IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL PROVINCIAL DIVISION,
PIETERMARITZBURG

Case No: 4212/07

AR No: 84/2008

In the matter between:

AMBIGAY RAIDOO YUDKOFF **Appellant**

versus

PRAVEEN RAIDOO **First Respondent**

MAGISTRATE BP MBULAWA **Second Respondent**

JUDGMENT

Delivered on: 2009

STEYN J

[1] Introduction

This is an appeal against a rescission order, granted in terms of section 30(1)(a) read with section 26(2)(a)(iii) of the

Maintenance Act, 99 of 1998 (hereinafter referred to as 'the Act') by the second respondent, in her capacity as Magistrate, at the Maintenance Court Durban.

[2] The background:

The appellant and the first respondent were previously married to each other. Three minor children were born from their marital relationship. On 9 February 2001 a final decree of divorce was granted wherein it was provided that the first respondent should pay maintenance to the appellant. Such order was however amended on 15 May 2002 by the Maintenance Court Durban to specifically provide for:

"4.1 the cost of the children's general and casual clothing (in addition to their school and related clothing); and

4.2 the children's pocket money directly to the children;

5. the respondent shall be liable and shall pay all medical, dental and ophthalmic expenses reasonably incurred in respect of the children including all costs of hospitalisation, surgical treatment, prescribed medicines and allied expenses;

6. the respondent shall pay all the educational expenses

of the children, up to and including tertiary level, such expenses shall include, inter alia, school fees, subscriptions, uniforms, books and insurances, sporting fees, sporting uniforms and equipment, extra mural fees and equipment, it being recorded that it is the parties' intention that the children should continue to attend Crawford School or an equivalent private school, and the respondent shall pay all the fees and other amounts required by the school from time to time."

On 9 November 2006 the Maintenance Court ordered a writ of attachment and pursuant to the attachment order the First Respondent's bank account was frozen. On the 29th November 2006 the First Respondent launched an application in which he sought to rescind the order for the attachment of the debt and such attachment order was then set aside.

In arriving at her decision to set aside the attachment order the learned Magistrate in short, found that the affidavits filed in support of the Section 26 Application were irregular and based on hearsay evidence as such affidavits had not been deposed to by the Applicant but by one J Nel.

The appellant now appeals against the decision.

[3] At the onset it should be stated that this court is and always will be acutely alive to the interests of children in disputes such as that which is now before this court. I have accordingly at all times in considering this matter kept this paramount consideration of the interests of the minor children who still need to be maintained, in mind.

I accordingly fully align myself with the view of the Constitutional Court as expressed in *AD and DD v W and Others (Centre for Child Law as Amicus Curiae, Dept for Social Development as Intervening Party)*[1] when it held that the interests of minors should not be *'held to ransom, for the sake of legal niceties'* and that in a case before a court the best interests of the child *'should not be mechanically sacrificed, on the altar of jurisdictional formalism.'*[2]

Before dealing with the issues on appeal it is necessary to briefly examine the relevant legislation applicable to the dispute before this court.

1 2008 (3) SA 183 (CC), see also *J v J* 2008 (6) SA 30 (C) at 37G-H.
2 *J v J supra* at 38A-B.

[4] The Maintenance Act:

The Maintenance Act provides for civil remedies against defaulters, which includes execution against property, the attachment of emolumants and the attachment of debts. Most specifically section 26 which deals with the enforcement of maintenance orders provides for:

> *"(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), 20 or 21(4) has failed to make such a payment, such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon -*
> *i) by execution against property as contemplated in section 27;*
> *ii) by the attachment of emoluments as contemplated in section 28; or*
> *iii) by the attachment of any debt as contemplated in section 30."*

[5] Section 26 also deals with the specific requirements that need to be fulfilled whenever an application in terms of section 26 is lodged. It stipulates that a copy of the maintenance order be attached to an application and that the

application also be accompanied by a statement under oath or affirmation setting forth the amount which the person against whom such order was made has failed to pay.[3] The aforementioned section clearly indicates/reflects that the affidavit used in support of the application is of utmost importance to the application in terms of Section 26 and hence it is necessary to scrutinise more closely the affidavits that were filed in obtaining the attachment order issued on 9 November 2006.

[6] The remedies provided for by the Act are clearly aimed at creating an environment where children will not be neglected due to the conduct of mothers and fathers who default in paying maintenance.[4] An analysis of the provisions of the Act, however, also shows that some of the provisions, such as section 26 which is applicable to this matter are far reaching and prejudicial in nature and hence the Legislature in its wisdom has provided for specific safeguards to guard against some of the drastic measures and consequences provided for in the Act.

---

3 See s 26(2)(b) of the Act.

4 See *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) at para [24] – [28]).

I shall now turn to the issues on appeal.

[7] The issues on appeal

In considering whether the rescission decision of the court *a quo* was correct, the main issues of the appeal that need to be considered are the following:

a) The alleged irregularities in the affidavits before the Court issuing the writ;

b) The application of the hearsay rule and the rescission decision of the court *a quo*;

[7.1] Alleged irregularities in the affidavit:

To my mind the issue of whether the application for enforcement of the Maintenance order in terms of s 26 of the Act, was accompanied by a statement under oath and whether the deponent was in a position to declare how the maintenance order was not complied with, i.e. how the respondent failed to pay the maintenance, is the fundamentally important issue in

deciding this appeal. Any irregularities in relation to the statement under oath or the deponent would mean that the provisions of Section 26 have not been fully complied with.

I shall now deal with each of the relevant affidavits in order to consider whether there were any irregularities:

[i] The first affidavit displays that the deponent is Ambigay Raidoo Yudkoff who declared that the defendant (now Respondent) is in arrears with his maintenance payments to the following extent: Medical Aid - an amount of R17 595,85; Clothing - an amount of R36 359,37 and Extras - an amount R130 814,68; the sum total of arrears, being R184 769,90. This affidavit, despite being deposed to by Ambigay Raidoo Yudkoff was not signed by her in the presence of a commissioner of oaths but by J Nel. *Ex facie* the document it appears that J Nel purportedly took an oath swearing that the contents of this affidavit were true and correct.

[ii] The second affidavit that accompanied the application in terms of Section 26, is also deposed to by Ambigay Raidoo, who ex facie the document once more declared that Mr Raidoo was in arrears. She also in the document declared that she is aware that 'if the affidavit is tendered in evidence, that I would be liable to prosecution if I wilfully state anything I know to be false, to be true.' This affidavit is once again not signed by the person deposing to the affidavit but by Ms J Nel.

[iii] The third affidavit that was tendered in support of the application in terms of section 26 of the Act follows the irregular pattern of the two previous affidavits, and was yet again signed by Ms Nel, despite the fact that it purports to be a statement made by Ambigay Raidoo who affirmed under oath that she is the person 'in whose favour a maintenance order was made' and that the Respondent is in arrears. This 'affidavit' was

made on 31 October 2006 and signed by Nel as the deponent on two dates, namely 31 October 2006 and 1 November 2006.

[iv] All these affidavits were not signed nor made by the deponent. The one and only person who should have made and signed these affidavits was Ms Raidoo but she never did. Accordingly all these affidavits used in the support of the application to obtain an order in terms of s 26 of the Act were clearly irregular and should never have been used in support of the section 26 application, nor should any order have been issued on the basis of such affidavits.

[v] It is apparent from all the papers filed that despite Ms Nel being authorised to institute proceedings on behalf of Ms Raidoo, that no reading or interpretation of such authorisation could ever be expanded to include an authority to depose to a statement in another person's name. If Ms Nel was under the impression that she was

> authorised to institute the proceedings in terms of the power of attorney issued by Ms Raidoo Yudkoff, then she should have applied for the order in a proper manner, i.e. to depose to the affidavits in her own name and to declare under oath all the relevant facts that are in her knowledge. To allow parties to make statements under oath on behalf of third parties not taking the oath in respect of such statement would only make a mockery of any justice system.

The rationale for making a statement under oath is to avoid false statements being made by deponents. Such false statements under oath are viewed in a serious light in any justice system. Our justice system is no different and deponents are faced with consequences when making such statements to the extent that such deponents could be charged with criminal offences such as perjury or defeating of the ends of justice.[5]

I therefore cannot fault the learned Magistrate's finding when

5 Cf. Statutory Perjury (s 319(3) of the 1955 Criminal Procedure Act) also see s 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

she held in relation to these affidavits as follows:

> *"[T]he applicant is the one who incurred the claimed expenses. The applicant is the one residing with the children in question. So therefore it goes without saying that the person qualified to depose to the founding affidavit is the applicant herself. Whatever Ms Nel deposed to in the founding affidavit thus amounted to hearsay."*

I will deal with the issue of the hearsay later in this judgment.

It was argued that as Ms Raidoo had subsequently herself deposed to a further affidavit in the United States of America and that the irregularities referred to should be condoned. I am not persuaded by this argument as I fail to see how it could have been expected of any court to rectify fatally flawed affidavits, retrospectively. What was asked of the court *a quo* was not to condone a defect but to condone an irregular procedure. In my view the defects in the aforementioned affidavits used in support of the writ of execution were materially defective and as such could not be condoned for the reasons given.

Before dealing with the issue of hearsay it should be mentioned that the learned Magistrate's judgment although sound is not above criticism. What is however required is to

determine whether she misdirected herself in either dealing with the facts or the application of the law. I have critically analysed the judgment and am of the view that the Magistrate adopted a very narrow approach when interpreting the power of attorney issued in favour of the attorneys. In my view the terms of the power of attorney are fairly broadly stated as the following extract indicates:

> *"[T]o ask, demand sue for, and recover, of and from all or any person or persons whomsoever, all such sum or sums of money as now are, or shall, or may at any time hereafter become due,"*

The power was therefore not limited only to the laying of criminal charges in respect of the Maintenance Act but was extended to encompass any litigation. This said, however, I remain unconvinced that the learned Magistrate was mistaken when she came to the conclusion that the order should be set aside, based on the fact that the application for the order was not in accordance with the law.

[8] <u>The application of the hearsay rule</u>

On behalf of the Appellant it was argued that the learned

Magistrate erred when she held that the affidavit deposed to by Ms Nel was based on hearsay and was inadmissible, I shall now deal with this submission.

In such it had at first been argued that the affidavits do not constitute hearsay[6] evidence and thus were admissible. In the alternative it was strongly argued by Mr Shapiro, acting on behalf of the Appellant, that the learned Magistrate should have exercised her discretion in terms of section 3 of the Evidence Law Amendment Act, 45 of 1988 and allowed the affidavit of Ms Nel as admissible evidence. It was argued that the learned magistrate should have exercised such discretion and allowed the evidence of the applicant in the 'interests of justice'. In my view there appears to be no reason why reliance should have been placed on hearsay evidence in circumstances where the applicant was readily available to make a statement, as she subsequently did. The best evidence to have been used in support of the application was the evidence of Ms Raidoo Yudkoff, and

6 Hearsay is now defined in section 3(4) of Act 45 of 1988 which reads as follows:

> *"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence*;

hence there was no need for the exercise of any discretion, as stipulated in terms of s 3(c) of Act 45 of 1988. Ms Raidoo was available and could have deposed to an affidavit.[7]

In my view the magistrate was correct in deciding that the evidence constituted hearsay and was thus inadmissible.

In my view the Second Respondent properly evaluated the case in light of the requirements set forth in section 27(5) of the Act when she found that the First Respondent had shown good cause for the attachment to be set aside and subsequently acted correctly when she had set the writ aside.

[9] Accordingly the appeal should be dismissed with costs.

_____

Steyn, J

7 See s 3(c)(v) which stipulates that the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, is but one of the considerations exercising a discretion in terms of the Act.

Koen J: I agree, it is so ordered.

_____

Koen, J

Date of Hearing:	20 April 2009
Date of Judgment:	12 June 2009
Counsel for the appellant:	Adv W N Shapiro
Instructed by:	Shepstone & Wylie c/o Tomlinson Mnguni James
Counsel for the first respondent:	Adv E S Law
Instructed by:	Nan Naidoo Attorneys c/o Steenkamp Weakly Ngwane