

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 22/11181

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES:
YES
- (3) REVISED: NO

20 April 2022

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In the matter between:

P V Applicant

and

C V First Respondent

DISCOVERY LIMITED

Second Respondent

STANLIB COLLECTIVE INVESTMENTS

(RF) (PTY) LIMITED

Third Respondent

JUDGMENT – [REASONS]

SIWENDU J

Introduction

- [1] This urgent application served before me on 13 April 2022. On 14 April, I dismissed the application with costs. I undertook to furnish reasons for the dismissal application soon after the order.
- [2] The applicant is a businessman and resides at [..., BA]. He brought the urgent application against his ex-wife, C V, the first respondent. She is a restaurateur and resides at [....., W].
- [3] The applicant and the respondent were married to each other on 15th April 2000 but divorced on 25th November 2019. Three children were born of the marriage, namely, [G], born in August 2001. [A], born on 12 May 2006 and [K], born on 20 July 2011. The divorce decree included a settlement agreement which was made an order of the court. Other than proprietary issues which I do not need to traverse in the reasons for the order, the settlement agreement provided that the applicant would pay maintenance at the rate of R20 000.00 per month per child, plus medical and educational expenses.
- [4] The applicant admits that he is in arrears and has not met his maintenance payment obligations in the full amount of R60 000.00 per month. It also seems he has not met the payments for medical and educational expenses either. He claims that he lost about 30 percent of his income between April 2020 to January 2021 in the sum of about R1 000 000.00 due to the Covid-19 pandemic. The pandemic prevented [G H], a company based in England where he is a shareholder, and derives dividend income from declaring dividends. He requested the first respondent to agree to a reduction of the maintenance payable, but she refused.
- [5] The applicant states that from April 2020 to June 2020, he paid to the respondent R35 000.00 per month as maintenance. From 1 July 2020 he paid R40 000.00 per month as maintenance and has maintained payment of the

latter amount since. During June 2020 he launched an application against the first respondent before the High Court under case no 43171/2014 for an order suspending a payment of the balance of R5 000 000.00 due to the first respondent in respect of the accrual portion of the settlement and for an order reducing the amount of maintenance payable. Due to the delay in resolving the High Court application, he brought another application out of the Roodepoort Magistrates Court's Maintenance Court for a reduction of the maintenance payable due to the change in circumstances. Both applications are opposed.

[6] It seems the applicant disputes some of the amounts claimed by the respondent for educational expenses. Once again, the intricacies of that dispute need not occupy the judgment.

Relief

[7] The applicant approached the urgent Court for the following orders:

7.1 directing the first respondent to first furnish a notice to the applicant in the event that she intends at any time to make application to any Court on an *ex parte* basis for an order issuing a warrant of execution against the applicant in respect of maintenance due to the first respondent which is allegedly in arrears; and

7.2 such notice is to be furnished not later than 10 Court days before any such application for a warrant of execution is made.

[8] The applicant claimed that the reason for seeking this relief is that he wishes to be afforded an opportunity to make representations to the Court and oppose the granting of such a warrant. He did not seek costs against the respondent save if she opposed the application.

[9] He stated that what precipitated the urgent application is that on or about 4 February 2022, he received a notification from Discovery Limited, whom he has joined in the proceedings as the second respondent, that a deduction had been made from his retirement annuity as follows:

- Gross amount — R776 661.28.

- Tax deduction — R226 897.78.
- Net payment — R549 763.50.

[10] The amount was withdrawn following an *ex parte* application by the first respondent. He claims she presented a schedule which purported to show arrear maintenance from the period April 2020 to December 2021. There was no notice that funds would be withdrawn from his retirement annuity.

[11] A month later, on or about 8 March 2022, he received a WhatsApp message from the first respondent which reads:

"Your attorney is giving you wrong information. Please I am doing another execution as you can't just subtract off stuff that you think should be. The Judge ruled that au pair and tutor falls under maintenance. So where are you guys going with this again. When there is a Court order Discovery is not allowed to notify you as it is for arrear maintenance. I paid [G] money when in Thailand and his first two weeks accommodation. Plus [A] paid for his flight. I have been using all my credit cards to support our children. You owe me the full maintenance and if you are unhappy with the order then you need to launch another application, get your legal team to advise you properly. This will also be a not a maintenance issue. Your lawyer can't over rule 2 Judges and just deduct whatever she wants ... For once in your life do the right thing and stop ducking and diving to get out of this. My lawyer will respond officially explaining once again as your lawyer does not get it how maintenance works! Good luck trying to stop the next one (emoji winking one eye)."

[12] This prompted the urgent application in that it became clear that the first respondent intended to effect another withdrawal. His concern is that the premature withdrawal has substantially decreased the value of his investment and is highly prejudicial to him. There is, in addition, an early exit fee of R118 955.37 which diminishes the value realised.

[13] He joined Stanlib Collective Investments as the third respondent because the first respondent is aware that he has an investment with them and is concerned that she will also withdraw the investment without notice. He claims that it is unfair for such application to be made without notice to him and without any opportunity granted to him to make representations to the Court.

[14] I determined that the application raises an important question of law which has the potential to affect many judgment creditors and debtors in the position of

the applicant and the respondent. In addition, the question of maintenance, the legal method for collecting and/or recouping arrears implicates the rights and interests of the children to parental care and provision in terms of section 28 of the Constitution of the Republic of South Africa, 1996. I exercised my discretion to hear the application as one of urgency given the allegations on an eminent threat of another withdrawal. Ultimately, the application turned on the applicant's *prima facie* right to relief.

[15] This Court's decision in *Butchart v Butchart*¹ by my Brother Wepener AJ, (as he then was), confirmed that a writ of execution may be validly issued based on an 'expenses clause' contained in a maintenance order, provided the amount is easily ascertainable. The applicant's request for a notice appeared to seek the development of the law further from *Butchart*. I had invited both parties to make further submission on the entitlement to a notice and the right on which such a notice is predicated.

[16] Mr Segal (for the applicant) contends that the issue is that the method of execution used by the first respondent, which she threatens to use again without notice, is to apply for a warrant of execution on an *ex parte* basis, which warrant is used to obtain payment directly out of the applicant's retirement annuity fund. Once such deduction has been made, the *status quo ante* in the retirement fund cannot be restored. In particular, the amount paid to SARS cannot be recovered.

[17] I found that irreparable harm was not difficult to establish, in particular where early withdrawals from the annuity would trigger an automatic early exit fee and a tax charge by SARS which he would not be able to recoup.

[18] Mr Segal sought to convince me that the right to a notice is evident from the judgment in the matter of *Block v Block* referred to by the Court with approval in *Butchart* at 112 C - F where it was stated in such judgment by Stegmann J:

"The judgment creditor must file with the Registrar an affidavit proving the medical expenses reasonably incurred; the writ may then validly include the amount so proved by the judgment creditor; and the affidavit of the judgment creditor must be served on the judgment debtor together with the writ. This procedure will ensure (a) the required certainty of the amount due under the judgment for purposes of the writ; and (b) that the judgment debtor has a fair opportunity to consider whether the amount included in

¹ 1997 (4) SA 108 (W).

the writ in respect of medical expenses was indeed within the terms of the judgment, and, if he considers that it was not, to approach the Court for appropriate relief."

[19] In *Butchart*, the Court also stated at 116 A that:

"A difficulty which may be envisaged in matters such as these is the fact that a judgment debtor may not be aware that substantial expenses have been incurred and are payable under the Court order. He or she may then be faced with a writ without any prior knowledge. That difficulty does not arise in the present matter since the issuing of a writ is, in consequence of the wording of clause (e)(i), dependent upon a demand being first made upon the appellant."

[20] In contesting the applicant's *prima facie* right to the notice, Mr Van Rooyen (for the respondent) countered that the applicant has failed to demonstrate the existence of a right, *clear or prima facie* for the relief sought. He contended that an applicant faced with a writ is not without relief in such circumstances which redress can be obtained in due course.

[21] In *Butchart*, the court points out that in the event of a judgment creditor incorrectly or improperly taking out a writ, the judgment debtor will have suitable remedies:

"The position has always been that if a judgment creditor authorises an attachment which causes damage to the judgment debtor or a third party the judgment creditor, and not the Sheriff, is liable therefor."²

The court in *Butchart* also refers to *McNutt v Mostert* (*supra* at 256), where Clayden J points out that the 'risk' in question 'would include the liability for costs if the writ were set aside . . . and the risk of having to pay damages for malicious execution'."

[22] The difficulty is that the horse will have bolted by this time. It became clear that the decision in *Butchart* dealt with a writ issued in terms of Rule 45 of the Uniform Rules, and makes clear that the risk in taking out the writ is with the person taking it out.

[23] In this case, the writ was issued by the Magistrate's Maintenance Court. The rights of parties are regulated under the Maintenance Act 99 of 1998. Given the social importance of the issue pertaining to maintenance, where the writ of execution was levelled pursuant to the provisions of the Maintenance Act, the provisions of the Act apply. The procedure for obtaining and serving a writ in

² See Erasmus *Superior Court Practice* at D1-594.

the Maintenance Court is prescribed in Section 27(1) and (2) of the Maintenance Act.

[24] Under section 27(2)(b), the first respondent as a person in whose favour the maintenance was issued, is generally assisted by the maintenance investigator or, in the absence of a maintenance investigator, by the maintenance officer in taking the prescribed steps to facilitate the execution of the warrant. In circumstances where there is a dispute about the amount owing under a pre-existing Maintenance Order, it seems the only remedy for an aggrieved party lies in Section 27(3) which provides that:

"A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section, set aside the warrant of execution if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question."

[25] The provisions of the Maintenance Act do not confer the right claimed by the applicant *in casu* to the applicant. Where there is a pre-existing Maintenance Court Order, there is no mechanism to resolve a dispute about the quantum owing before the issue of a writ nor a requirement for a notice before the issue of such a writ. The only redress I can discern afforded to the applicant is in Section 27(3) as aforesaid.

[26] Whether such a right should exist, was not properly placed before me. In any event, it is a matter for the Legislature who saw it fit *not* to afford the applicant a right to a notice before the issue of a writ of execution.

[27] Accordingly, I dismissed the application with costs for the reasons stated above.

T. SIWENDU J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 20 April 2022.

Heard On: 13 April 2022

Order Granted on: 14 April 2022

Reasons on: 20 April 2022

Applicant's Counsel: N Segal

Instructed by: Jadrana Brunetta Attorneys

First Respondent's Counsel: Adv J van Rooyen

Instructed by: Greyling Orchard Attorneys