IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: EAST LONDON CIRCUIT DIVISION)

CASE NO: EL246/2024

In the matter between:

DR V. N **APPLICANT**

and

MAGISTRATE Z. MJALI, DISTRICT COURT MAGISTRATE, EL **1ST RESPONDENT**

I.T.N **2ND RESPONDENT**

MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT **3RD RESPONDENT**

JUDGMENT

NORMAN J:

[1] This is the return day of the Rule Nisi . On 14 February 2024 the applicant sought and was granted on an urgent basis the following Order:

"1. A rule nisi do hereby issue calling upon the first, second and third respondent to show cause, if any, on 05 March 2024 why the following order should not be made final :

1.1 The applicant's non – compliance with the Uniform Rules of Court, the deviation with/ from the forms and service provided for the Rules be condoned and directing that the matter be heard as an urgent matter as envisaged in Rule 6 (12) of this Court's Rules.

1.2 The execution of the garnishee order granted by the first respondent, Magistrate Z Mjali on 6 February 2024 be stayed pending the outcome of the review proceeding instituted as Part B of the application.

2. The relief set out in prayer 1.2 above shall operate as an interim interdict pending the finalization of Part A and/ or B of this application."

[2] The parties are divorced. The applicant is a specialist plastic surgeon. The parties have three children. Two of the children are at boarding school in one of the affluent catholic schools in Makhanda. The applicant is responsible for their boarding and school fees. The first and third respondent decided to abide the decision of the court. The second respondent opposed the application.

[3] What grounds the application was a garnishee order issued by the Magistrate sitting in the district court in East London on 6 February 2024 in the amount of R80 000.00 from the salary of the applicant with effect from 1 March 2024. The applicant brought the application in two parts where in Part A he sought an order to stay the execution of the garnishee order pending finalization of the review application in Part B. The stay of the execution is premised on two grounds , namely , that the amount of garnishee of R80 000.00 exceeds his income of R78 000.00 and would leave him with no means at all to sustain himself. The second ground is that the magistrate who granted the order had recused herself from a maintenance enquiry involving the parties as a result of a complaint raised by the applicant against her which was informed by her conduct and utterances made during the maintenance enquiry. As a result thereof the applicant believed that she was biased in favour of the second respondent and through her attorneys requested the Chief Magistrate to intervene. The magistrate recused herself from the matter when the complaint was raised with the Chief Magistrate. The applicant contends that the magistrate should not have presided over the maintenance enquiry and grant the impugned order due to her attitude displayed when she recused herself.

[4] I hasten to state that the applicant has now realized that Part B of the application cannot be heard by a single Judge, in terms of the Joint Rules of this Division which provides that : Two Judges will hear reviews from the Magistrate's Court.[1] Mr Skoti who appeared for the applicant also conceded that at the time of filing of the application the applicant was not aware of that rule and that he was intending

[1] Joint Rules of Practice for the High Court of the Eastrn Cape Province Rule 19 (b) (ii)

to bring an application for the transfer of the application to Makhanda inorder to comply with both Rules 19 (b) (ii) and 18(c)[2].

[5] Mr Nzuzo who appeared for the second respondent submitted that the court must dismiss the application on that basis. Having made that submission he submitted that this Court has jurisdiction to entertain Part A because it relates to the stay of the execution of the order. The second respondent delivered a notice in terms of Rule 6 (8) seeking to anticipate the return date. She also brought an application to rescind the rule nisi. She contended that the application was brought *ex parte* as she only became aware of the application a few minutes before the court heard it. The anticipation served before Zono AJ on 20 February 2024. He removed the matter from the roll and directed that it should remain on the roll of 05 March 2024. One of the findings of the court was that the second respondent was served prior to the urgent application being heard . The court also found, *inter alia*, that on that basis Rule 6 (8) was not available to the second respondent because the application was not an *ex parte* application and the order was not granted *ex parte*. She contends that she was seriously prejudiced by the granting of the interim relief because her children will suffer as the applicant will not pay their school fees. The second ground is that the applicant earns more that what he receives as his salary . She contends that his total income was found by the magistrate who presided over the enquiry to be R138 409.61. On this basis , Mr Nzuzo submitted that this court must discharge the rule to curb prejudice to the childen. Mr Skoti submitted that the applicant was not seeking a final order due to the fact that the applicant was going to bring an application for the transfer of the matter to Makhanda. The applicant was seeking an extension of the Rule pending filing of that application. Mr Nzuzo persisted that the court should discharge the Rule Nisi.

[6] Mr Nzuzo submitted that the applicant failed to satisfy the requirements for an interdict as laid down in Setlogelo v Setlogelo[3]. He submitted that the applicant

[2] Rule 18 (c) of the Joint Rules provides that : " No application opposed or unopposed may be enrolled for hearing in the East London Circuit Local Division where a quorum of two or more judges will be required.
[3] Setlogelo v Setlogelo 1914 AD 221 at 227

must show that he has good prospects of success in the review. In this regard he relied on Eriksen Motors (Welkom) Ltd v Protea Motors , Warrenton[4]. He submitted that in determining a prima facie right this court must not only look at the applicant's allegations but also at the respondent's affidavits as set out in Webster v Mitchell[5] . He argued that the applicant failed to satisfy the requirements for an interdict.

Discussion

[7] The allegations made by the applicant that at the time the garnishee order was issued by the magistrate he had paid the arrears due to the school have not been controverted by the second respondent. The applicant had conceded that at some point he fell behind with payments due to matters such as Covid 19. Infact the second respondent attached statements from the school which reflected that , for example, on 06 December 2023 an amount of R245 000.00 was paid to the school. It also reflects an amount of R110 000.00 was paid in January 2024. Both parties contend that payment of fees is the applicant's responsibility. These payments are not consistent with a parent who is recalcitrant. It is therefore incorrect to suggest that because one is a parent one has no right to challenge a garnishee order. This is an order made against his salary and he contends that it was not an issue that was before the magistrate. That is a matter for the review court to consider once it has had regard to the entire record.

[8] In **National Treasury v Opposition to Urban Tolling Alliance[6]** , the Constitutional Court held that the test on interdicts must be applied cognizant of the normative scheme and democratic principles that underpin the Constitution. Having considered the status of the children's fees at this point

[4] 1973 (3) SA 685 and also Marinpine Transport (Pty) Ltd v Local Road Transportation Board , Pietermaritzburg 1984 (1) SA 213 (N) at 234 C.
[5] 1948 (1) SA 1186 (W) at 1189
[6] OUTA 2012 (6) SA 223 (CC) at 231 C-E

and the rights of the applicant in relation to the garnishee order I am satisfied that the interim order does not trump the interests of the children.

[9] The applicant in the review relies on bias on the part of the magistrate, particularly on the fact that she had recused herself previously from the maintenance enquiry involving the parties. The second respondent confirms that the magistrate did recuse herself from their maintenance enquiry. That fact alone suggests that there may be merit in the review and it is not hopeless.

[10] For all the above reasons the application by the second respondent to have the rule discharged must fail. This matter involves children and it is for that reason that it must be dealt with by the parties urgently so as to enable a speedy determination of the issues.

[11] **I accordingly make the following Order :**

1. The application for the discharge of the Rule Nisi is refused.
2. The Rule Nisi is extended to 16 April 2024.
3. The applicant is directed to bring the contemplated application for the transfer of the application to Makhanda High Court within two weeks hereof.
4. The costs of this application shall be costs in the review application.

T.V. NORMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT	**:**	**ADV SIKOTI**
Instructed by	**:**	**V. FUNANI INC.**
		c/o MS GINYA INC.
		LANCASTER ROAD
		VINCENT

		EAST LONDON
		REF: NOGAGA
		TEL: 083 538 8545
For the 2ND RESPONDENT:		**ADV NZUZO**
Instructed by	**:**	**MASETI INC.**
		NO.12 BELL ROAD
		VINCENT
		EAST LONDON
		TEL: 043 726 7442
		REF: PLCM/msb/MEL4644
Matter Heard on	**:**	**19 March 2024**
Judgment Delivered on	**:**	**20 March 2024**