IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A152/2019

Date: 21 April 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

21/4/2023 .....
DATE

.....
SIGNATURE

In the matter between:

W[redacted] N[redacted] D[redacted] K[redacted] **APPELLANT**

AND

C[redacted] I[redacted] D[redacted] K[redacted] **RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] This is an appeal against part of the order and judgment delivered by the court *a quo* on 23 May 2019.

[2] The matter came before the court a quo as an application for the substitution or discharge of a maintenance order that was granted, as part of divorce proceedings on 13 June 2003 in the High Court. The maintenance order is contained in the settlement agreement that the parties entered into and the relevant part reads as follows:

> *"To make a monthly cash payment of R5 000-00 for the maintenance of the respondent which maintenance will fall away should the respondent remarry, enter into a cohabitant relationship or become financially independent*".

[3] At inception of the proceedings in the Court *a quo* the appellant raised a point in *limine* it was agreed that this would first be ventilated before a full financial enquiry in terms of section 10 of the Maintenance Act 99 of 1998(the Maintenance Act) would be conducted.

[4] Ultimately, the only question that had to be considered by the Court *a quo* was whether the respondent abided by the terms of the settlement, or whether she had subsequently entered into a cohabitant relationship, which would mean that the obligation to maintain would terminate.

[5] The court *a quo* accordingly only had to consider the point *in limine* and, as a result, it was not burdened at this preliminary stage with having to determine, or consider, whether the respondent had a need for maintenance, neither did it have to consider the appellant's ability to afford it. It was accepted that, should the appellant be successful with the point in *limine*, it would be the end of the matter. It must be noted that during the proceedings the learned magistrate herself, disallowed the leading of evidence regarding financial issues and pointed out that the point *in limine* should first be decided.

[6] The court found after hearing evidence of the appellant and respondent that the respondent entered into a cohabitation relationship and discharged the maintenance order in terms of section 16(1)(b)(ii) of the Maintenance Act, but then proceeded to order that "the current maintenance order will be discharged with effect from 1st August 2019 and the final payment with relation to the said order will be conducted on or before 31 July 2019.

[7] The first part of the order, relating to the discharge of the maintenance order is not appealed against, nor was a cross-appeal launched against that part of the order.

[8] This Court accordingly should decide whether the appeal against the aforementioned part of the order should succeed, but before getting to that, some preliminary issues need to be decided.

[9] The respondent contended that the appeal lapsed due to the appellant's failure to apply to the registrar for the assignment of a date for hearing of the appeal within 40 days after noting the appeal in terms of Rule 50(4)(a) of the Uniform Rules of Court and to lodge simultaneously two copies of the record as prescribed by Rule 50(7)(a). It must be noted that in terms of special rules applying to Gauteng the periods of 60 and 40 days were extended by 14 weeks and 12 weeks respectively.

[10] Rule 51(9) of the Magistrates' Court Rules provides that a party "*shall*" prosecute the appeal within the time prescribed by the Rules of the court of appeal and if there is no compliance the appeal shall be deemed to have lapsed, unless the Court of Appeal shall see fit to make a contrary order.

[11] The appellant did not apply for condonation, nor was the point in limine dealt with in the appellant's heads of argument The Court, however requested the appellant to file submissions on the point *in limine*. Both appellant and respondent filed supplementary heads of argument, and the appellant then proceeded to file a condonation application on 4 March 2023.It was argued that the appeal did not lapse and no condonation was required, but if the Court should find that there was indeed no compliance with the rules, condonation was sought.

[12] The approach of courts to condonation in circumstances such as the present is well-known. In ***Dengetenge Holdings (Pty) Ltd v Southern Sphere***

Mining and Development Company Ltd & others[1] Ponnan JA held that factors relevant to the discretion to grant or refuse condonation include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice'. It is trite that these factors are not individually decisive but are interrelated and must be weighed against each other. [2]

[13] In the condonation application the attorney for the appellant stated that the judgment of the court *a quo* was delivered on 23 May 2019, well within time, the appellant proceeded to file its notice of appeal on 11 June 2019. Digital Audio Recording Transcriptions was requested to transcribe the proceedings. It transpired that the recoding of the court proceedings of 25 May 2018 did not form part of the record in their possession. A further investigation was apparently launched to find the missing recording. On 29 August 2019 the appellant's attorney informed the respondent about the missing record and an indulgence was sought to file the proceedings within 30 days after that. No response was received and on 2 September 2019 a similar letter was addressed to the respondent's attorney. Further letters dated 21 October 2019 and 22 November 2019 were sent to explain the continued difficulty to obtain the missing recording. A final undertaking was given to file the record by 22 November 2019. It must be noted that no response was received, or objections raised by the respondent or her attorneys to these requests. It was pointed out

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[1] [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.
[2] Academic and Professional Staff Association v Pretorius NO and Others[2] (2008) 29 ILJ 318 (LC) at para 17 - 18.

by the counsel that the respondent's previous attorneys were not acting on her behalf at that point. However, the respondent was personally also informed of the difficulty and the attorneys, should at least have informed appellant's attorneys of the fact that they were not on record. Mere silence under these circumstances could not suffice.

[14] On 22 November 2019 the incomplete record was filed and all the letters previously referred to were attached and the attorney stated that in light thereof, he was under the impression that no condonation was required. He attached an affidavit by the transcriber, which indicated that the missing part of the record could not be obtained. The attorney failed to explain why there was no attempt to reconstruct the record. It was however pointed out in the practice note, that was filed by the appellant on 25 August 2021, that the missing part of the record was not material to the appeal.

[15] The attorney for the appellant stated that respondent's heads of argument were filed on 7 April 2022, but it was not filed under a separate filing notice. Due to an error in his office, it was then filed under notices and did not come to his attention and the objection to the non-compliance with the rules of court was not noted. It was apparently only when the Court requested submissions on the point *in limine* that the objection contained in the heads of argument was noted.

[16] The respondent's heads of argument, practice note, list of authorities and notice of appointment as attorneys were separately uploaded on Caselines on

7 April 2022 and the respondent's representative argued that the objection should have been noted earlier.

[17] It must be noted that, due to the late filing of the condonation application, the respondent did not have time to file an answering affidavit. The Court asked respondent's representative whether an opportunity to file an answering affidavit was required. The representative declined the opportunity on instructions of the respondent, who was present in court and who indicated that she wanted finality in the matter. Both parties also indicated that they wanted to continue with the appeal in spite of the incomplete record, as they were both of the view that the missing part was not relevant to the determination of the appeal. The court proceeded with the appeal on the basis that both parties consented to it.

[18] The appeal was previously set down for 3 June 2020, but was removed from the roll, according to appellant's attorney, due to the National State of Disaster. The respondent pointed out, in the further written submissions, that the appeal could have proceeded virtually and that no explanation was given why the attorney waited for more than a year to re-apply for a court date. These are valid points, however the weight that should be given to it, should be measured taking into consideration all the facts.

[19] The respondent pointed out that the appellant in the condonation application did not specifically ask for re-instatement of the lapsed appeal. That is correct as the prayer merely asks that the failure to prosecute the appeal

within 60 days be condoned. However, this is a very technical approach, especially in a maintenance matter, because once the condonation is granted the re-instatement of the appeal should follow, whether it was asked explicitly is neither here nor there as the purpose of the application is clear.

[20] The Court retains the inherent right to grant condonation where principles of justice and fairness demand this and where the reasons provided for non-compliance have been explained to the satisfaction of the Court.[3] The Court will in the exercise of this duty also look at the merits of the appeal.

[21] It is trite that the Court *a quo*, as a division of the magistrates' courts, is a creature of statute and has no jurisdiction beyond that granted by the statute creating it.[4] As such the magistrate did not have a discretion that she could have exercised.

[22] Section 16 of the Maintenance Act[5] conferred certain powers on the court *a quo* in making maintenance- and ancillary orders, in terms whereof the court *a quo* could grant an order for maintenance in substitution of an existing order,

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[3] Barnard v Minister f Police (CA 98/2022) (3 May 2022).

[4] Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa (Volume I and II) on the Magistrates' Court Act 32 of 1944, with reference to Proclamation R27 of 20 February 1987.

[5] Section 16 of the Act determines the following:

"(1) After consideration of the evidence adduced at the enquiry, the maintenance court may

(a) In the case where no maintenance order is in force –

(i) Make a maintenance order against any person proved to be legally liable to maintain any other person for the payment…of sums of money so specified, towards the maintenance of such other person…"

(ii) …

(b) In the case where a maintenance order is in force –

(i) Make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order; or

(ii) Discharge such maintenance order; or

(iii) …."

only after an enquiry in terms of section 10 had proved one party was legally liable to maintain the other. Alternatively, the court *a quo* could have discharged the existing maintenance order.[6] Considering the powers conferred upon the court *a quo*, and once it is established that an existing maintenance order should be discharged, it follows that once it has been established that there is no legal obligation for one party to still maintain the other, it cannot simultaneously be found that the existing maintenance order should also be substituted on the premise that it has been proven that the one party is still legally liable to maintain the other.

[23] The court *a quo* established that the only issues in dispute were the existence of good cause for the discharge of the existing maintenance order and whether the respondent had entered into a cohabitation relationship. The issue whether the respondent had a need for maintenance, or whether the parties had a right to be supported was not for the court to determine at that point. The court a quo found that the respondent had indeed entered into a cohabitation relationship subsequent to the decree of divorce.

[24] The court *a quo* found that although the said cohabitation relationship had in the meantime come to an end, it did not impact on the application as the terms of the settlement agreement did not stipulate that such a relationship needed to be everlasting, but that the maintenance order would cease should

[6] The authority of the Court *a quo* in terms of s16(1)(b)(i) is joined with its authority in terms of s16(1)(b)(ii) by the use of the word *'or'*, as such, the Court *a quo* may only grant one or the other order.

the respondent enter into such a relationship. These findings of the court a quo is not appealed against.

[25] The court *a quo*, furthermore, held itself correctly bound to the applicable authorities in terms whereof the basis for the discharge of a maintenance order, in circumstances where the respondent had entered into a cohabitation relationship was established. Despite this, the court *a quo* failed to consider that the appellant should be indemnified for all maintenance payments he made towards the appellant after she had entered into the cohabitation relationship.

[26] The court *a quo* erred by, after having accepted that the existing maintenance order should be discharged, finding that the appellant was still legally liable to maintain the respondent. Accordingly, the court *a quo* erred in finding that the discharge of the maintenance order would only take effect on a later date

[27] The court *a quo* also erred by, after finding that the appellant was successful with the application for discharge of the maintenance order, in not indemnifying the appellant from maintenance payments from the date upon which the cohabitation relationship commenced, alternatively, from the date upon which the application for discharge of the maintenance order was instituted.

[28] The consequence was that the court *a quo* made a finding beyond what it was required to do, in finding that the respondent still had a need for maintenance and exercising a discretion regarding the discharge of the existing maintenance order, which discretion was influenced by the fact that the cohabitant relationship had, in the meantime, come to an end.

[29] Accordingly, the court *a quo* erred in making findings beyond the task it was faced with, by finding that the respondent had a right to be supported and had a need for maintenance. It follows then that the court *a quo* erred in its order that the discharge of the existing maintenance order would only be effective from August 2019 and that the appellant was still legally liable for maintenance towards the respondent up until 31 July 2019.

[30] The court *a quo* was only empowered to grant a maintenance order, where one did not already exist, or in substitution of an existing order, in circumstances where it was proven that a person was legally liable to maintain another, through consideration of the evidence adduced at a section 10 financial enquiry as envisaged by the Maintenance Act.

[31] No section 10 financial enquiry was conducted by the Court *a quo*, as it merely determined the point in *limine*. The Court *a quo* specifically refrained from dealing with the questions regarding a need for maintenance and the ability to maintain.

[32] Notwithstanding the absence of any evidence led in terms of a section 10 financial enquiry, which is required in terms of section 16 of the Maintenance Act, the court *a quo* proceeded to make a finding regarding the respondent's need for maintenance and the appellant's ability to maintain.

[33] Taking into consideration all the facts, I am of the view that the appeal did not lapse, the appellant had a problem obtaining a complete record. The respondent was informed about the delay, but did not object thereto. As a result, condonation is not required. Even if I am wrong in that regard, condonation should be granted based on all the facts, especially the clear error contained in the court *a quo*'s order as appealed against.

[34] In the light of the fact that this is a maintenance matter and the respondent, who is assisted by Legal Aid, is clearly financially compromised. I am of the view that each party should pay their own costs.

[35] The following order is made:

a) The appeal is upheld and the order of the court a quo is set aside and substituted with the following:

b) In terms of section 16(1)(b)(ii) of the Maintenance Act, 99 of 1998, the application for discharge of the maintenance order is upheld.

c) The parties to pay their own costs.

R G TOLMAY

JUDGE OF THE HIGH COURT, PRETORIA

I agree.

R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING:	**7 MARCH 2023**
DATE OF JUDGMENT:	**21 APRIL 2023**
ATTORNEY FOR APPLICANTS:	**VAN ROOYEN ATTORNEYS**
ADVOCATE FOR APPLICANTS:	**ADV. A LOUW**
ATTORNEYS FOR RESPONDENTS:	**LEGAL AID**
ADVOCATE FOR RESPONDENTS:	**ADV. M STEENEKAMP**