CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 18/02

NADENA BANNATYNE	Applicant
versus	
LAURIE NOËL BANNATYNE	Respondent
COMMISSION FOR GENDER EQUALITY	Amicus Curiae

Heard on : 7 November 2002

Decided on : 20 December 2002

JUDGMENT

MOKGORO J:

Introduction

[1] This case concerns the responsibility of the judiciary to ensure that maintenance orders are observed. Ms Nadena Bannatyne, the applicant in this matter, approaches this Court in terms of rule 20 of the Constitutional Court Rules for special leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA). The High Court had made an order at the instance of the applicant committing the respondent, Mr Laurie Noël Bannatyne, for contempt of a maintenance order. On appeal to the SCA, that contempt order was set aside. The applicant applied for

special leave to appeal to this Court on the basis that, in its finding regarding when a High Court is competent to make an order for contempt, the SCA failed to take into consideration and give due weight to section 28(2) of the Constitution which requires that the best interests of the child be given paramountcy in all matters affecting children.

[2] The parties were directed to deal with the following issues:

> "(a) Whether the issue concerning the High Court's jurisdiction to make an order committing the respondent for contempt of court on the grounds of his failure to comply with a maintenance order made by the Magistrates Court is within the jurisdiction of the Constitutional Court; and if it is,
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> (b) Whether in the light of the provisions of section 28(2) of the Constitution, or any other provision of the Constitution, the question whether the High Court should or should not have made an order in the circumstances of the present case, raises a constitutional matter, or an issue connected with a decision on a constitutional matter; and if so
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> (c) Whether in the circumstances of the present case, such an order ought to have been made by the High Court; and if so,
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> (d) Whether the Supreme Court of Appeal erred in setting aside the order that had been made."

[3] The Court admitted as amicus curiae the Commission for Gender Equality (CGE)[1] which lodged empirical data on the state of the maintenance system in South

[1] The CGE is a state institution established in terms of chapter 9 of the Constitution. Its constitutional mandate is set out in section 187 of the Constitution which requires that it "promote respect for gender equality and the protection, development and attainment of gender equality". Furthermore, section 11 of the Commission on Gender Equality Act 39 of 1996 sets out its powers and functions which include the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. Its interest in this matter arises from the fact that since its inception, the CGE has viewed the administration of maintenance payments as a major obstacle to women fully attaining equality.

Africa and its effect on the rights of women and children in seeking effective relief pursuant to the Maintenance Act (the Act).[2] This evidence proved most useful and gave the necessary context by providing information regarding the frailties inherent in the functioning of the maintenance system and more particularly its effect on the promotion and advancement of gender equality in this country. The Court is indebted to the CGE for this evidence and its argument.

The relevant provisions of the Act

[4] The Act provides both civil and criminal remedies against defaulters. Chapter 5 of the Act makes provision for maintenance orders to be enforced by civil execution. This includes execution against property, the attachment of emoluments and the attachment of debts.[3] A failure to comply with a maintenance order is also a criminal offence for which a defaulter can be sentenced to imprisonment or ordered to pay a fine.[4] Chapter 6 of the Act makes provision for a court to convict a person for failing

[2] Act 99 of 1998.

[3] Section 26(1) provides:

> "Whenever any person−
> (a) against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or
> (b) . . . .
> such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon−
> (i) by execution against property as contemplated in section 27;
> (ii) by the attachment of emoluments as contemplated in section 28; or
> (iii) by the attachment of any debt as contemplated in section 30."

[4] Section 31(1) of the Act stipulates that

> ". . . any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine."

to pay maintenance. Section 40 of the Act specifically deals with the recovery of arrear maintenance and provides:

> "(1) A court . . . may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court and shall, subject to subsection (2), be executed in the prescribed manner.
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> (2) A court granting an order against a convicted person may−
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> (a) in a summary manner enquire into the circumstances mentioned in subsection (3); and
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> (b) if the court so decides, authorise the issue of a warrant of execution against the movable or immovable property of the convicted person in order to satisfy such order.
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> (3) At the enquiry, the court shall take into consideration−
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> (a) the existing and prospective means of the convicted person;
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> (b) the financial needs and obligations of, or in respect of, the person maintained by the convicted person;
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> (c) the conduct of the convicted person in so far as it may be relevant concerning his or her failure to pay in accordance with the maintenance order; and
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> (d) the other circumstances which should, in the opinion of the court, be taken into consideration.
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> (4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section."

Provision is also made for criminal proceedings in respect of the non-payment of maintenance to be converted into a maintenance enquiry. This must be done if

> ". . . it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests . . . "[5]

[5] Chapter 3 of the Act governs the functions and powers of maintenance officers in the enforcement of maintenance orders. Section 6 requires the maintenance officer to take steps to investigate a maintenance complaint and thereafter institute a maintenance enquiry. The investigation of a complaint includes obtaining statements under oath from persons with information regarding the complaint;[6] investigating the identity or whereabouts of the alleged defaulter[7] and any other relevant information for the purposes of the maintenance enquiry. A maintenance officer is also empowered to enlist the assistance of a maintenance investigator to assist in the performance of such functions.[8] At the maintenance inquiry, the maintenance officer is entitled to subpoena witnesses to give evidence or to produce documentary evidence relating to the financial position of the parties.[9]

[6] After setting out the factual background, I shall deal with the question whether this is a constitutional matter, then whether a High Court has jurisdiction to commit for contempt a person who defaults in terms of an order of a maintenance court.[10] If it

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[5] Section 41.

[6] Section 7(1)(a).

[7] Section 7(1)(b)(i).

[8] Section 7(2).

[9] Section 9(1).

[10] The SCA was prepared to assume that the High Court has such jurisdiction.

is found that the High Court enjoys such jurisdiction, the next leg of this inquiry is to consider the circumstances in which it may exercise such jurisdiction so as to provide effective relief to maintenance complainants.

Factual background

[7] The parties were married in 1986. They have two young children born of the marriage. On 4 February 1999 the parties were divorced in the Pretoria High Court. Incorporated into their decree of divorce was a settlement agreement making provision for the payment of maintenance by the respondent to the applicant for herself and their two children. The amounts specified were R1750 per month per child and R1000 per month for the applicant for a period of five years. The respondent also undertook to retain the children on his medical aid scheme at his cost and to pay all reasonable medical expenses incurred on their behalf. The agreement also made provision for either party to bring an application for a variation of the amounts owing in respect of maintenance.[11]

[8] The respondent did not pay maintenance regularly. Towards the end of 1999 he brought an application in the maintenance court for the reduction of the maintenance payable to the applicant and the children. This led to the court making an order on 5 January 2000 in terms of section 16(1)(b) of the Act, which reduced the maintenance payable for the children to R1500 per month per child, but left unaltered the

[11] The Act permits this to be done. According to section 3 of the Act every magistrate's court is a maintenance court. A maintenance order is defined as meaning "any order for the payment . . . of sums of money towards the maintenance of any person issued by any court in the Republic . . .". A court is defined in section 1 of the Act as including a High Court. The Act goes on to provide in section 16(1)(b) that a maintenance court may make an order in substitution of a maintenance order made by any court.

maintenance for the applicant. The effect of this order was to discharge the High Court order and to substitute for it the order made by the maintenance court.[12]

[9] Despite having secured the reduction of the maintenance payable, the respondent fell into arrears. The applicant approached the maintenance court for assistance in March 2000 and as a result the respondent made payment of the arrears in April 2000. Almost immediately, however, he fell into arrears again. In contravention of the maintenance court order, he paid a reduced amount of R1200 in respect of each child for the months of June and July 2000 and removed them from his medical aid scheme, refusing to make any payment of medical expenses incurred on their behalf. He made no further payments after July 2000.

[10] The applicant approached the maintenance court repeatedly to seek to enforce the maintenance order. Apart from the first approach in March 2000, which led to payment of the arrears in April 2000, her attempts to secure payment of maintenance and of the arrears failed. Two writs of execution were issued, but both failed to produce any money. On the first occasion property was attached. It was subsequently released from the attachment as a result of interpleader proceedings instituted by a woman with whom the respondent was then cohabiting, and children from a former marriage, who claimed that the property had been sold to them by the respondent.

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[12] Section 22 provides:

> "Whenever a maintenance court–
> (a) makes an order under section 16(1)(b) in substitution of a maintenance order; or
> (b) discharges a maintenance order under section 16(1)(b),
> the maintenance order shall cease to be of force and effect . . ."

The second writ also failed when it appeared that a motor vehicle which had been attached was subject to a hire-purchase agreement and did not belong to the respondent.

[11] It is not clear exactly what happened after that. The applicant says that when she wanted to lay a charge for the non-payment of maintenance, the respondent applied for the children's maintenance to be reduced to R600 per month. This led to a new enquiry which was repeatedly postponed. A final postponement was granted until 1 February 2001 but the prosecutor in Louis Trichardt, at the instance of the respondent, arranged with the prosecutor in Pretoria for a further postponement. This was done on 31 January 2001 without reference to the applicant. She merely received a message on her cellular phone from the respondent saying that the application would again be postponed to 20 February 2001 because he had made other arrangements. She, however, attended court on 1 February 2001 only to find that the application had been removed from the roll.

[12] By this time the applicant was in parlous circumstances. She was earning R3500 per month and, though living modestly, incurred monthly expenses of R3600. She had used up all her savings, had surrendered insurance policies taken out for the children and had no other source of income to maintain herself and the children. She was desperate and believed that the respondent was maliciously disposing of his assets and frustrating the maintenance court proceedings. It was in these circumstances that she applied to the High Court for an order that the respondent be committed to prison

for contempt of court for failing to comply with the maintenance order but that the imprisonment be suspended on condition that he paid the arrear maintenance and continued payments thereafter timeously. The matter was heard in the High Court on 21 February 2001.

[13] In her Notice of Motion in the High Court the applicant asked that the respondent be committed for contempt of court for failing to comply with the order made on 4 February 1999 at the time of their divorce. That order had in fact been discharged by the order made by the maintenance court.[13] Although the founding affidavit referred to the fact that the order made at the time of the divorce had been varied by the maintenance court and was the subject of proceedings before that court, the attention of the judge who dealt with the matter in the High Court was not drawn to the provisions of section 22 of the Act, or to the decision of the Appellate Division in *Purnell v Purnell*.[14]

[14] Had the judge's attention been drawn to this he would have had to consider whether it was competent to enforce the order of the maintenance court by way of contempt proceedings in the High Court. He did not consider this question. Instead, he ordered that the respondent be committed for contempt of court for failing to comply with the order made at the time of the divorce. This was not a competent

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[13] See para 8 above.

[14] 1993 (2) SA 662 (A). In this case it was held that an application under the Divorce Act to vary a maintenance order made by the High Court at the time of a divorce, which had subsequently been varied by the maintenance court, was fatally defective because the latter order had discharged the former.

order. When application was made to him for leave to appeal against the order, and his attention was drawn to section 22 of the Act and to *Purnell's* case, he immediately granted leave to appeal.

[15] The SCA correctly did not deal with the appeal on a technical basis. At issue was maintenance due to children. It approached the matter on the assumption that the High Court could have committed the respondent for contempt of court for failing to comply with the order of the maintenance court, but concluded that the applicant had not established factual and legal grounds for the granting of such relief.

[16] For reasons which appear later in this judgment I do not agree with the finding that the applicant had not established a factual and legal basis for the granting of a contempt order. I agree, however, that this was the issue that had to be considered, and that it is the issue which arises for consideration in the appeal to this Court.

Whether the issue is a constitutional matter

[17] First it is necessary to consider whether the case concerns a constitutional matter within the jurisdiction of this Court. The respondent contended that the High Court did not have jurisdiction to commit him for contempt for his failure to comply with an order of the maintenance court. The High Court's powers are embodied in section 169 of the Constitution.[15] Any issue as to the nature and ambit of those

[15] Section 169 of the Constitution provides:

> "A High Court may decide–
> (a) any constitutional matter except a matter that–

powers necessarily raises a constitutional question. Furthermore, the applicant challenges the test set by the SCA for determining the circumstances in which a High Court should exercise its jurisdiction, on the basis that it failed to take into consideration and give due weight to the best interests of the children in this matter and the state of the maintenance system in South Africa and its effect on gender equality. Section 28(2) of the Constitution enjoins a court to give paramountcy to the best interests of the child "in every matter concerning the child". A dispute as to whether this was done by the SCA raises a constitutional matter. As appears in paragraphs 29-30 below, this case also raises issues of gender equality relevant to the manner in which a court should approach a case such as this. Inquiries into these issues are constitutional matters and are properly before this Court. Given this and the fact that applicant has reasonable prospects of success, it is in the interests of justice for special leave to appeal to be granted.

Inherent jurisdiction of the High Courts

[18] Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.[16] What is less clear is whether it is competent for a High Court to make an order for contempt of court for the failure to comply with an order made by a magistrate's court. This question was left open by the SCA in this

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(i) only the Constitutional Court may decide; or
(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament."

[16] *Hofmeyr v Fourie; B.J.B.S. Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C) at 594C-D.

case. While it was willing to assume that the High Court had such jurisdiction, it concluded on the evidence that the applicant had not pursued her remedies under the Act "fully and diligently" and that there were accordingly insufficient grounds for the High Court to have made the order that it did.

Circumstances in which a High Court should exercise its inherent jurisdiction

[19] In terms of section 8 of the Constitution the judiciary is bound by the Bill of Rights.[17] Courts are empowered to ensure that constitutional rights are enforced. They are thus obliged to grant "appropriate relief" to those whose rights have been infringed or threatened.[18] In *Fose v Minister of Safety and Security*[19] Ackermann J said:

> ". . . I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal." (Footnote omitted.)

[17] Section 8(1) provides, "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[18] Section 38 of the Constitution states,

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights . . ."

[19] 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[20] There is however no need to forge new remedies permitting the High Court to enforce a maintenance order made by the maintenance court. Process-in-aid is an appropriate remedy for this purpose. It is the means whereby a court enforces a judgment of another court which cannot be effectively enforced through its own process.[20] It is also a means whereby a court secures compliance with its own procedures.[21] Although process-in-aid is sometimes sanctioned by a statutory provision or a rule of court,[22] it is an incident of a superior court's ordinary jurisdiction.[23] Contempt of court proceedings are a recognised method of putting pressure on a maintenance defaulter to comply with his/her obligation.[24] An application to the High Court for process-in-aid by way of contempt proceedings to secure the enforcement of a maintenance debt is therefore appropriate constitutional relief for the enforcement of a claim for the maintenance of children.

[21] This does not mean that High Courts can be seized of all claims for maintenance. Process-in-aid is a discretionary remedy. In *Troskie v Troskie*[25] the court dealt with the question of whether it should exercise a discretion which it had

[20] Van Zyl *The Theory of the Judicial Practice of South Africa* Vol. 1, 3rd ed. (Juta: Cape Town, 1921) at 370 describes process-in-aid as "an authority from a higher tribunal to supplement the jurisdiction of a lower tribunal."

[21] See *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 11; and *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 7, 14, 21, 33, 36, 84 and 91.

[22] See, for instance, *Ex Parte Rabinowitz NO: In re Estate Sirkin v Zahrt* 1948 (4) SA 286 (SWA) at 288.

[23] *Riddle v Riddle* 1956 (2) SA 739 (C) at 745H.

[24] *Sparks v Sparks* 1998 (4) SA 714 (W) at 725H.

[25] 1968 (3) SA 369 (W) at 370G-371D.

under the rules of court as they then existed,[26] to conduct an enquiry into the financial position of a person who had failed to make payment in terms of a maintenance order and to grant appropriate relief in the light of such examination. In developing the test for the exercise of the discretion, Trollip J said the following:

> "Now the important factor relating to the exercise of such discretion by the Court is the existence of the Maintenance Act, 23 of 1963, as amended by Act 19 of 1967. In that Act ample provision is made for the enforcement, and the variation if necessary, of any order for maintenance made by a Supreme Court by the appropriate magistrate's court by means of a simple, inexpensive and effective procedure.
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> . . . .
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> Those provisions were obviously designed to expedite and to simplify the procedure relating to maintenance orders, and, above all, to avoid the necessity of the parties having to resort to the far more costly procedure of applying to the Supreme Court for relief. A further object must have been to relieve the Supreme Court from having to deal with the somewhat frequent applications that, in the past, were directed to it to enforce or vary maintenance orders.
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> It seems to me, therefore, that this Court, in the exercise of its discretion, should not entertain any application under Rule 45(12)(*i*) to enforce payment of the arrears of a maintenance order, unless there are good and sufficient circumstances warranting it."

[22] Process-in-aid will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used.[27] However, there may well be instances in which the facts of a particular case justify approaching a High Court for such relief. Although *Troskie* was concerned with the

[26] Rule 45(12)(h)-(j). These sub-rules have been repealed.

[27] *Bosman v Bredell* 1932 CPD 385 at 388.

circumstances in which a High Court should invoke rule 45(12) of the Supreme Court Rules which requires the Court to conduct an investigation into the financial position of a person for the purposes of enforcing payment of a High Court maintenance order, the policy considerations underlying that test are equally applicable in this case.

[23] It is for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court. What constitutes "good and sufficient circumstances" warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights of the complainant and the best interests of the children. This much is confirmed in section 38 of the Constitution which permits a court to grant appropriate relief where it is alleged that a right in the Bill of Rights has been infringed or threatened.

[24] The right in question in children's maintenance matters is contained in section 28 of the Constitution.[28] Section 28(2) provides:

[28] Section 28(1) of the Constitution provides:

> "(1) Every child has the right−
> (a) to a name and a nationality from birth;
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (c) to basic nutrition, shelter, basic health care services and social services;
> (d) to be protected from maltreatment, neglect, abuse or degradation;
> (e) to be protected from exploitative labour practices;
> (f) not to be required or permitted to perform work or provide services that−
> (i) are inappropriate for a person of that child's age; or
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be−

> "A child's best interests are of paramount importance in every matter concerning the child."

Children have a right to proper parental care. It is universally recognised in the context of family law that the best interests of the child are of paramount importance.[29] While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents,[30] there is an obligation on the state to create the necessary environment for parents to do so. This Court has held that the state

> ". . . must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28."[31]

(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict."

[29] International law also affirms the "best interests" principle and many countries have subsequently incorporated it into their constitutions or child and family legislation. Article 3(1) of the United Nations Convention on the Rights of the Child, 1989 requires that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Similar pronouncements are found in article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter). It is significant that the preamble to the Act refers to South Africa's commitment under these international instruments. South Africa ratified the United Nations Convention on 16 June 1995 and the African Children's Charter on 7 January 2000. See also *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC) at n 19.

[30] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 77; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 77.

[31] *Grootboom* id at para 78.

[25] As reflected in the preamble to the Act, our country has committed itself to giving high priority to the constitutional rights of children. It has provided the legal infrastructure through the Act thereby giving effect to the imperative contained in section 28 of the Constitution.[32] The Act is a comprehensive piece of legislation designed to provide speedy and effective remedies at minimum cost for the enforcement of parents' obligations to maintain their children. This Act followed the highly criticised Maintenance Act 23 of 1963 in an attempt by the Department of Justice to address the systemic failures of the maintenance system.[33] The Act includes a number of innovations, including the introduction of maintenance investigators. Established in terms of section 5 of the Act,[34] the maintenance investigator, acting subject to the directions and control of a maintenance officer, investigates any complaint relating to maintenance and gathers relevant information, including information on the financial position of any person affected by the liability created by a maintenance order. In terms of section 27(2)(b) of the Act, when a complainant applies for a warrant of execution against the movable property of a maintenance

[32] The preamble of the Act specifically provides that the "Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted . . . to improve the quality of life of all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system . . ."

[33] See n 36 below.

[34] Section 5 of the Act provides:

> "(1) The Minister, or any officer of the Department of Justice authorised thereto in writing by the Minister, may appoint in the prescribed manner and on the prescribed conditions one or more persons as maintenance investigators of a maintenance court to exercise or perform any power, duty or function conferred upon or assigned to maintenance investigators by or under this Act.
> (2) The Minister shall take all reasonable steps within the available resources of the Department of Justice to achieve the progressive realisation of the appointment of at least one maintenance investigator for each maintenance court."

defaulter, it is the task of the maintenance investigator or the maintenance officer to assist the complainant in facilitating this process.[35]

[26] Despite the good intentions of this comprehensive legal framework specifically created for the recovery of maintenance, there is evidence of logistical difficulties in the maintenance courts that result in the system not functioning effectively.[36] The CGE placed material before the Court, demonstrating the difficulties with the operation of the Act, including problems ranging from inadequately trained staff to insufficient facilities and resources.[37]

[27] Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the

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[35] The section instituting maintenance investigators has however not yet been brought into effect due to budgetary constraints. See Wamhoff *South Africa's New Maintenance System: Problems and Suggestions* (Centre for Socio-Legal Research Report No 5, Cape Town 2001) at 6.

[36] A number of reports, discussion papers and articles have been published on the state of the maintenance system in South Africa. See *Report of the Lund Committee on Child and Family Support, 1996* (Chapter 5: The Private Maintenance System); *South African Law Commission: Review of the Maintenance System* (Project 100, Issue Paper 5, 1997); and Clark, "The new Maintenance Bill: some incremental reform to judicial maintenance procedure" *De Rebus* (Dec 1998) 63. These works assisted in giving rise to the enactment of the Maintenance Act 99 of 1998, however the system continues to provide a host of problems for struggling single parents. See in particular Wamhoff above n 35.

[37] Cornerstone Economic Research *A baseline cost study on the appointment of maintenance investigators in terms of the Maintenance Act, 1998: Report 1 (2 July 2002*) at 19-25. This study was commissioned by the Department of Justice as part of an attempt to correct some of the systemic deficiencies in the maintenance system. It sets out a list of the current problems of the system, namely inadequately trained staff; inadequate numbers of staff; poor administration; low priority given to maintenance cases; an incoherent division of labour within the system; the lack of tracing defaulters; delays in service of process; failure to serve process; lack of adequate information within the system; inadequate court facilities; and inadequate technology and resources.

constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.

[28] It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.

[29] Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.

[30] These disparities undermine the achievement of gender equality which is a founding value of the Constitution.[38] The enforcement of maintenance payments

[38] Section 1(a) of the Constitution.

therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.

[31] The appropriate relief required by section 38 is relief that is effective in protecting threatened or infringed rights.[39] Where legislative remedies specifically designed to vindicate children's rights as efficiently and cost-effectively as possible fail to achieve that purpose, they do not provide effective relief. The SCA, in upholding the appeal, held that

> ". . . it has not been established that the statutory remedies have been fully and diligently pursued and have been found to be wanting."[40]

This fails to have regard to the fact that once the applicant had reported the respondent's maintenance default, the matter was then in the hands of the maintenance officer on whom there was a duty to investigate the complaint and provide the applicant with the requisite assistance to enforce the order.[41] It also fails to have regard to the parlous circumstances in which the applicant found herself, and the fact that despite her efforts to secure relief through the provisions of the Act, the

[39] See para 19 above.

[40] *Bannatyne v Bannatyne* Case No 177/2001, as yet unreported judgment of the Supreme Court of Appeal dated 16 May 2001, at para 10.

[41] See paras 5 and 25 above.

respondent had failed to pay any maintenance whatsoever to her and the children for seven months. If regard is had to all the circumstances there were indeed "good and sufficient circumstances" warranting an application to the High Court.[42]

[32] Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children. The respondent was entitled to apply for a variation of the maintenance order. But whatever excuse he might have had for failing to comply with the existing order, there was no excuse for his failure to pay even the reduced amount that he contended should be substituted for it. The respondent appears to have utilised the system to stall his maintenance obligations through the machinery of the Act. It appears from the evidence of the CGE that this happens frequently in the maintenance courts. The hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice.

Remedy

[33] After the applicant had launched the proceedings in the High Court, the respondent tendered through his attorneys to cede to her an amount of R34 366.06 out of the proceeds of the sale of fixed property which he had concluded. A deed of cession in such terms was signed by the respondent and enclosed with the letter. This represented the arrear maintenance at that date. The letter went on to request the

[42] *Troskie v Troskie* above n 25 at 371D.

applicant to withdraw her application to the High Court on the basis that each party would pay its own costs. According to the letter the only alternative to this would be for the respondent to arrange for his own sequestration, in which event − as the letter said − the applicant would receive nothing at all.

[34] The applicant's response to this letter was that she would not agree to withdraw the application simply on the basis of the cession. She had no information concerning the terms of the sale, when the purchase price would be payable and whether there were preferred creditors who might have a stronger claim to such proceeds. There was further correspondence concerning a possible settlement in which the respondent consented to an order requiring him to pay the maintenance promptly and to reimburse the applicant for all medical expenses incurred by her for the children within seven days of payment.

[35] The exchange of letters was said to be with prejudice and all this information was before the High Court. The judge in the High Court did not give reasons for the order he made, and it is not possible, therefore to know what weight he attached to this correspondence. The correspondence is also not dealt with in the judgment of the SCA.

[36] The belated offer by the respondent to meet his obligation to settle the arrears and to pay the maintenance promptly was clearly prompted by the High Court application. In the light of the respondent's past conduct, and the threat to cause

himself to be sequestrated, the applicant was entitled to proceed with the application. She had no assurance that the respondent would comply with his undertakings or that he would not again look for ways of avoiding them. The threat of sequestration could only have added to this concern. She was entitled to secure the protection of a court order and to ask for a sanction to be imposed if the undertaking was not complied with. The High Court agreed and sentenced the respondent to 90 days imprisonment for contempt of court, suspending the order for a period of 5 years on condition that the arrears be paid with interest within a period of three months, and ordered that the monthly maintenance be paid promptly.

[37] Although the order was fatally defective because it was made with reference to the High Court order and not the maintenance court order that had replaced it, the substance of the order as far as the arrears are concerned was correct.

[38] In the light of these considerations, I find that at the time the applicant brought the contempt proceedings in the High Court, grounds existed for the court to commit the respondent for contempt of court for failing to comply with the order of the maintenance court.

[39] We were informed by counsel that after the committal order was made in the High Court the arrear maintenance of R34 366.06 was paid out of the proceeds of the sale of the property. Since then, however, there has apparently been an ongoing

dispute about the payment of maintenance, which is the subject of a maintenance enquiry which was to take place on 9 December 2002.

[40] In the light of these changed circumstances, it is desirable that the initial contempt order of the High Court be partly set aside and that the inquiry concerning the question of past, present and future maintenance continue in the maintenance court. The maintenance court is the most appropriate forum to inquire into the changed circumstances and decide the matter. Given the long delay in this case, it seems necessary to expedite the matter and a copy of this judgment must be brought to the attention of the presiding maintenance officer.

Costs

[41] The applicant was represented by two junior counsel. She is entitled to her costs. The case is not one, however, that warrants the costs of two counsel.

Order

[42] In the result, the following order is made:

1. The application for special leave to appeal is granted.
2. The appeal is upheld.
3. The order made by the Supreme Court of Appeal is set aside.
4. In place of paragraphs 2.2 and 2.3 of the order made by Roux J the following order is made: "All matters pertaining to the payment of maintenance subsequent to February 2001 and to any arrear

maintenance that may be due and payable, and all other matters related to the dispute between the applicant and the respondent concerning payment of maintenance are referred to the maintenance court having jurisdiction for its determination."

4. The respondent (appellant in the proceedings of the Supreme Court of Appeal) is to pay the costs of the appeals to the SCA and to this Court.

5. A copy of this judgment is to be brought to the attention of the maintenance officer dealing with the dispute between the applicant and the respondent.

Chaskalson CJ, Langa DCJ, Kriegler J, Goldstone J, Madala J, Ngcobo J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Mokgoro J.

For the applicant:	P. Oosthuizen and P. W. Oosthuizen instructed by M Van Den Berg Attorneys, Pretoria.
For the respondent:	M. H. van Twisk instructed by Sanet De Lange Attorneys, Pretoria.
For the amicus curiae:	G. M. Budlender instructed by the Legal Resources Centre, Johannesburg.