

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

CASE NO: A395/2011

In the matter between:

CHRISNA GEYER

Appellant

and

WILLEM JOHANNES BEKKER

Respondent

JUDGMENT DELIVERED ON 01 MARCH 2012

GOLIATH, et SAMELA, JJ:

Introduction:

[1] This is an appeal against an order granted by the court *a quo* compelling the appellant to pay a monthly maintenance in the sum of R4 212 per child. Adv **M Bartman** appears for the appellant. The respondent was in person. The court impressed upon the respondent the importance of having a legal representative in the High Court proceedings. The respondent uncompromisingly informed the

court that he would defend this matter. He was quite aware that he did not qualify for legal aid and any other legal assistance provided by other institutions, as he had received some money from his pension.

Facts:

[2] On 23 April 2009 the respondent initiated maintenance proceedings against the appellant in terms of Section (6)(1)(a) of the Maintenance Act 99 of 1998 in terms of which he claimed payment of the sum of R8 006.73 as a monthly maintenance contribution in respect of the parties' two minor children.

[3] The parties to this appeal were previously married to each other, but were divorced on 5 July 2007. At the time of dissolution of the marriage the parties entered into a consent paper in terms of which custody of their two minor children was awarded to the respondent. The consent paper was silent on the issue of maintenance for the minor children.

[4] In support of the maintenance claim the complaint was that the respondent was unemployed and no longer in a position to maintain the minor children. Respondent holds a Ph.D degree in biokinetica and was previously employed in a senior position at the South African Defence Force. He received his last salary in January 2009 whereafter he moved to Stellenbosch to pursue a research project at the instance of the Defence Force. He subsequently

terminated the project due to a lack of support and funding from the institution. He applied for a severance package which remained outstanding. He received an amount of R11 000.00 in April 2009 due to him in respect of leave pay. In the interim he had to access funds from the mortgage bond on his home for their daily living expenses. He eventually sold his house and after the proceeds had been depleted he had to rely on family and friends for financial support. He has not made any attempts to seek employment although he is aware that there are junior positions available in the Defence Force. He acknowledged that the appellant instituted legal proceedings against him in 2008 claiming an amount of R400 000 arising out of a dispute regarding the debts of the Trust awarded to her in terms of the divorce settlement.

[5] The appellant holds a Master degree in Biokinetica. She was previously employed as a lecturer at the University of the Free State for approximately 14 years. After her divorce she remarried, and moved to Pretoria where she is now employed as a Gym instructor at Virgin Active. She earns approximately R3 000 per month and is unable to find alternative employment. She relies on her husband to support her and has an outstanding debt due to Standard Bank which she is paying at the rate of R2 250 per month. According to her the divorce settlement made provision for her maintenance obligations that was deemed to have been settled in advance. This is denied by the respondent.

[6] On 14 February 2010 she sought a postponement in this matter and agreed to an interim order of R3 000 per month. She anticipated that the enquiry would be finalized within three months and her husband undertook to pay the maintenance. Contrary to her expectations finalization of the matter took longer than anticipated and her husband had already paid the total sum of R42 000 towards the maintenance of the children. He subsequently declined to make further payments. She testified that she cannot afford to pay the amount of R8 006.73 maintenance as claimed by respondent. She confirmed that litigation is pending between the parties.

[7] The magistrate heard the testimony of both parties. However, the maintenance enquiry was concluded whilst appellant was under cross-examination after her legal representative informed the court that his mandate was terminated and that "*Me Geyer die verdediging van die aansoek terugtrek en dat sy haar berus by die uiteindelijke uitspraak en bevinding van hierdie Agbare Hof*"

[8] It is common cause that the cross-examination of the appellant was not proceeded with nor any further witnesses called or documents requested in order to assist the court in the enquiry. In her judgment the magistrate expressed the view that the appellant had abandoned her opposition to the case and that consequently there was no evidence from the appellant which could be considered by the court due to incomplete cross-examination. Furthermore, the

court held that the amount claimed for maintenance is reasonable in the absence of any evidence from appellant.

[9] The magistrate held that the court's hands were tied regarding the appellant's affordability due to the withdrawal of the opposition and that Default Judgment is justified in the circumstances. Consequently, it was stated, that the court had no other choice but to grant the order as claimed.

Issues to be decided:

[10] The court is to determine whether the court *a quo* was correct in compelling the appellant to pay a monthly amount of R4 212.00 per child despite the flawed process followed in the enquiry.

Applicable Law:

[11] An enquiry in terms of Section 6 of Act 99 of 1998 is *sui generis*. Section 10(5) of the Act provided that the law of evidence, including the law relating to competency, compellability, examination and cross-examination of witnesses, as in respect of civil proceedings in a Magistrate's Court, shall apply in respect of the enquiry. However, it is well settled that the proceedings are inquisitorial in nature (see **Perumal v Naidoo** 1975 (3) SA 901 (N) D-F, **Forster v De Klerk NO en Andere** 1993 (1) SA 596 (C) at 601.

[12] Section 6(1)(a) places a duty on the maintenance officer to gather all relevant information and conduct a thorough investigation on receipt of a complaint. A person who is considered legally liable to maintain is informed of the complaint and subpoenaed to appear at the enquiry to give evidence. The Act does not make provision for formal opposition. The fact that the magistrate considered the appellant's appearance at the trial as opposition to respondent's complaint is clearly a misdirection.

[13] Section 10 places an obligation on the court to hold and conduct an enquiry in order to determine the pertinent issues relating to the duty of support. The court may order any amount as maintenance which is fair in all the circumstances, after taking various factors into account, including the respective means of the parties.

[14] The duty of support of minor children which falls on both parents continues after divorce, it does not follow that the custodian parent in each case is entitled to claim a monetary contribution from the non-custodian parent or that because there is a duty there must be an award against the non-custodian parent.

[15] In **Zimelka v Zimelka** 1990 (4) SA 303 (W) at 305 I it was held by **Kirk-Cohen, J** as follows:

"The principle is clear. What is more difficult is the application thereof. It does not follow that, because of the principal referred to, the custodian parent in each case is entitled to claim a monetary contribution from the

non-custodian parent. If one parent 'has not the means to make any significant financial contribution...' to the maintenance of the children, the Court will not order that parent to do so."

[16] The Court further referred to the judgment of **Jansen, J** in **Kemp v Kemp** 1958 (3) SA 736 (D) at 738 A-B where it was held:

"As a matter of expediency the Court, the upper guardian of the child, usually regulates the incidence of this duty as between the parents when it grants the divorce. It makes an order for 'maintenance'. This order is based upon assessment of the facts at that particular point of time; it is directed at the enforcement of the duty to maintain as it then exists and is expected to continue. In this sense the order is ancillary to the duty to maintain. As circumstances may change and therefore the incidence of the duty, it seems to follow that the Court must be able to vary its order so as to bring it into line with the incidence of the duty at any later stage."

[17] In **Zimelka** (supra) **Kirk-Cohen, J** further stated at 306 C that:

"What is of importance is that the order of maintenance is ancillary to the duty to maintain. It does not follow that because there is a duty, ergo, there must be an award against the non-custodian parent. The practical incidence of the duty depends upon the facts and the ability to contribute at the relevant time."

Analysis of the Evidence:

[18] The appellant submitted the following:

- (a) It was not correct that she had abandoned her opposition entitling the court to grant a “default Judgment”;
- (b) The court *a quo* erred in not attaching sufficient weight to appellant’s income and assets and her ability to contribute to the maintenance of the parties’ minor children; and
- (c) The court *a quo* erred in finding that the appellant was able to pay the contribution sought by the respondent.

[19] The respondent was unable to dispute any of the above submissions. He told the court that he could not understand why the respondent appealed against the court *a quo* decision as it was not his decision.

[20] The court was of the view that unless the matter can be properly dealt with in accordance with the Maintenance Act, the appellant would be prejudiced. It seemed to us that both the appellant and respondent appreciated the fact that the court *a quo* proceedings in this matter were flawed. We do not want to bore this judgment with respondent’s allegations against the appellant, as these were not dealt with in the court *a quo*.

Findings:

[21] In the circumstances we find that:

- (i) It was incorrect for the court *a quo* to grant default judgment against the appellant.
- (ii) The court *a quo* failed to properly investigate the appellant's financial circumstances, enabling her to make a reasonable monthly contribution towards the maintenance of her two minor children; and
- (iii) The court *a quo* failed to investigate properly whether the appellant was able to pay the sum of money sought by the respondent.

Order:

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

- (1) **The appeal succeeds.**
- (2) **The decision of the court *a quo* is set aside.**
- (3) **No order is made as to costs.**


.....
P L GOLIATH, J

I agree


.....
M A SAMELA, J