SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 602/2011

Not Reportable

In the matter between:

MARTIN JAMES BROSSY **APPELLANT**

and

DEBORAH GREER BROSSY **RESPONDENT**

Neutral citation: *Brossy v Brossy* (602/11) [2012] ZASCA 151 (28 September 2012).

Coram: Mthiyane DP, Snyders, Van Heerden, Malan et Pillay JJA

Heard: **17 August 2012**

Delivered: **28 September 2012**

Summary: Maintenance of minor children – variation order refused – appeal to high court – record incomplete – matter postponed sine die for completion and reconstruction of the record.

ORDER

On appeal from: Western Cape High Court, Cape Town (Allie and Saldanha JJ sitting as court of first instance)

The following order is made:

1 The appeal succeeds.

2 No order is made as to costs.

3 The order of the high court dated 11 March 2011 is set aside and replaced with the following:

'a) The appeal is postponed *sine die* to enable the appellant to complete and reconstruct the record of proceedings in the maintenance court.

b) Costs are reserved.'

JUDGMENT

VAN HEERDEN AND PILLAY JJA (MTHIYANE DP AND MALAN JA CONCURRING)

[1] This appeal, which is before us with the leave of this court, concerns an ongoing battle about maintenance between ex-spouses. This battle commenced in the maintenance court in about 2005. In that year, and again in March 2007, the respondent (Ms Deborah Brossy) filed a complaint against the appellant (Mr Martin Brossy) in terms of s 6(1)*(b)* of the Maintenance Act 99 of 1998 (the Act).[1] Ms Brossy sought an upward variation of the maintenance payable by Mr Brossy in respect of the parties' two children. An enquiry was then held in the

1Section 6(1)*(b)* provides as follows: '(1) Whenever a complaint to the effect – *(b)* that good cause exists for the substitution or discharge of a maintenance order, has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.'

maintenance court. The magistrate found that Ms Brossy had not provided sufficient grounds to justify any increase to the existing maintenance award and the variation was refused.

[2] Ms Brossy appealed to the Western Cape High Court (Allie and Saldanha JJ), as was her right in terms of s 25 of the Act. That court made an order in the following terms:

'1. [That] this matter be referred back to the magistrate's court for it to commence *de novo* before a new magistrate.
2. Such proceedings shall commence within 30 days from the date of this order.
3. The Legal Aid Board of South Africa shall consider an application for legal aid brought on behalf of the children in terms of section 28(2) of the Constitution, within 7 days of this order.
4. The Appellant is to do all things necessary to facilitate the completion of the necessary application and provide all the supporting documents required by the Legal Aid Board.
5. At the finalisation of the trial, the magistrate presiding shall determine whether either or both of the parties should pay all or a contribution towards the legal costs incurred by the Legal Aid Board in providing the necessary legal representation to the minor children.
6. No order as to costs is made.'

It is this order against which the present appeal is directed.

[3] By way of background, the parties have two children, Christopher, born on 12 November 1993, and Emma, born on 4 November 1996. The parties were divorced from each other in February 1998. An agreement, entered into between the parties by way of a consent paper, was made an order of court. In terms thereof Mr Brossy undertook to pay maintenance for the children at the rate of R1 500 per month per child. In addition, Mr Brossy undertook to pay the costs of schooling for the children at public schools. If, however, he consented to the children attending a private school, he was obliged to pay the costs of schooling charged by the private school concerned. Mr Brossy also undertook to pay the cost of extra-mural activities for the children, provided that he agreed to them participating in such activities and that the children maintained an interest in them.

[4] On 14 September 2000, a 'consent and maintenance order' was made in terms of s 17 read with s 16 of the Act, whereby Mr Brossy's obligation to pay maintenance for the children was increased to R2 000 in respect of Christopher and R1 800 in respect of Emma, such amounts to be increased annually in accordance with the Consumer Price Index. He also undertook to pay 'the Hill pre-school school fee rate' (a private school) for Emma's education and the 'SACS primary school fee rate' for Christopher's education. The rest of the agreement between the parties in terms of the consent paper remained intact.

[5] In 2007, the parties entered into a co-parenting agreement in terms of which they had to make joint decisions about the general welfare of the children, including decisions about which schools or other educational institutions the children would attend in the future. That notwithstanding, the agreement further provided that Ms Brossy would in the ordinary course make decisions regarding, inter alia, the children's schooling, the courses they took, their 'general education', as well as decisions about the children's extramural activities, including the choice of such activities. It was recorded that the children 'currently attend Reddam School' (a private school).

[6] Ms Brossy ultimately sought an amount of R25 000 per month per child as a global maintenance payment, with the exception of all medical, dental and other like expenses, which Mr Brossy was in any event obliged to pay in terms of the consent paper. Mr Brossy was at that time paying R5 300 per month in respect of both children. Ms Brossy also sought 'back payments from 1 June 2005'. Her claim, in effect, thus purported to include a claim for 'arrear maintenance' in a capital amount which, by the date of the magistrate's judgment on 27 August 2009, exceeded R2 million.

[7] The biggest dispute between the parties was the payment of school fees and the cost of extra-mural activities. At the time of the maintenance enquiry, the children were both attending a private school (Reddam School), where Christopher had been for more than six years and Emma had been for nine years. Mr Brossy had never paid the total Reddam School fees. He paid an

amount equal to the fees charged by, respectively, SACS and Rustenburg Girls' School. Because the Reddam School fees were considerably higher than these other (public) schools, Ms Brossy had always paid the balance. She testified that she had only managed to do so by borrowing money from her parents, who (she alleged) had lent her more than R4 million.

[8] Ms Brossy also testified that Mr Brossy had consistently paid too little for the children's' extra-mural activities and that she had to pay the balance, making her financial position even more precarious.

[9] During the course of the maintenance enquiry, reference was made to a large number of exhibits, most of which did not form part of the record before the high court. In addition, because of malfunctioning recording equipment, the examination-in-chief and part of the cross-examination of Ms Brossy had not been recorded and the transcript of this evidence was thus not available. It would seem that the record before the high court was also defective in other aspects. In the light of the incomplete record, the high court did not deal with the merits of the appeal.

[10] Ordinarily, an appellant bears the onus of placing a complete record before the court. Should the record be defective in material respects, a court of appeal would generally strike the matter from the roll and render the appellant liable for costs. The high court invited the parties to address it on whether the appeal should be struck from the roll. Ultimately, however, despite the incompleteness of the record, the high court did not strike the matter from the roll, apparently to protect the interests of the minor children involved. It also did not postpone the appeal in order to afford Ms Brossy an opportunity to place a complete record before it to ensure that all the necessary material was available to enable proper adjudication on appeal.

[11] It does not, however, appear from the record that the deficiencies could not be made good. Both parties were of the view that the record could indeed be completed and reconstructed. In fact, during the hearing of Mr Brossy's application to the high court for leave to appeal to this court, his legal

representatives tendered to provide the exhibits handed up in the maintenance court that did not form part of the record. In argument before this court, Mr Brossy's counsel once again tendered to assist Ms Brossy in efforts to ensure that the record was completed and reconstructed to an acceptable level to enable the high court to deal with the appeal. We are certain that this tender will be made good.

[12] The high court came to the conclusion that the magistrate had acted irregularly 'in as much as he launched a scathing attack upon the respondent [Mr Brossy] and his legal representative'. The court listed several examples of what it considered to be overly aggressive questioning of, apparent disrespect for and disbelief of Mr Brossy on the part of the magistrate. The court also concluded that the magistrate's questioning of Mr Brossy 'leaves us in no doubt' that the magistrate had prejudged the case. It was on this basis that the high court made the order referred to in paragraph 2 above.

[13] It is trite that a judicial officer must ensure not only that justice is done, but, in addition, that it is seen to be done. He or she must therefore so conduct the trial that his or her open-mindedness, impartiality and fairness are manifest to all concerned in the trial and its outcome.[2] However, in the present case, bias or improper conduct on the part of the magistrate did not form part of either party's case in the high court or before us. Neither party at any stage objected to the magistrate's conduct or applied for his recusal. Indeed, the magistrate's alleged hostility toward Mr Brossy did not influence the outcome of the maintenance enquiry in that the judgment ultimately given by the magistrate was in favour of Mr Brossy. This was overlooked by the high court.

[14] In our view, having decided not to strike the appeal from the roll, the proper course for the high court to have taken was to have postponed the appeal in order to enable Ms Brossy to complete and reconstruct the record and then to have decided the case on its merits. First, the retrospective rights of children were at stake and Ms Brossy was unrepresented. Second, if, as it now appears, the record could be reconstructed, affording Ms Brossy an opportunity to do so would, from her perspective, preserve the children's accrued rights and would

2 See *S v Rall* 1982 (1) SA 828 (A) at 831H-832A.

spare the additional costs of a fully-fledged maintenance enquiry in respect of the period in question. Third, Mr Brossy was being disadvantaged by Ms Brossy's failure to prepare a complete record, and starting matters anew in circumstances where he was not the defaulting party would further prejudice him. Fourth, a postponement to facilitate a full record, with costs reserved, would effectively retain the rights of each party to have his or her day in an appeal hearing.

[15] As regards maintenance claims for the period beyond that of the complaint which formed the basis of the enquiry before the maintenance court, Ms Brossy will be entitled to approach the maintenance court for a further variation based on circumstances prevailing at that stage, and this can be tested by a new maintenance court enquiry. The circumstances of the children have clearly changed in the interim. At the time of the judgment of the maintenance court, Christopher was 15 years and nine months' old and still at school. Emma was 13 years and nine months' old and also at school. Christopher is now a major and will turn 19 years' old in November 2012. He is no longer at school, having matriculated last year. Emma is now 15 years' old and will turn 16 in November 2012. She is in Grade 10 and continues to attend Reddam School. Mr Brossy's liability for Emma's private school fees is therefore still a live issue, while his liability for the costs of tertiary education for Christopher will now also have to be determined. It is important that the children's rights as regards both past and future maintenance be preserved.

[16] As indicated above, it appears that the record of proceedings in the maintenance court can be completed and reconstructed without too much difficulty. As indicated above, in argument before us, Mr Brossy's counsel tendered to assist Ms Brossy in this regard and we have no reason to doubt that such assistance will be forthcoming. Given the nature of the case and the lengthy delays that have already occurred, it is to be expected that the process of putting the record in order will take place speedily. Once the record is in order, Ms Brossy can apply for a date for the hearing of the appeal. Should she fail to do so within a reasonable period of time, then Mr Brossy will be entitled to apply for a date for the hearing of the appeal and to ask for a dismissal of the appeal with costs, including the costs of the postponement. It will then be for the high court to

determine the appeal on such basis as to it seems meet.

[17] As indicated above, the high court ordered Legal Aid, South Africa to consider an application for legal aid brought on behalf of the children in terms of s 28(2) of the Constitution. This was on the basis that the interests of the minor children should be protected and advanced by affording them legal representation at the envisaged retrial before the maintenance court. The Centre for Child Law, which appeared before us as *amicus curiae*, pointed to international and regional instruments to which South Africa is a party, such as the United Nations Convention on the Rights of the Child (CRC)[3] and the African Charter on the Rights and Welfare of the Child (ACRWC),[4] both of which entrench children's rights to express their views in all matters affecting them and their right to be heard in all judicial and administrative proceedings affecting them. Section 28(1) *(h)* of the Constitution guarantees the child's right to have a legal representative assigned by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result

[18] Children's right to participate has been incorporated into domestic legislation in the Children's Act 38 of 2005, s 10 of which reads as follows:

'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'

As one of the general principles of the Children's Act, s 10 must guide the implementation of all legislation applicable to children (s 6(1)). In appropriate cases, this would include the Maintenance Act.

[19] It is correct that, in many maintenance enquiries, the dispute will be between the parents, and the children will have an identity of interest with the parent claiming maintenance on their behalf. This does not mean, however, that there will never be situations where it will be important for a child to be given a say in a maintenance matter, although the form that such participation will take

3 Article 12 of the CRC.
4 Article 4(2) of ACRWC.

will depend on a variety of factors, such as the age and ability of the child to express his or her own views. In this case, for example, much of the acrimony between the parents arises from the choice of school that the children are attending and the extra-mural activities in which the children are involved. It does not appear from the record that the children's preferences and choices in this regard have ever been canvassed before the court. As was pointed out by Wallis AJ in *Legal Aid Board v R* 2009 (2) SA 262 (D) para 20:

'When one is dealing with acrimonious litigation concerning the fundamentally important questions of where a child shall live and who shall be responsible for their principal day-to-day care and the central decisions concerning their lives, such as schooling, health, religion and the like, it seems to me that, if the court comes to the conclusion that the voice of the child has been drowned out by the warring voices of her or his parents, it is a necessary conclusion that substantial injustice to the child will result if he or she is not afforded the assistance of a legal practitioner to make his or her voice heard.'

[20] This is not an area where it is possible to lay down hard and fast rules. Whether or not a legal representative should be appointed for a child who is the subject of a maintenance dispute will depend on the specific facts and circumstances of each case. It is primarily a question of recognising the child as an autonomous individual whose right to express views and to be heard should be tested against the nature of the dispute and the role that the child can play in adding a significant dimension to the dispute. It is no longer the case that children should be seen and not heard. Maintenance matters are not an exception to this rule.

[21] Christopher is now a major and will be able to institute his own maintenance claim against his father, should this become necessary. However, as far as Emma is concerned, one must bear in mind that she might well require the assistance of a legal representative in any future maintenance claim by Ms Brossy acting on Emma's behalf against Mr Brossy.

[22] As regards the costs of this appeal, it seems to us to be just that Ms Brossy should not at this stage be mulcted in the costs of appeal. She has acted throughout in what she believed to be in the best interests of her children, even to

the extent of representing herself throughout the proceedings due to lack of funds for a legal representative. In our view, the fairest outcome is that there should be no order as to costs in this court.

[23] Subsequent to the appeal hearing and after judgment was reserved, but before this judgment was finalised, Snyders JA became indisposed. This judgment is therefore a decision of the remaining members of this court.

[24] The following order is made:

1 The appeal succeeds.

2 No order is made as to costs.

3 The order of the high court dated 11 March 2011 is set aside and replaced with the following:

'a) The appeal is postponed *sine die* to enable the appellant to complete and reconstruct the record of proceedings in the maintenance court.

b) Costs are reserved.'

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B J VAN HEERDEN

JUDGE OF APPEAL

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R PILLAY

JUDGE OF APPEAL

APPEARANCES

APPELLANT:	D Watson Instructed by: KG Druker Attorneys, Cape Town Honey Attorneys, Bloemfontein
RESPONDENT:	Deborah Greer Brossy In person