bond cancellation Attorney (JVE Attorneys) are hereby ordered to pay any share due to the appellant (Mr. L[...] N[...]) over to Ramoromisi Attorneys Trust account within 7 days from date of order.

JUDGMENT

WINDELL, J

Introduction

[1] This is an appeal against the judgment of the Booyens Magistrates Court (Magistrate Mr S. Mkata), dated 12 December 2022, in which the appellant was

ordered to pay future maintenance to the respondent in favour of their two minor children, aged 9 and 11 years.

[2] The parties divorced in August 2022. In terms of the settlement agreement that was made an order of court, the joint estate had to be divided and maintenance for the minor children was referred to the maintenance court. It was also agreed that:

1. The appellant is entitled to 50% of the respondent's interest in the pension fund (Alexander Forbes Pension Fund) as at date of divorce.
2. The respondent is entitled to 50% of the appellant's interest in the pension fund (Momentum Pension Fund) as at date of divorce
3. The immovable property that is owned by both parties to be sold and the proceeds to be used to settle the bond. The remainder of the funds to be equally shared between the parties.

[3] During September 2022 the respondent approached the Booysens Magistrate's Court to apply for maintenance on behalf of the two children. She sought a monthly contribution of R6000 (R3000 per child) in respect of maintenance, as well as a contribution towards school uniforms, stationery and sport expenses.

[4] The parties appeared before the court a quo on 2 December 2022 for a formal enquiry in terms of section 10 of the Maintenance Act 99 of 1998 (the Act). At the time the appellant had received an amount of R646 189.58 which represented 50% of the respondent's pension fund. The house had been sold, and it was estimated that the proceeds would amount to R521 574.71. Each of the parties would thus receive an amount of R260 787 as soon as the transaction was finalized. The appellant's pension fund had not yet been cashed in as the appellant had been retrenched by his employer, the South African Airways (SAA), and there was an arbitration pending seeking, inter alia, his reinstatement. The value of the appellant's pension fund at the time of the divorce amounted to R287 131.10. Each party would therefore receive an amount of R143 565.50.

[5] The respondent indicated that there was an amount of R36 988 outstanding for the school fees for the year (2022). She also stated that the appellant had not been contributing to the school fees or the maintenance of the children for an

extended period. The appellant proposed that a sum of R300 000 be attached from his bank account for future maintenance (equivalent to R8000 per month). Additionally, he offered to pay the children's school fees for the next three years. After enquiring about the money available in the appellant's bank account, the court a quo made an order attaching an amount of R36 988.00 from the appellant's bank account and ordered that it be paid directly to the school.

[6] On 10 December 2022 the court a quo continued with the financial enquiry in terms of section 10 of the Act and the evidence of both parties was heard. It then made the following order:

“36.1 The Respondent is ordered to pay a monthly amount of R13 769.66 in respect of maintenance of his two minor children with effect from the 20th of December 2022 and thereafter on the 20th day of each and every succeeding month until the children are self- supporting.

36.2 The said amount shall be paid into the bank account of the Applicant at Standard bank, Account Number 3[...] as set out hereunder or as a competent court may determine.

36.3. In order to give effect to the order in 36.1 above, an amount of R526 048.92 or so much as may be available held in account 2[...] and one of R28 324.21 or so much as may be available held in account number 0[...] at Standard Bank are hereby attached and Standard Bank is hereby ordered to pay the said amounts to JAFS Maintenance and Other Employers and Individuals (JAFS M OE & I) being the name of the public recipient account at any ABSA, FIRST NATIONAL BANK, STANDARD BANK OR NEDBANK with reference number 10002207533 forthwith for the future maintenance of the children.

36.4 The Bond Cancellation Attorneys, (JVE Attorneys) are hereby ordered to pay any share due to the Respondent (Mr L[...] N[...]) from the proceeds of sale of the immovable property of the joint estate on cancellation of the bond and on receipts of such funds, and pay same to JAFS Maintenance and Other Employers And Individuals (J OE & I) being the name of the public recipient account at any FIRST NATIONAL BANK, STANDARD BANK OR NEDBANK reference number 10002207533 for the future maintenance of the children.

36.5 Furthermore, in terms of Section 37A(1) of the pension Fund Act and Section 26(4) of the Maintenance Act, the current 50% share of the Respondent (Member Number 3[...]) in the sum of R143 565.50 or any greater amount that may have accrued which is an asset accruing to the estate of the Respondent is hereby attached and Momentum pension fund is hereby ordered to pay the said sum to JAFS Maintenance and Other Employers And individuals (JAFS M OE & I) being the name of the public recipient account at any ABSA, FIRST NATIONAL BANK, STANDARD BANK OR NEDBANK forthwith with reference number 10002207533 for the future maintenance of the minor children.”

[7] The above orders had the ultimate effect that the appellant was divested of all his funds in his two banking accounts, as well as of the funds that were due to him in terms of the prospective sale of the parties' property. It also left him with no money to maintain himself.

[8] The appellant seeks an order setting aside the maintenance order and replacing it with an order to pay maintenance in the sum of R3 000.00 per month per child. He also seeks an order that the respondent pay the costs of the appeal.

The maintenance enquiry

[9] At the time of the maintenance enquiry the respondent was employed at Standard Bank whilst the appellant was unemployed. The appellant lost his employment at SAA because of retrenchment. He received a retrenchment package of R170 000, which he used to settle some of his debts and to purchase a motor vehicle (a bakkie) for the sum of R92 000. He testified that he was utilizing the bakkie to generate an income of approximately R1000 per month. At this stage the funds holding under the appellant's banking accounts had already been frozen by the court a quo.

[10] The children reside with the respondent. She stated that her gross monthly income was R74 803 and her nett salary was R48 803. The respondent and children's monthly expenses were approximately R33000, with the exception of

clothes, school uniforms, sports expenses and textbooks, which she buys seasonally. The court a quo allocated R20 478.38 to the children's expenses.

[11] The appellant was solely asked by the court a quo regarding the amount of money he had received since his retrenchment and the purpose for which it was spent. It did not enquire about the appellant's monthly expenses or the items he required to maintain himself.

[12] After hearing both parties the magistrate stated that he *"had to determine each party's legal liability towards the maintenance of each child and on determination thereof, consider how, and from where such maintenance will be paid by the unemployed respondent for future benefit of the two minor children"*. He subsequently found that:

1. The appellant had *"assets in the form of capital value in the sum of R930 400.99. The monthly value amount which the respondent [the appellant] is entitled to when the amount is capitilized is R77 533.41"*.
2. The respondent had *"assets in the form of capital value in the sum of R404 352.86 plus her monthly nett salary of R48 976.43 which totals to R453 329.29. The monthly value amount which the applicant [the respondent] is entitled to when the amount is capitilized is R37 777.44"*

[13] It is difficult to understand the magistrate's methodology for calculating these figures. As best as could be discerned he took into account the appellant's remaining balance in his two bank accounts, which was approximately R526 048.13. This amount was the remainder of the 50% he received from the respondent's pension fund, minus the R36 988 that was attached for school fees, plus the appellant's proceeds from the house which he had yet to receive (R260 787), as well as his 50% of his pension funds (R143 565). This amounted to R930 400. He then divided the sum by 12 months and concluded that the appellant had a monthly amount of R77 533 available to support the children.

[14] When it came to the respondent however, the court a quo seemingly took into account her entitlement to 50% of the appellant's pension fund (R143 565), the

proceeds of the sale of the house (R260 787), and one month's salary (R48 976.43). He then divided the total amount by 12 months and concluded that the respondent had a monthly amount of R37 777 available to support the children.

[15] Based on these calculations the appellant had twice the monthly available amount as the respondent. Consequently, the magistrate concluded that the respondent should bear 32,76% of the children's expenses and the appellant 67.24%. This amounted to R6708 and R13769 respectively. It only takes a moment to realize that these calculations made no sense at all.

[16] Nevertheless, the magistrate did not conclude his investigation at that point. He then calculated that it would take 180 months for the children to reach the age of majority. The liability of the appellant was then calculated as R13 769 x 180 months amounting to R2 478 538. He declared this to be a fair and reasonable formula.

[17] The court a quo continued to find that the respondent *"caused the deterioration of his financial circumstances because he is unemployed and does not appear to be keen to be finding employment except relying on the seldom hiring of his bakkie and hoping to survive"*. The court then attached everything the appellant had in the bank, as well as his portion of the sale proceeds, as well as 50% of his pension fund. As previously stated, the order left the appellant without any money at all to support himself.

[18] This conclusion was reached by the court a quo, despite the absence of any evidentiary support. It also did not consider the fact that the appellant was placed in a Training Lay-off Scheme by SAA after his retrenchment, which meant that he could be recalled to work.

[19] It is evident from the transcribed record that the magistrate conducted a thorough examination of the respondent's monthly expenses but did not do the same for the appellant's. He also appears to have overlooked or given less consideration to additional significant facts when assessing the appellant's capacity to provide maintenance for his children, including future maintenance. These facts are discussed below.

[20] Firstly, the appellant was unable to cash out his pension fund due to the fact that he was placed in a Training Layoff Scheme. This was due to the likelihood that he could be recalled to his previous position if the situation at SAA changed. Additionally, the arbitration related to his retrenchment and potential reemployment was still pending. He could receive his full pension only if and when he was taken off the Training Layoff Scheme. The respondent was however entitled to claim her half-share of his pension in accordance with the divorce decree. Despite this, she elected to not claim her share.

[21] Secondly, the appellant utilised the retrenchment package he received from SAA to settle his obligations that had accrued during his unemployment and to purchase a vehicle in an effort to generate an income. He testified that he was surviving from handouts from family and friends and the little amount of money that he received from renting out his bakkie.

[22] Thirdly, the respondent proposed contributing half of the funds in his bank accounts towards the children's maintenance over a three-year period. He also offered to pay the children's school fees for the next three years in advance. He stated that he was confident that he would secure employment within the next three years to continue providing for his children.

[23] Lastly, the appellant intended to acquire a residence for himself with his portion of the proceeds from the sale of the parties' property. This would enable him to adhere to the parental plan that the parties had agreed upon.

[24] It is beyond dispute that the appellant has and will continue to have a legal obligation to support his children, both now and in the future. However, the law mandates that this obligation be allocated based on the respective financial resources of each parent. The court a quo paid lip service to this principle and would certainly have reached a different conclusion if it had considered these additional facts.

[25] Section 26 (4) of the Act provides for the attachment of a member's retirement benefits or interests for the purposes of securing maintenance that is due or outstanding. In *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others*,¹ the court ordered that the retirement funds of the maintenance creditor be retained in order to make an equitable and proper provision for the support of the children. In this case, the provident fund member had resigned in order to avoid paying child maintenance, and the court rightfully took a dim view of this conduct.

[26] The appellant's situation is different in that he did not resign from his position solely to escape the responsibility of supporting and maintaining his children. His employment was terminated as a result of a retrenchment, which was not his fault. Additionally, there was no factual basis to infer that he intended to forgo providing for his children. In fact, he proposed that R300 000 be withdrawn from his bank account to cover future maintenance and education fees.

[27] Furthermore, in *Mngadi* above, the court granted an anti-dissipation interdict to prevent the recalcitrant party from dissipating their retirements funds in order to undermine the maintenance claim. No indication has been provided by the respondent or the court that the appellant had any intention of dissipating his assets with the ultimate goal of evading the payment of maintenance for his children in the present or the future.

[28] Similarly, in *Magewu v Zozo and Another*,² the first respondent's retirement funds were attached to secure the future maintenance of his child under circumstances where the first respondent had been retrenched and had a history of avoiding maintenance. The first respondent could therefore not be trusted to abide by the court order for maintenance.

[29] The appellant has not disregarded any prior maintenance orders that were issued in relation to his children. The maintenance proceedings were conducted in accordance with the settlement agreement that was included in the divorce order.

¹ *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* [2003] 7 BPLR 4870 (D) at 4874.

² [2004] 3 All SA 235 (C) at paras 21 and 24. See also *Soller v Maintenance Magistrate of Wynberg and Others* 2006 (2) SA 66 (C) (4 November 2005) at para 8.

The appellant testifies that he had been providing financial support and maintenance for his children during the period following the divorce and prior to the maintenance proceedings. Consequently, the order that attached all current and future funds and proceeds to the appellant's name did not have any basis. Additionally, an applicant who is requesting the attachment of a party's funds for future maintenance must demonstrate a history of neglecting one's maintenance obligations. With respect to the appellant, this was not the case.

[30] Furthermore, in *Baart v Malan*,³ it has been held that the custodial parent may not claim so much maintenance for the child that the non-custodial parent retains no income. In *Baart*, the respondent undertook to pay her entire monthly salary to the custodial parent. The court held that such agreement deprived her of any material benefit from her employment and that such agreement was unconscionable and contrary to public policy.

[31] Ultimately, the orders made by the court *a quo*, not only overlooked his personal circumstances, but were overly broad, unconscionable, and resulting in an inequitable outcome for the appellant.

[32] In the first instance, the court erred in its conclusion that the appellant was more liable than the respondent when evaluating the respective liabilities of the parties for maintenance. The appellant's unemployment for an extended period following his retrenchment, which persisted during the maintenance proceedings, was entirely disregarded by the court. The court also neglected the fact that the respondent had earned significantly more than the appellant, and was, as a result, more liable in aggregate terms for the children's maintenance than the appellant.

[33] The court appeared to be incensed by the appellant's exercise of his right to receive a portion of the respondent's pension, which was derived from the divorce decree. The court went so far as to state that the appellant was benefiting from the proceeds of his marriage. This reasoning was deeply flawed, given that the parties were married in community of property, and the divorce decree ordered an equal

³ 1990 (2) SA 862 (E) at page 162.

division of the joint estate. Both parties were entitled to half of the estate, so there was nothing improper about the appellant claiming his share of the respondent's pension, even if it was ultimately used to support his children under any maintenance agreement or order.

[34] The court appears to have overlooked the fact that the respondent had the right to claim her half-share of the appellant's pension at the time of the divorce in its analysis. This is despite the fact that the appellant was a participant in a Training Layoff Scheme, which guaranteed that his pension or a portion of it would be retained in the event that he was recalled to his previous position. The respondent declined to exercise this privilege, thereby forfeiting funds that she could have allocated to the children's maintenance.

[35] When considering the orders of the court a quo in their entirety, it is evident that the court's orders effectively amounted to a punitive measure against the appellant, thinly disguised as an 'appropriate and equitable' maintenance order. These orders resemble a forfeiture order typically included in a divorce decree, aimed at penalizing the party deemed responsible for the breakdown of the marriage by stripping them of their share of the matrimonial assets as punishment for their alleged misconduct during the marriage.

[36] I am satisfied that the court a quo misdirected itself on the facts and the law. In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the maintenance court dated 12 December 2022 is set aside and replaced with the following:
 - “2.1 The respondent, Mr L[...] N[...] is ordered to pay an amount of R 6000 per month (R3000 per child) towards the maintenance of the two minor children with effect from 20 August 2024 and every succeeding month until the children are self-supporting.
 - 2.2 The said amount shall be paid into the bank account of the Applicant at Standard bank, Account Number 3[...]
 - 2.3 The respondent is ordered to pay 50% of the children's monthly school fees.”

3. The attachment of the appellant's 50% share of the pension fund held with Momentum (member number: 3[...]) in the sum of R 143 565.50, is set aside.
4. JAFS Maintenance and Other Employers and Individuals (JAFS M OE &I) being the name of the public recipient at any ABSA, FNB, NEDBANK, and STANDARD BANK with reference number 10002207533, is directed to pay the balance of the monies attached in terms of the court order of the Booyens Magistrate Court, dated 12 December 2022, over to the appellant's attorneys, Ramoromisi Attorneys' Trust Account within 7 days from date of order.
5. To the extent that the proceeds of the sale of the immovable property have not yet been paid over to JAFS Maintenance and Other Employers and Individuals (JAFS M OE &I), the bond cancellation Attorney (JVE Attorneys) are hereby ordered to pay any share due to the appellant (Mr. L[...] N[...]) over to Ramoromisi Attorneys Trust account within 7 days from date of order.

L WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

I agree

A P DEN HARTOG
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Delivered: This judgement was prepared and authored by the Judges whose name are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 August 2024.

APPEARANCES

Counsel for the Appellant: Advocate. T. Qhali

Instructed by:	Ramoromisi Attorneys
Counsel for the Respondent:	Mr J. Gwebu
Instructed by	Madlela Gwebu Mashamba Attorneys Inc.
Date of hearing:	30 April 2024
Date of judgment:	19 August 2024