Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number A275/2010

In the matter of:

DEON GERHARD MULDER Appellant

versus

SUSANNA FRANSINA MULDER Respondent

Judgment: 01 February 2011

MIA AJ

[1] This is an appeal against a decision of the Magistrate, Kuilsriver, to increase the maintenance of the respondent and the minor child from R 2000 per month each to R 7000 per month each. This increased the total amount payable by the appellant from R4000 per month to R14000 per month. The magistrate ordered further that the maintenance order made shall operate retrospectively from 1 June 2009.

[2] The parties were divorced on 1 August 2008 and a settlement agreement

between the parties was made an order of Court. In terms of this settlement agreement the appellant (plaintiff in the divorce action) agreed to pay R 2 000 per month to the respondent (defendant in the divorce action and applicant in the maintenance matter) until her death or remarriage and R 2 000 per month for the minor child until the minor reached the age of 18years old or became self supporting. He agreed to keep the respondent and the minor child registered as dependants on his medical aid scheme. He also agreed to pay for all school fees and dance classes for the minor child. The parties noted in the settlement agreement that the respondent was not satisfied with the maintenance amount and that a full enquiry had not been undertaken. She reserved her right to apply for an increase in the amount of maintenance in the Maintenance Court and the appellant's (plaintiff in the divorce action) right to oppose was reserved.

[3] The applicant (defendant in the divorce action) brought an application for an increase of the maintenance payable on 4 September 2008 in terms of Section 6(1)(b) of the Maintenance Act, Act 99 of 1998. The matter was heard on 24 November 2009 approximately 14 months later and finalised on 9 December 2009.

[4] The application was opposed by the appellant. The appellant is an insurance broker and receives a salary as well as commission from different companies. From the record it appears that different amounts are deposited into different accounts. When requested to furnish a list of income and expenses the appellant furnished a list of expenses and failed to indicate his total income per

month or for the previous year. It appears from the record that the appellant was compelled to furnish details of his income and expenses in terms of an order of the Court after he failed to co-operate to furnish the information requested. The appellant's resistance to disclose his income during the enquiry is apparent upon perusal of the record. He often refused to respond to questions directly and referred the magistrate to his bank statements without explaining which statements and what amounts he referred to.

[5] During the enquiry the appellant was unrepresented. It appears that his attorney Mr Hendricks, withdrew from the matter before it was remanded for enquiry. During the enquiry the appellant did not question the expenses listed in the application for an increase in relation to the applicant or the minor child. He indicated that he was not willing to contribute more than R 1 000 per month to the R2000 he was paying.

[6] Mr Hendricks appeared on behalf of the appellant in the appeal. The respondent was represented by Mr Heunis. The grounds on which the appellant approached this Court are that the Court *a quo* erred in that:

1. The Honourable Magistrate incorrectly decided on the evidence placed before her that the Respondent could afford an amount of R14 000.00 per month in respect of his maintenance obligations.

2. The Honourable Magistrate erred in finding that the Respondents maintenance obligations in relation to both the Respondent and the minor child warranted an increase in the amount of R5000.00 per month.

3. The Honourable Magistrate erred in law in exercising a discretion in favour of the Respondent by ordering that the maintenance order granted would be effective as of 1st June 2009 without taking into consideration the current financial position of the Appellant together with the fact that the Appellant had maintained both the Respondent and the minor child throughout the period and that the order in respect of arrear maintenance was not warranted.

4 The Honourable Magistrate erred in ordering an increase in the maintenance obligation of the Appellant without a proper consideration of the current financial position of the Appellant and his means to meet this obligation in the future.

5. The Honourable Magistrate erred in awarding an excessive amount to the Respondent and the minor child in respect of the maintenance payable by the Appellant in relation to what amount is reasonable[sic] necessary to maintain both the Respondent and the minor child together with the Appellant's means to meet this obligation.

[7] In *Mentz v Simpson* 1990(4) SA 455 AD Hefer JA indicated that the approach to an appeal in a maintenance matter should be approached along the lines indicated in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194, where Watermeyer JA stated at 200

> ".... a Court of Appeal should not interfere unless there is some striking disparity between its estimate of the damages and that of the trial court, and further unless there is some unusual degree of certainty in its mind that the estimate of the trial Court is wrong."

[8] The approach of Joubert JA in *AA Mutual Insurance Association Ltd v*

Magula 1978(1) SA 805 is also referred to by Hefer JA in the Mentz case. The relevant paragraph reads as follows:

> " '... (T)his Court will not, in the absence of any misdirection or irregularity, interfere with a trial Court's award of damages unless there is a substantial variation or a striking disparity between the trial Court's award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court.' "

[9] Mr Hendricks raised some aspects which did not fall within the parameters of his notice of appeal and the content of which would have fallen to be dealt with by review. One such aspect was the magistrate's failure to invite the appellant to address the Court *a quo* at the close of the enquiry. The record indicates that throughout the enquiry the appellant was afforded the opportunity to question the respondent in the Court *a quo*. He was also afforded the opportunity to give evidence which he did.

[10] During this latter process the appellant responded to questions with great reluctance and on occasion indicated that he did not wish to respond to questions. He informed the Court *a quo* that he did not wish to support his ex-wife and would support his daughter if she lived with him. In view of the appellant being afforded an opportunity to place information before the Court under oath and to challenge the applicant's expenses, it cannot be concluded that he was not afforded an opportunity to place relevant information before this Court. Mr Hendricks was invited to elaborate on what information the Court *a*

quo failed to consider during the enquiry and was unable to add anything further. This is not a credible or genuine complaint in this regard having regard to the facts of this matter.

[11] An enquiry in terms of § 6 of Act 99 of 1998 is one *sui generis*. The test is that of a balance of probabilities. The procedure followed throughout is one akin to civil proceedings. Section 10(5) provides that the law of evidence, including the law relating to the competency, compellability, examination and cross-examination of witnesses, as applicable in respect of civil proceedings in a magistrate's court, shall apply in respect of the enquiry. See *Govender vs Amurtham and Others [1979] 2 All SA 47 (N)* and *Foster v de Klerk [1993] 4 All SA 860(O)*.

[12] I proceed now to address the appellant's complaints on the grounds of appeal. All five aspects raised refer to the magistrate's error in calculating what the applicant required and what the appellant could afford at the time of the enquiry. A further complaint was that the amount was ordered to be paid retrospectively from 1 June 2009.

[13] The appellant did not challenge the cost of maintenance of the minor child nor did he indicate that the requirements of the applicant were unreasonable or that they were not supported by the evidence tendered. The appellant's complaint was that he did not wish to maintain the applicant and that he would fully maintain the minor child when she lived with him. The expenses of the applicant and the minor child is reflected as a total of R 16751. During evidence it appeared that the applicant was no longer paying a monthly amount for the

vehicle as it had been paid in full after she received her portion of the proceeds of the parties holiday home. The installment of R2400 for the vehicle was thus to be deducted from the total expense. This results in a total of R14351 required for the combined maintenance of the applicant and the minor child. Having regard to the vouchers submitted and the monthly expenses indicated there appears to be no misdirection which prejudices the appellant. Having regard to one item such as the minor child's monthly allocation for clothing, the vouchers reflect an amount more than the monthly allocation.

[14] The record reflects that in the evidence in chief the appellant testified that he earned R11 000 per month. When cross-examined by Mr Heunis he conceded that that was not the only income he received. The magistrate estimated the appellants income conservatively at approximately R 50 000. Mr Hendricks appearing for the appellant addressed this Court and referred to an amount of R54 000. There is no glaring misdirection in the magistrate's calculation of the appellant's approximate income. The appellant's complaint that the bank statements were outdated ignores that he was the author of such circumstance. It appears that a court order was required before the appellant furnished any information regarding his income. Nothing prevented the appellant from furnishing his updated bank statements during the enquiry or indicating what he financial position was. In response to questions by Mr Heunis about his income he referred the magistrate to his bank statements which resulted in an estimation of an income of approximately R50 000.

[15] The submission on behalf of the appellant that the magistrate accepted that "he had lots of debt" and therefore the appeal should succeed has no basis in law and Mr Hendricks understandably did not address this aspect in great detail. It is trite that the interests of the minor child, in this instance the maintenance of the minor enjoys greater priority than the appellant's creditors. The appellant is required to manage his expenses to ensure that he is able to meet his maintenance obligations. The record reflects that the appellant reflected the amount of R2400 as an expense which he was required to pay for the Getz driven by the applicant. The evidence reflected that this amount is no longer required as the applicant has paid for the motor vehicle in full.

[16] The applicant also reflected an amount of R150 for school books each month. The appellant's evidence that he pays this amount once in January was not challenged. The record also reflects that the appellant completed paying off the Jeep motor vehicle in 2010. It appears that the appellant favours paying for insurance policies rather than contributing to the current maintenance needs of the minor child. The record does not indicate that the applicant and minor child's expenses are beyond the applicant's ability, the appellant's complaint is reflected in his statement under cross examination ".... I will support my daughter but I don't want to support my ex-wife." (See page 90 of the record).

[17] The appellant's further ground of appeal was that the order was made retrospectively from 1 June 2009. Mr Hendricks submitted on behalf of the appellant that whilst it was possible for an order to be made retrospectively with

regard to a minor child that such an order was not possible with regard to spousal maintenance and that there was no precedent for such an order. In *Fluxman v Fluxman 1958 (4) SA 409 (W)* at 413 Trollip AJ, (as he then was), considered the common law regarding maintenance of a divorced spouse and stated the following regarding the Court's power to vary maintenance orders,

> "section 10 of the Matrimonial Affairs Act sought to remedy the above deficiencies in the common law. It provided that henceforth the Court could order maintenance for a divorced spouse; it could make any present or past agreement for such maintenance an order of Court; and on good cause shown it could rescind, suspend or vary any such order. The section therefore dealt with the subject matter comprehensively and obviously intended to deal with it completely. I think it can be inferred from that and the state of the law as it existed when the section was enacted that the intention behind sec. 10 was to endow the Court by statute in regard to maintenance orders between divorced spouses with the same full powers as the Court already had inherently in regard to maintenance orders for minors and judicially separated spouses.... For those reasons I reject Mr Browde's argument and hold that the Court has the power under section 10 to rescind, suspend or vary an order retrospectively and thus deal with arrear maintenance."

[18] In Levin v Levin [1984] 3 All SA 500 (C) Berman AJ at 507 states;

> "Now it is certainly competent for this court to amend an order relating to maintenance for a divorced wife retrospectively. See Fluxman v Fluxman 1958 (4) SA 409 (W) at 412-3. It seems to me, however, that it would be fairer to both parties were I to order the amount of R850 per month to be made payable as from 1 May 1983, viz from the beginning of the month following the institution of these proceedings"

This reasoning is sound and applicable in the present matter.

[19] Mr Heunis submitted on behalf of the respondent that the appellants conduct delayed the speedy finalization of the enquiry. Further that the appellant

was represented throughout the proceedings and when discovery was made and only appeared unrepresented when the enquiry commenced. The application for substitution of the maintenance order is dated 4 September 2008, the parties first appeared before the magistrate on 28 January 2009 when the matter was remanded until 23 June 2009. The appellant was to furnish his documents as agreed upon on or before 11 February 2009. This was not done resulting in the matter being postponed in June 2009 until November 2009. The enquiry commenced before the magistrate on 24 November 2009. The magistrate notes that there was a delay in the matter proceeding due to the appellant's reluctance to make a higher offer. As indicated above it appears that it was necessary to bring the appellant before Court to compel him to furnish details regarding his income, this would also have contributed to the delay in the enquiry proceeding. There is thus no startling misdirection with regard to the date from which retrospective maintenance was due.

[20] The appellant appeals on the basis that the court did not take into account his current financial position. Mr Heunis submitted in his heads of argument that the appellant did not disclose the amount he received from the proceeds of the sale of the holiday home. This amount is not reflected in the appellant's statement of income and expenses and he did not indicate that this amount was not available to satisfy the amount due as a result of the retrospective order. Mr Hendricks did not refute this in his submissions to this Court. On a conspectus of the evidence I am satisfied that the appellant has sufficient funds available to satisfy his maintenance obligation. The Court *a quo* did not misdirect itself on this issue. There is therefore no substance in the complaint that the Court *a quo* did not take into account his current financial position.

[21] For these reasons, it follows that the appeal cannot succeed.

[22] In the result the following order is proposed:

The appeal is dismissed with costs.

MIA AJ

I agree and it is so ordered.

LE GRANGE J