IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***24th May 2019*** Signature: _____

APPEAL CASE NO: A3074/2018

COURT *A QUO* CASE NO: 011/2018 – MAI00034

DATE: 24TH MAY 2019

In the matter between:

WAKEFIELD: DARRYL WILLIAM Appellant

- and -

NELSON: GILLIAN Respondent

JUDGMENT

Adams J (Senyatsi AJ concurring):

[1]. Central to this appeal is an issue relating to the enforcement by way of an emoluments attachment order of a maintenance order in favour of minor children who subsequently became major. A further issue is whether an existing maintenance order in favour of the children is enforceable at the instance of their mother after they turned eighteen or whether the children themselves are the only ones with the necessary *locus standi* to enforce the maintenance order. Closely linked to these issues is the question whether the duty to maintain minor children in terms of a court order ceases on the children reaching the age of majority.

[2]. The appeal is against the judgment and the order of the Johannesburg Magistrates Court (Acting Additional Magistrate H Nicolaou), sitting as a Maintenance Court, handed down on the 13th of June 2018. In terms of the judgment and the order of Magistrate Nicolaou, the application by the appellant for a rescission of the order for the attachment of the appellant's emoluments granted on the 9th of January 2018 against the appellant in favour of the respondent, was dismissed, with no order as to costs.

[3]. In terms of the Emoluments Attachment Order of the 9th of January 2018, the appellant's employer, Trellidor SA, was ordered to deduct an amount of R45 663.96 per month from the appellant's salary and to pay this amount over to the respondent in settlement of maintenance. The order of the 9th of January 2018 was granted by the court *a quo* on an *ex parte* basis against the appellant and his employer in terms s 16(2) of the Maintenance Act, 99 of 1998 ('the Act'). This order was based on a previous divorce order of the High Court dated the 30th March 2007, which required the appellant to *inter alia* pay maintenance to the respondent in respect of their minor children, Megan and Edward, the cash

portion of which at the time was an amount of R6 250 per month per child, to be escalated at 10% per annum.

[4]. According to the respondent, the appellant had not complied with the maintenance portion of the High Court order for a considerable period of time probably from shortly after the court order took effect. The emoluments attachment order was granted in respect of the appellant's salary from his employer and was for R45 663.96 per month, which amount comprised R35 663.96 in respect of maintenance then payable in terms of the order of the High Court and R10 000 in respect of arrear maintenance, which the Maintenance Court had calculated at and ruled to amount in total to R1 611 072.82. In terms of the emoluments attachment order a total amount of R45 663.96 per month is therefore at present payable and should be paid by the appellant to the respondent via a deduction from his salary by his employer. The appellant's net salary payable by Trellidor however amounts to about R29 000 per month, which means that since February 2018 the appellant has been receiving no salary from his employer, the whole net amount of the remuneration having been redirected and which is still being redirected to the respondent as per the Emoluments Attachment Order. The *ex parte* application was by definition granted in the absence of the appellant in circumstances where neither the appellant nor his employer were given notice of the fact that the respondent intended applying to court for the order aforesaid.

[5]. Prior to that, on the 8th of January 2018, the respondent had issued out of the Johannesburg Magistrates Court an 'Application for Enforcement of Maintenance or other Order' in terms of s 26, read with s 28 of the Maintenance Act, 99 of 1998. It was pursuant to this application that the respondent was able to obtain the emoluments attachment order. As indicated *supra*, the appellant and / or his employer were never given notice of this intended application, which was granted on the 9th January 2018, that being the very next day after the application was issued.

[6]. I interpose here to note that I am not convinced that the procedures prescribed by s 26 of the Act were complied with. The application was brought on an *ex parte* basis although s 26(2)(a)(ii) of the Act required the respondent to 'apply' to the maintenance court for an order for the attachment of emoluments referred to in section 28(1), which implies that the order ought not to have been granted in the absence of notice of the intended application having been given to the appellant as an interested party. This means that the right procedure was not followed if regard is had to the accepted definition of 'apply', which means apply on motion, which in turn requires notice to be given to interested parties. In any event, the failure by the respondent to give notice to the appellant and / or his employer was a grave violation of the *audi alteram partem* rule.

[7]. All the same, shortly after the order was granted the appellant became aware of same and on the 14th of March 2018 he caused to be issued out of the Johannesburg Maintenance Court an application in terms of s 28(2) of the Act for a rescission of the emoluments attachment order. The application was served on the respondent, who opposed same, but opted not to deliver an answering affidavit. The application was therefore argued on the papers before the court, which included the respondent's application for the issue of the Emoluments Attachment Order and the appellant's founding and supplementary affidavits in support of his application for rescission. The opposed application for rescission was heard by the Johannesburg Magistrates Court, sitting as a Maintenance Court as defined in the Act, on the 25th April and the 21st of May 2018. The respondent was not legally represented at the hearing of the opposed application, but appeared in person.

[8]. The appellant's application for a rescission of the emoluments attachment order was based on his claim that as and at the time the order was granted his obligation to support Megan and Edward had ceased as both of them had by then reached the age of majority and had become self – supporting. Megan's date of birth is 4 December 1995, which means that she

became a major on 4 December 2013. Edward was born on 12 August 1999, and he therefore reached the age of majority on 12 August 2017. His obligation to maintain and financially support his two children, so the appellant contended, had come to an end, and the Magistrate's Court should therefore not have issued the order attaching his emoluments. In any event, on 9 January 2018, when the emoluments attachment order was granted, the respondent did not have the necessary *locus standi* to apply for and obtain the said order, which should have been applied for by the children themselves if they so desired. As regards the arrear maintenance, the appellant denied that he was in arrears in view of the fact that his duty of support came to an end on 4 December 2013 in respect of Megan and on 12 August 2017 as regards Edward.

[9]. The calculations by the respondent in support of her application for the issue of the emoluments attachment order suggest that as and at the 9th of January 2018 the arrear maintenance payable by the appellant in terms of the High Court order of 30 March 2007 amounted in total to R1 377 186.86. In the main, the arrears were made up, according to the respondent's calculations, by constant and continuous short payments in respect of the maintenance payments by the appellant on a monthly basis. My reading of the respondent's calculations is that the short payments commenced shortly after the divorce order was granted during 2007. By March 2013, according to the respondent's calculations, the short payments on a monthly basis had accumulated to a total amount of R563 181.11. No details and particulars are furnished by the respondent of how this amount is arrived at. For example in the row which details the transactions of March 2013, the respondent indicates that R22 144.51 was payable by the appellant as the cash contribution towards the maintenance of the children. This amount is calculated at the initial amount of R12 500 payable per month, escalated annually at 10% per annum. *Ex facie* this calculation is mathematically correct as are all of the other amounts payable in terms of the calculations if regard is had to the High Court Order of 2007. Instead of paying the amount of R22 144.51 for March 2013 the appellant only paid R11 000, which means that for March he underpaid by R11 144.51. This is

an example relating to one month only, but it is the case of the respondent, as demonstrated in the schedule of her calculations relating to the arrear maintenance, that this pattern of short payment was sustained by the appellant since 2007, which led to the accumulated amount of R1 377 186.86 as and at January 2018.

[10]. The respondent's schedule also indicates that up to December 2017 the appellant has been making payments, with regular monotony, in respect of the maintenance for the children. The payments made during 2018 was an amount of R14 000 per month. The point of this is that the appellant has all along been making payment to the respondent on a monthly basis of amounts which he believed to be due and payable to the respondent. The respondent accepts this, but contends that the short payment on a monthly basis over a long period of time has resulted in arrear maintenance totalling R1 377 185.86. I interpose here to note that the court *a quo* ruled that the arrear maintenance amounted in total to R1 611 072.82, which is at variance with the respondent's calculations. It is not clear from the appeal record how the Magistrates Court arrived at this amount. Nothing however turns on this.

[11]. On the 13th of June 2018 the application for rescission by the appellant was dismissed by the court *a quo* on the basis that the original divorce order, which incorporated the settlement agreement between the parties, was still in force. Therefore, so the Magistrates Court held, the appellant was liable to pay R35 663.96 per month maintenance for the two children, who by then had both attained the age of majority, which means that, applying the applicable legal principles, so the court below concluded, the respondent was entitled to the attachment order against the appellant's emoluments in view of the fact that he was not complying with the maintenance provisions of the order. Although the court below did not say so in as many words, the implication of its dismissal of the rescission application is that it was of the view that the appellant had not demonstrated a *bona fide* defence to the respondent's claim.

[12]. In coming to her conclusion the learned Magistrate found that the provisions of s 28(2) of the Act had not been complied with and accordingly dismissed the application for rescission. The court rejected the defence of the appellant to the effect that he was no longer under any obligation to pay maintenance to the respondent as the children had attained majority. Factually, so it was contended by the appellant, the need to pay maintenance to the respondent in respect of both children had fallen away by operation of the law, which dictated that the maintenance order came to an end when the children reached the age of majority. This contention the Maintenance Court rejected as it did with the contentions by the appellant that there were no arrear maintenance payable to the respondent.

[13]. This appeal is on the basis that the court *a quo* erred in its findings relating to these issues, and it is submitted, on behalf of the appellant, that the Maintenance Court should have granted the rescission of the emoluments attachment order.

[14]. There were a number of points *in limine* raised by the respondent, which I intend dealing with briefly before discussing the merits of the appeal. The most notable of these legal points relate to the fact that the appellant had not complied with the rules relating to the prosecution of the appeal. The respondent had also applied for an order declaring that the appellant's appeal has lapsed on the basis that the appellant failed to timeously give notice to the Clerk of the Magistrates Court and to the respondent of the date of the hearing of the appeal, as allocated by the Registrar of this Court. In addition, the said application was based on the appellant's failure to furnish security for the respondent's cost of the appeal as required by the Rules of the Magistrates Court and the appellant's failure to timeously prosecute the appeal as provided for in terms of Uniform Rule of Court 50(7)(a).

[15]. The respondent submits that the 'cumulative and persistent transgressions on the part of the appellant, as well as his total lack of interest in his own appeal' justify the granting by the appeal court of an order declaring the appeal to have lapsed. I am not convinced that the respondent's claim that the appellant was tardy in the prosecution of his appeal is born out in any way by the objective facts in this matter. The judgment of the Magistrates Court was handed down on the 13th of June 2018. The appeal was argued before us on the 20th of May 2019. This means that in a period of less than twelve months the appellant was able to note the appeal, prosecute same in this court and have same heard by and argued before the appeal court. That fact alone, in my judgment, belies the claim by the respondent that there has been an undue delay in the prosecution of the appeal.

[16]. In any event, in his applications for condonation of his non – compliance with the relevant rules and the practice manual and directives of this division, the appellant explains the difficulties he experienced in obtaining the appeal record from the official court transcribers. We accept this explanation. It is understandable that in procuring the appeal record there can be and more often than not will be a delay caused by logistical issues. Importantly, the respondent has not been prejudiced in any way by any of the instances of non – compliance of the rules by the appellant.

[17]. We are therefore of the view that the appellant's non – compliance with the rules of this court and its practice manual should be condoned and that, insofar as it may be necessary, the appeal should be reinstated. As is often said, the Rules are there to serve the Court and not the other way around. The courts are not there to serve the Rules. Accordingly, an order to that effect be and is hereby granted.

[18]. The respondent also raised a preliminary point that the order of Magistrate Nicolaou is not appealable on the basis that it was not final in effect or definitive of the rights of the parties or that it disposes of any portion of the relief claimed. The question to be asked, in our view, is whether the judgment of the Maintenance Court was a final and definitive one. On appeal the appellant attacked the judgment on the basis that it was.

[19]. As per the dictum in *Zweni v Minister of Law and Order,* 1993(1) SA 523 (A), it is trite that, generally speaking, a judgment or order is susceptible to appeal if it has three attributes, namely:

> '[T]he decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'

[20]. Applying these principles *in casu*, we are of the view that the order of the court *a quo* was final in effect. What the order in effect did was to force the appellant to pay an amount of R45 663.36 per month. This order remains in effect until such time as the monthly amount is reduced by an order of the Maintenance Court. The order is final in effect. The final word as to the relief to which the appellant may be entitled, has been spoken – he is not entitled to an order rescinding the order of attachment of his salary. It will not arise again as it has been finally determined.

[21]. In these circumstances, the order of the court *a quo* has the attributes of an appealable order. In any event, the appeal would lead to a final determination of some of the real issues between the parties. It has also been demonstrated that the interests of justice demand that the order be considered to be appealable.

The Law & its Application *in casu*

[22]. S 28(2)(a) of the Act provides that an order for the attachment of emoluments may at any time, on good cause shown, be suspended, amended or rescinded by the maintenance court.

[23]. The wording of s 28(2)(a), in particular the requirement of 'on good cause shown' corresponds with the wording of Rule 49(1) of the Magistrates' Court Rules, which provides that a party to proceedings in which a default judgment has been given may serve and file an application to court, on notice to all parties to the proceedings, for a rescission of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind the default judgment on such terms as it deems fit. (My emphasis). The principles applicable to Magistrate Court Rule 49(1) therefore can and should be applied to s 28(2)(a) of the Act.

[24]. The common cause facts in this matter is that the divorce order of the High Court of the 30th of March 2007, which incorporated the settlement agreement concluded between the parties, provided that appellant shall pay maintenance 'in respect of each of the minor children in the sum of R6 250 per month per child, commencing on the first day of the month' following the month during which the divorce order is granted. With effect from the 4th of December 2013 Megan was no longer a minor child and the maintenance order would from that day onwards not have applied to her if regard is had to the letter of the court order. The same applies to Edward with effect from the 11th of August 2017 from which date he was no longer a 'minor child' as contemplated in the High Court order as being entitled to received maintenance.

[25]. In our view, and having regard to the wording of the order, the appellant's obligation to pay maintenance to the respondent for Megan would have ceased

on the 4th of December 2013, which means that the amount payable by the appellant from January 2014 would have been R12 179.48 based on the respondent's figures. This amount would have escalated at the rate of 10% per annum up to August 2017, when Edward also became an adult, whereafter no maintenance would have been payable pursuant to the High Court Order. It bears emphasising that this view is based on the wording of the order which expressly provided that the maintenance should be paid to the respondents in respect of the 'minor children'. On this basis alone, in our view, the appellant was entitled to discontinue payment of further maintenance from August 2017. This means that the Magistrates Court had misdirected itself in ordering the appellant to continue paying maintenance as at January 2018.

[26]. There is another reason why, in our judgment, the order of the Magistrates Court should have been set aside. That relates to the fact that on the papers before the court a quo, it had to be accepted, as alleged by the appellant, that both Megan and Edward had by then become self – supporting. This allegation by the appellant in his supplementary founding affidavit is not gainsaid or contradicted or challenged in any way by the respondent. She most certainly does not contend otherwise in papers before the Maintenance Court which heard the application for rescission. When considering the rescission application the court *a quo* therefore had no choice but to accept as a fact that the children were self – supporting. This then means that it could not possibly be said that the appellant had a duty to support the children. There would then have been no reason why the order, relating to the then current maintenance, ought not to have been set aside.

[27]. The aforegoing reasoning in support of a conclusion that that portion of the emoluments attachment order of the 9th of January 2018 should have been set aside is furthermore strengthened by the fact that, as rightly submitted by Mr Wilkins, Counsel for the appellant, the respondent lacked *locus standi* to apply for the attachment order on the 8th of January 2018. In that regard, we are of the

view that the respondent's reliance on the decision in *Bersey v Bersey,* 1999 (3) SA 33 (SCA), is misplaced, if for no other reason than the fact that *Bersey* is distinguishable on the facts. Also, the wording of the order in *Bersey* differed in the material respect that it provided for the maintenance of the two minor children until they became self – supporting. In that matter the mother had proceeded with a writ of attachment of the father's assets in respect of the arrear maintenance. The father then applied to the High Court for an order setting aside the writ. On appeal the SCA held that, according to the common law, both divorced parents have a duty to maintain a child of the dissolved marriage. The incidence of this duty in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time. The duty does not terminate when the child reaches a particular age but continues after majority. In that case the divorce order stipulated periodic payments of a fixed sum of money 'until the said children become self – supporting'. The Court held that the maintenance order was ancillary to the common – law duty of support and merely regulated the incidence of this duty as between the parents. The order, so it was held by the SCA, was clear and unambiguous that the father was obliged to pay maintenance for the children until they became self – supporting even if that occurred after they had attained majority.

[28]. I reiterate that the matter before us can and should be distinguished from *Bersey* because *in casu* the order provided by implication that the appellant was obliged to pay maintenance in respect of the children until they reached the age of majority. In any event, on the facts before us, based on the papers in the application for rescission, the children were self – supporting at the relevant time.

[29]. I therefore find that with effect from January 2018 the appellant would no longer be liable to pay maintenance to the respondent, pursuant to the High Court Order of the 30th March 2007, in respect of the children.

[30]. As far as the arrear maintenance is concerned, it is the case of the appellant that, according to his calculations and if regard is had to the fact that during 2013 his liability to pay maintenance in respect of Megan ceased, there was no arrears due. No details are furnished by the appellant relating to how he arrives at this conclusion. He also alleges that there are certain payments which he made to the respondent from time to time which are not reflected in her calculations. Again, not much particulars are furnished in that regard, and the appellant does not offer a reconciliation in any form in support if his claim. He does however state in his founding papers that no arrears are due. This is not challenged by the respondent by acceptable evidence, which means that the Magistrates Court, in the application for rescission, should have accepted this as a fact.

[31]. The point is this: at the hearing of the application for rescission the Magistrate should have accepted as a fact, without finally ruling on that issue, that the appellant was not arrears with the maintenance payable by him pursuant to the High Court order. It may very transpire later that he was in fact in arrears, but that is an issue which could and should have been ventilated and debated at a subsequent opposed application for the issue of an Emoluments Attachment Order after the order of the 9th of January had been set aside.

The Rescission Application

[32]. A court is not entitled to rescind or vary a judgment if the applicant fails to show *'good cause'* for that relief. If the applicant succeeds in showing good cause, it is still in the discretion of the court to grant or refuse relief. This discretion must be exercised judicially in the light of all the facts and circumstances of the case as a whole. The approach to be adopted by the court has been described by Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd,* 1994 (4) SA 705 (E), at 711E–G, as follows:

'An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in *Grant v Plumbers (Pty) Ltd*, 1949 (2) SA 470 (O), and *HDS Construction (Pty) Ltd v Wait*, 1979 (2) SA 298 (E), and also any prejudice that might be occasioned by the outcome of the application.'

[33]. S 28(2) of the Act imposes on the appellant the burden of actually proving good cause for rescission. It has been held that the requirement of *'good cause'* cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of a *bona fide* presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded. See: *Galp v Tansley NO*, 1966(4) SA 555 (C), at 560B. The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he must show a probability of success: it suffices if he shows a *prima facie* case, or the existence of an issue which is fit for trial.

[34]. In this matter the main defence which the appellant intended raising against the application for the emoluments attachment order was based the fact that since January 2018 he is no longer liable to pay maintenance to respondent, which means that the basis for the granting of the emoluments attachment order has fallen away. For the reasons alluded to above in detail I am of the view that that is a valid defence to the said application. This, in our view, ought to have been regarded by the Magistrate as a *'substantial defence'* to the respondent's application.

[35]. Accordingly, the court *a quo* erred in not granting the application for rescission. It ought to have ruled that the appellant did not owe the respondent any maintenance for the children. By finding, as it did, that the appellant was still liable in view of the existing court order which had not been amended, the court *a quo* had misdirected itself. The misdirection lies therein that, having regard to the applicable legal principles, the basis for the granting of the emoluments attachment order has fallen by the way side.

[36]. For these reasons, I am of the view that the court *a quo* was incorrect in dismissing the application for rescission. Accordingly, the appeal stands to be upheld.

Cost

[37]. The appellant is successful with his appeal against the order of the Magistrates Court. The respondent has been unsuccessful in her opposition to the appeal. This means that, applying the general rule, the respondent, being the losing party, should be held liable for applicant's cost of the appeal.

[38]. However, in this matter we are dealing with the interest of minor children and their constitutional rights. I can understand why the respondent thought that she was entitled to an order for the attachment of the appellant's emoluments. In this appeal and in the application proceedings in the Magistrates Court fresh legal and constitutional terrain was being traversed for all concerned.

[39]. Therefore, in the circumstances of this matter, I am of the view that each party should bear his / her own cost of this appeal. This approach locates the risk for costs at the correct door and such an order, in my judgment, would be

just and equitable. No order as to cost would be fair, reasonable and just to all concerned. Therefore, in the exercise of my discretion I intend granting no order as to costs.

Order

Accordingly, I make the following order:-

1. The appeal against the order of the Johannesburg Magistrates Court dated the 13th June 2018 succeeds and is upheld.

2. The order of the Court *a quo* be and is hereby set aside and substituted with the following:-

   '1. The Order for the attachment of applicant's emoluments granted by this Court on the 9th January 2018 be and is hereby rescinded and set aside.

   2. The respondent shall on or before the 7th of June 2019 deliver notice of his intention to oppose the applicant's application for the issue of an emoluments attachment order.

   3. Thereafter, the rules relating to opposed applications in the Magistrates Court shall apply.

   4. There shall be no order as to cost relating to the application for rescission.'

3. Each party shall bear his / her own cost relative to this appeal, including the cost in relation to any and / or all interlocutory applications and applications for condonation.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,

M L SENYATSI
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	20th May 2019
JUDGMENT DATE:	24th May 2019
FOR THE APPELLANT	Adv P A Wilkins
INSTRUCTED BY:	Albasini Incorporated
FOR THE RESPONDENT:	Adv R G Cohen
INSTRUCTED BY:	Jeff Donenberg & Co