

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



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

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| | DATE |
| SIGNATURE | |

**CASE NO: A6270 – 2023
KEMPTON PARK
MAGISTRATES' COURT
CASE NUMBER 705/2021
MAINTENANCE REFERENCE
NUMBER
1042021MA1000705**

In the application by

R[...], O[...]

and

R[...], H[...]

APPELLANT

RESPONDENT

JUDGMENT

MOORCROFT AJ [CRUTCHFIELD J CONCURRING]:

Summary

Appeal from Magistrates' Court – maintenance order – magistrates' discretion exercised judicially – no ground for interfering with order

Order

[1] In this matter I make the following order:

1. *The appeal is dismissed;*
2. *The appellant is ordered to pay the costs of the appeal.*

[2] The reasons for the order follow below.

Introduction

[3] This is an appeal against a judgement handed down on 30 September 2022 by the learned Additional Magistrate Mokoma in the Magistrates' Court for the district of Ekurhuleni North, held at Kempton Park. In his judgement, the Learned Magistrate discharged an earlier judgement of the Randburg Magistrates' Court handed down by consent on 20 August 2020, set aside an interim maintenance order granted on 20 June 2022 and substituted the interim maintenance order with a new order, against which the appellant appeals, and in terms of which the appellant was ordered to pay -

3.1 R15,000 per month towards a loan secured by a mortgage bond until the sale of the house over which the bond was registered had been finalised, and thereafter to pay R7,500.00 per month towards board and lodging for the three minor children born¹ out of the marriage between the parties; and

3.2 R10,400.00 per month towards the maintenance of the children from January 2023 onwards.

¹ The three children were born in 2008, 2013 and 2018.

[4] The appellant also instituted a divorce action against the respondent in the Randburg Regional Court in 2021 under case number 100 of 2021. The parties entered into a settlement agreement in the divorce action² but the question of maintenance of the minor children was left for determination by the Maintenance Court. The order that is the subject of this appeal is therefore a final order and not struck by section 16(3)(a) of the Superior Courts Act, 10 of 2013.

[5] The magistrate gave a detailed judgement and found the following facts that are not in dispute:

- 5.1 Two of the three children born out of the marriage are attending school and the third is attending a creche;
- 5.2 The appellant is also the father of three other children born out of wedlock during the subsistence of the marriage;
- 5.3 Both parties are gainfully employed;
- 5.4 The first maintenance order was granted in the Randburg Maintenance Court on 28 August 2020;
- 5.5 The order was granted by consent and in accordance with a settlement agreement entered into on 28 August 2020;
- 5.6 The appellant could not comply with the order and sought an order amending the first order.

[6] The magistrate referred to section 28(2) of the Constitution of 1996. The subsection entrenches the rights of children and reads as follows:

“(2) A child's best interests are of paramount importance in every matter concerning the child.”

² Judgment para 1.

[7] The learned magistrate then analysed various authorities³ and set out the factors that a court should consider when deciding on the contribution to be made by each party. He did so by quoting from *Modise v Modise and Another*.⁴ The following factors are deserving of consideration:

“(i) The reasons that led to the failure by the other parent to contribute to the maintenance of the child.

“(ii) Whether the claiming parent has acted within reasonable time, regard being had to her ability to claim from the other party, the relationship between the parties, the availability of the other party, etc.

“(iii) Whether the parent who did not contribute was aware that the other party was making expenses for the benefit of their children.

“(iv) What steps, if any, the party who failed to contribute made to enquire about his own obligations in the maintenance arrangements made and executed by the other party.”

[8] Having set out the applicable principles the magistrate turned to the facts placed before him. The appellant earned R62,433.90 **nett** per month, more than double the **amount of R30,345.20 nett earned by the respondent**. Both parties earned overtime payment in **addition to** their salaries.

[9] The parties' eldest son is head-boy at the school he attended. He performs well academically and in sport and moving him to another school to reduce costs would be a very unsatisfactory option. His school fees amounted to R4,200.00 per month. The second-born attended a public school and the monthly fees amounted to R1,150.00. A nanny looked after the children and earned R3,200.00 per month. The respondent's brother lived with the respondent in the same house and contributed to their well-being and maintenance.

³ *Hancock v Hancock* 1957 (2) SA 500 (C) 503, *Davis v Davis* 1993 (1) SA 293 (SE) 295, *Burse v Bursey and Another* 1999 (3) SA 33 (SCA) 36D, and *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) para 29.

⁴ *Modise v Modise and Another* 2007 (1) BLR 622 (HC) 627. See also *SV v JB* 2016 JDR 0704 (GP) para 22.

[10] The learned magistrate pointed out that sufficient internet data is no longer a luxury as the children required internet access for school work. The two older children required internet access and expenditure on Wi-Fi⁵ was justified.

[11] The magistrate was critical of the appellant's expenditure on what was termed a "second nest." The appellant spent considerable amounts on the mothers of his other children and the appellant's averment that those amounts were not items of expenditure but the repayment of loans was not substantiated by any evidence.

[12] In reaching the conclusions that he did, the magistrate considered the evidence that was placed before him and arrived at reasoned conclusions. He exercised his discretion judicially according to the respective earnings of the parties and the needs of the children. The learned magistrate did not reach his decision arbitrarily or capriciously and the decision is not at variance with the law.

[13] Moseneke DCJ said in *Florence v Government of the Republic of South Africa*:⁶

"Where a court is granted wide decision making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision making."

[footnotes in text of judgment omitted]

[14] Accordingly, there is no basis for me to interfere with the decision of the court a quo.

[15] For the reasons set out above I am of the view that the appeal should be dismissed and I grant the following order:

⁵ Wireless Fidelity.

⁶ *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 113. See also *Ex parte Neethling and Others* [1951 \(4\) SA 331 \(A\)](#) 335D to E, *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another* 1989 (4) SA 31 (T) 39J to 40J, and *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) paras 144 to 145,

1. *The appeal is dismissed;*
2. *The appellant is ordered to pay the costs of the appeal.*

MOORCROFT AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

I agree and it is so ordered

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be _____ **NOVEMBER 2023.**

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| APPEARANCE FOR THE APPELLANT: | L S KAMFER |
| INSTRUCTED BY: | KAMFER ATTORNEYS INC |
| APPEARANCE FOR THE RESPONDENT: | IN PERSON |
| INSTRUCTED BY: | - |
| DATE OF ARGUMENT: | 31 OCTOBER 2023 |
| DATE OF JUDGMENT: | 15 NOVEMBER 2023 |

