A 330/99

DIANO FOSTO JANTJIES vs MARITA JANTJIES & 2 OTHER

LEVY, AJ

2000/05/22

PRACTICE

SUMMARY JUDGMENT - A maintenance order must be complied with and a husband or former husband is not entitled to set-off monies that he has laid out for the children against the maintenance he is obliged to pay in terms of that order.

A party can apply to vary such order but if he does not do so, the Registrar can issue a writ to attach his salary or other forms of income.

CIRCULATE

CASE NO. A 330/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DIANO FOSTO JANTJIES	**APPLICANT**
and	
MARITA JANTJIES	**FIRST RESPONDENT**
DEPUTY SHERIFF, WINDHOEK	**SECOND RESPONDENT**
METCALFE LEGAL PRACTITIONERS	**THIRD RESPONDENT**

CORAM: LEVY, A.J.

Heard on: 2000.04.28

Delivered on: 2000.05.22

JUDGMENT

LEVY, A.J.: The Applicant herein is represented by Adv . Kato Van Niekerk while first respondent is represented by Adv JAN Strydom. The other Respondents are not represented and abide the Courts decision.

Rule of Court 6(12) (a) and (b) provides that in urgent matters an applicant can approach the Court for relief without giving notice to the respondent. In terms of sub-rule 6 (12) (b) the applicant is obliged to demonstrate to the Court why "he or she claims that he or she could not be afforded substantial redress

at a hearing in due course." This is an extraordinary remedy. It reverses the entire process of proof by putting the onus on the respondent to come to Court and to show why the order should not be granted against him or her. Furthermore where the applicant can show that further delay, or service, may frustrate the relief claimed, the court will grant an interim interdict. Because this relief is so far-reaching, in practice the Court has introduced certain safeguards so that an injustice should not be wrought. One of these safeguards requires the applicant to act expeditiously.

In this matter, Applicant regarded his matter so urgent that the delay in drafting an affidavit in support of his notice of motion, would cause him prejudice. He therefore came to court without such affidavit and gave oral evidence in lieu thereof.

On 15th December 1999, the Court granted Applicant a rule nisi returnable on 28 January 2000 calling on respondent to show cause why:-

2.1.The writ of execution issued by the Registrar of this Honourable Court in case 1519/95 on 15 November 1999 should not be stayed pending the outcome of proceedings to be instituted for the setting aside of the said writ.

(a) the second respondent should not be interdicted from paying over to either the first or third respondent the proceeds of the attachment in execution.

(b) the third respondent should not be interdicted from paying over to first respondent the proceeds of the attachment in execution.

(c) in the event that the proceeds of the "attachment in execution have already been paid to either the first or third respondents, why such respondent should not be ordered to pay over the proceeds to the second respondent to be held in trust pending the outcome of the proceedings referred to in paragraph 2.1.

(d) the first respondent should not pay the costs —."

The Court ordered that the aforesaid relief operate as an interim interdict pending the return date of the rule nisi.

The writ of execution No 1519/95, was sworn out by first respondent on 15 November 1999. On 7 July 1995, the High Court of Namibia had granted a decree of divorce and in terms of that order Applicant herein, was ordered to pay N$400-00 per month as maintenance for each of the two children of the marriage, one then aged approximately six years and the other approximately eleven years.

First Respondent alleges that as from September 1998, Applicant failed to pay her the maintenance, in terms of the order of Court, and that as a consequence, as at the 15 November 1999, he was indebted to her in the sum of N$ 9600-00. At the instance of First Respondent, the Registrar of this Honourable Court issued the writ of attachment. Pursuant thereto two amounts which became payable to Applicant during the period 15 November 1999 to 15 December 1999 were attached by the Deputy Sheriff and cheques one dated 23 November 1999 for NS7230-02 and the other cheque dated 2 December 1999 for N$ 3014-35 were sent by Second Respondent to Third Respondent. The debt of N$9600-00 was therefore expunged before the High Court issued the Order to stay the writ. Third Respondent, however paid the full proceeds he had received back to Second Respondent to be held in trust by him in terms of sub orders 2.3 and 2.4 of the rule nisi.

One of the points which Ms Van Niekerk made on behalf of Applicant, in a strenuous argument, was that the Order of Court of 7 July 1995, ordered maintenance to be paid at NS400-00 per month for each child, by the Applicant, but did not order that such maintenance was to be paid to First Respondent. In view of the ages of the children, the maintenance could not have been paid to them personally although it was for them. Hahlo In his book on "Husband and Wife " says categorically at page 413 (5th Ed).

> "In the case of a minor child, a maintenance order is intended to fix the contribution the non-custodian spouse has to pay to the custodian spouse while the latter has 'the custody of the child'.

Applicant does not deny that he has not paid First Respondent NS9600-00 cash, for the aforesaid period, but, he says that he has from time to time bought clothes for the children, paid their school fees direct to the school, paid other expenses, and given them pocket money totalling in all in excess of the NS400-00 per child per month stipulated in the order. In the circumstances, he says, he paid out for the children more than N$9600-00 and therefore does not owe First Respondent anything in respect of the Order of Court of 7 July 1995.

His statement thereanent demonstrates that the children most certainly require more than NS400-00 per

month for their maintenance, but the fact that he has made the payments he alleges, does not relieve Applicant of his obligation in terms of the Order of Court. He is obliged to comply with the Order of Court.

In Kanis v. Kanis 1974 (2) SA.606 (RA) a father did not apply to Court for a variation of the Court's Order, but unilaterally reduced the maintenance fixed in the Court's Order, by various sums, which he had voluntarily spent on education, travel and other items for his children. The Court held that he was not entitled to do so. At page 609 G, of that report, Lewis AJP. Said,

> "It is the utmost importance that orders made by the High Court for the maintenance of a wife or children should be strictly observed until varied or discharged by order of a competent Court."

In S v Olivier 1976(3) SA 186, the Court held that the non-custodian parent (in that case, the father) was not allowed to reduce unilaterally, the amount of maintenance ordered by the Court in respect of the period the child resides with or visits him.

This case has been followed on numerous occasions in the Republic of South Africa.

In R v Glasser 1944 EDL 227 which was an appeal by a father against a conviction in the Magistrates Court for failing to comply with a maintenance order, the father's defence was that he had paid for certain medical and nursing expenses for his minor daughter and he claimed that he was entitled to set such payments off against the amount he was ordered to pay in the Court's Order. His defence was discussed by Gardemer J and by Pitmann J. P. The latter at page 233 to 234, said:-

> "If he.....thinks that as between his wife and himself he had paid more than his share towards the maintenance of their child, it is open to him to approach the Court for readjustment of their position inter se."

Apparently, conscious that he could not act unilaterally in setting-off or deducting the items for which he had paid, from the maintenance ordered by the Court, the Applicant said he did this by agreement with First Respondent. However, First Respondent denies that their was such an agreement. Applicant nails his colours to the mast relying on a letter which he says he sent First Respondent in January 1997. In this letter, Applicant purports to inform First Respondent that he intends to make the deductions,

referred to above from time to time, from the amounts ordered by Court in view of the fact that he was spending the money for and on behalf of the maintenance of the children. The aforesaid is a precis of the relevant portions of a lengthy letter which concludes with the arrogant sentence:-

> "I assume that you approve and accept this draft if I do not receive a written appeal within 30 days."

Applicant was not entitled to put First Respondent to terms, in this manner. If he wanted the maintenance order varied, he could apply to court for variation. First Respondent did not "appeal " to him, as he had demanded, and because she did not do so, Applicant was not entitled to assume that she approved. At a subsequent date she did write to him and in her letter she protests that she has never agreed to his demands. She says there is no agreement between the parties. Ms Van Niekerk argued that if there was no specific agreement, then it was implied. The denial of First Respondent is applicable to a specific agreement as well as to one which may arise by implication. Whether or not there is such an agreement goes to the root of the case. This can only be determined by oral evidence. Ms Van Niekerk did not ask that the matter be referred to oral evidence. The application should therefore be dismissed. The aforesaid notwithstanding and in any event the Applicant and his Counsel realised on 15 December 1999, that there would be a dispute of fact and asked the court then for an Order to stay the writ "pending the outcome of proceedings to be instituted for the setting aside of the said writ."

The motivation in granting the rule nisi was that proceedings would be instituted to set aside the writ. Inherent in an order granted pendente lite is that an Applicant show it's bona Fides by instituting the action as soon as possible. The Applicant advances no reason for the delay. Ms Van Niekerk argues that the matter can be decided on motion. This cannot be done as the dispute is material and oral evidence and cross-examination is necessary.

In Juta & Co. Ltd V. Financial Publishing Co. Ltd 1969 (4) SA 443(C) where an interdict was granted pendente lite but despite the lapse of some five months the Applicant had not issued summons to institute the action, the Court discharged the rule nisi. In that case Van Wyk J (as he then was) said,

> " There is such a thing as the tyranny of litigation and a Court of Law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict pendente lite which from its very nature, requires the maximum expedition on the part of an applicant."

The aforesaid is certainly applicable in the instant matter.

At a somewhat late stage, Adv. Van Niekerk tried to persuade this Court that the Registrar of the Court should not have issued the writ at all, or that he should have issued it in terms of a different Rule of Court.

She relied on Pienaar V Pienaar 2000(1) SA 231 (0)

This application is to make a rule nisi final. It is not an application to set the writ aside on the grounds now relied on by Applicant. This contention of the Applicant has never been made before. Applicant did not allege this when he gave oral evidence nor did he raise this in his Replying Affidavit. Nevertheless, this Court permitted the argument. There is, however, no substance therein.

Adv Van Niekerk argued that an attachment of salary, earnings or emoluments can only be effected in terms of Rule of Court 45 (12) (j) and (k) Rule 45 (12) (j) provides:-

> "Whenever the court is of opinion that a debtor is able to satisfy a debt by instalments out of his or her earnings, it may make an order for payment of such debt by instalments, and whenever an order has been made for payment of such debt by instalments and the debtor makes default in such payment, any salary, earnings or emoluments due or accruing to such debtor to the extent of the arrears

may be attached."

This Rule has no application to a debt which arises from the debtor's failure to pay maintenance. The Rule is only applicable to a Court's order which orders a debtor to liquidate his or her debt by instalments. The difference between instalments and maintenance are manifold and obvious e.g. maintenance ceases on the death of the person to be maintained but death does not terminate a debt. Maintenance's is variable by a Court but not so a debt.

Furthermore in any event Rule 45 (1) provides that "a party in whose favour, any judgment of the court has been pronounced may sue out of the office of the Registrar one or more writs of execution.".

"Any" judgment means "any" judgment and includes a debt

which arises from a judgment for the payment of maintenance.

Du Preez V Du Preez 1977

(2) SA at 402

Rule of Court 45 (12) (a) makes provisions for the attachment by a creditor of debts (such as salary or earnings) which are owing or accruing from a third person to the judgement debtor.

The Registrar was therefore fully entitled to issue the writ which he issued in the present case.

(See also Strime v Strime

1983 (4) 837 at 852 D-G)

There is no substance in this point taken by Adv Van Niekerk.

In any event when the Rule Nisi was issued the debt was already expunged.

At the commencement of this hearing Adv. Strydom applied to strike out certain matter from the Replying Affidavit of Applicant. It is unnecessary to deal with the application which only accupied a few minutes of the Courts time.

To sum up, the Applicant could have applied to vary the maintenance order. He could even do so in respect of arrears.

(Strimes case supra and decisions cited therein)

He has however not availed himself of this right.

Furthermore, Applicant has not instituted the action which in terms of the rule nisi granted on 15 December 1999, he was obliged to instituted.

Although aware of the dispute of fact, Applicant did not apply to refer the motion for oral evidence.

For all these reasons,

Applicant is not entitled to

relief. The Order of this

Court is:-

(e) The Application to make the rule nisi issued on 15 December 1999 final is refused, and the said rule is discharged.

(f) All monies held in trust by Second Respondent must be paid back to Third Respondent within 72 hours of this Order,

(g) Applicant shall pay the costs.

ADV K VAN NIEKERK

ON BEHALF OF APPLICANT:

Instructed by: Weder Kruger & Hartmann

ON BEHALF OF RESPONDENT: STRY DOM Metcal fe Legal Practiti oner s

Instructed by: ADV JAN