



**CASE NO. A 70/2009**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**DAVID NKWANGA MONDO**

**APPLICANT**

and

**THE MESSENGER OF COURT: GROOTFONTEIN**

**1<sup>ST</sup> RESPONDENT**

**THE CLERK OF THE MAINTENANCE COURT**

**2<sup>ND</sup> RESPONDENT**

**THE MAINTENANCE MAGISTRATE OF WINDHOEK**

**3<sup>RD</sup> RESPONDENT**

**SPECIOZA MONDO**

**4<sup>TH</sup> RESPONDENT**

**CORAM:** MANYARARA, A.J.

Heard on: 13 March 2009

Delivered on: 13 March 2009

Reasons on: 11 June 2009

---

**REASONS**

**MANYARARA, A.J.:** [1] This is an application brought on an urgent basis to nullify a warrant of execution issued at the instance of the fourth respondent. At the hearing, the application was removed from the roll for lack of urgency, with no order for costs, with reasons to follow. These are they.

[2] The parties were married to each other but divorced by order of the court dated 24 February 2004. In terms of the order, the applicant was ordered to pay maintenance in respect of the fourth respondent at the rate of N\$2000.00 per month; custody and control of two minor children, namely Rachel and Charles, was awarded to the fourth respondent and custody and control of the third minor child, namely Christine, was awarded to the applicant, subject to the non-custodian parent's right of reasonable access to the child under the custody and control of the custodian parent. The applicant subsequently obtained a *rule nisi* awarding custody and control of Christine, then aged ten years and two months, to him and the rule was confirmed on 23 July 2008.

[3] The affidavit founding this application avers that, following the dissolution of the marriage, the fourth respondent "brought a number of complaints against (the deponent)" for failing to pay maintenance in terms of the divorce order. The deponent gave his explanation as follows:

*"I could not comply with the court orders to pay maintenance to the custody and control of the minor child and to the fourth respondent for two reasons, one was that the minor child's custody and control, Christine Mondo was, shortly after divorce awarded to me and secondly I lost employment and did not have the means to comply with the court order and when I started working during or about 2004 I was simply not in a position to comply with the court order to pay maintenance to the fourth respondent."*

[4] The fourth respondent instituted criminal proceedings against the applicant for failing to pay maintenance to her and the minor child Rachel.

The applicant was acquitted on the charge relating to Rachel but convicted of failing to pay maintenance to the fourth respondent. He was sentenced to a fine of N\$2000.00 or 6 months imprisonment, wholly suspended for a period of 2 years on condition *inter alia* that he complies

with the order to pay the arrear maintenance due the fourth respondent at the rate of N\$500 per month with effect from 30 September 2007. The applicant appealed against the judgment. However, according to the affidavit founding the present application, the parties thereafter entered into settlement negotiations. The negotiations led to an oral agreement. The fourth respondent demanded that the agreement be recorded in writing and the deponent's legal practitioner prepared a draft which was forwarded to the fourth respondent. However, she did not respond to the draft agreement but instead caused a warrant of execution to be issued and the first respondent attached an assortment of the applicant's goods by notice dated 16 February 2009.

[5] It is this latest development which triggered the urgent application whereby the applicant sought an order in the following terms:

- (1) Declaring the warrant of execution dated 17<sup>th</sup> January 2009 and the notice of attachment annexed thereto as unlawful and invalid and setting aside the same and any other steps taken in relation thereto.
- (2) That pending the finalization of this application no steps shall be taken in relation to the execution of judgment in relation to this matter.
- (3) Ordering the immediate release from attachment of all goods attached in terms of the inventory attached to the warrant of execution.
- (4) Costs of suit to be paid by any of the respondents that opposes the application.

Further, that the order sought serve as interim relief with immediate effect and that the applicant advertise in a local English newspaper the order issued herein and take such steps as may be necessary to serve the order on the fourth respondent.

[6] The main thrust of the application addressed the merits as set out above.

[7] The answering affidavit was filed by Nomusa Sibanda, the Magistrate of the Maintenance Court at Katutura, with a confirmatory affidavit filed by Willem Sebulon Shikongo Mekondjo Nathinge, the Maintenance Officer. That this the affidavit also clearly addressed only the merits is evident from the averments.

[8] Sibanda's affidavit averred that, while the second and third respondents did not oppose the application but would abide the court's decision, the deponent wished to address the submissions made by the applicant on the Maintenance Act 9 of 2003 (the Act). My reading of the averment was that the respondents wished to deal only with the merits, leaving the question of urgency for the court to decide.

[9] As indicated, the crisp issue for determination was the question of urgency of the application and the applicant's contentions on this issue may fairly be enumerated as follows:

- (1) After the attachment, advertisement would be made in the print media soon, which publication has adverse business implications; the goods attached would be sold "*and this will take place in the next few weeks as indicated by the first respondent.*"
- (2) No alternative remedy is available to the applicant because of the impending removal and sale of the goods attached.
- (3) The balance of convenience favoured the applicant as "*the value of the goods attached is exceedingly higher than the amount claimed.*"

[10] Mr. Swanepoel for the second and third respondents submitted that the applicant's contentions on urgency must fail on two grounds. Firstly, that the applicant had not specified the dates of possible removal and sale of the goods attached and, secondly, the applicant had not exhausted the internal remedies open to him under the Act. The obvious reason was that the dates were unknown to the applicant and, in any event, subsections 29(5) and 29(8) provided ample time to suspend the warrant of execution – a course which was open to the applicant before he launched his application. Further, while the notice of attachment was dated 16 February 2009, the applicant had not explained why he had waited for a period of 4 weeks before launching his application. Section 29(5) and (6) of the Act provide as follows:

- “1. *A defendant against whom a warrant of execution has been issued may, within 10 days of becoming aware of the existence of the warrant of execution and in the prescribed manner, apply to the maintenance court where the warrant was issued to set aside the warrant of execution.*
  
2. *An application made under subsection (5) must-*
  - (a) *state the grounds on which the warrant of execution should be set aside;*  
*and*
  - (b) *be served by the defendant on the complainant at least 14 days before the date on which the application is to be heard.”*

And section 29(8) and (9) provide as follows:

- “1. *A defendant against whom a warrant of execution was issued under this section may at any time, in the prescribed manner, apply to the maintenance court for substitution or suspension of the warrant of execution.*
  
2. *An application made under subsection (8) must-*

- (a) *state the grounds on which the warrant is sought to be substituted or suspended; and*
- (b) *be served by the defendant on the complainant at least 14 days before the date on which the application is to be heard.”*

[11] In any event, if the date for the sale were to be announced, it would be open to the applicant to approach the court on an urgent basis to interdict the sale and I believe that such an application would have been favourably received. But this has not happened and the applicant has jumped the gun by seeking to set aside the proceedings in the maintenance court before adopting the course suggested by Mr. Swanepoel.

[12] The applicant’s counsel, Mr. Sisa Namandje, had no answer to the submissions made on the respondents’ behalf for the obvious reason that there were none. Accordingly, the application failed for lack of urgency and the application was removed from the roll without consideration of the merits.

---

**MANYARARA, AJ**

ON BEHALF OF THE APPLICANT

Instructed by:

Mr Namandje

Sisa Namandje & Company

ON BEHALF OF THE 2<sup>nd</sup> and 3<sup>rd</sup> RESPONDENTS

Instructed by:

Mr Swanepoel

Government Attorneys