

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/268/2020

In the matter between:

TANKI MOHANOE

APPLICANT

AND

**LEARNED MAGISTRATE Mc PHERSON
(ESQUIRE)**

1ST RESPONDENT

TLALANE LEBEKO

2ND RESPONDENT

**CLERK OF COURT – MASERU
MAGISTRATE’S COURT CHILDREN’S
COURT DIVISION**

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

Neutral Citation: Tanki Mohanoe v Learned Magistrate Mc Pherson (Esquire)
& 3 Others CIV/APN/268/2020 [2021] LSHC 29

JUDGEMENT

CORAM: BANYANE J

DATES OF HEARING: 19/10/2020

DATE OF JUDGEMENT: 30/03/2021

Summary

*Application for review - Maintenance proceedings instituted pursuant to the
Deserted Wives and Children’s proclamation of 1959-procedure sui generis*

and inquisitorial - presiding officer's duty to investigate facts relevant for the exercise of his/her discretion in awarding a reasonable and fair amount of maintenance-relevant factors in awarding maintenance restated.

ANNOTATIONS

Cited cases

1. Ntoli v Ntoli C of A(CIV) 45/18
2. Smit v Smit 1980 (3) SA 1010
3. Herfst v Herfst 1964 (4) SA 127 (W)
4. Douglas v Douglas 1996 (2) SA 1 A
5. Lamb v Sack 1974 (2) SA 670 (T)
6. Zimelka v Zimelka 1990 (4) SA 303
7. Joffe v Lubner 1972 (4) SA 521(C)

Legislation

1. The Deserted Wives and Children's Proclamation 1959
2. The Subordinate Court Rules of 1996

BANYANE J

Introduction

[1] This is a review application of an order granted by the Maseru Magistrates' Court directing the applicant to pay monthly maintenance in the sum of M 1500 for a minor child fathered by him. In August 2020, the applicant approached this Court on urgent basis, seeking the following orders;

1. Dispensing with modes and times of service prescribed by the rules of this Court on account of urgency hereof.
2. That a rule nisi be issued returnable on Monday the 7th of September 2020 calling upon the Respondent to show cause, if any, why an order in the following terms shall not be made;
 - (a) An Order staying execution of the Order made on the 12th August 2020 by the learned Magistrate Mrs. Mc Pherson, in which she ordered that Applicant pay maintenance of the minor child in the amount of M1 500 every month.
3. Reviewing, correcting and or setting aside decision of the learned Magistrate Mrs Mc Pherson in CIV/MAINT/357/2020.
4. Directing 3rd Respondent to dispatch the record of proceedings in CIV/MAINT/357/2020.
5. That Prayers 1, 2(a) and operate with immediate effect as an Interim Order of this Honourable Court.

1.1 An interim order was granted on 31/08/2020 by Makara J. The rule was made returnable on 07/09/2020. The return date was extended to 20/09/2020 and subsequently to 12/10/2020.

[2] On 12/10/2020, the file was placed before me. The respondents had not demonstrated an intention to oppose the matter at this time.

2.1 Although the application stands unopposed, it raises important issues relating to the maintenance procedure in the Magistrates' Court and considerations in awarding maintenance. It is on this premise that these issues will be addressed.

The facts

[3] It is common cause that on the 16th July 2020, the 2nd respondent (as plaintiff) launched maintenance proceedings against the applicant (as defendant) in the Magistrates' Court for the District of Maseru. These were initiated by filing a complaint under the Deserted Wives and Children Proclamation of 1959.

3.1 The long title of the proclamation (as amended by the deserted Wives and Children (Amendment Order No.29 of 1971) reads as follows;

“to provide for payment of maintenance by any person legally liable to maintain any other person, and to make provision for the relief of wives and families deserted and left destitute” (my underlining).

3.2 The 2nd respondent claimed payment of the sum of M 1 500 as a monthly maintenance contribution in respect of the parties' minor child. The parties are unmarried, and the child is in the custody of the 2nd respondent.

[4] In support of the maintenance claim, the 2nd respondent's primary complaint was that she is unemployed and not in the position to maintain the minor child. The Court *a quo*, after conducting an inquiry, issued a maintenance award in the amount M 1 500. Dissatisfied with this award, the applicant launched this review application.

The Complaints before this Court

[5] The gravamen of the applicant's complaint in this review application can be summed up as follows;

- a) The procedure adopted in the Court below was not in compliance with the subordinate Court Rules of 1996;

- b) The learned Magistrate was biased in favour of the 2nd respondent;
- c) The learned Magistrate failed to; a) consider 2nd respondent's ability to maintain; b) and to distribute the responsibility to both parents.

[6] I deal with these review grounds below. I propose to first address the allegations of bias before dealing with procedural improprieties complained of.

Bias

[7] The applicant avers that the presiding officer was biased in favour of 2nd respondent during the inquiry; that any solutions suggested by him were disregarded. He says he was essentially ordered around "like a child" by the learned Magistrate. He did not however give details of these suggestions to enable this Court decide this issue nor did he furnish full details of any act done by the magistrate during the inquiry that was indicative of bias. For these reasons, this point is unsubstantiated. I am therefore not persuaded that the learned Magistrate was biased in favour of the 2nd respondent. I proceed now to address procedural irregularities complained of.

Procedural complaints

[8] The applicant complains that; a) the learned Magistrate did not explain the procedure to be adopted at the hearing; b) no evidence was led by either party hence the award was made without hearing any evidence; c) the Court ignored an answering affidavit filed by him. d) the Court did not inquire into the 2nd respondent's means; consequently, he is solely burdened with maintenance. e)The procedure followed in the inquiry was not in accordance with the subordinate Court Rules of 1996 and that had the learned Magistrate followed the proper procedure, she would have established that the

child is not in need of maintenance because he is already doing what he was ordered to do with the result that his responsibility is now doubled by the order of Court.

Issue

[9] The main issue that the Court has to determine is whether the process adopted in arriving at the amount was flawed.

Discussion

[10] The starting point of the inquiry is section 6 of the Deserted Wives and Children's Proclamation of 1959 which sets out the procedure for the launching of maintenance proceedings under the proclamation. It provides as follows;

Section 6;

"if a complaint is made to the clerk of Court of the area or district in which a wife or child resides or by the wife or by a reputable person on her behalf or by the mother or a reputable person on behalf of the child that-

- a) The husband of the wife has unlawfully deserted her or left her without adequate means of support; or that
- b) the person legally liable to maintain the child has deserted it or has left it without adequate means of support;

The court may summon the husband or other person to show cause why he should not support such wife or child. In the summons and in any subsequent proceedings founded thereon the person making the complaint shall be cited as the plaintiff and the person against whom the complainant is made shall be cited as the defendant".(underlining mine)

[11] Section 8 places an obligation on the Court to hold and conduct an inquiry in order to determine the validity of the complaint. It reads as follows;

Section 8:

“upon the date appointed for the hearing and upon proof of service of the summons, the Court shall inquire into the matter of the complaint whether the defendant be then present or not.

8(2) if the Court is satisfied that the wife or the child is without adequate means of support and that the defendant is able to maintain or to contribute to the maintenance of the wife or the child, the Court may give judgement in favour of the plaintiff and make an order in writing directing the defendant to pay at such intervals, in such manner, and to such person as such the Court may think fit, a reasonable sum or allowance for the use of such wife or child.

8(3) the judgement under this action shall have the effect of a civil judgement of the Court and an order made hereunder shall be enforceable and recoverable accordingly”.

[12] It is clear from the wording of this provision that the maintenance proceedings are *sui generis* and inquisitorial in nature.

[13] It is also discernible from the above quoted legislative provisions that the maintenance procedure envisaged therein is a simple, straightforward, expeditious, cost-effective, convenient and court-driven process.

[14] The proceedings are initiated by lodging a complaint with the clerk of Court, without more. The plaintiff is not required to file pleadings ordinarily filed in civil matters. The Proclamation does not similarly require the defendant to file opposing papers. It is also implicit in these provisions that the defendant is only expected to appear before court for an inquiry on the date appearing on the summons. It follows

that the applicant counsel's argument to the effect that the applicant's answering affidavit was disregarded, cannot be sustained.

[15] I should add that the procedure under the subordinate Court Rules may only be adopted where the Proclamation itself makes no provision for a given matter. In this regard, Section 15(1) reads;

“the Subordinate Courts Proclamation No.58 of 1938(now Subordinate Courts Act of 1988) and Rules of Court made thereunder shall apply to a matter dealt with by a Subordinate Court under this proclamation for which no provision is made herein”.

[16] In my judgement, sections 6 and 8 clearly set out the procedure for the institution and hearing of maintenance proceedings under this proclamation. The procedure envisaged therein is two-staged: viz: the lodging of the complaint and inquiry stage (an issue discussed next).

Conduct of an inquiry

[17] In the light of the view expressed above that the proceedings are *sui generis* and inquisitorial; the presiding magistrate, in conducting the inquiry, should not therefore take a passive attitude and let the parties present such evidence as they think fit and then give his/her judgement. In my opinion, he/she should be actively involved in investigating the facts of the case or supervising the gathering of evidence necessary to resolve issues arising in the case. He/she may examine/question witnesses, including defendant or plaintiff, require books and documents to be produced e.t.c.

[18] After considering all relevant factors and depending on the evidence produced by both parties, the court will grant an amount of maintenance which it considers fair and reasonable under the circumstances of each case.

[19] Having outlined the procedure as I understand it, the issue to be discussed next is whether the learned Magistrate properly held the inquiry in making the award that it did.

Procedure for determining Quantum

[20] With regard to the issue of quantum, the applicant told the court that he owns a spaza shop which under normal circumstances generates a daily income estimated at M 300.00-M400.00. He stated that lockdown had a significant impact on this business. Consequently, he only generates an income of M70.00-M120.00 per month from this shop.

20.1 He also told the court that he owns rentable flats and were at the time of inquiry vacant because tenants moved out due to inability to pay rent as a result of loss of jobs. He told the Court that he had only three tenants at the time, paying M150.00 per month.

[21] The 2nd respondent controverted this and told the court that all rooms (eight in number) were occupied and that each tenant paid M 300.00. With regard to the income generated from the shop, she told the court that it was M1200.00 to M1500.00 per day.

[22] In making her decision, the Magistrate reasoned as follows;

“ I do not know which side is telling the truth, but the court is inclined to believe plaintiff when she says the stands pay M 300.00 per month thus making M 2100.00 per month. The court choses to believe the defendant when he says the shop makes M120.00 per day, thus making M3600.00 per month. total number of earning is M5700.00.

In her papers plaintiff asked for M 1500.00 as maintenance. M1500.00 deducted from M5700.00 makes M 4200.00. This is enough money for defendant to also make a living. Maintenance is

set at M1500.00 per month. This money be availed on or before the 05th of every month”

[23] The applicant contends before this Court that the learned Magistrate did not take his personal circumstances into account to determine the issue of ability to pay the amount requested by the 2nd respondent. He contends that the Court failed to thoroughly inquire into his sources of income and expenses; that although he runs a spaza shop and owns rentable flats, it disregarded the fact that the covid-19 pandemic and measures adopted to combat its spread (lockdown), have negatively impacted on his business, in particular, income from the spaza shop as well as from the rented flats declined. He contends further that the Court did not consider the spaza shop related expenses before making the decision.

[24] He avers further that their child spends a substantial time at his home, which is close to 2nd respondent’s home, have meals, sleeps over and plays with kids thereat.

24.1 In addition, he currently pays all transport costs (to and from School), as well as school fees. According to him, the child is not in need of maintenance because he singly provides the child with everything.

Applicable principles in assessment of maintenance

[25] The principles governing parental responsibility for maintenance are well-established. A child is entitled to be provided with everything that it requires for its proper living and upbringing. In other words, to a reasonable maintenance for housing, clothing, medical, health care, education e.t.c. What is reasonable depends on various circumstances or factors such as; the needs of the child, the child’s health, parties’ standard of living and both parents’ ability to pay for the above. **Ntoli v Ntoli C of A(CIV) 45/18, Smit v Smit 1980(3)**

SA 1010, Herfst v Herfst 1964(4) SA 127(W), Douglas v Douglas 1996(2) ALL SA 1(A)

[26] The parents of the child have a joint responsibility to provide these needs. It matters not whether such a child is born in or out of wedlock. The obligation of supporting children is however attributable or apportioned between them according to their respective means i.e financial resources and circumstances of each of them. **Ntoli v Ntoli** (*supra*) **Lamb v Sack 1974(2) SA 670(T) at 671F** (cited with approval) in **Zimelka v Zimelka 1990(4) SA 303. Joffe v Lubner 1972(4) SA at 525C, Herfst v Herfst** (*supra*).

[27] The guiding principles distillable from these authorities are that in determining what is a fair and reasonable maintenance, the Court makes an assessment of all relevant facts at that particular point in time. These includes, inter alia; the number of children and their needs, the age of the child(ren), the standard of living of both parties, the liabilities of each parent although the child's needs come first, all sources of income, the nature of maintenance, which is not limited to the monetary value and the financial means of the parties.

[28] While the custodian parent is entitled to claim contribution from the non-custodian parent, the fact that the latter is contributing to the maintenance of the child is also an important factor to be considered in making the award. The time the children spend with the non-custodian parents should also not be overlooked in the assessment of the award to be made. **Zimelka v Zimelka** (*supra*).

Application of the principles to the present matter

[29] In the instant case, it is clear that the applicant is practically able to pay a reasonable amount the Court should require him to pay. However, his correct financial position was not properly investigated.

The question whether the 2nd respondent has any source of income was also not investigated.

- [30]** The Magistrate heard the testimony of both parties. The evidence was however very brief. The evidence of the plaintiff covers half a page, so does the defendant's (applicant). The whole inquiry was recorded in 25 lines.
- [31]** It emerged during the inquiry that the parties were at loggerheads over the income of the defendant(applicant); in particular, income derived from the spaza-shop and the amount of rentals collected at the material time. The inquiry was regrettably concluded without enabling the parties to call further witnesses or without asking them to furnish documents in order to assist the Court on this contested issue. This issue of income is material because it has a direct bearing on the award to be made. Further evidence on it was therefore indispensable in my view.
- [32]** The respondent was not asked about her source of information in support of her assertion relating to occupancy of the flats, nor did the Court provide any basis for rejecting the applicant's story that the rooms were unoccupied and vice versa.
- [33]** In addition, the learned magistrate did not inquire into the applicant's expenditure and liabilities his living expenses were also not investigated. She did not ask the applicant to furnish details about the nature of the spaza shop and merchandise sold in order to have information on how much that kind of business would ordinarily generate. She did not ask for evidence such as receipts for the purchase of stock or the latest three months Bank statement (If necessary) in order to determine ability on the basis of income.

Conclusion

[34] In all circumstances, I find that the Court failed to properly investigate the applicant's correct financial position to establish whether he was able to pay the sum of money sought by the 2nd respondent or whether an amount of M 1 500.00 was reasonable and fair to both parties. In my judgement, she decided the matter on insufficient evidence. I do not think she was justified for making the order that she did, without evidence.

[35] I am therefore of the opinion that the order of the Court below must be set aside, and the matter be referred back for a fuller investigation of the financial position of the parties and needs of the child. The review in regard to quantum of maintenance must therefore succeed.

Order

[36] In the result, the following order is made;

- a) The application succeeds.
- b) The decision of the Court *a quo* is set aside.
- c) The inquiry should start *de novo* before a different Magistrate.
- d) No order as to costs.

**P. BANYANE
JUDGE**

For Applicant: Adv Malefane

For Respondents: No appearance