IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A22/2010

In the matter between:

D G B Appellant

Versus

M J B Respondent

JUDGMENT DELIVERED ON 11 MARCH 2011

Allie. J

[1] This is an appeal against the decision of the Magistrate on 27 August 2009 in which the appellant's application for an increase in maintenance for the parties' 2 minor children was refused.

[2] In the court a *quo* the respondent had legal representation while the appellant appeared in person. Before us on appeal the appellant once again appears in person and the respondent had legal representation up until 4 March 2011 when his legal representatives withdrew and so he is also before us in person.

[3] Both parties were given an opportunity to address us on 2 issues namely, whether the matter should be struck from the roll and on the conduct of the Magistrate in the court *a quo.*

[4] The transcription before us commences on page 3 with the date of 27 February 2009 after the maintenance officer had already started cross-examining the appellant for some time. The transcription commences with a question put to the appellant by

the maintenance officer referring to medical expenses. It is clear that the proceedings were not transcribed from its inception.

[5] Despite numerous requests to the appellant to supplement the transcription so that we could have a full transcription of the proceedings, we have not been furnished with the full transcription. In the respondent's heads of argument, reference is made to numerous parts of the record that were not transcribed and placed before us. These include "exhibits" to which reference is made in the court a *quo.* In his heads of argument, the respondent indicated that the transcription that his legal representative was given was not paginated. The respondent also indicated that the appellant refused to furnish his legal representative at the time with her heads of argument The respondent accordingly request that the appeal be struck off the roll with costs and that it not be re-enrolled until such time as the appellant has remedied the defects in the appeal record and the appeal is ripe for hearing.

[6] The appellant addressed a letter to us indicating that although the transcription commences on page no. 3. nothing was omitted. She went on to state that there was a problem with the recording and that what we have before us was all that was available. However in the second paragraph of her letter she stated that she had asked the transcription services to obtain a disc and re-do that section of the record. She indicated that the Maintenance Court had the disc ready and that she would have it transcribed urgently.

[7] To the extent that this is a matter involving child maintenance, clearly this court, as the upper guardian of all minors, should ensure that the minor children's interest are protected. We are accordingly not inclined to strike this matter from the roll.

[8] Upon a perusal of the record albeit incomplete, we came across 17 transcribed pages of questions posed to the respondent by the court. During the course of the court a *quo* posing those questions to the respondent, it became clear that the Magistrate had acted irregular, in as much as, he launched a scathing attack upon the respondent and his legal representative.

8.1. What follows are a few quotations; Record page 657 at lines 7 - 9 the Magistrate states the following: *"So let's not waste time please. There is a - I don't think you are a very good economist. In fact I think you are a very poor one."*

8.2. Record page 657 on line 10 the Magistrate says the following: *"And there is a wonderful little song. I don't believe in if any more. If is an illusion."* At this juncture the Magistrate appears to be singing.

8.3. Record page 658 at lines 15 and following: 7 *want a good explanation for this'*

8.4. Record page 660 at lines 12 and following: *'That actually makes it worse because now I don't believe you at all. Because you are giving now two different versions as to the one you gave right in the beginning as to the one you gave just now and now. Three different versions. Come on, Dr B. What will the court think? What will Sherlock Holmes determine? He is lying Am I right?"*

8.5. Record page 665 at line 7: *"So then why do you say it is in their best interests to stay there but I am not going to pay for it. Did you say so?"* Further on the same page at lines 21 and following: *"Okay. This I want now because I have no evidence of that Okay. What is your arrangement? Your arrangement*

- ja, your advocate is frowning very deeply there and I don't think it is very good because they say you get bad skin from frowning too much."

8.6. Record page *669* at lines 21 and following: *'Okay. Dr B, I am now going to tell you and Mrs B that I am not going to change the order as per 2000 and Mrs B has started her evidence yesterday stating that the school wanted me to make a decision so that she can take the children out of the school because she cannot pay it. What do you have to say about that? Is that fine? Can I tell Mrs B to take the children out asap because I am not going to rule in her favour regarding schooling?'* The respondent replied as follows; *"That is a hypothetical question."*

8.7. Record at line 5 on page 670: *'No it is not I am giving you the facts. I am not going to rule on schooling. I am not going to change the order..."*

[9] It is an essential part of our judicial system that a judicial officer should remain impartial and not become involved in the questioning of any one witness to the extent where it becomes clear that he or she is biased, in favour or against any particular party.

[10] In the case of S v Msithing 2O06 (1) SACR 266 (N) the court was concerned in a criminal matter with a judicial officer that had indicated clearly that he disbelieved the accused and went on to interrogate the accused. In that matter the court found that the irregularity was of such a fundamental nature that a reasonable observer would perceive that the integrity of the judicial process must be called into question.

[11] In the case of S v Maseko 1990 ft) SACR 107 (A) the court was concerned with a trial court judge who had clearly become impatient with the accused and who had questioned the accused in such a manner that he had created the impression that he was biased and had pre-decided issues which should only be decided at the end of the trial. The appeal court found in that matter that while a trial judge is entitled and often obliged to ask questions of a witness during a trial, he should always guard against any conduct which could create the impression that he was descending into the arena of conflict.

[12] In this matter the court's questioning of the respondent leaves us in no doubt that the Magistrate had pre-decided the matter as he said so in express terms. The fact that the Magistrate at the stage where he was about to deliver the judgment apologised to the respondent as he considered that his earlier questioning may have been aggressive does not alter the irregularity of the proceedings

[13] There is a very cogent reason why a judicial officer should not descend into the arena. A judicial officer must at all times remain un-biased and objective if he or she wants to acquit himself or herself adequately of the task of adjudicating without fear or favour.

[14] The appellant brought the application for the substitution of the existing maintenance order in terms of section 6(1) (b) of the Maintenance Act 99 of 1998 on 7 March 2007. The matter was eventually set down for the trial to commence on 21 April 2008. The matter was postponed on that day and several times thereafter for the parties to provide a list of documents that they each require from the other and for legal representation.

[15] We are not certain when the trial eventually commenced but the incomplete transcription of the trial commenced on 27 February 2009. Judgment was delivered on 27 August 2009. The trial continued over many days which spanned a period of at least 6 months.

[16) The Magistrate allowed extensive cross examination of the appellant, a substantial amount of which was irrelevant and argumentative. By the time the respondent was being re examined, the Magistrate had clearly reached the end of his tether, hence his obvious annoyance with the respondent.

[171 A judicial officer is not a silent arbiter to such an extent that he or she must remain completely uninvolved in the conduct of a trial. He or she must clearly manage a trial by not allowing unduly lengthy cross examination which is irrelevant and which is designed to badger a witness Unfortunately the magistrate did not manage the cross examination and admonish the witnesses to answer the questions pertinently.

[18] In *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 2-4 Harms JA said:

> *[2] Everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator This common-law right is now constitutionally entrenched....*
> *[3] That is one side of the coin. The other is this:*
>
> > *'A criminal tnal is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal thai is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.' (R v Hepworth* 1928 AD 265 at 277 *per* Curlewis JA.)

The same applies to civil proceedings: a Judge is not simply a 'silent umpire'. (Greenfield Manufacturers (Temba) (Ply) Ltd v Royton Electrical Engineering (Pty) Ltd 1976 (21 SA 565 (A) at 570E - F.)

A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said:

Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right. (Jones v National Coat Board **[1957] 2 All ER 155 (CA) at 159B)**

[4] A balancing act by the judicial officer is required because there is a thin dividing line between managing a thai and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal taking into account the degree of the that court's aberration. (R v Roopsingh 1956 (4) SA 509 (A) at 515B -H; Hamman v Moolman 1968 (4) SA 340 (A) at 344H;

Rondalia Versekeringskorporasie van SA Bpk v Lira 1971 (2) SA 586(A) at 590H; Solomon and Another NNO v De Waal 1972 11) SA 575 (A) at 581 A.)"

[19] The parties clearly have a history of acrimony which is reflected in the way they conducted the trial and in the preceding disputes between them that have been brought to court. Regrettably it is the best interests of the children which have been compromised by the hostility between the parties.

[20] I am of the view that the interests of the minor children should be protected and advanced by affording them legal representation at the trial To this end the Legal Aid Board of South Africa should assist the children by appointing legal representation for them

It is order that:

1. This matter be referred back to the magistrates court for it to commence *de novo* before a new magistrate.

2. Such proceeding 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 ordered 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 realisation 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.

This order will be directed to the Chief Magistrate. Wynberg for the allocation of the case to a Magistrate.

ALLIE, J

I agree

SALDANHA, J