

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT - MAINTENANCE

Case No: HC-NLD-CIV-APP-AMC-2020/00005

In the matter between:

VALERIANUS AMUTHENU

APPELLANT

v

FERDINAND ANNA

RESPONDENT

Neutral citation: *Amuthenu v Ferdinand* (HC-NLD-CIV-APP-AMC-2020/00005)
[2021] 64 (30 June 2021)

Coram: MUNSU AJ

Heard: 18 June 2021

Delivered: 30 June 2021

Flynote: Maintenance – Act, 9 of 2003 – Application for variation – Applicant to show cause – Court a quo not conducting a proper enquiry.

Summary: The appellant was ordered to pay maintenance towards his two children. Some months after, he approached the Maintenance Court with an application for variation of the maintenance order because his salary reduced. The court a quo dismissed the application on the basis that the maintenance amount was less and that reducing it to the offered amount would not serve any purpose.

Held, that, the court a quo misdirected itself on its approach to the enquiry and failed to conduct a proper enquiry. The matter is remitted back to the court a quo in order to conduct a proper enquiry and comply with further directives.

ORDER

1. The appeal is upheld.
2. The order made by the court a quo on 09 October 2020 dismissing the appellant's application for changes to the existing maintenance order is set aside.
3. The matter is remitted back to the Outapi Maintenance court for that court to conduct a proper enquiry in terms of s 9 of the Maintenance Act, 9 of 2003.
4. In the enquiry, the court a quo is directed to consider the existence of new circumstances which developed since the date of the order and determine if sufficient cause exists for the suspension, substitution or discharge of the existing maintenance order.
5. In the enquiry, the court a quo is further directed to enquire into the living arrangements of the complainant and the beneficiaries as well as any misuse, by any person, including the complainant of any payment made in terms of the maintenance order.
6. The appellant is directed to approach the Outapi Maintenance Court on a date suitable to him to have this matter rolled for hearing by that court.
7. The Registrar is directed to serve a copy of this judgment on Outapi Maintenance Court.
8. The matter is removed from the roll, case regarded as finalized.

JUDGMENT

MUNSU AJ:

[1] This is an appeal against a decision of the Outapi Maintenance Court made on 09 October, 2020 dismissing the appellant's application for changes to an existing maintenance order. On 31 January 2020 the appellant was ordered by that court in terms of section 18 of the Maintenance Act, 9 of 2003 ("the Act") to pay maintenance for his two children in the amount of N\$ 550 per month.¹

[2] During the hearing of the appeal, the appellant appeared on his own, while the respondent was represented by Mr. Shileka designated by the Prosecutor-General.²

[3] On 01 May 2020 the appellant made an application for variation of the maintenance order – to be reduced to N\$ 300.³ On 09 October 2020, the application for variation was dismissed by the court. This appeal lies against the magistrate's dismissal of the variation application.

¹ On the date of the maintenance enquiry, the appellant consented to the amount N\$ 550 and signed the prescribed form G (Consent order in terms of section 18 of the Act). In making the said written consent an order of court, the Magistrate should have signed on the same document. This was not done. It is not clear how appellant's written consent became an order of court. It is however, common cause between the parties that there is a maintenance order against the appellant in the amount of N\$ 550. Also, it is not an issue in this appeal as to whether there is a maintenance order or not as this appeal is in respect to the dismissal of the appellant's application for changes to the existing order. During the hearing of this appeal, the appellant confirmed that there exists a maintenance order of N\$ 550 against him.

² Section 47(3) of the Act provides that "If an appeal is noted against a person who is a child or the custodian or primary caretaker of a child, and if that person so requests, the Prosecutor-General, or a person designated by the Prosecutor-General, must, in the High Court, act on behalf of that person".

³ This application was brought on a wrong form – (Form I). The correct form is Form B. Form I is meant for variation/setting aside of a default maintenance order in terms of section 19 of the Act. These proceedings concerns an order made in terms of section 9 of the Act. Form B is titled "Complaint in terms of section 9 (1) Act (Changes to existing maintenance order).". See Regulations made in terms of the Act, Government Notice 233 of 2003 (GG 3093) in force on 17 November 2003.

[4] The appellant filed his notice of appeal on 15 October 2020 (6 days after the dismissal of his variation application). His appeal is therefore properly before court.

[5] In an application for variation of an existing order, the party seeking a variation bears the onus.⁴

[6] The reason the appellant applied for variation of the maintenance order is because his salary reduced to half and could no longer afford to pay N\$ 550 per month. He stated that he has not been going to work because of the negative impact Covid-19 had on the operations of his employment. Because he no longer had to go to work, likewise, he no longer worked overtime. He also stated that he stays with one of the beneficiaries (the elder child) aged 23 years, yet he is paying maintenance towards that beneficiary.

[7] In support of his application, he submitted a letter from his employer, which in essence states that the paying of full salaries became unsustainable due to the impact of the global corona pandemic. As such cost cutting measures were implemented, they included sending all staff members on compulsory leave. Employees would receive a reduced salary of 65 percent for the months July, August and September and all other benefits would also be decreased with 35 percent.

[8] During the application, the court also heard evidence of the younger beneficiary (aged 15 years) who informed the court that she lives with her auntie and that her mother (complainant) lives in a different house.

[9] In dismissing the application, the court a quo stated the following:

“N\$ 500 is very less and if it is reduced to N\$ 300, it will not serve any purpose.

Court order: The order remains N\$ 550. The variation order is dismissed.”

⁴ See *Van Zyl v Fourie* 1997 NR 85.

[10] The maintenance order that the appellant sought to be varied is for N\$ 550 and not N\$ 500. Also, the court *a quo* dismissed the application for variation and not the order for variation.

[11] The issue is whether the court *a quo* misdirected itself when it dismissed the application. For a better synopsis, suffice to quote the entire applicable section:

'Maintenance complaints

9. (1) Subject to subsection (3), a person who wants to lodge a complaint under this Act must, in the prescribed form and manner, lodge the complaint with the maintenance officer of the maintenance court which has jurisdiction in the area where the complainant or beneficiary resides or, in the case where there is an existing maintenance order, with the maintenance officer of the maintenance court where the order is registered.

(2) The complaint referred to in subsection (1) must be made under oath or affirmation and must state that –

(a) the person against whom the complaint is made is legally liable to maintain the beneficiary of the claim but that he or she fails to maintain that other person; or

(b) **sufficient cause exists for the suspension, substitution or discharge of an existing maintenance order,**

(3) A complaint made under subsection (1) may be made by a complainant, beneficiary, defendant or any person who is affected by a maintenance order or any other order, directive or notice issued under this Act.

(4) On receipt of a complaint made under subsection (1), the maintenance officer must –

(a) where there is no existing maintenance order, investigate the complaint and institute a maintenance enquiry in the relevant maintenance court; or

(b) where there is an existing maintenance order, investigate the complaint for evidence of –

(i) the existence of new circumstances which developed since the date of the order; or

(ii) misuse, by any person, of any payment made in terms of a maintenance order; and if evidence to prove those new circumstances or the misuse is found, institute an enquiry in the relevant maintenance court.

(5) For the purposes of this section “misuse” means failure, without a reasonable or lawful excuse, to use any maintenance payment for the benefit of a beneficiary.’ (My underlining).

[12] Section 9 (1) of the Act read with subsections (2), (3) and (4) of the Act allows a defendant to lodge a maintenance complaint in respect of an existing order.

[13] Regulation 2 of the regulations to the Maintenance Act⁵ requires a complaint in respect of an existing maintenance order to be lodged on a form corresponding substantially to Form B of the Annexure.

[14] Section 9 (4) (b) provides for an enquiry to be instituted in respect of an existing maintenance order if there is evidence to prove the existence of *new circumstances* which developed since the order. Part of the reason this provision was enacted, in my view, is to prevent parties from seeking a rehearing in the same court on the same facts. In other words, if there are no new circumstances, a party’s recourse lies in an appeal to the High Court.

[15] It follows therefore, that, in application for variation (changes to an existing order), the court’s task is to assess if there are new circumstances that developed since the order. If such new facts exist, the court must assess whether sufficient cause exists for the suspension, substitution or discharge of an existing maintenance order.⁶

⁵ Government Notice 233 of 2003 (GG 3093) in force on 17 November 2003.

⁶ In such an assessment, the court should bear in mind the principles to be applied in respect of maintenance such as - both parents are primarily responsible for the maintenance of the child/children. The duty to maintain a child has priority over all other commitments of the parents except those commitments which are necessary to enable a parent to maintain other persons in respect of whom

[16] This court is bound to consider only facts and the evidence placed before the court a quo and not entertain new evidence.

[17] The reasons advanced by the applicant were firstly, that his salary was reduced. Secondly, that he was staying with the elder beneficiary yet he was paying maintenance towards him. This evidence coupled with that of the minor beneficiary shows that the complainant is not staying with any of the two beneficiaries. No enquiry was conducted by the court in respect to these developments.

[18] Section 5 titled “*Conditions precedent to granting of maintenance order*” provides that:

‘A maintenance court must not make a maintenance order unless it is satisfied that the person against whom the order is sought –

(a) is legally liable to maintain the beneficiary;

(b) is able to contribute to the maintenance of the beneficiary; and

(c) fails or neglects to provide reasonable maintenance for the beneficiary’. (My underlining).

[19] An enquiry into the reason advanced by the applicant of his reduced salary would establish whether he is able to contribute to the maintenance of the beneficiaries and whether there is sufficient cause for the suspension, substitution or discharge of the existing maintenance order. An enquiry on the second reason would establish if indeed the appellant is staying with the elder beneficiary and if so, the basis on which maintenance towards him should be paid. An enquiry on the aspect of the complainant not staying with the younger beneficiary could establish if the maintenance payment is being used for its purpose and therefore not abused.

[20] The court a quo solely looked at the amount the appellant was ordered to pay and reasoned that to reduce it, would not serve any purpose. This constitutes a misdirection

he/she has a legal duty to maintain – see section 4 of the Act. This should include an assessment of whether any of the defendant’s expenses are luxury which may be disregarded. In essence, the interests of the child should prevail.

and a failure to conduct a proper enquiry which could lend the appellant in trouble with the law should he not be able to keep up with the payments.

[21] This court sitting as an appeal court is not in a position to substitute its decision for that of the court a quo because there is no material on which it can make a decision as no proper enquiry was conducted by the court a quo.

[22] The respondent initially opposed the appeal; however, they adopted a different stance during the hearing of the appeal and urged the court not to dismiss the appeal but to refer the matter back to the court a quo with directions. I agree with the proposal as it is the right course to take.

[23] In the result, it is ordered as follows:

1. The appeal is upheld.
2. The order made by the court a quo on 09 October 2020 dismissing the appellant's application for changes to existing maintenance order is set aside.
3. The matter is remitted back to the Outapi Maintenance court for that court to conduct a proper enquiry in terms of s 9 of the Maintenance Act, 9 of 2003.
4. In the enquiry, the court a quo is directed to consider the existence of new circumstances which developed since the date of the order and determine if sufficient cause exists for the suspension, substitution or discharge of the existing maintenance order.
5. In the enquiry, the court a quo is further directed to enquire into the living arrangements of the complainant and the beneficiaries as well as any misuse, by any person, including the complainant of any payment made in terms of the maintenance order.
6. The appellant is directed to approach the Outapi Maintenance Court on a date suitable to him to have this matter rolled for hearing by that court.
7. The Registrar is directed to serve a copy of this judgment on Outapi Maintenance Court.
8. The matter is removed from the roll, case regarded as finalized.

D C MUNSU
ACTING JUDGE

APPEARANCES

For the Appellant: Mr. V. Amuthenu (In person)
Keetmanshoop, Sossusvlei Lodge.

For the Respondent: Mr. R. Shileka.
Designated by the Office of the Prosecutor-General,
Oshakati.