



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG2

CASE NO: A026585- 2021

COURT A QUO CASE NO: 0112020MAI1000781

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

DATE
SIGNATURE

In the matter between –

LYONS, STEVEN ROBERT

APPELLANT

and

LIPSCHITZ, ELISE MARTIN

RESPONDENT

Neutral Citation: *Lyons v Lipschitz* (Case No. A026585- 2021) [2023] ZAGPJHC 476 (16 May 2023)

JUDGMENT

MOORCROFT AJ [COPPIN J CONCURRING]:

Summary

Appeal – against order granted ex parte – application in terms of section 26 and 27 of

Maintenance Act, 99 of 1998, read with regulations – service on respondent a prerequisite for warrant of execution to be authorised

Introduction

[1] This is an appeal against a judgment granted by the Additional Magistrate Nkabinde, in the Magistrate's Court for the District of Johannesburg on 15 July 2022. In terms of the judgment the Magistrate's Court dismissed an application in terms of section 27(3) of the Maintenance Act, 99 of 1998, ("the Act") for the setting aside of a warrant of execution dated 22 April 2021, and reinstated the warrant.

[2] The respondent abides the outcome of the appeal.

[3] The warrant was issued pursuant to an *ex parte* application by the respondent for the enforcement of a maintenance order.

[4] The appellant applied for the setting aside of the warrant and alleged that the respondent's attorney had failed to advise the Court of the variation agreements entered into by the parties, and failed to place other essential facts before the Court. The second of these agreements was made an order of court in March 2021.

[5] In *Schlesinger v Schlesinger*¹ Le Roux J said with reference the duty to disclose all relevant facts in an *ex parte* application:

"(1) in ex parte applications all material facts must be disclosed which might influence a Court in coming to a decision;

(2) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission; and

¹ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) 349A-B.

(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.

Although these broad principles appear well-settled, I have not come across an authoritative statement as to when a Court will exercise its discretion in favour of a party who has been remiss in its duty to disclose, rather than to set aside the order obtained by it on incomplete facts.”

[6] Regulation 16 of the Regulations² made under the Act provide for the authorisation of a warrant of execution on application. Application must be made using a prescribed form, identified as Form K. The form itself envisages that notice must be given to the respondent.

[7] In any event, in *Louw v Louw*³ the Supreme Court of Appeal was seized with an application in terms of sections 26 and 30 of the Act. Section 30 provides for the attachment of a debt owing to a person against whom a maintenance order was made (the respondent), by the person in whose favour the order was made (the applicant). The application for attachment of the debt was not served on the respondent and Olivier JA⁴ said that while neither the Act nor the Regulations contain any provision regarding notice, the common law right to be heard is not negated by the legislation. The *audi alteram partem* rule imposes a duty on officials to a duty to hear a party affected by a decision.⁵

[8] With reference to Regulation 16 and Form K referred to above, the Learned Justice of Appeal said that -

² Government notice R1361 of 15 November 1999.

³ *Louw v Louw* 2006 JDR 0474 (SCA).

⁴ Majiedt JA concurring.

⁵ *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 156 at 172-173; *Sachs v Minister of Justice*; *Diamond v Minister of Justice* 1934 AD 11 at 38; *Diepsloot Residents' and Landowners' Association and Another v Administrator, Transvaal* 1994 (3) SA 336 (A) 345 I - 346 B *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); *Buffalo City Municipality v Gauss and Another* 2005 (4) SA 498 (SCA).

“...form K obliges the applicant to supply the maintenance court with information regarding the ‘whereabouts of the person against whom the order was made’. What other purpose could such information possibly serve than to enable the maintenance court to cause a subpoena to be served upon the person (and therefore in effect notice to such person) against whom the maintenance order was made?”

[9] The comments made by the Supreme Court of Appeal are equally applicable to the present matter and to section 27 of the Act.

[10] As stated above, the respondent abides the outcome of the appeal. It is regrettable that there is no indication by the respondent’s attorneys who represented her when the warrant was sought on an *ex parte* basis as to whether, and if not, why the presiding Magistrate was not informed of the Supreme Court of Appeal authority referred to above. The fact that the warrant was subsequently suspended by agreement does not, as the Magistrate states in paragraph 26 of the application, remedy the failure to give notice of the application before the warrant was sought.

[11] The warrant should not have been sought or granted on an *ex parte* basis. The appeal is upheld. In the absence of an explanation by the respondent’s attorney there shall be no cost order in the appeal.

Order

[12] I make the following order:

1. *The appeal is upheld;*

2. *The following order is substituted for the order of the Additional Magistrate handed down in the Magistrate's Court for the District of Johannesburg, Held in Johannesburg, on 15 July 2022 under case number 0112020MAI000781:*

2.1. *The warrant of execution issued in terms of section 27(3) of the Maintenance Act, 99 of 1998, issued on 22 April 2021 is set aside;*

2.2. *The respondent is ordered to pay the costs of the application.*

3. *No order is made as to costs of the appeal.*

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

I agree and it is so ordered

P COPPIN
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 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 _____ **MAY 2023**.

APPEARANCE FOR THE APPELLANT:	N RILEY
INSTRUCTED BY:	CRAIG BAILIE ATTORNEYS
COUNSEL FOR THE RESPONDENT:	NO APPEARANCE
INSTRUCTED BY:	-
DATE OF THE HEARING:	9 MAY 2022
DATE OF JUDGMENT:	16 MAY 2023