HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

CASE NO: 84382/2017

11/12/2018

In the matter between:

G[….] C[….] (NEE O[….]) Applicant

and

D[….] S[….] C[….] First Respondent

MAGISTRATE UNGERER OF THE MAGISTRATE'S COURT FOR THE DISTRICT OF TSHWANE CENTRAL, HELD AT PRETORIA Second Respondent

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JUDGMENT

DAVIS, J

[1] This is a review application of an order of refusal to grant absolution from the instance, given by a Magistrate sitting in the Maintenance court. It is brought in terms of Sections 22 (1)(b), (c) and (d) of the Superior Courts Act, No 10 of 2013.

[2] A summary of the facts are the following:

2.1 The Applicant and the first Respondent were previously married to each other. Of their marriage, a son was born on 19 May 2012. He is still a minor.

2.2 The marriage was dissolved by a decree of divorce on 29 October 2015. A settlement agreement was incorporated therein.

2.3 In the settlement agreement, maintenance for the minor child was provided for, amongst a number of other aspects. Two later addenda varied the maintenance part of the agreement during 2016.

2.4 The maintenance payable for the minor by the First Respondent to the Applicant, who was agreed to be the minor's primary caregiver, is R 9000.00 per month plus all school and ancillary costs. Rehabilitative maintenance for the Applicant herself was also agreed on at R 9000 per month for 36 months. This has since terminated through effluxion of time.

2.5 In January 2017 the First Respondent launched an application for variation of the maintenance payable by him in respect of the minor.

2.6 During the course of proceedings, the Applicant launched what was referred to as her "counter-application" for increased maintenance for the minor.

2.7 The enquiry in respect of the above commenced on 16 October 2017 before the Second Respondent, the magistrate sitting in the Maintenance Court for the District of Tshwane Central, held at Pretoria and concluded on 27 November 2017.

2.8 The enquiry was, as is apparent from the record, conducted as if a civil trial. At the close of the First Respondent's case, the Applicant applied for absolution from the instance and conditionally withdrew her counter- application.

2.9 In a judgment spanning some eight typewritten pages, the Second Respondent refused to grant absolution. It is this refusal which the Applicant seeks to have reviewed and set aside.

[3] The legal position

During argument, counsel for both the Applicant and the First Respondent initially were ad idem that magistrates sitting in the Maintenance courts were legally competent to grant orders for absolution from the instance and in fact concurred that this happened on a regular basis. However, as the argument progressed, doubts about the validity of this procedure was expressed, particularly by counsel for the First Responded. The Second Respondent expressed no view and had filed a notice to abide. It is therefore necessary to examine the relevant legal position:

3.1 In terms of Section 3 of the Maintenance Act, 99 of 1998, every magistrate's court established in terms of the Magistrates' Courts Act, is within its area of jurisdiction also a maintenance court. Similarly, every prosecutor of a particular magistrate's court is deemed to have been appointed as a maintenance officer of the corresponding maintenance court, in terms of Section 3 of the Maintenance Act.

3.2 In the conduct of an enquiry in terms of section 10 of the Maintenance Act, the law of evidence, including the law relating to the competency, compellability, examination and cross-examination of witnesses as applicable in civil proceedings in a magistrate's court, shall, in terms of Section 10(5) of the Maintenance Act apply to such an enquiry.

3.3 The conduct of a trial and the orders competent for a magistrate to make in a magistrate's court are regulated by Section 48 of the Magistrate's Courts Act and Rule 29 of the Magistrates' Courts Rules of Court. The relevant portions thereof read as follows:

> *"Section 48 Judgment*
>
> *The court may, as a result of the trial of an action, grant - ...*
> *(c) absolution from the instance if it appears to the court that the evidence does not justify the court in giving judgment for either*

party."

and

"Rule 29 Trial

(7)(a) If on the pleadings the burden of proof is on the Plaintiff he or she shall first adduce his or her evidence

(b) If absolution from the instance is not decreed after the Plaintiff has adduced evidence, the Defendant shall then adduce his or her evidence".

3.4 Section 16 of the Maintenance Act makes provision for the granting of orders "after consideration of the evidence adduced at the enquiry". These include the granting of a (new) order if no maintenance order is in force (section 16 (l)(a)), the substitution or discharge of an existing order (section 16(1)(b)) or, in terms of section 16(1)(c), to make no order.

3.5 The Maintenance Court rules are silent as to the issue of absolution from the instance. They also contain no rule corresponding with Rule 29 of the Magistrates' courts rules.

3.6 The seminal work Jones & Buckle, the Civil Practice of the Magistrates' Courts in South Africa describes an order of absolution from the instance as follows (at Act 325): *"it is an order granted either at the end of the Plaintiff's case or at the end of the whole case, dismissing the Plaintiff's claim. Its effect is to leave the parties in the same position as if the case had never been brought, for a judgment of absolution from the instance does not amount to res judicata and the Plaintiff is entitled to proceed afresh".*

3.7 In effect an order for absolution from the instance thus accords with what the Maintenance Court is empowered to do in terms of Section 16(1)(c) of its enabling section. I therefore find that such orders are competent.

3.8 It is further trite that *"when absolution from the instance is sought at the end of the Plaintiff's case, the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the Plaintiff"* (Jones & Buckle *op cit* with reference to the test first formulated by De Villiers JP in Gascoyne v Paul and Hunter 1917 TPD 170 at 173 and as approved by the Supreme Court of Appeal in, *inter alia,* Gafoor v Unie Versekeringsadviseurs (Edms) Bkp 1961 (1) SA 335 (A) at 340 A-C and Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 A at 409G-H.

[4] Should the Second Respondent's order be reviewed?

4.1 Having established that it is competent for a maintenance court to grant an order of absolution from the instance (a section 16(1)(c) order), the next enquiry is whether the learned magistrate's order refusing absolution can or should be reviewed. The first part of the enquiry is of a legal nature and the second more of a factual nature.

4.2 The Applicant relies on sections 22(1)(b), (c) and (d) of the Superior Courts Act. These subsections provide as follows:

> "22 Grounds for review of proceedings of Magistrates' Court *[sic]*
>
> *(1) The grounds upon which the proceedings of any Magistrates' [sic] Court may be brought under review before a court of a Division are -*
>
> *(a) Absence of jurisdiction on the part of the court;*
>
> *(b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
>
> *(c) Gross irregularity in the proceedings,· and*
>
> *(d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence" .*

4.3 The issue of bias was still relied on by the Applicant during argument but, from my reading of the record of proceedings, is not supported thereby and is an aspect which should best have been dealt with by way of an application for recusal. This was a course of action more than once alluded to by the present Applicant in the proceedings before the magistrate, but never pursued. I do not find sufficient grounds for review on this score.

4.4 If a magistrate sitting in maintenance court although correctly dealing with the issue of absolution completely misconstrues the test to be applied and commits a material error of law to such an extent that it amounts to a gross irregularity in the proceedings, his or her decision is capable of being reviewed under section 22(l)(c) of the Superior Courts Act. Such a review is to be distinguished from an appeal, which the Applicant initially considered to be the correct course of action but later abandoned. No appeal would generally lie against an order refusing an order of absolution from the instance, as no final or definitive decision would thereby have been made in respect of the rights of the parties. See inter alia Phillips v South African Reserve Bank 2013 (6) SA 450 (SCA) at 458 D-I and Health Professions Council of South Arica v Emergency Medical Suppliers and Training CC 2010 (6) SA 469 (SCA) at 476 D-E.

4.5 Subject to the distinction between appeals and reviews to be maintained, Section 22 (1)(d) as a ground of review, speaks for itself. A further rider however, is that the improper admission or refusal of evidence will not constitute a ground of review if the remainder of evidence would in any event have justified the granting of the order in question.

4.6 Technically therefore, the decision in question is legally capable of being reviewed in terms of Sections 22(l)(c) and (d) of the Superior Courts Act.

[5] The Factual issues:

I tum now to the factual enquiry:

5.1 In Claassens v Claassens 1981 (1) SA 360 (N), Didcott, J made the

following remarks regarding the nature of settlement agreements in divorce actions:

> *"Agreements governing maintenance often cover other topics too. They are frequently compromises over hotly contested issues of all sorts and the product of hard and protracted bargaining".*

5.2 In Reid v Reid 1992 (1) SA 443 (ECD) a former husband applied to the maintenance court two years after the "consent paper" (settlement agreement) had been made an order of court in the divorce action, for the reduction of maintenance that he was obliged to pay in terms of an alleged "unjust settlement". The court held that to allow an ex-spouse to freely attack the "justness" of a divorce order could open the door to abuse of the process of the court and that an Applicant who wished to question the justness of the divorce order should be required to show the existence of special circumstances.

5.3 In order to bring his application within the ambit of the Maintenance Act, the Respondent had to show "sufficient reason" to vary the maintenance provision included in the divorce order. This meant that he had the onus to show that circumstances have changed "substantially". See Georghiades (previously Jansen van Rensburg v Jansen van Rensburg 2007 (3) SA 18(C).

5.4 In his application for variation of the amount of maintenance payable for his minor son, the First Respondent stated the following as his reasons:

> *"1. The parties must contribute pro rata to the needs of the child;*
> *2. The Settlement agreement was ill-considered* ...;
>
> *3. The Applicant (the current First Respondent) cannot afford the maintenance as per the Settlement agreement;*
>
> *4. Change in the Respondent's circumstances (the circumstances of the current Applicant)".*

5.5 The reason in paragraph 1 above is trite law but the pro rata contributions have been addressed and agreed on in the settlement

agreement in circumstances similar to those described in Claassens v Claassens above.

5.6 The reason in paragraph 2 above falls short of the requirements dealt in Reid v Reid above. No other reasons such as undue duress or grounds for rescission in terms of the common law have been proven.

5.7 The issue of affordability raised as reason no 3 also falls away as a result of the First Respondent having conceded in the record as follows:

> *"If it so happens, hypothetically speaking, that the court order should remain exactly as is, what would the position be?*
>
> - *It would be the same, I would be able to fulfill my duties, if that is the decision of the court, then I will be able to fulfill it, so no change".*

5.8 On reason no 4, being the issue of alleged changed circumstances , the Frist Respondent was under the impression that the Applicant was employed or received a salary from a family trust. For this purpose, he called the Applicant's father as a witness. After grilling examination, it appeared that she in fact did not receive a salary. This ground or reason then also fell by the wayside.

5.9 When the Applicant was then questioned about his motivation for his application for reduction of maintenance, his answer is telling:

> *" Now why did you bring an application initially for the setting aside of this maintenance or the reduction of same?*
>
> - *At the time I was under the impression that G[….] was employed and I felt like okay well, she can pay her own way from now on, I do not have to sponsor her for the remainder of the period. And that was the reason".*

5.10 At the end of the First Respondent's evidence and after the above concessions, the Applicant applied for absolution from the instance and indicated that, should same be granted, she will withdraw her counter- application, i.e. if no order is made on the first Respondent'

s application for reduction (as provided for in section 16(1)(c) of the Maintenance Act) she would not pursue her application for variation of the existing order.

5.11 The learned magistrate commenced the subsequent judgment by referring to the preamble of the Maintenance Act as well as sections 2 and 50 thereof and the enforcement of parents' duties to support their children. The judgment then proceeds to explain the investigative nature of maintenance proceedings with reference to Pieterse v Pieterse 1965 (4) SA 344 (T) and Zimelka v Zimelka 1990 (4) SA 303 (WLD). With all possible bona fides, the magistrate proclaimed that the court is a family court, not a civil court or a criminal court and that it is the duty of the maintenance officer and the judicial officer *"to ensure that all factors are* properly researched and determined before determination of a fair and just order ... at the end of the day".

5.12 The learned magistrate concluded the judgment as follows:

> *"However the High Court should be approached if there is a patent error in a High Court Order. This is not the case. Accordingly the court is not going to grant absolution. The trial will continue, all the evidence will be placed in front of the court to determine the best interest of the child regarding the needs or the minor child and inevitably the means of the parties" .*

5.13 Although the learned magistrate had referred to the requirement of the existence of changed circumstances, particularly in means or income of parties, for justifying an approach to court for variation of an existing order (with reference to Prophet v Prophet 1948 (4) SA 325 (0). and Stone v Stone 1966 (4) SA 98(C)), the learned magistrate then committed a gross error of law in not applying any of these cases or at all considering whether the Frist Respondent as applicant had placed any evidence before the court on which a court could order a reduction of maintenance. The magistrate simply decided that the Applicant should

also be subjected to the giving of evidence. This approach was clearly grossly irregular.

5.14 An approach such as the above by the learned magistrate would imply that in all instance both parties would always have to be heard even where there is an existing court-sanctioned agreement and even where the applicant in the maintenance court clearly has no case on any grounds to rely on a reduction of maintenance and has not proven any changed circumstances and the respondent/custodian parent has indicated that she (or he) is happy with the existing order (as the Applicant herein has done by way of the conditional withdrawal of her counter-application).

5.15 Such an approach would lead to an unwarranted clogging of a system already under pressure by the further entertainment of unmeritorious applications. This would not be cost effective and have all the other adverse consequences of subjecting a party happy with the agreed maintenance to unnecessary court attendances, cross-examination and increase in acrimony between parents of a minor child. As it stands, the papers in the review application already exceed 800 pages and contain mud-slinging excursions by the parties and their various legal representatives.

5.16 The judgment of the magistrate and the conclusion thereof as quoted earlier also seem to suggest that the decision is reviewable in terms of Section 22 (l)(d) of the Superior Courts Act in that the learned magistrate had clearly attached weight to evidence which was either not (yet) before court or which did not satisfy the case law referred to earlier.

[6] On the facts of this case, I therefore find that the decision to refuse absolution from the instance should be set aside. In the context of this case further, this is not a matter which should be remitted and this court is equally competent to grant a substituting order.

[7] Costs

As always in family matters, this is a vexing Issue. The Applicant was

substantially successful in her application. The court should also take into account the nature of the matter: this is an application where an impecunious applicant seeks to prevent a more affluent ex-spouse from proceeding with an unmeritorious application in the Maintenance Court. There is also a huge dispute about who should be liable for the costs occasioned by a postponement of the matter on 4 September 2018. On that date the record of proceedings were not in the court file and the parties and their attorneys blame and accuse each other and serious aspersions are cast both ways. Having regard to the nature of this application, I find it counter-productive to settle the factual disputes purely for purposes of resolving a costs dispute relating to a postponement.

[8] Order

In the premises, the order which I make is the following:

1. The order of the Second Respondent of 27 November 2017 to refuse absolution from the instance at the end of the First Respondent's case in the Maintenance Enquiry with reference number 00117 MAI 000373 in the Magistrate Court for the District of Tshwane Central, Held at Pretoria, is set aside and replaced with the following:

   "The Respondent's application for absolution from the instance is granted with costs".

2. The First Respondent is ordered to pay the costs of this application.

3. In respect of the costs of 4 September 2018 in this court, each party shall pay his or her own costs.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 22 November 2018

Judgment delivered: 11 December 2018

APPEARANCES:

For the Plaintiff:	**Adv. B Bergenthuin**
Attorney for Plaintiff:	**VZLR. Inc., Pretoria**
For the Defendant:	**Adv. L van der Westhuizen**
Attorney for Defendant:	**F van Wyk Attorney, Pretoria**