

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal case number: A181/2024

Lower Court Case Number: 3312022/MAI000048

C L

APPELLANT

and

Z L

RESPONDENT

Coram: Wille, J et Kholong, AJ

Heard: 11 October 2024

Delivered: 21 October 2024

Case Number: 16530/24

JUDGMENT

WILLE, J

INTRODUCTION

[1] This is an appeal from the lower court about the maintenance payable by the appellant ('CL'). The lower court (the 'maintenance court') issued an order in favour of the respondent ('ZL') concerning the maintenance of their two minor children. Initially, the parties had entered into a settlement agreement, culminating in an order by the High Court (the 'high court').¹

[2] ZL advanced that CL failed to meet the increased needs of their minor children and sought a substitution and variation of the maintenance order. By contrast, the CL sought a reduction in the amounts payable. The maintenance court increased the monthly maintenance payable by CL, including additional obligations for school fees and orthodontic expenses.²

[3] CL's grounds of appeal primarily focus on the assertion that no '*good cause*' existed for the variation of the original maintenance order, that his financial position had deteriorated, and that the maintenance court exceeded its powers in granting relief beyond what was initially requested by ZL. The appeal ground advanced that the financial position of CL had deteriorated was challenging to follow as 'affordability' by CL was conceded and not placed in issue during the trial. CL was legally represented in the maintenance court, and 'affordability' was not disputed.³

BACKGROUND AND CONTEXT

[4] CL and ZL were married, and during the subsistence of their marriage, two minor children were born (these children are still minors). They were divorced about five years ago. They entered into a settlement agreement that was made an order of court by consent. Following the terms of the settlement agreement, the parties agreed that CL would pay the following maintenance obligations regarding the minor children: (a) an amount of R7500,00 per month per child (without deduction or set-off); (b) this amount

¹ *This happened about three years ago and this was the order which sought to be varied and substituted.*

² *These issues were the two main considerations in this appeal.*

³ *It was common cause that affordability by CL was not an issue in dispute.*

would cover the minor children's expenses, including food, vitamins, clothing, activities, outings, housing, internet, security, educational costs, and medical aid, and (c) certain 'variable' expenses in the amount of R10,520.00.⁴

[5] Finally, the settlement agreement provided that the maintenance payable concerning the children was subject to an annual inflationary increase. ZL was required to retain the minor children on her medical aid, and the instalment in respect of the children's medical aid would be paid from the cash component of the maintenance paid by CL.⁵

[6] The application for the variation in the maintenance court at the instance of ZL was undoubtedly triggered by an alleged failure by CL to pay the monthly variable expenses. Further, a dispute arose in connection with the payment of the educational costs of the minor children as CL claimed that these expenses were included in the cash component of the monthly maintenance payable to ZL.⁶

VARIATION AND SUBSTITUTION

[7] ZL contended that a globular monthly maintenance amount of R32,303.50 for the minor children was required. She calculated that CL's maintenance liability should amount to R16,151.75 per month per child, considering the actual expenses of the minor children, which she carefully recorded in her variation application.⁷

[8] This amount included R5,500.00 per month for school fees and, most importantly, the variable amount of R10,520.00 per month. CL was paying (according to ZL) the sum of R19,471.00 per month for the children, which was R15,252.00 less

⁴ These expenses were not permanent and could be reviewed annually (this is where the uncertainty first arose).

⁵ There was an increase in the medical costs of the minor children as especially orthodontic costs of one of the children.

⁶ The educational costs of the children increased dramatically.

⁷ ZL made a complete disclosure with specific details.

than what ZL alleged to be CL's actual maintenance liability. having regard to the increased expenses and needs of the children.⁸

[9] In her variation and substitution application, ZL sought the following relief: (a) that CL be ordered to pay maintenance of R16,151.75 per month (per child) and (b) that CL be ordered to pay other contributions like the children's school fees, school curriculum, school stationery, school clothes and shoes, sports uniforms and orthodontist costs. The issue of the orthodontist costs was regrettably a hotly disputed and contested issue between CL and ZL.⁹

[10] ZL contended that no 'good cause' existed for substituting the extant maintenance order because ZL's financial position had improved since their divorce. CL instituted discrete proceedings seeking a substitution of the extant divorce order to vary the maintenance amount payable. CL sought an order: (a) that the cash component of the maintenance order be reduced to R3,500.00 per month (per child) and (b) that he be liable for the children's school fees and medical aid premium.¹⁰

THE ORDER BY THE MAINTENANCE COURT

[11] The matter proceeded to trial with *viva voce* evidence from CL and ZL. After hearing the evidence and argument, the maintenance court issued the following order: (a) that the extant order be substituted; (b) that CL pay maintenance of R15,190.00 per month (per child); (c) that in addition, CL to pay the children's educational expenses (which included school fees, books, clothes and stationery); (d) that CL pay the children's orthodontist expenses insofar as ZL's medical aid does not cover these expenses and, (e) that the order would have retrospective effect.¹¹

RELEVANT EVIDENCE

⁸ *The educational expenses increased tenfold.*

⁹ *CL took the position that these costs were unnecessary.*

¹⁰ *The undisputed evidence was that ZL was now living with her parents to manage her financial affairs.*

¹¹ *With effect from 1 November 2023.*

[12] CL contended that ‘affordability’ was not an issue on his part and, therefore, did not disclose or rely on any documents. In addition, when CL chartered his variation application, he did not present evidence as to why the extant order should be substituted or discharged. When he testified, he averred that he could afford the increased maintenance claimed by ZL.¹²

[13] ZL testified and presented evidence concerning three discrete bank accounts demonstrating her financial position. She testified about a separate bank account that she used only for the expenses of the minor children. When there were insufficient funds in this account, ZL would use funds from her other bank accounts to maintain the minor children.¹³

THE LEGAL FRAMEWORK

[14] By legislative intervention, the targeted legislation (Chapter 4 of the Maintenance Act, 99 of 1998) (the ‘Act’) regulates maintenance and related orders. Subsection 6(1)(b), read with ss 6(2) and further read with ss 16(1)(b), provides that an existing maintenance order may be substituted if ‘good cause’ exists to do so. Section 15 codifies the common-law duty of parents to support their children.¹⁴

CONSIDERATION

DISCRETION

[15] A court of appeal will not readily interfere with a maintenance order awarded in a lower court (a trial court). It will only do so if there is a misdirection or irregularity. This is even more prevalent when a trial court exercises judicial discretion when weighing up

¹² *Affordability was not placed in issue.*

¹³ *ZL kept meticulous records in connection with the use of the maintenance which she received for the minor children.*

¹⁴ *A variation and substitution may be ordered when “good cause” is demonstrated.*

what is fair, reasonable and just, considering the peculiar circumstances of a specific case.¹⁵

[16] I say this also because when the maintenance court exercised its discretion in this matter, it had (available to it) the choice of a wide range of equally permissible options. Thus, demonstrating and establishing (on appeal) that the option chosen by the maintenance court is subject to appeal (because of a misdirection or an irregularity) is demanding and complex. An appeal court's approach is analogous to the test applied in compensation cases on appeal.¹⁶

[17] I am also enjoined in considering (in maintenance matters) the children's best interests. This means carefully considering the children's needs and the parent's ability to contribute to such needs.¹⁷

IRREGULARITY

[18] The first possible ground contended for by CL that requires a debate under the rubric of a 'misdirection or an irregularity' is the averment that the maintenance awarded to ZL is more than what she initially requested. This (in my view) is a question of interpretation and is, at best, a neutral consideration for CL.¹⁸

[19] This is so because ZL attempted to identify (in her variation application) the 'cash component' to be paid for each child and an additional amount for 'other contributions' to be paid for the minor children. The 'variable' amounts initially agreed upon (subject to annual review) led to the uncertainty surrounding the initially agreed court order.¹⁹

FINANCIAL ISSUES

¹⁵ *Mentz v Simpson* 1990 (4) SA 455 (A) at 456 E - J.

¹⁶ *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at page 200.

¹⁷ *Kemp v Kemp* 1958 3 SA 736 (D).

¹⁸ ZL merely defined her case in her application analogous to what is done in pleadings.

[20] CL advanced that he remained unemployed since the end of last year. This employment status had to be evaluated against the concession that affordability was not an issue raised for determination. Further, being unemployed did not exonerate CL from paying maintenance as he had assets from which he derived a substantial income. CL provided no details of the income he derived from his business activities.²⁰

[21] By contrast, the evidence presented by ZL was not challenged. She is living with her parents to allow the interest she has earned on the capital she received after selling the former matrimonial home may be used to supplement her income and care for the minor children's needs. Most significantly, she demonstrated that she managed her financial affairs responsibly and ensured that the money she received for maintenance was allocated solely towards the needs of the minor children.²¹

[22] One of the material financial changes presented at the hearing was the dramatic increase in the educational expenses of the minor children. CL could not challenge or engage with ZL's evidence in this connection, coupled with her evidence concerning the increased costs of maintaining the minor children.²²

[23] Put another way, it was not established that the needs of the children were extravagant or unnecessary, considering the children's prior standard of living. In addition, ZL demonstrated that her son required orthodontic treatment. CL was notified about the cost but believed this treatment was cosmetic and unnecessary.²³

[24] We are then left with the argument that the maintenance court should have ordered a *pro rata* apportionment of the maintenance obligations. This issue was not engaged with or raised as a shield by CL. A conspectus of the evidence exhibited that

¹⁹ The variable amounts were by their very nature subject to amendment and review.

²⁰ CL owned immovable properties and owned a share in a close corporation.

²¹ This was achieved by maintaining a discrete bank account as alluded to earlier.

²² *Mgumane v Setemane* 1998 (2) SA 247 (TK) at page 253.

²³ On a reading of the papers and the reasons advanced this procedure seemed not to be extravagant or a luxury.

ZL was battling to make ends meet and struggled to meet her financial obligations despite moving in to live with her parents.²⁴

CONCLUSION AND COSTS

[25] CL could not demonstrate a misdirection or irregularity by the judicial officer of the maintenance court. CL advanced that affordability was not an issue, and he could not effectively (or at all) challenge the evidence presented by ZL save for some general criticisms in this connection.²⁵

[26] CL did not support his claims or assertions using any supporting documentary evidence. He simply failed to disclose his financial position completely (or at all). CL has not demonstrated that the maintenance court's discretion was exercised improperly, nor that any wrong principles were applied or relevant facts overlooked.²⁶

[27] The best interests of the minor children remain the core focus in maintenance matters. These interests were thoroughly considered. No case was made out for interference with the terms of the maintenance order, and there is no justification to set aside or alter the lower court's decision. The judicial officer's discretion to substitute the original order considered the best interests of the minor children with an emphasis on their increased educational and healthcare requirements.²⁷

COSTS

[28] An argument was made that a punitive costs order should be granted because the appeal record was unnecessarily prolix. I disagree. I say this because this

²⁴ *It would have been challenging to order an increased pro rata contribution by ZL.*

²⁵ *CL did not engage with specific challenges to the evidence given by ZL.*

²⁶ *Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at page 200.*

²⁷ *There was no genuine dispute about the requirements of the minor children save for the orthodontic dispute.*

complaint primarily referenced the 'Heads of Argument' filed in the lower court, which subsequently found their way into the record of appeal.²⁸

[29] This was explained. The legal representatives agreed that they would file 'Heads of Argument' and would not thereafter advance further arguments through oral submissions to the judicial officer. Thus, what was advanced through written argument did not form part of the transcribed record of proceedings.²⁹

[30] Finally, a complaint was made about the volume of bank statements (by way of redacted copies) attached to the appeal record. This complaint may have some merit, but I needed more (than this in isolation) to be persuaded that this would warrant granting a punitive costs order against CL. I say this because some of the information contained in these bank statements was relevant to the ultimate determination of this appeal.³⁰

ORDER

[31] The following order is granted:

1. The appeal is dismissed.
2. The appellant (CL) shall be liable for the costs of and incidental to this appeal on the scale as between party and party (as taxed or agreed), with the costs of counsel according to scale B.

WILLE, J

I agree:

²⁸ These Heads of Argument were even referenced by counsel for ZL.

²⁹ This is the reason why they were included in the record of appeal.

³⁰ The evidence of the keeping of discrete bank accounts kept by ZL.

KHOLONG, AJ