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REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 31156/2012

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

FREDERIK WILLEM (FW) DE KLERK (SNR)

Applicant

and

DELORES GROEPIES N.O.

First Respondent

NICOLENE NOORDEN DE KLERK

Second Respondent

THE MAGISTRATE, RANDBURG

Third Respondent

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] The applicant approached this Court as a matter of urgency. Part A thereof prays for an order:

1.1 dispensing with the forms, service and time periods provided for in the Rules of this Court, including Rule 6(13), and granting leave for this application to be heard as a matter of urgency in terms of Rule 6(12);

1.2 directing that the directive issued by the first respondent to the applicant on 4 June 2012, purportedly in terms of Regulation 3(1) of the Regulations relating to maintenance as published in Government Notice R.1361 dated 15 November 1995; read with sections 6 and 44 of the Maintenance Act 99 of 1998; under Case Numbers 14/3/2-172/2012, be stayed with immediate effect; and that the first respondent take no further steps to enforce the directive against the applicant pending the determination of the application under Part B of this notice of motion;

1.3 directing that the costs of the application under Part A be paid by –

1.3.1 the second respondent; and

1.3.2 such other respondent(s) as may oppose the application;
and

1.4 granting such further and alternative relief as the court may
deem fit.

[2] Part B of the notice of motion prays for an order –

2.1 reviewing and setting aside the directive referred to in paragraph
1 of Part A above;

2.2 directing that the costs of the application under Part B be paid
by –

2.2.1 the second respondent; and

2.2.2 any such other respondent(s) as may oppose the
application; and

2.2.3 for further and/or alternative relief as the court may deem
fit.

URGENCY

[3] After perusing the papers filed of record herein and listening to argument I am satisfied that in spite of the fact that the directive complained about or in issue herein was issued as far back as 4 June 2012, the circumstances hereof, coupled with the protracted horse-trading or negotiations that ensued thereafter, the matter remains deserving of being heard as an urgent one in the Urgent Court of this Court.

RELEVANT BACKGROUND AND FACTUAL MATRIX

[4] The applicant herein, who will henceforth be referred to as "*FW de Klerk*" is the adoptive father of one Frederik Willem de Klerk (Jnr) ("*FW de Klerk Jnr*") who is married to the second respondent herein ("*Nicole*"). The last mentioned couple have two minor children, M and N, aged 9 and 8 years respectively ("*the minor children*"). Since the year 2008 FW de Klerk Jnr and Nicole have been involved in acrimonious and protracted divorce proceedings in the Western Cape High Court. It is still ongoing. It is proceeding under Case Number 19988/08 there.

[5] During December 2008 Nicole instituted Rule 43 proceedings in the Western Cape High Court under the same divorce case file claiming maintenance for herself and the minor children in the amount of R45 000,00 per month plus medical, educational and accommodation expenses in addition thereto.

[6] On 27 February 2009 the above court granted an order that FW de Klerk Jnr pay an interim maintenance for Nicole and the minor children in the amount of R18 000,00 per month pending the finalisation or determination of the divorce action. He was further ordered to pay medical costs, educational costs and accommodation costs for them.

[7] This Rule 43 order is still in force as it was not suspended, set aside or discharged by a competent court.

[8] On or about 18 January 2012 Nicole lodged a complaint against FW de Klerk Jnr in terms of section 31(1) of the Maintenance Act in the Randburg Magistrates' Court under Case Number 14/3/2-20/2012 (CH 45/2012) arising out of FW de Klerk Jnr's alleged or purported failure to comply with the Rule 43 order. The criminal summons issued pursuant to the above complaint called upon him to appear before that court (Randburg Magistrates' Court) on 23 February 2012.

[9] From a note or endorsement made in the court file at Randburg, that criminal matter was struck off the roll on 23 February 2012 because there was no personal service of the summons issued. The maintenance officer, being the first respondent in this application was ordered by the court to liaise with the maintenance investigator at Bellevue, Western Cape, or Cape Town, to ensure that personal service is effected in respect of possibly the summons as re-issued.

[10] The papers have no much trail of what happened subsequently regarding this aspect save that the maintenance file at Randburg has an endorsement dated 14 May 2012 that FW de Klerk Jnr was required to appear in that court on 15 May 2012.

[11] It is not clear whether or not he did appear or what took place there if he did appear or did not appear.

[12] What is of closer relevance to our present matter is that on 9 May 2012 Nicole lodged an “*Application for Maintenance Order: Complaint in terms of Section 6(1)(a) of the Act*” in which she declared under oath that FW de Klerk (Snr), the applicant herein was legally liable to maintain the minor children. The material part of the application states that:

“... He is the grandfather of my two daughters and his son claims to not be able to support the girls financially ...”

[13] She (Nicole) claimed contribution from the applicant towards such maintenance in the amount of R16 569,00 for each child; a total of R33 138,00 in respect of both minor children.

[14] On 31 May 2012 a directive was issued against FW de Klerk Jnr by the first respondent, purportedly in terms of Regulation 3(1) of the Regulations as read with sections 6 and 55 of the Maintenance Act, to appear before the first respondent on 16 July 2012 and to produce documents in connection with a

maintenance complaint allegedly lodged by the second respondent; i.e. Nicole against him.

[15] I have not seen copies of the section 6 complaint itself and as such there is no certainty as to whether it indeed exists or was lodged in writing as required.

[16] From the applicant's papers I could not ascertain what happened to the above complaint and directive or when the date was De Klerk Jnr was to appear before the Randburg Magistrates' Court.

[17] On 22 June 2012 the directive which is the subject for determination in this application was served on the applicant. The applicant's attorney proceeded to apply for and receive a copy of the applicable court file(s) relevant hereto. The applicant was called upon to appear before Magistrate Randburg's Maintenance Section on 30 July 2012.

[18] By mutual agreement between the applicant's attorneys and the first respondent's representative(s) the applicant was excused from attending the proceedings on 30 July 2012 as the two parties were still to first argue the correctness or otherwise of the issuing of the directive to the applicant before a magistrate.

[19] It appears as if the first respondent, although having agreed that the applicant need not attend court on 30 July 2012, nevertheless prevaricated or

was not forthright or seeing her way clear to deal with the arguments required to be placed before the magistrate on 30 July 2012. This necessitated the applicant's attorney confirming the issue of the argument in an e-mail dated 16 July 2012 to the first respondent.

[20] The argument was directed at –

- 20.1 ascertaining the validity or regularity of the said directive, especially, the record of the manner in which the directive was given by the first respondent as required or contemplated in Regulation 3(b) of the Maintenance Regulations;
- 20.2 ascertaining the first respondent's reasons for investigating the complaint against the applicant in the face of the currency of an existing maintenance order against FW de Klerk Jnr, which has not been discharged or varied by a competent court;
- 20.3 details of what steps, if any, have been taken by the second respondent (Nicole) to enforce the Rule 43 order against FW de Klerk Jnr;
- 20.4 details as to what progress has/had been made in the investigation and enquiry(ies) against FW de Klerk Jnr, if any; and

20.5 information about the outcome(s) of any of the first respondent's investigations and enquiries against FW de Klerk Jnr.

[21] Suffice to state that the first respondent did not respond or reply to the e-mail sent to her requesting clarification over the above issues.

[22] On 30 July 2012 the third respondent, being the presiding magistrate on the day, refused to hear argument on the regularity of the directive, being of the view that he did not have the authority to do so.

[23] In short, a magistrate ruled that he was not authorised to listen to and determine a point *in limine* raised in the proceedings before him.

[24] The matter was postponed to 3 September 2012 for hearing the merits of the directive. I am made to believe that this very date is also the date to which FW de Klerk's "*directive matter*" was adjourned to.

[25] On 6 August 2012 the applicant's attorney e-mailed a letter to the first respondent, copy whereof was hand-delivered to her office on the same date, in which the applicant's attorney set out some of the grounds on which the applicant contended that the directive was irregular and improper. The first respondent was given until 14 August 2012 to withdraw the directive, alternatively, to confirm by that date that the directive would be stayed or postponed without the applicant having to appear in court until the maintenance enquiry against De Klerk Jnr had been finalised and/or determined, failing which an application would be brought to this Court to

review and set aside the directive and/or to stay it in the interim. The request for the withdrawal of the directive was based on the facts that (according to the applicant) it was ill-founded, vexatious as well as constituting an abuse of process.

[26] The above letter was responded to by letter dated 10 August 2012 which was e-mailed to the applicant's attorneys on 13 August 2012. In addition to the lengthy explanation contained therein concerning the history of the matter, the first respondent concludes as follows:

“Furthermore, there is no provision in the Regulations that allows the Maintenance Officer to withdraw a Directive as contemplated ...”

[27] I am not sure whether I understand the maintenance officer, i.e. the first respondent in this application by the above to mean that once she has issued a directive, whether it was wrongly or irregularly issued, she cannot withdraw or have it withdrawn; or whether she may be understood to mean that irrespective of the legality or regularity issue relating to such a directive, the respondent mentioned therein must by hook or crook appear before court for such a directive to be withdrawn, irrespective of where such a respondent comes from, like the applicant herein who would be coming from Cape Town or the Western Cape Province.

GROUND FOR REVIEW AND SETTING ASIDE

[28] I have listened to argument in this application from both sides. It is so that Part A of the notice of motion is the one that is in issue today. However, for a proper and informed decision to be made regarding Part A, it was necessary to look cursorily at the grounds of review or setting aside of the directive.

ULTRA VIRES AND CONTRAVENTION OF PAJA AND CONSTITUTION

[29] The applicant attacks the directive on the grounds that it being an administration action the first respondent was obliged to act in accordance with the requirements of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) in order to give effect to the right which everyone has in terms of section 33(1) of the Constitution to administrative action that is lawful, reasonable and procedurally fair.

[30] The applicant further contended that the directive is reviewable under section 6(2)(a)(i) of PAJA on the grounds that the first respondent was not authorised by the empowering provision to issue the directive. Furthermore, they contended that the directive is in any event reviewable under the common law ground that it was *ultra vires*.

[31] The applicant also submitted and/or contended that the first respondent acted outside her powers in and/or when issuing the directive.

AUTHORITY TO ISSUE A DIRECTIVE

[32] Regulation 3(1) read with Regulation 2(1) empowers a maintenance officer, in investigating a complaint, to issue a directive to the complainant and the person(s) against whom a maintenance order may be or was made.

[33] Section 6 of the Maintenance Act draws a distinction between two types of complaints:

- (a) a complaint against a person legally liable to maintain any other person and who is failing to so maintain (section 6(1)(a)); and
- (b) a complaint that good cause exists for the substitution or discharge of a maintenance order (section 6(1)(b)).

[34] The type of complaint contemplated in (a) above ought to be made through a form which corresponds with Form A of the Annexure to the Regulations (Regulation 2(1)) and the type in (b) above ought to be made on or in a form corresponding with Form B of the annexure to the Regulations (Regulation 2(b)).

[35] The above distinction is sustained throughout the scheme provided in Chapters 3 and 4 of the Act.

[36] The complaint lodged by Nicole against the applicant on 9 May 2012 corresponds with a complaint made in terms of section 6(1)(a) of the Act and is made on a form corresponding with Form A of the Annexure to the Regulations. In the absence of a complaint under section 6(1)(b), it is my considered view and finding that the first respondent was empowered under Regulation 3(1) to issue a directive only to a person against whom a maintenance order “*may*” or “*might*” be made.

[37] A *prima facie* view exists that at the time that the directive was issued (i.e. 9 May 2012) the applicant was not the person against whom a maintenance order might be made because –

37.1 there was in force an existing maintenance order against FW de Klerk Jnr for the maintenance of the children; and

37.2 at the time, no competent court had found that the children’s natural parents were unable to support them.

[38] Sections 6 and 16 of the Maintenance Act may lend themselves to an interpretation that a maintenance court has no jurisdiction to make a further maintenance order against a further person in respect of children where another maintenance order in respect of those children is already in place or in force against an existing maintenance debtor.

[39] This is one of the issues that may be adequately interrogated in a proper review application.

[40] Section 16 of the Maintenance Act empowers the maintenance court to make maintenance orders of three kinds. Firstly, in terms of section 16(1)(a) where no maintenance order is in force a maintenance order may be made against any person proved to be legally liable to maintain any other person(s). Secondly, in terms of section 16(1)(b) where there is an existing maintenance order, same may be substituted or discharged. Thirdly, in terms of section 16(1)(c) a maintenance court may decline to make any order.

[41] I agree with the submission and hold it to be the correct interpretation of section 16 of the Act that it is not proper or contemplated by the law or that it was not the intention of the legislature that section 16 should contemplate or authorise more than one maintenance order being in force at the same time against several maintenance debtors in respect of the same dependants. The scheme of Chapters 3 and 4 of the Maintenance Act does not in my view contemplate or authorise simultaneous maintenance enquiries in respect of the same dependants against different maintenance debtors. Neither in my considered view does it contemplate concurrent investigation which would potentially culminate or result in concurrent enquiries.

[42] The definition of “*maintenance order*” in my view supports the above view.

[43] A Rule 43 order is a species of maintenance orders as contemplated by the Act. During its subsistence or currency, the only order which may be made by a maintenance court under section 16 in my view is an order substituting or discharging that order.

[44] A view thus is propounded herein and which view may also be finally dealt with by a reviewing court that no order could be made under section 6(1)(a) against the applicant emanating from a complaint laid by the first respondent in these circumstances where the Rule 43 order is still in force. What complicates matters further is that the papers do not point to or show any formal complaint by Nicole having been before the first respondent when she issued the directive against the applicant. Doubt thus exists as to whether section 6(1)(b) of the Act was complied with. The issue of a discharge of the Rule 43 order has thus been muddled or obscured from clear scrutiny and a court of review may be best placed to hear argument or evidence thereon, at its discretion.

DUTY OF SUPPORT : GRANDPARENTS

[45] Section 15(1) of the maintenance court provides among others that –

“[W]ithout derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child’s parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.”

[46] It is a well-established principle of the common law that although grandparents may have a reciprocal duty to support their grandchildren, such a duty does not come into operation or give rise to a claim in law, unless and until it is established that the parent(s) of those minor children are deceased or are unable to support them.

[47] A dependant may thus not claim support from a more remote relative such as grandparents before he/she has gone against the closer relative, in this case, their father, FW de Klerk Jnr. Such a claim against a far removed relative in my view only kicks in once a competent court has found that the parent is unable to support his children.

[48] There is evidence in this application by FW de Klerk Jnr that he is indeed contributing towards the minor children's maintenance. He set out a series of figures as representing what he was doing there towards.

[49] Even the first respondent lent credence to the above claim in her letter to the applicant's attorney dated 10 August 2012 (which was only e-mailed to the latter on 13 August 2012). FW de Klerk's temporary inability to fully comply with his obligations was acknowledged.

[50] At paragraph 10.4 thereof the following is recorded:

"10.4 On the 30th July 2012, whilst conducting an enquiry, I was informed that there is a possibility that the children's father might find employment in a month's time."

[51] The first respondent went on to state that she decided to issue the directive against the applicant because –

“... 10.5 *No offer of employment or documentary proof was presented to substantiate this allegation or possible employment.*”

[52] Why the first respondent did not stand that enquiry down for one month to take FW de Klerk on his word is not comprehended. Instead, she just proceeds to issue a directive against the minor children’s grandfather whom she also confirms have been helping out with those minor children unsolicited and without a court order.

[53] At paragraph 8 of her letter e-mailed to the applicant’s attorney on 13 August 2012, the following is recorded:

“8. *I had (sic) further been informed by the applicant that the respondent Mr F W de Klerk (Snr) is currently paying for the minor children’s school fees directly to the service provider and he currently pays R8 000-00 per month in respect of maintenance for both minor children ...*”

[54] A further perusal of the papers filed herein points to a trail of e-mails to and from the parties herein wherein payments made to Nicole on behalf of the minor children are documented.

[55] From Annexures A1 and A2 to the papers herein dated 4 June 2012 and 29 May 2012 respectively, they being e-mails between Nicole and the De Klerks, the following amounts having been paid to Nicole and the children's school are documented:

55.1	May 2009	=	R28 000,00
55.2	1 June 2009 – January 2011	=	R308 000,00
55.3	February 2011	=	R19 000,00
55.4	March 2011	=	R14 000,00
55.5	April 2011	=	R14 000,00
55.6	May 2011 – September 2011	=	R137 500,00
55.7	October 2011 – December 2011	=	R36 000,00
55.8	January 2012	=	R7 000,00
55.9	February 2012 – March 2012	=	R24 000,00
55.10	April 2012	=	R3 000,00

[56] It has not been disputed that most if not all the above payments were subsidised by the applicant of his own volition.

[57] The circumstances under which the directive was issued against the applicant have a suspicious ring about them. This Court cannot, on the thread-bare evidence gleanable from the papers filed in this urgent application, determine whether the accusation by the applicant that in lodging the complaint, Nicole used the machinery of the Maintenance Act for an ulterior purpose, namely, to put unfair and oppressive pressure on the

applicant to take over and/or discharge the maintenance obligations imposed on FW de Klerk Jnr in terms of the still valid and operative and enforceable court order.

[58] That and related aspects can be better interrogated by a court hearing a review of the issuing of the directive.

[59] The issue relating to why Nicole is claiming R33 180,00 per month from the applicant, which amount is almost double what the Western Cape High Court granted her in the Rule 43 order can also be interrogated in that process.

[60] A reciprocal duty of support against grandparents is not only to be directed at one part of the grandparentage, but at both, i.e. the paternal and maternal grandparents. Nothing is being said in this application about anything having been demanded or claimed against Nicole's parents. That also can be dealt with in the review proceedings should it be found to be necessary.

[61] In her letter e-mailed to the applicant's attorney on 13 August 2012 the first respondent does not deny explicitly that the directive was irregular or improper. This can only be inferred from her refusal to withdraw the directive. She does not deal with the alleged refusal by a magistrate to listen to this point *in limine* on 30 July 2012. Neither does she deal with the applicant's contentions as to why the directive is irregular and/or improper.

[62] The above in my view supports the applicant's contention that the directive issued against him by the first respondent on 4 June 2012 be stayed until a review of its issuing is completed.

[63] It is common cause that such a review cannot be determined by or before 3 September 2012.

[64] I have looked at the other grounds set out by the applicant why the proceedings of 3 September 2012 against him ought to be suspended until a review process has been dealt with to finality.

[65] Contrary to the first respondent's doubts or dismissal out of hand of FW de Klerk Jnr securing employment sooner, there is evidence that the latter has been taken into employ by Shenzi Trading (Pty) Ltd.

[66] The applicant has pledged that the trust he controls, viz the Fredek Trust will continue to pay the R8 000,00 per month to the second respondent, i.e. Nicole, like in the preceding four months as well as the children's school fees, which he had been doing since January 2012 without prejudice. Such payments will be gratuitous as they have always been.

RESPONDENTS NOTICES TO ABIDE

[67] On the date of argument of this application, counsel acting on behalf of the three respondents filed from the bar notices, to abide by the first and third respondents as well as notice to reply by the second respondent. The first and third respondents were presented by counsel instructed by the state attorney. The second respondent was unrepresented.

[68] The first respondent's notice to abide reads as follows:

"NOTICE OF INTENTION TO ABIDE

I, the undersigned, Doloris Groepies, the First Respondent herein withdraw my Founding Affidavit dated 25 August 2012 and will abide by the decision of the above Honourable Court.

The record will be filed shortly.

DATED at JOHANNESBURG ... 27th of AUGUST 2012."

[69] The third respondent's notice reads as follows:

"BE PLEASED TO TAKE NOTICE that the Third Respondent will abide by the decision of the above Honourable Court."

[70] The notice is dated 24 August 2012.

[71] My interpretation of the above two notices to abide was that this Court should proceed to hear the merits of the application and arrive at a decision, which is what I did.

[72] The second respondent's notice termed "*Reply by Second Respondent*" reads as follows:

"I the undersigned, Nicole Noordien De Klerk do hereby make oath and say that:

- 1. I am a (sic) the minor children's (sic) mother and the applicant in the current proceedings in the maintenance court, Randburg.*
- 2. The allegations herein contained are within my personal knowledge, and are both true and correct.*
- 3. I do not oppose the application brought by the applicant and will abide by the decision of the Honourable Court."*

[73] I have taken the above notices' contents into consideration when I made the final ruling which is attached hereto as Annexure "X" authenticated with my signature and the date being 28 August 2012.

[74] In the circumstances the following order is granted:

"Having read the papers filed of record and having heard counsel for the Applicant on the 28th of August 2012, an order is granted in terms of prayers 1, 2 and 3 of the Notice of Motion in the following terms:

- 1. Dispensing with the forms, service and time periods provided for in the Rules of this Court (including Rule 6(13)) and granting leave for this application to be heard as a matter of urgency in terms of Rule 6(12);*
- 2. Directing that the directive issued by the First Respondent to the Applicant on 4 June 2012, purportedly in terms of Regulation 3(1) of the Regulations relating to Maintenance (GN R1361 in GG 20627 of 15 November 1999), read with section 44 and section 6 of the Maintenance Act 99 of 1998, under Case Number 14/3/2-172/2012 (Annexure 'FWDK' to the founding affidavit) be stayed with immediate effect, and that the First Respondent takes no further steps to ensure the directive*

against the Applicant pending the determination of the application under Part B of this Notice of Motion;

3. *Costs will be costs in the main application."*

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE APPLICANTS

INSTRUCTED BY

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FOR THE FIRST RESPONDENT

SELF

FOR THE SECOND RESPONDENT

SELF

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