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

CASE NO. AR 245/13

In the matter between:

MARY- ANNE VAN DIJK (VINCENT)

Appellant

And

CHRISTOFFEL JOHANNES VAN DIJK

Respondent

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] This is an appeal against an order of the maintenance court refusing the authorisation of the issue of a warrant of execution in respect of the Respondent's failure to meet certain maintenance obligations due by him.

BACKGROUND:

[2] On the 9 January 2013¹ an order² was granted by the maintenance court in Pietermaritzburg directing the Respondent:

- (a) to pay maintenance in the sum of R3 500.00 per month per child in respect of the minor children M a girl born on 14 October 1995, J a girl born on 22 June 1998 and C a girl born on 13 December 1999;
- (b) to pay the boarding fees in respect of M and J for 2012;
- (c) to pay the boarding fees for the three minor children;
- (d) to pay the school fees in respect of the three minor children;
- (e) to reimburse the Appellant for premiums for the membership of the minor children on her Medical Scheme on the Emerald participation level;
- (f) to pay alternatively reimburse the Appellant in respect of all reasonable educational costs over and above the school fees;
- (g) to pay the Concerta medication in respect of Calsey.

[3] On 4 February 2013 the Appellant applied *ex parte* to the maintenance court in terms of s 26 and 27 of the Act³ for authorisation for the issue of a warrant of execution in the sum of R19 898.84. *Ex facie* the affidavit in support of that application, the Respondent allegedly failed to pay:

- (a) the maintenance in respect of January 2013⁴ and February 2013⁵, in that he paid an amount of R9 462.00, leaving a shortfall of R11 538 in arrears;
- (b) the boarding fees in respect of the three minor children, in that he paid an amount of R12 600.00, leaving a balance of R6 300.00 in arrears;
- (c) the educational costs in the sum of R2 060.84.

¹ The judgment of the court *a quo* wrongly refers to the order in respect of which the authorisation of the warrant of execution was sought as being one dated 21 December 2012.

² The maintenance order was one made in terms of section 16 of the Maintenance Act 1998 against the Respondent, as a person legally liable to maintain his three minor children, in substitution of an earlier maintenance order of the 21 of December 2012 which was in force, or in substitution of other earlier maintenance orders which were previously in force, as contemplated in s16 of the Maintenance Act 99 of 1998 (hereinafter referred to as 'the Act').

³ The Maintenance Act 99 of 1998.

⁴ He had paid R4 232,00.

⁵ He had paid R5 230.00.

[4] It is common cause that when the application was argued before the court *a quo*⁶, an appeal had already been noted by the Respondent against the maintenance order⁷ on which the application for authorisation was based.

THE JUDGMENT OF THE COURT A QUO:

[5] The court *a quo* concluded that the maintenance order in respect of which the authorisation of the issue of a warrant of execution was sought, was one contemplated in s 16(2) of the Act. Referring to s 26(3)⁸ of the Act, which provides for enforcing a maintenance order by applying for authorisation for the issue of a warrant of execution but which contains no reference to s 16(2) and only refers to orders in terms of s 16 (1), the court concluded that it did not have the power to authorise the issue of the warrant of execution. It accordingly refused the application.

[6] S 16(2) of the Act provides:

‘(a) Any court –

(i) that has at any time, whether before or after the commencement of this Act, made a maintenance order under subsection (1)(a)(i) or (b)(i);

(ii) that makes such a maintenance order; or

(iii) that convicts any person of an offence referred to in section 31 (1),

shall subject to paragraph (b)(i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with that maintenance order if that court is satisfied -

⁶ According to the Respondent’s heads of argument the Appellant subsequently brought successful applications for the authorisation of the issue of warrants of execution against the Respondent, namely during August 2013 for an amount of R23 266.00, which was met when the warrant was served, and 16 October 2013 in respect of which an application brought by the Respondent to have the warrant set aside, is pending.

⁷ Pars of which have been quoted in paragraph 2 above.

⁸ Quoted in paragraph [17] below.

- (aa) in the case of subparagraph (1), after hearing such evidence, either in writing or orally, as that court may consider necessary;
- (bb) in the case of subparagraph (ii), after referring to the evidence adduced at the enquiry or the application for an order by default, as the case may be; or
- (cc) in the case of subparagraph (iii), after referring to the evidence at the trial ,

that it is not impracticable in the circumstances of the case.

- (b) A court –
 - (i) contemplated in paragraph (a)(i) shall only make an order referred to in paragraph (a) on application; and
 - (ii) that convicts any person of an offence referred to in section 31(1) shall make such order whether or not any penalty is imposed in respect of that offence or any order is made under section 40 (1)."

[7] The maintenance order in respect of which the authorisation of the issue of a warrant was sought, was clearly not one for periodical payments contemplated in s 16(2). This much was also common cause between the parties on appeal. Indeed the order sought to be enforced was one in terms of s 16(1)(b)(i)⁹ of the Act being a maintenance order contemplated in s 16(1)(a)(i) made in substitution of an existing maintenance order which was in force. The court *a quo* accordingly erred in concluding that the case before it was one in terms of s 16(2) which precluded the authorisation of the issue of a warrant of execution in terms of s 26(3)(b) of the Act.

[8] It follows that if that order is appealable, the decision of the court falls to be set aside. If set aside, an appeal court would in the ordinary course substitute for the order set aside such order as should have been granted.

[9] On the arguments raised in this appeal, the main issues arising for consideration are:

- (a) accepting that the refusal of the application for authorisation by the court *a quo* was wrong, whether that decision is appealable;
- (b) if appealable, what order should properly have been granted by the court *a quo*.

⁹ See paragraph 13 below.

The scheme adopted in this judgment will be as follows. Firstly I shall refer briefly to the relevant provisions of the Act. I shall then, and simply because it is convenient to do so, deal with some of the relevant legal principles to be considered in dealing with an application for authorisation for the issue of a warrant of execution in respect of unpaid maintenance such as confronted the court *a quo*. Next I shall consider the Respondent's contention that the refusal of such an order is not appealable. On the basis that it is appealable, I shall thereafter consider whether on the facts placed before the court *a quo*, an order authorising the issue of a warrant of execution should have been granted and should now be granted on appeal. Finally I shall deal with the question of the costs of the appeal.

THE APPLICABLE LEGAL FRAMEWORK:

[10] A maintenance court is defined in s 1 of the Act as meaning 'a maintenance court as contemplated in s 3'. S 3 of the Act provides that 'every magistrate's court for a district, established in terms of s 2(1)(e) of the Magistrates' Courts Act, 1944 (Act No 32 of 1944), is within its area of jurisdiction a maintenance court for the purposes of this Act'.

[11] Section 1 of the Act defines 'maintenance order' to mean 'any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic and includes, except for the purposes of s 30(1), any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person'.

[12] Chapter 4 of the Act deals with 'Maintenance and other orders'. The different kinds of orders include those referred to in s16 (Maintenance and ancillary orders), s17 (Orders by consent), s18 (Orders by default), s19 (Variation or setting aside of certain orders), s20 (Orders as to costs of service) and s21 (Orders relating to scientific tests regarding paternity).

[13] Section 16(1)(b) provides:

- (1) After consideration of the evidence adduced at the enquiry, the maintenance court may –
 - (a) ...
 - (b) in the case where a maintenance order is in force –
 - (i) make a maintenance order contemplated in paragraph (a) (i) in substitution of such maintenance order; or
 - (ii) discharge such maintenance order; or
 - (c) make no order.

[14] Section 24 of the Act provides:

‘Effect of orders of maintenance court –

- (1) Save as is otherwise provided in this Act, any order or direction made by a maintenance court under this Act shall have the effect of an order or direction of the said court made in a civil action.
- (2) Any order made under section 16(1)(a)(ii), 20 or 21(4) shall have the effect of a civil judgment of the maintenance court concerned and shall be executed as provided in Chapter 5.’

[15] Section 25 deals with appeals against orders and provides:

- ‘(1) Any person aggrieved by any order made by a maintenance court under this Act may, within such period and in such manner as may be prescribed, appeal against such order to the High Court having jurisdiction.
- (2) On appeal, the High Court or the Supreme Court of Appeal, as the case may be, may make such order in the matter as it may think fit.
- (3) Notwithstanding anything to the contrary contained in any law, an appeal under this section shall not suspend the payment of maintenance in accordance with the maintenance order in question, unless the appeal is noted against a finding that the appellant is legally liable to maintain the person in whose favour the order was made.
- (4) For the purposes of subsection (1) “**order**” –
 - (a) does not include any order by consent referred to in section 17(1), any provisional order referred to in section 21(3)(a) or any order by default referred to in section 18(2)(a);

- (b) includes any discharge of such order as well as any confirmation, setting aside, substitution or variation of such provisional order or such order by default;
- (c) includes any refusal to make such order as well as any refusal-
 - (i) to make such provisional order;
 - (ii) to make such order by default; or
 - (iii) to make any provisional maintenance order under section 16 by virtue of the provisions of any other law.'

[16] Chapter 5 of the Act deals with 'civil execution.' It comprises sections 26 to 30.

[17] Section 26 provides:

'Enforcement of maintenance or other orders. –

- (1) Whenever any person –
 - (a) Against who 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.
- (2)(a) If any maintenance order or any order made under section 16(1)(a)(ii), 20 or 21(4) has remained unsatisfied for a period of ten days from the date 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 the 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 28(1); or

- (iii) for an order for the attachment of any debt referred to in section 30(1).
- (b) The application shall be made in the prescribed manner and shall be accompanied by –
 - (i) a copy of the maintenance or other order in question; and
 - (ii) a statement under oath or affirmation setting forth the amount which the person against whom such order was made has failed to pay.
- (3) A maintenance court shall not authorise the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order-
 - (a) If the payment of maintenance in accordance with that maintenance order has been suspended by an appeal against the order under section 25; or
 - (b) If that maintenance court has made an order referred to in section 16(2).
- (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.'

[18] Section 27 of the Act deals with “warrants of execution” and provides that:

- ‘(1) The maintenance court may... authorise the issue of a warrant of execution against the movable property of the person against whom the maintenance or other order in question was made and, if the movable property is insufficient to satisfy such order, then against the immovable property of the latter person to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the cost of execution.
- (2) ...
- (3) A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section, set aside the warrant of execution if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question.

- (4) A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section –
 - (a) in summary manner enquire into the circumstances mentioned in subsection (5); and
 - (b) if the maintenance court so decides, suspend the warrant of execution and make an order –
 - (i) for the attachment of emoluments referred to in section 28 (1); or
 - (ii) for the attachment of any debt referred to in section 30 (1).
- (5) At the enquiry the maintenance court shall take into consideration –
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
- (6)(a) Any person who wishes to make an application under subsection (3) or (4) shall give notice in the prescribed manner of his or her intention to make the application to the person in whose favour the maintenance or other order in question was made, which notice shall be served at least 14 days before the day on which the application is to be heard.
- (b)...'

APPLICATIONS FOR THE AUTHORISATION OF A WARRANT OF EXECUTION:

[19] The maintenance order in respect of which the authorisation of the issue of the warrant of execution was sought, was one contemplated in s16(1)(b) of the Act. If aggrieved by such order, the Respondent could appeal such order in terms of s25(1) of the Act, as he indeed did. In terms of s25(3) of the Act, the effect of noting the appeal was that it 'shall not suspend¹⁰ the payment of maintenance in accordance with the maintenance order in question.' The Appellant was accordingly entitled to enforce the maintenance order against the Respondent, as a person against whom a

¹⁰ The constitutionality of this provision was not attacked. Accordingly no view is expressed thereon.

maintenance order had been made¹¹, notwithstanding the Respondent noting an appeal against that order.

[20] If any obligations required to be performed by the Respondent in terms of the maintenance order remained had unsatisfied for a period of ten days, the Appellant, as the person in whose favour such order was made, was entitled to apply to 'the maintenance court where that person is resident ... for the authorisation of the issue of a warrant of execution referred to in s 27(1)...¹²'. S 26(2)(b) of the Act requires that this be done in the prescribed form, with a copy of the maintenance order attached and a statement under oath setting forth the amount not paid. If these requirements are complied with, authorisation of the issue of a warrant of execution should in the ordinary course be granted.

[21] Neither s 27, nor the form prescribed or such an application, makes provision for the application to the maintenance court for the authorisation of the issue of a warrant of execution to be on notice to the party against whom the maintenance order had been made. It appears competent for such an application to be made *ex parte*¹³. This is what occurred in this instance.

[22] It appears that it is only after a warrant of execution has 'been issued', that the person against whom the warrant of execution has been issued, and whose rights may be affected, may apply to have such warrant set aside in terms of s 27 (3) of the Act, or to have it suspended in terms of s 27(4) of the Act.

[23] In *casu*, the Respondent was represented during the application for the authorisation of the issue of a warrant of execution, but this was purely fortuitous and arose as the attorney for the Respondent happened to discover on a per chance perusal of the file that such an application was pending. As at that stage no warrant of execution had yet been 'issued' under s 27, no application to set aside or suspend

¹¹ as contemplated in s26(1)(a) of the Act.

¹² S26(2)(a) of the Act.

¹³ No view is expressed on the constitutionality or otherwise of this provision as this was not an issue before this court.

the warrant had been brought. Hence, the version of the Respondent, including possibly on issues as outlined in s 27(5) of the Act, were not before the court.

IS THE REFUSAL OF AN APPLICATION FOR THE AUTHORISATION OF A WARRANT OF EXECUTION AN ORDER WHICH IS APPEALABLE?:

[24] In his heads of argument the Respondent contends that the refusal to authorise the issue of a warrant of execution is not appealable.¹⁴

[25] Mr Ender, on behalf of the Respondent, relying on regulations 16 and 17¹⁵ of the regulations to the Act submitted that when an application for the authorisation of the issue of a warrant of execution is considered, it amounts to an administrative act performed by the clerk of the court to whom the prescribed form is addressed and

¹⁴ The Respondent in his heads of argument also contended that the appeal has been rendered moot by subsequent developments, notably subsequent warrants authorised and issued apparently being satisfied. The latter contention was not persisted with. It seems that the arrears in respect of which the authorisation of the issue of the warrant of execution forming the subject of this appeal was sought, have in fact not been discharged to date.

¹⁵ The relevant part of Regulation 16 of the Regulations issued in terms of s44 of the Act contained in GN R.1361 dated 15 November 1999 provides:

'Application for enforcement of maintenance or other orders. – An application for-

- (a) The authorisation of the issue of a warrant of execution;
- (b) ...
- (c) ...'

The relevant part of Regulation 17 provides:

'Warrant of Execution –

(1) A warrant of execution contemplated in section 27 of the Act, shall-

- (a) Substantially correspond with Form L of the Annexure; and
- (b) Be prepared in triplicate.

(2) The person in whose favour the order was made shall prepare Part A of Form L of the Annexure and thereafter lodge the said form with the clerk of the maintenance court concerned.

(3) On receipt of the warrant of execution referred to in subregulation (2) the clerk of the maintenance court shall issue the warrant of execution if he or she is satisfied that

- (a) the authorisation for the issuing of a warrant of execution was granted; and
- (b) the warrant of execution has been properly prepared, by preparing Part B of Form L of the Annexure.

(4)'

even if such an application is decided by a magistrate, it would entail the magistrate acting in an administrative capacity and not a judicial capacity.

[26] It seems that the mere fact that the prescribed form is addressed to the clerk of the court does not vest the clerk of the court with the authority to authorise the issue of a warrant of execution, particularly if regard has had to the express wording of s 27 which provides that it is 'the maintenance court' which 'may ... authorise the issue of a warrant of execution ...'. To the extent that the regulations might suggest, not that I think a proper reading thereof do, that the clerk of the court may authorise the issue of a writ (as opposed to issue a writ after it has been authorised), they appear *prima facie* to be *ultra vires* the provisions of the Act, specifically s 27. As this aspect was however not argued before us fully and did not arise for further consideration, I shall not comment on it further.

[27] In *casu*, the application was considered by the magistrate, who is the correct party to consider an application for the authorisation of the issue of a warrant of execution¹⁶. In considering such an application, there appears no reason why the magistrate's conduct in doing so should be categorised as administrative rather than judicial. The decision of the magistrate is an order of a competent court.

[28] At common law an order is only appealable if it is one which is:

- (a) Final (in the sense that it cannot later be revisited);
- (b) Finally definitive of the rights of the parties.¹⁷

[29] The Respondent argues that an order refusing the authorisation of the issue of a warrant of execution is not final in effect, but merely procedural in nature and that if refused, the applicant for such authority can always apply again. The Appellant relies on the provisions of s 25(1) and specifically the reference to 'any order made by a maintenance court under this Act' to also include an order refusing the

¹⁶ The position is of course different in the High Court where the Registrar issues a warrant of execution pursuant to the provisions of Rule 46? in respect of any unpaid maintenance in terms of an order of that court, supported by an affidavit setting out the amounts that remained unpaid – see *Du Preez v Du Preez* 1977 (2) SA 400 (C).

¹⁷ *Zweni v Minister of Law and Order* 1993(1) SA 523 A.

authorisation of the issue of a warrant of execution, as an order against which an appeal may lie.

[30] Section 25(4) deals especially with the types of decisions that qualify as 'orders'. The subsection does not specifically refer to a refusal to authorise the issue of a warrant of execution, but that omission does not *per se* make such a refusal non appealable. That much is also accepted by the Respondent and correctly so, in my view, as s 25(4) was clearly not intended to be exhaustive of what orders are susceptible to appeal and which not¹⁸.

[31] The provisions of s 25(1) and (4) must be construed against the background of the common law and in the light of the presumption that the intention behind any statutory provision is not to alter the common law more than it is necessary, unless there is a clear expression to the contrary. Differently put, the legislature is presumed not to have intended to change the common law, and in any event not to a greater extent, than is consistent with the language of the particular statute¹⁹. A statute is presumed not to alter the common law unless it expressly states that that is the intention, or unless such intention emerges by irresistible inference from a reading of the statute itself²⁰.

[32] The authorisation of the issue of a warrant of execution is a very important step to the issue of a warrant of execution. In this day when many parties in need of maintenance are left destitute, all methods of execution at their disposal, unless expressly excluded, should be available to exact satisfaction of outstanding claims to maintenance. The only jurisdictional prerequisites are that:

- (a) there must be a valid maintenance order (even if subject to appeal);

¹⁸ See *F Stauffer Chemical Co. and another v Safsan Marketing and Distribution Co. (Pty) Ltd. and others* 1987(2) SA 331 A at 350G-H to 351B; *Gold Circle (Pty) Ltd. v Premier KZN* 2005(4) SA 402 D at 415-6; *Ndlovu v Ngcobo*; *Bekker v Jika* 2003(1) SA 113 (SCA) at para [20]; *R v Debele* 1956(4) SA 570 A at 575; *De Reuck v DPP*, WLD 2004(1) SA 406 (CC) at para [17] to [18].

¹⁹ See *Gin v G R Gin* 1960(1) SA 24 W at 827; *Coetzee and another v Nedbank Limited* 2011 (2) SA 372 (KZD); *Mills v Starwell Finance (Pty) Limited* 1981(3) SA 84 (N) at 87 B; *S v Leeuw* 1980(3) SA 815 A (at 823 F-G).

²⁰ *Johannesburg Municipality v Cohens Trustees* 1909 TS 811 at 823.

- (b) against the Respondent against whom the warrant is sought;
- (c) which creates obligations which have remained unsatisfied for a period of ten days.

If those requirements are satisfied, then the issue of a warrant should be authorised and it will be up to the party against whom the maintenance order operates to invoke any of his remedies in terms of s 27(3) or (4).

[33] The refusal of authority to issue a warrant of execution is final and definitive of an applicant's rights to proceed to execution. The respondent is not required to place his or her version before the court and he will never have to do so unless the authority to issue the warrant is first granted. An order for authority to issue a warrant is therefore similar to an interlocutory application²¹ to relief, which *ex lege* will become final in nature unless and until set aside or suspended at the instance of a respondent against whom it operates. The preliminary application to authorise the issue of a warrant of execution, if granted will result in the issue of a valid warrant of execution which might, or might not be set aside or suspended. The grant of authority is potentially final, but the refusal of authority is certainly final and definitive of the rights of an applicant for the required authority to proceed to execution.

[34] Obviously an application for authorisation of the issue of a warrant of execution may be refused because of technical deficiencies in that application, such as for example that 10 days had not elapsed from the time that the amount payable became due. In that event an application for the outstanding amounts may always subsequently be brought as the application would have been dismissed for a technical irregularity which cannot be met with a plea of *res judicata*. Nothing would preclude an application subsequently being made to authorise the issue of a warrant of execution in respect of the same amounts that were outstanding at the time of the earlier application which had not been paid. These can be included in a fresh application to be brought, together with any further amounts which have fallen due and remain unpaid, provided the prescribed 10 days had by then elapsed. But that

²¹ The refusal of such an application for authority is in my view analogous to the refusal of an interdict *pendente lite* – see *Knox D'Arcy Limited v Jamieson* 1996(4) SA 348 (A) at 356 H – 360 C which is final and definitive in effect and appealable.

scenario does not render a clearly incorrect refusal of an application for authority for the issue of a warrant of execution on its merits, not appealable.

[35] Accordingly, in my view, the refusal of an application for authority to issue a warrant of execution is final and definitive of the rights of the parties in regard to the authority required for the issue of a warrant of execution pursuant to the Act, and is appealable.

WHAT ORDER SHOULD THE COURT A QUO HAVE GRANTED?

[36] The maintenance payments were in terms of the order to commence 'with effect from 31/12/2012 on a monthly basis.' The first payment was to be made on '31/12/2012 and thereafter on/or before the last day of each succeeding month...'

[37] The order does not state whether the maintenance payments were payable in advance or arrears. If payable in advance then the January 2013 payment would only be due on 31 December 2012 and the February 2013 payment on 31 January 2013. If payable in arrears then the January 2013 payment would only be due on 31 January and the February 2013 payment on 28 February 2013.

[38] The application is dated 4 February 2013. The affidavit in support of the application was signed on 4 February 2013. At best for the Appellant, if the maintenance was payable in advance, 10 days would have elapsed from when the January payment was due but 10 days would not have elapsed from the end of January 2013 when the February payment would at the earliest be due. If payable in arrears, then 10 days would not have elapsed from either the January 2013 or February 2013 payments becoming due. The affidavit in support of the application was however silent on this aspect. Although this point was not raised, it is something which must be considered in deciding whether the requirement that 10 days must be shown to have elapsed before an application for authorisation can be brought, was satisfied. The parties were invited to submit written argument on this aspect. The above construction was accepted although the Appellant submitted that there were

other outstanding obligations in terms of the court order which it could be inferred had fallen due and in respect of which more than ten days had expired before the application was brought. I am by no means convinced that this is so. In any event, it seems to me that where as drastic a remedy as execution is sought, that the date on which alleged outstanding obligations were due should be spelt out and not left to being inferred. The court *a quo* was not provided with adequate factual allegations under oath on which it could have granted an order authorising the issue of a warrant of execution in the total amount claimed. This court on appeal likewise cannot grant any such order.

[39] Although the appeal succeeds and the refusal of the authorisation on the grounds relied upon by the learned magistrate is set aside, this court is not prepared on what is contained in the supporting affidavit to grant such authority. The Appellant can pursue a fresh application for such authority in the maintenance court, if so advised, after there has been proper compliance with the provisions of the Act.

COSTS:

[40] The magistrate had erred in refusing the application for the reason furnished by him, namely that the order was one in terms of s 16(2). The appeal should to that extent succeed and the order refusing authorisation of the issue of a warrant of execution set aside. The magistrate would not however have been entitled to have authorised the issue of the warrant of execution but for that misdirection, because of the lacunae in the supporting affidavit.

[41] The Appellant has been successful in the appeal in challenging the refusal of the authorisation to issue the warrant of execution. However, the success has not meant that the refusal of the authorisation by the court *a quo* is substituted with an order that the required authorisation be granted. There was the 10 day requirement which was in my view not satisfied on the allegations contained in the supporting affidavit on a balance of probabilities. This relates to a substantial component of the application. The order granted by the court *a quo* was therefore correct but for reasons different to those relied upon by the magistrate. In the circumstances it

appears just and equitable and a correct exercise of this court's discretion on costs that each party be directed to pay his/her own costs of the appeal.

ORDER:

[42] The following order is granted:

1. The appeal is upheld and the refusal of the authority for the issue of a warrant of execution on the grounds relied upon in the judgment of the maintenance court set aside.
2. Each party is directed to pay his/her own costs relating to the appeal.

BEZUIDENHOUT A J: I agree.

DATE OF HEARING: 18 NOVEMBER 2013

DATE OF DELIVERY: 7 FEBRUARY 2014

APPELLANT'S COUNSEL: MS S FRANKE

APPELLANT'S ATTORNEYS: BERNHARD ATTORNEYS

(Ref: OLB : 01V008001)

RESPONDENT'S COUNSEL: ADV. G ENDER

RESPONDENT'S ATTORNEYS: TALBOT ATTORNEYS

(Ref: Mr T Talbot/02V005004)