

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

Case number: 61876/2012

Date: 26 May 2014

In the matter between:

A[...] O[...] M[...]

PLAINTIFF

and

MINISTER OF JUSTICE AND

AND CONSTITUTIONAL DEVELOPMENT

FIRST DEFENDANT

NATIONAL PROSECUTING AUTHORITY

SECOND DEFENDANT

M[...] M[...]

THIRD DEFENDANT

D. LESESE

FOURTH DEFENDANT

T.A. MOHLABA

FIFTH DEFENDANT

S. MALUNGANE

SIXTH DEFENDANT

N. NTHULI

SEVENTH DEFENDANT

HIEMSTRA AJ

[1] The plaintiff, Ms A[...] O[...] M[...], was married to the third defendant, M[...] M[...] (M[...]). Two minor children were born from the marriage. The marriage ended in divorce and the primary residence of the minor

children is with the plaintiff. On 6 December 1990 M[...] consented in writing to pay maintenance in respect of the children. This consent was made an order of court at the Mdutjana Magistrates' Court at Siyabuswa in Mpumalanga, sitting as a Maintenance Court in terms of s 3 of the Maintenance Act, 99 of 1998 (the Act).

[2] The first defendant is the Minister of Justice and Constitutional Development. He is sued in his capacity as the political head responsible for the Department of Justice. The second defendant is the National Prosecuting Authority of South Africa, which is sued in its capacity as the employer of the fourth, fifth, sixth and seventh defendants.

[3] The fourth to seventh defendants are prosecutors employed by the second defendant at the Mdutjana Magistrates' Court. In terms of s 4(1)(a) of the Act, prosecutors are by virtue of the powers delegated to them by the Director of Public Prosecutions deemed to be maintenance officers of the corresponding Maintenance Court. I shall refer to them as "the maintenance officers".

[4] The plaintiff claims damages from the defendants jointly and severally. Her cause of action against the first and second defendants and the maintenance officers is delictual. Her claim against M [...], the third defendant, is for payment of arrear maintenance. She alleges that the maintenance officers, acting within the course and scope of their employment with the second defendant, had negligently and unlawfully omitted to take appropriate steps in terms of the Act to enforce the payment of arrear maintenance by M [...]. As a result of their omissions the arrears in maintenance accumulated over a period of three years to R24 500. On 28 October 2009 a magistrate purported to "write off" the arrear maintenance.

[5] M [...] had from the outset been delinquent in paying his maintenance. He was employed as a teacher at the M [...] Primary School at M [...], Mpumalanga. Because of his irregular payments, the plaintiff had obtained garnishee orders against his emoluments, which ensured regular payments from then on. However, he resigned from his employment with effect from 1 January 2006 and promptly ceased paying maintenance. However, a pension payout was due to him.

[6] The failure of the maintenance officers to attach this pension payout in order to secure the recovery of arrear maintenance is the issue in this case.

[7] After M [...] had stopped paying maintenance, the plaintiff reported the arrears to Mr Jimmy Mahlangu, a maintenance inspector at the Maintenance Court. Mr Mah-langu duly made enquiries at the M [...] Primary School and the principal confirmed in writing on 14 February 2006 that the third respondent had resigned from his position with effect from January 2006. The plaintiff testified that she had called at the accounts hall at the Magistrates'/Maintenance Court to collect her maintenance each month. Invariably M [...] had made no payments and the staff referred her to the maintenance clerks to report the non-payment, which she duly did.

She dealt with various officers, including the senior magistrate, Mr Gama. She told Mr Gama that a pension payout was due to M[...] and asked him to instruct Mr Mahlangu to hurry up because she feared that M[...] would squander the money. Mr Gama told her that the Maintenance Court had no authority to attach M[...]’s pension benefits while he is retired. As shown below, this advice was clearly wrong.

[8] A maintenance enquiry in terms of s 10 of the Act was nevertheless duly initiated. It was first enrolled for 21 February 2006. It was thereafter postponed or struck from the roll on 8 March and 15 March 2006 for reasons that cannot be discerned from the docket.

[9] On 31 May 2006 the plaintiff filled in a form entitled “*Complaint of failure to comply with Maintenance Order*”. The maintenance enquiry was apparently thereupon aborted criminal proceedings initiated. On the same day a criminal summons was issued against M[...]. The criminal case was enrolled for 6 June 2006 but was postponed because M[...] said that he wanted to apply for legal aid. It was again postponed to 2 August 2006. On 2 August 2006 the matter was once again postponed to 6 September 2006. On 6 September the magistrate recorded the following:

“State submit (sic) that accused failed to pay as per the maintenance order because he was still waiting for his pension moneys, but at this stage arrears have been paid in full.

Withdrawn by the State.”

(It appears from the records of the Maintenance Court that not all the arrears had at that stage been paid and that the sum of R900 was still in arrears.)

[10] The plaintiff testified that she had repeatedly reminded Mr Mahlangu of the awaited pension payout and asked him to take steps to have it attached. Mr Mahlangu said in his testimony that he could not remember the plaintiff mentioning the pension payout but admitted that he had been aware of it. He said he had been in constant communication with the Treasury about it. During August 2006 he obtained a statement of M[...]’s bank account. It reflected that the sum of R237 248.42 had been deposited in M[...]’s bank account on 1 August 2006.

[11] The fourth defendant, Mr D. Lesese, testified on his own behalf and on behalf of the other defendants. He appeared as maintenance officer in the aborted maintenance enquiry and in the criminal proceedings. He conceded that the maintenance officers had been aware of the expected pension payout, but said that they had left it to M[...] to use this money to bring his arrear maintenance up to date. When asked under cross-examination why he had chosen to institute criminal proceedings instead of the extensive civil proceedings for the enforcement of maintenance orders provided for in the Act, he responded that he had been a relief prosecutor and that it was the decision of the resident maintenance officers. He further conceded

that he had not familiarised himself fully with the contents of the file but said that other maintenance officers had also neglected to apply their minds to the file. He also conceded that he was not familiar with the whole of the Act, and had only read parts of it.

[12] When M[...] received his pension moneys, he made a substantial payment towards the arrears. However, there remained an amount of R900, being one month's maintenance, in arrears after this payment. Thereafter he made sporadic payments, but soon fell into arrears again, it appears from a bank statement dated 9 March 2007 that M[...] had been in credit to the tune of R60 104.11 on 11 January 2007. However, by 3 March 2007 his account was in overdraft to the amount of R199.30. Between those dates he made 24 withdrawals of R2 000 each and others of R8 000, R5 000, R3 500 and R7 000. All these withdrawals were made at an automatic teller machine (ATM) at the Carousel Sun casino.

[13] Ms Thakor, who appeared for the plaintiff, provided the court with a full analysis of the amounts of outstanding maintenance from time to time. This has not been refuted by the defendants. Suffice it so say that M[...] had at all relevant times been in arrears.

[14] There are ample provisions in the Act for the effective enforcement of maintenance orders. They are the following:

Section 26(1) and (2) of the Act provide as follows:

26 Enforcement of maintenance or other orders

(1) Whenever any person-

(a) Against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or

(b) against whom any order for the payment of a specified sum of money has been made under section 16(1)(a)(ii), or 20 or 21(4) has failed to make such payment,

such order shall be enforceable in respect of any amount which that person has failed to pay, together with any interest thereon-

(i) by execution against property as contemplated in section 27;

(ii) by the attachment of emoluments referred to in section 28; or (Hi) by the attachment of any debt as contemplated in section 30.

(2) (a) *If any maintenance order or any order made under section 16(1)(a(11), 20 or 21(4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident-*

(i) for authorisation of the issue of a warrant of execution referred to in section 27(1);

(ii) for an order for the attachment of emoluments referred to in section 30(1);

(iii) for an order for the attachment of any debt referred to in section 30(1).

[15] S 26(4) provides

“(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.”

[16] S 30 provides in respect of a debt referred to in s 26(2)(a)(ii):

30 Attachment of debts

(1) A maintenance court may-

(a) on the application of a person referred to in section 26(2)(a), or

(b) when such court suspends the warrant of execution under section 27 (4) (b), make an order for the attachment of any debt at present owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interests thereon, as well as the costs of the attachment or execution, which order shall direct the person who has incurred the obligation to pay the debt to make payment as may be specified in that order within the time and the manner so specified.

[The emphases in the sections quoted above are mine]

[17] As appears from the underlined words in S 26(1)(a) and (b), quoted above, the provisions provide for the recovery of maintenance where a person has failed to make “*any particular payment in accordance with that maintenance order*” or failed to make “*the payment of a specified sum of money*”. The question has arisen whether the law allows for the attachment of pension fund benefits to secure future maintenance obligations

of a person. On a literal reading of the section, it appears as if the Act only provides for the recovery of arrear maintenance not future maintenance.

Our courts have, however, made short shrift of this question. Nicolson J said in *Mngadi v Beacon Sweets & Chocolate Provident Fund*¹

“The law has never shrunk from interdicting a debtor from dissipating funds to thwart the rights of creditors and it was no great leap for the courts to extend such relief to cover or safeguarding a payout in the hands of a fund such as the first respondent. The provisions of the Pension Fund Act applied to the payment of future maintenance, more especially s 37A(1) and the provision thereto which protects dependants.

Ms Tharok also referred me to the headnote in *Magewu v Zono and Others*², which reads as follows:

“It is clear that upon a reading of the Act and the relevant sections of the Pension Funds Act that the two Acts together work in a manner to provide relief to an applicant who has a maintenance order that has not been abided by the judgment debtor. That although the respondent was not in arrears, this on its own did not frustrate the applicant’s case. Acknowledging the child’s right to maintenance, and the best interests of the child being paramount in matters dealing with children, the court pointed out that the first respondent had been in arrears on several occasions. The child therefore had no security that his future maintenance claims would be met. It was also unfair to expect the applicant to constantly take legal action to enforce the child’s claims.

An application for the attachment of a pension benefit was accordingly granted.

[18] Despite the withdrawal of the criminal proceedings on 2 August 2007 after M[...] paid a portion of the arrear maintenance, criminal proceedings were again instituted. M[...] was convicted on 28 October 2009 of contravention of s 31(1) of the Act in that he had failed to pay maintenance during the period December 2006 to June 2009. At that stage the arrear maintenance amounted to R24 500. He was sentenced to a fine of R2 000 or two years’ imprisonment. The sentence was wholly suspended for five years on condition that he was not found guilty of contravention of s 31 of the Act during the period of suspension. The court further ruled that the arrears of R24 500 be “written off”. The magistrate gave no reasons for this order.

There is no provision for such an order in the Act. No steps were taken to appeal against this ruling or to have it reviewed or set aside. However, it cannot be expected of the plaintiff to have taken steps in this regard. The State was *do minus litis* in the proceedings. It was the duty of the State, not the plaintiff to prosecute such proceedings.

[19] There are in any event other effective processes that the maintenance court should have followed upon

conviction. They are contained in ss 40 and 41 of the Act:

40 Recovery of arrear maintenance

(1) A court with civil jurisdiction convicting any person of an offence under section 31 (1) may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court and shall, subject to subsection (2), be executed in the prescribed manner.

(2) A court granting an order against a convicted person may-

(a) in a summary manner enquire into the circumstances mentioned in subsection (3); and

(b) if the court so decides, authorise the issue of a warrant of execution against the movable or immovable property of the convicted person in order to satisfy such order.

(3) At the enquiry, the court shall take into consideration-

(a) the existing and prospective means of the convicted person;

(b) the financial needs and obligations of, or in respect of, the person maintained by the convicted person;

(c) the conduct of the convicted person in so far as it may be relevant concerning his or her failure to pay in accordance with the maintenance order; and

(d) the other circumstances which should, in the opinion of the court, be taken into consideration.

(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section. [My emphasis]

41 Conversion of criminal proceedings into maintenance enquiry

If during the course of any proceedings in a magistrate's court in respect of-

(a) an offence referred to in section 31 (1); or

(b) the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person,

it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court shall convert the proceedings into such enquiry.

[20] These remedies have simply been disregarded. It was held in *De Wit v De Wit*³ that it is the maintenance officer, not the complainant, who must decide whether or not to take such steps. The failure to take effective and available steps speaks of gross incompetence and dereliction of duties.

[21] As a result the plaintiff cannot recover the arrear maintenance, and is left with only a dubious *spes* of future maintenance payments.

[22] The plaintiff's claim is for pure economic loss suffered as a result of the maintenance officers' failure to take the necessary steps to secure her claim. The Act placed a statutory duty upon them to take such steps. Their failure to do so is therefore unlawful. They have patently been grossly negligent. These facts satisfy the requirements for an action for pure economic loss suffered as a result of an omission.

[23] The loss that the plaintiff suffered is the amount of arrear maintenance that the maintenance officers could and should have secured through an attachment of M[...]’s pension benefit. This amount was irretrievably lost when the magistrate ordered on 28 October 2009 that the arrears be written off.

[24] The plaintiff sued the individual maintenance officers personally, jointly and severally with the first and second defendants. The individual roles of the different maintenance officers do not appear from the evidence. As a team of maintenance officers they neglected to take the steps provided for in the Act. Their employer, the second defendant is vicariously liable for their unlawful and negligent omissions. I shall therefore make no orders against the maintenance officers individually.

[25] The amount of the claim falls within the jurisdiction of the magistrates' court. However, this action is akin to a review of proceedings of a magistrates' court sitting as a maintenance court. The magistrates' court has no jurisdiction to review its own proceedings. It was therefore appropriate for the plaintiff to bring her action in this court

In the result I make the following order:

1. The first, second and third defendants are ordered to pay to the plaintiff the sum of R24 500 jointly and severally, the one paying the others to be absolved;

2. Interest on the said sum at the rate of 15,5% per annum from the date of summons.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date heard: 23 - 25 April 2014

Date of judgment: 26 May 2014

Counsel for the plaintiff: Attorney Ms A. Thakor

Attorney for the plaintiff: Webber Wentzel

10 Fricker Road

Illovo Boulevard Johannesburg

Tel: 011 530 5358

Fax: 011 530 6358

Ref.: A. Thakor/2101491

Counsel for the defendants: Attorney Mr L. Kopman

Attorney for the defendants: The State Attorney

Ref: Ref.: 8802/2012/21

1 *2004 (5) SA 388 (D) at 396E-J*

2 [2004 JOL 12662(C)]

3 1995 (3) SA 700 (T) at 709