Case number 576/91

607/91

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matters between:

DAVID J. PURNELL Appellant

and

LYNETTE V.P. PURNELL Respondent

CORAM: HOEXTER, EKSTEENT, F.H. GROSSKOPF, GOLDSTONE

JJA, et KRIEGLER AJA

DATE OF HEARING : 22 February 1993

DATE OF JUDGMENT : 11 March 1993

J U D G M E N T

KRIEGLER AJA/.....

KRIEGLER AJA:

The issue in these two related appeals is maintenance by a man to his former wife. The parties were divorced on 1 July 1986 by order of the Witwatersrand Local Division of the Supreme Court ("the WLD"). The present respondent was the plaintiff in that action and the appellant was the defendant. It will be convenient to retain their original designations in what follows. The order of court inter alia' contained the following provision:

> "3. The defendant is ordered to pay maintenance for the plaintiff at the rate of Rl 000,00 per month from 1 August 1986 to 31 July 1988."

In November 1987 the plaintiff, by consent, obtained an order in terms of the Maintenance Act No 23 of 1963 ("the Maintenance Act") from the Johannesburg Maintenance Court ("the magistrate") for an increase in such maintenance to Rl 500,00

per month. Then in July 1988 she applied to the WLD for relief couched as follows in prayer 1 of the notice of motion:

> "That Clause 3 of the Court order under Case No. 11294/84 [i.e. the divorce action] in the matter between the applicant and the respondent is varied by the deletion of the words 'to 31 July 1988'."

Although the plaintiff's founding affidavit made mention of the order by the magistrate, and annexed the relevant record, the order sought to be varied was that of the WLD.

The factual foundation advanced in support of the application was that the plaintiff was chronically ill and permanently disabled from earning a living. Affidavits were filed on that issue. An opposed application came before Roux J on the preliminary point whether the WLD was competent to grant the relief sought under s 8 of the Divorce Act No 70 of 1979 ("the Divorce Act"). In a considered judgment (reported sub nom Purnell

v Purnell 1989 (2) SA 795 (W)) the learned judge held in favour of the plaintiff and ordered that costs be in the cause. Thereafter Eloff AJP granted a joint application for a referral of the application for the hearing of oral evidence.

Some two and a half years and numerous pre-trial exchanges later the hearing eventually commenced before Zulman J on 15 April 1991. The parties perceived the main issue to be whether there was "sufficient reason" within the meaning of s 8 of the Divorce Act to vary the maintenance order made by the WLD when it granted the divorce. They became engrossed in the question whether the plaintiff had, at the time of the divorce action (but unbeknown to her) and thereafter, been suffering from a debilitating and occupationally disabling condition called myalgic encephalomyelitis or, colloquially, "yuppie flu". Consequently the plaintiff's evidence in the

divorce action and the papers filed in an application by her for maintenance pendente lite formed part of the evidentiary material before Zulman J. On the morning of the second day of the hearing the learned judge mero motu adverted to a reported judgment by Streicher J (Steyn v Steyn 1990 (2) SA 272 (W)) and pointedly raised with counsel whether (a) the operative maintenance order was not that of the magistrate and (b) if so, whether the WLD was empowered to order a variation thereof. Nevertheless the hearing continued for a further three days on the question of plaintiff's state of health, counsel eventually reverting to the point raised by the judge in their closing argument. In due course Zulman J held in favour of the plaintiff on the facts, construed the parties' conduct as a consent to the jurisdiction of the WLD to deal with the maintenance order by the magistrate and granted an order in terms of prayer

1 of the notice of motion with costs.

Then followed an opposed application before Roux J for leave to appeal against the order he had made on the preliminary point. That application was dismissed with costs but on petition to the chief justice leave was granted to appeal to this court, the costs of the application before Roux J and of the petition being ordered to be costs in the appeal. In the interim and pending the outcome of the petition the parties had appeared before Zulman J and had by consent postponed an application for leave to appeal against his judgment. It was agreed that, should the petition prove successful, Zulman J would be asked to grant leave likewise. That was duly done after the outcome of the petition had become known and Zulman J complied, also directing that the costs of the proceedings before him for leave to appeal be costs in the appeal.

7 In the result there are two appeals before this court; the one is directed against the order by Roux J that an order for maintenance for a limited period granted by a court under s 7(2) of the Divorce Act may subsequently be extended under s 8 of that Act; the other challenges the substantive relief granted to the plaintiff by Zulman J and the concomitant award of costs. On the face of it therefore this is a weighty matter involving two concurrent appeals, several orders of court and complicated issues of fact and law arising from a composite record of more than a thousand pages. But that is an illusion. Everything turns on the application of the plain terms of a single statute to facts which were common cause from the outset.

It should have been manifest that the application was doomed from the outset. Prayer 1 of the notice of motion sought a variation of the

maintenance order made by the WLD on 1 July 1986.

On the plaintiff's own showing however that order had in November 1987 been the subject of an enquiry in terms of s 4(1)(b) of the Maintenance Act, pursuant to which the magistrate had made an order under the powers vested in him by s 5(4)(b) of that Act. The relevant portions of the two sub-sections at the time read as follows:

> "4.(1) Whenever a complaint on oath is made to a maintenance officer to the effect that -
>
> (a) any person legally liable to maintain any other person fails to maintain such other person; or
>
> (b) sufficient cause exists for the substitution or discharge of a maintenance order,
>
> the maintenance officer may, ... institute an enquiry ... for the purpose of enquiring into the provision of maintenance in respect of the person concerned ..."
>
> 5.(4) After consideration of the evidence adduced at the enquiry the court may -
>
> (a) in the case where no maintenance order is in force, make an order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such officer, organization or institution

> and in such manner as may be specified in the order, of sums of money so specified, towards the maintenance of such other person; (b) in the case where a maintenance order is in force, make an order contemplated in paragraph (a) in substitution of such maintenance order ..."

The language is unequivocal and the mechanism plain. Whether or not there is a maintenance order in operation, a complaint may trigger an enquiry by the maintenance officer under s 4(1). Where no order has been made the requisite jurisdictional precondition to an enquiry is that a person is alleged to have failed to perform a legal duty to maintain another (par (a)). In a case such as the present, where a maintenance order has previously been made, the precondition is the alleged existence of "sufficient cause ... for the substitution or discharge" of such previous order (par (b)). Conformably s 5(4) empowers the magistrate either to "make an order" where no order

exists (par (a)) or, "where a maintenance order is in force", to "make an order ... in substitution ..." thereof (par (b)). The word used, namely "substitution", ("vervanging" in the signed Afrikaans text), to describe the possible action contemplated in s 4(1)(b) and the magistrate's powers under s 5(4)(b) is explicit. It denotes that the maintenance order made by the magistrate replaces the former order, i.e. takes it place. The old order ceases to operate while the new order operates in its place.

Such conclusion is fortified by the fact that par (b) of ss 5(4) refers back to par (a) of the sub-section when delineating the components permissible in a substituted order. The latter paragraph enumerates a comprehensive variety of permissible components, i.e. the quantum, duration, frequency and manner of payments to be made, as well as a designated intermediary recipient. In

arming the magistrate with that full panoply of powers when making an order in substitution of an existing one the legislature contemplated an entirely new order, if needs be with a completely new set of components.

But the draftsman of the Act made assurance doubly sure by adding s 6(1), which commences with the following unambiguous pronouncement:

> "Whenever a maintenance court makes an order under section 5 in substitution of or discharging a maintenance order, such maintenance order shall cease to be of force and effect ..." (Emphasis added.)

Nothing could be plainer save, possibly, the corresponding key words in the Afrikaans text:

> "... hou daardie onderhoudsbevel op om van krag te wees ..."

The simple conclusion is that the order of court at which prayer 1 of the notice of motion was directed (and which spawned all of the subsequent litigation) was a dead letter. It had ceased to be

of any force or effect the moment the magistrate made the substituting order under s 5(4)(b) of the Maintenance Act on 17 November 1987.

Counsel for the plaintiff sought to argue, albeit faintly and as a last resort, that the magistrate's order did not replace the whole of the maintenance order made in the WLD in the divorce action but only that part of it fixing the monthly amount payable. That, so the argument ran, had been the common intention of the parties before the magistrate and again in the proceedings before Roux J and Zulman J. The argument is untenable. It flies in the face of the underlying rationale of the Maintenance Act, which contemplates the replacement of the previous order and not its amendment, and in any event lacks any factual foundation in the papers.

It follows that the point submitted to Roux J for adjudication was irrelevant. The question that

should have been posed - but could not because the notice of motion had been directed against the wrong maintenance order - was whether the WLD was empowered by s 8(1) of the Divorce Act to vary the order made by the magistrate in terms of the Maintenance Act, i.e. the point subsequently considered in Steyn's case, supra. As it was the proceedings were an exercise in futility. The order made pursuant thereto had no bearing on the true issue between the parties. Nevertheless the order made by Roux J cannot be allowed to stand. Had the learned judge's attention been drawn to the effect of the magistrate's order he would either have declined to determine the question in the form in which it had been put or he would have ruled that the divorce court's maintenance order could indeed not be varied by the WLD as it had ceased to have any force. That might well have resulted in a timely end to the matter. And in the result

the referral of the fatally misdirected application for the hearing of oral evidence and the hearing itself could have been avoided. The order made by Zulman J granting prayer 1 of the notice of motion with costs clearly cannot be allowed to stand either. The flaw in the plaintiff' s case was not one of jurisdiction, as the learned judge held, but simply that prayer 1 of the notice of motion had been aimed at varying an order of court which had ceased to have .any force or effect many months before the application was ever launched. The application should have been refused on the basis that the order granted at the time of the divorce was incapable of variation, however compelling the grounds advanced, as it had ceased to have any force once the magistrate had made his order.

That leaves the question of costs, which in this case is indeed knotty. The plaintiff must be held responsible for launching a fatally

misdirected application. At the same time though the defendant failed to discern the patent flaw. Instead of moving for dismissal of the application on the plaintiff's founding papers the defendant not only joined issue on the facts but took the initiative in inviting Roux J to deal with the preliminary point. Thereafter the case burgeoned but, sadly for the parties, nobody ever paused to reflect whether the relief sought was aimed at the correct order. It was only several years and many thousands of rands in costs later that the question was raised by Zulman J - and even then it was brushed aside. Instead the parties continued an odyssean journey into the irrelevant.

In the circumstances the fairest order to make regarding the costs in the court a quo in respect of both orders under appeal would be to allow the defendant his costs on the basis that he had raised the point on which he now, ultimately, succeeds on

the plaintiff's founding papers. For the rest the parties should bear their own costs a quo.

The costs of appeal are, of course, a different matter. The defendant is clearly the successful party in this court and would ordinarily be entitled to a costs award in his favour. The only reservation is whether the mass of otiose factual material in the record does not warrant some special order. Upon reflection that does not appear to be the case. As Zulman J had held against him both on the law and the facts, the defendant cannot be faulted for wishing to debate the case as a whole in this court. Although it has transpired that he could have rested his case solely on the point on which he now succeeds, the learned judge had considered the very point and resolved it adversely to the defendant. It cannot be said that the defendant acted unreasonably in taking the whole of the case on appeal and a

qualified order is not warranted.

The appeals succeed with costs. The orders made in the court a quo are set aside and the following orders are substituted therefor:

1. In the proceedings before Roux J: "No order is made."

2. In the proceedings before Zulman J:

"(a) The application is dismissed.

3. The applicant is ordered to pay the costs of the application as if the matter had been argued on the applicant's founding papers.

4. Save as set out in (b) each party is to bear her or his own costs."

J.C KRIEGLER

ACTING JUDGE OF APPEAL

HOEXTER JA]

EKSTEEN JA]

F.H. GROSSKOPF JA] CONCUR

GOLDSTONE JA]