REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

REPORTABLE

Case no: 9179/2013

In the matter between:

J[…] J[…] M[…] **Applicant**

and

LINDA M[…] **1st Respondent**

THE SHERIFF OF THE HIGH COURT STELLENBOSCH **2nd Respondent**

Heard: 13 November2013

JUDGMENT: 20 NOVEMBER 2013

SAVAGE AJ

Introduction

[1] This is an opposed urgent application instituted by the applicant, J[…] M[…], in terms of which a writ of execution issued out of this Court at the instance of the first respondent, L[…] M[…], is sought to be set aside, alternatively suspended with costs to stand over for later determination.

[2] The issue to be determined is whether a High Court writ of execution may be obtained to enforce a maintenance order granted by the High Court when Ch 5 of the Maintenance Act 99 of 1998 (as amended) provides for the enforcement of a maintenance order, which includes a maintenance order made by the High Court, by the maintenance court.

[3] At the outset of proceedings, counsel for the first respondent disputed that the application was urgent but accepted given the importance of the issue raised that the matter should nevertheless be determined.

Background

[4] The background to the matter is as follows. The parties,who have three young daughters, are currently embroiled in acrimonious divorce proceedings. On 28 August 2013, following an opposed rule 43 application, the applicant

was ordered by this Court to pay maintenance *pendente lite*in the amount of R11 000 per month to the first respondent in respect of the children and further monthly payments detailed in the order. In spite of the order granted, the following month the respondent failed to paythe maintenance amountand the first respondent obtained a writ of execution issued by the registrar of the High Court in respect of the arrear maintenance outstanding. In addition, the applicant approached the magistrate's court for an emoluments attachment order, which was granted on 30 September 2013 in terms of which the applicant's employer was ordered to deduct R11 000 per month plus the arrear maintenance at a rate of R500 per month from the applicant's salary.

[5] At the time that this application was argued, the applicant's trailer valued at approximately R10 000,00 had been attached by the second respondent to cover the arrear amount of R3825,00 outstanding and the applicant had applied on 7 October 2013 to the maintenance court for a variation of this Court's order made in terms of rule 43.

Enforcement of order

[6] A maintenance order isdefined in s1(1) of the Maintenance Act 99 of 1998 as –

> '*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…*'.

[7] S26(1) provides that a maintenance 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'.*

[8] Such warrant of execution, emolument attachment or debt attachment order may be obtained in terms of s26(2) if the maintenance order remains unsatisfied for a period of 10 days from the day on which the relevant amounts became payable.

[9] Following an amendment to s26 in terms of s18(1) of the Judicial Matters Second Amendment Act 55 of 2003, effective from 31 March 2005, a maintenance order of the High Court order became enforceable through the maintenance court. This was so consequent to the removal in s26 of the words 'made under this Act' after 'maintenance order' having the effect that a maintenance order granted in the High Court was enforceable by way of the mechanisms provided in the Maintenance Act.

[10] Since the writ of execution in this matter was issued in respect of a maintenance order, Ms Pratt for the applicant submitted that the first respondent was obliged to adhere to the procedures contained in chapter 5 of

the Maintenance Act to obtain civil execution and execute any debt out of the magistrate's court as opposed to the High Court.Ms De Wet for the first respondent disputed this on the basis of *Thomson v Thomson* 2010 (3) SA 211 (W) at 218C-D in which a full bench of the Witwatersrand Local Division held that the provisions of the Maintenance Act do not preclude a party from obtaining a writ of execution out of the High Court for failure to pay maintenance and accordingly that this procedure remains competent and available to the first respondent.

[11] The decision of*PT v LT and another* 2012 (3) SA 623 (C),to which I was referred by counsel, does not follow *Thomson (supra)*. In *PT*an order was sought setting aside a writ of execution obtained from the registrar of the High Court in respect of an unpaid arrear maintenancedebt. This debt had arisen subsequent to a maintenance order granted by the High Court.Binns-Ward J at 628G-Hof the judgment found that the Maintenance Act expressly dealt with the recovery of arrear maintenance by civil execution and that at the time *Thomson* had been decided the provisions of Ch 5 were applicable only in respect of orders of the maintenance court.

[12] At 630A-D Binns-Ward J stated that the amendments to the Maintenance Act brought maintenance orders made by the High Courts within the embrace of s26 of that Act and noted that s26(2), read with s27, permits any person against whom a writ of execution is issued the right to apply for the holding of an enquiryand the maintenance court may suspend the writ (or attachment of emoluments or debt order) pending conclusion of such enquiry.

In considering the intention of the legislature when it amended s26(1) to make High Court maintenance orders susceptible to Ch 5 of the Maintenance Act, the judgefound that –

> '(i)*t is unlikely to have been the legislature's intention that there should be two different systems of civil enforcement of High Court maintenance orders in existence parallel to each other; the one with a 10 day moratorium on enforcement, the other having no such moratorium; the one providing for a statutory procedure to convert the enforcement process into an enquiry; the other attended by no statutory restraints. An ability by a maintenance creditor to choose between such alternative enforcement procedures, if the choice were available, would introduce an arbitrariness in respect of the consequences for the debtor that would be difficult to reconcile with rationality and equality before the law. Moreover, having regard to the expressed intention of the Act, being the creation of a fair and equitable maintenance system under the framework of the statute, the achievement of that object it would not be assisted if s26(1) were read as merely permissive or enabling in nature, and as allowing for disparate but parallel means of enforcement of High Court maintenance orders - the one under the Act, and the other outside it'* (at 632 F-H).

[13] It was further concluded in*PT*that the unified system of enforcement provided did not derogate from the existing authority of any court to make a maintenance order and that the Maintenance Act is of a character such as to

assist the accessibility and effectiveness of the courts and to provide for their functions and procedures as contemplated by s 165(4) and s171 of the Constitution (at 634A-B). Accordingly, a system different to the ordinary enforcement of High Court orders does not derogate from or oust the High Court's jurisdiction.

Evaluation

[14] The enforcement of court orders is a critical component of the exercise of judicial authority. The unlawful and intentional disobedience of a court order not only violates the dignity, repute or authority of the court (*S v Beyers* 1968(3) SA 70(A) per Steyn CJ) but also undermines the effect of the order. Orders are enforced primarily although not exclusively through the issuance of a writ of execution in the High Court (a warrant in the magistrate's court) or by way of contempt proceedings. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) 326 (SCA)Cameron JA at para 7 held that a private litigant who has obtained a court order requiring an opponent to do or not do something (*ad factum praestandum*) is entitled to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. This is a civil proceeding that invokes a criminal sanction or its threat and the court grants enforcement -

> '…*because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law' (at para 8)*.'

[15] S42 of the Superior Courts Act 10 of 2013, which came into operation on 23 August 2013, provides that –

> …(2) *The civil process of a Division runs throughout the Republic and may be served or executed within the jurisdiction of any Division'.*
>
> *(3) Any warrant or other process for the execution of a judgment given or order issued against any juristic person, partnership or firm may be executed by attachment of the property or assets of such juristic person, partnership or firm*.

[16] In terms of s43(1) the sheriff –

> '*must, subject to the applicable rules, execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must make return of the manner of execution thereof to the court and to the party at whose instance they were issued*.'

[17] Similar provisions existed in the now repealed Supreme Court Act 59 of 1959.

[18] As a general rule the Court that grants an order retains jurisdiction to ensure that its order is complied with, although that jurisdiction is not exclusive. In *Els v Weideman*2011 (2) SA 126 (SCA) at para 37 it was stated in the context of contempt proceedings that -

> '…(g)*iven the common constitutional foundation and mutual duty of enforcement among the High Courts of South Africa it makes no sense to insist that the court which issued the order is the only one to feel the insult to its dignity and, therefore the only proper court to try such an issue. None of the countervailing arguments carries persuasion*.'

[19] Distinct remedies available to a party that seeks to enforce a Court order entitle the party seeking enforcement to choose the remedy which is considered the most efficacious (*Martin v Martin* 1997 (1) SA 491 (N) at 496);*Duncan v Duncan 1984 (2) SA 310 (C)).*

[20] The fact that a party is permitted to seek the magistrate's court to enforce a maintenance order of this Court does not lead to a necessary implication that the High Court is prevented from enforcingits own maintenance order. To find this be so, a conclusion would have to be drawn that ss42(2), (3) and 43(1) of the Superior Courts Act had by necessary implication been amended to exclude the enforcement of maintenance orders granted by the High Court.Corbett JA in *Rennie NO v Gordon and another NNO* 1988 (1) SA 1 (A) at 22E-G stated that –

'Over the years our Courts have consistently adopted the view that words cannot be read into statute by implication unless the implication is a necessary one in the sense that with out it effect cannot be given to the statute as it stands (see e.g.*Germiston Municipality v Rand Cold Storage Co* Ltd 1913 TPD 530 at 539; *Taj Properties (Pty) Ltd v Bobat* 1952 (1) SA 723 (N) at 729 E-H; *S v Van Rensburg* 1967 (2) SA 291 (C) at 294C-D; *The Firs investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557B-C; *DEP Investments (Pty) Ltd v City Council, Pietermaritzburg* 1975 (2) SA 261 (N) at 265G-H; *Hamman en 'n ander v AlgemeneKomitee, JohannesburgseEffektebeurs en 'n ander* 1984 92) SA 383 (W) at 391 H…'

[21] It is presumed that a statutory provision is not aimed at altering or abrogating the existing law more than necessary, although a statutory provision clearly inconsistent and irreconcilable with its preceding, hierarchically equal or subordinate counterparts in *parimateria* revokes them to the extent of such inconsistency and irreconcilability as per the maxim *lex posterior priori derogate* (LAWSA 25 part 1 at para 305).

[22] In *Ntuli v Benoni Town Council and another* 1957 (3) SA 597 (W) at 601 G-H, Ramsbottom J stated that –

'(t)he rule of construction where two statutes deal with the same subject matter has often been stated. In Rex v Carson 1926 AD 419 at 423, Innes CJ said that:"if a later statute is clearly inconsistent with an

earlier one the latter must be regarded as pro tanto repealed."But the inconsistency must be clear. In New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367, Sir John Kotze referred with approval to Bishop on the Written Law who summed up the result of the authorities in these terms:"Hence in principle, and equally on the better American authorities and on the English, the just doctrine is, that, without exception, a statute in affirmative terms, with no intimation of an intent to repeal prior laws, does not repeal them, unless the new and the old are irreconcilably in conflict."'

[23] In *Ntuli*at 602 A-B,the judge quotedCraies on *Statute Law*, 5th Ed at 339:

' …*Where a new Act is couched in general affirmative language and the previous law is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together.*'

[24] No clear inconsistency exists between the provisions of the Maintenance Act and those of the Superior Courts Act and such provisions are not irreconcilable with each other. Rather, the statutes entitlean election on the part of a party seeking to enforce a High Court maintenance order as to the court out of which such order is to be enforced. The fact that in terms of the Maintenance Act a 10-day moratorium on enforcement and a statutory procedure to convert the enforcement process into an enquiry arise, neither of

which are available where enforcement occurs under the Superior Courts Act, does not lead to a necessary implication being drawn that the legislature in enacting the Maintenance Act intended that enforcement remedies under High Court machinery were to be unavailable. This is so given that the twostatutes are capable of standing together. The fact that a choice is introduced into enforcement does not introduce an arbitrariness that is difficult to reconcile with rationality and equality before the law. The distinctions that exist in the enforcement mechanisms available between the courts in this regard, rather that introducing arbitrariness, rationality and inequality, are factors to be taken into account by a party in the exercise of their election.

[25] Were no such choice available, this would have the necessary consequence that all High Court maintenance orders would in all circumstances be subject to the moratorium and enquiry provisions contained in the Maintenance Act upon steps being taken to enforce such orders. Not only would this necessarily diminish the value of the order obtained but it would have the potential to cause prejudice to the persons that such an order for maintenance seeks by its nature to protect where enforcement is pursued. Such a consequence could not have been intended by the legislature.

[26] A litigant in terms of the law may exercise an election in seeking interim relief *pendente lite* in a matrimonial matter either from the High Court or from the applicablemagistrate's court. The reliefgranted in such an order is in many instances wider than maintenance only and includes that relating to the care of and contact with minor children. Were it to be the case that the

maintenance component of a High Court order *pendente lite*was only capable of enforcement in the maintenance court, whilst other aspects of the same order required enforcement in the High Court, this would result in unduly complex enforcement mechanisms arising that could not have been intended by the legislature. The same applies to the varied relief that may be granted by the High Court in divorce proceedings in respect of which it cannot have been intended that the maintenance component be severed from the remainder of the order for purposes of enforcement.

[27] The Superior Courts Act was signed into law in 2013, many years after the amendments to the Maintenance Act came into effect. This further supports the conclusion that the two statutes are capable of standing together and that the legislature, although seeking to advance effectiveness and accessibility in the maintenance system through the Maintenance Act, did not intend to limit the right of the High Court to enforce orders granted by it. Had the contrary been intended, the enforcement provisions contained in the Superior Courts Act would reasonably have reflected this restriction on enforcement, which they do not.

[28] For all of these reasons it follows that had the legislature intended that the maintenance court provide the only mechanism for the enforcement of maintenance orders, as much would have been apparent from the relevant statutes. Accordingly, with great respect to my colleague and for all the reasons set out above, I am unable to reconcile myself with the conclusions reached in *PT*and the view I take of the matter is that that decision is wrong.

[29] Consequently, the first respondent was entitled to enforce a maintenance order granted by the High Court by way of a writ issued by the registrar of this Court. It follows therefore that the application to set such writ aside must fail.

Emoluments attachment order

[30] Counsel for the applicant raised a further ground on which it was argued that the writ obtained by the first respondent fell to be set aside. This related to the fact that the first respondent had obtained an emoluments attachment order out of the magistrate's court against the applicant's employer. It was argued that in such circumstances the first respondent had elected to enforce the order by way of the maintenance court and could therefore not, in addition, obtain a writ from the High Court in order to enforce the maintenance order.

[31] The first respondent's counsel disputed this to be so on the basis that the first respondent was entitled to use whatever avenues were available to her to enforce the recovery of the arrear maintenance amount, subject to each of these avenues falling away once the arrears had been paid.

[32] There is no provision in either the Maintenance Act or Superior Courts Act to prevent a writ being obtained from the High Court in respect of arrear maintenance even in circumstances in which an emoluments attachment

order has been obtained in respect of future and arrear maintenance through the maintenance court. In this regard I am in agreement with Ms De Wet for the first respondent that the first respondent is permitted to make use of the enforcement mechanisms available to her until the full amount of the maintenance debt is extinguished.

[33] There are compelling reasons why this is so. A maintenance order is granted to protect the vulnerable and ensure their support. The Maintenance Act makes it clear that the law seeks to promote an effective and accessible maintenance scheme. An effective maintenance scheme exists where maintenance ordered is paid and received without undue delay. Accordingly, the fact that an emoluments attachment order has been obtained in respect of both future and arrear maintenance does not bar the first respondent from obtaining a writ of execution issued out of the High Court against the applicant in an attempt to secure a speedy settlement of the arrear amount outstanding.

[34] It follows for the reasons set out above that the application falls to be dismissed. There is no reason as to why costs should not follow the result.

Order

[35] In the result, I make the following order:

The application is dismissed with costs.

_____

K M Savage

Acting Judge of the High Court

Appearances:

For applicant: Ms T Pratt

Instructed by: HanlieVisser Attorneys

For respondent:Ms A de Wet

Instructed by: Marieke Van Rooyen Attorneys