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# *Ex parte* writ of execution for arrear maintenance against retirement funds

A recent case handed down by the Gauteng Local Division High Court confirmed the legal position dealing with giving a defaulting father notice that the mother (the respondent) intended to request a writ of execution *ex parte* in cases where a father (the applicant) is in default with a maintenance order.

In the matter of *VDB v VDB and Others* (GJ) (unreported case no 22/11181, 20-4-2022) (Siwendu J) handed down on 20 April 2022 the facts that led to the appeal were based on a divorce settlement between the parties where the applicant would contribute an amount of R 20 000 per month per child for child maintenance, including additional medical and educational expenses. The applicant argued that due to the COVID-19 pandemic, his financial circumstances changed and he subsequently fell into arrears with his monthly maintenance payments.

Without any notice to the applicant, Discovery made a deduction of R 776 661,28 from his retirement annuity following an *ex parte* application by the respondent in terms of s 27(1) and (2) of the Maintenance Act 99 of 1998 after filing a detailed schedule of arrear maintenance for the period between April 2020 to December 2021.

The applicant received no prior notice of the writ of execution and only became aware of the first deduction when he received notification from Discovery (the second respondent in the matter) that the funds were already withdrawn from his retirement annuity in the amount of R 776 661,28. A month later he received a WhatsApp message from the respondent of her intention to again cause a deduction to be made from his retirement annuity to cover the arrear maintenance.

The applicant approached the court on an urgent basis to protect his investment and joined another financial institution as third respondent in order to prevent any further deductions. He claimed, 'that it is unfair for such application to be made without notice to him and without any opportunity granted to him to make representations to the court'.

The procedure for obtaining and serving a writ in the Maintenance Court is clearly defined in s 27(1) and (2) of the Maintenance Act.

Section 27(2)(b) allows for a person in whose favour a maintenance order was issued in taking the necessary steps with assistance of the maintenance officer to facilitate the execution of a warrant.

Neither s 27, nor the forms prescribed for such an application in Maintenance Courts (see J306 Form: 'Application for enforcement of maintenance or other order in terms of section 26 of the Maintenance Act, 1998' ([www.justice.gov.za](http://www.justice.gov.za), accessed 31-5-2022) and J397 Form: 'Warrant of execution against property in terms of section 27 of the Maintenance Act'), 'makes provision for the application to the maintenance court for the authorisation of the issue of a warrant of execution to be on notice to the party against whom the maintenance order had been made. It appears competent for such an application to be made *ex parte*' (*MV v CV* 2014 (3) SA 1 (KZP)).

In the *MV v CV* matter the court held that the only jurisdictional prerequisites necessary were:

- there must be a valid maintenance order (even if subject to appeal);
- a maintenance order against the respondent against whom the warrant is sought;
- arrears of maintenance payments which have remained unsatisfied for a period of ten days.

Koen J noted that if the above 'requirements are satisfied, then the issue of a warrant should be authorised and it will be up to the party against whom the maintenance order operates to invoke any of his remedies in terms of s 27(3) or (4)'.

The court in the *VDB v VDB* case under discussion, rightly so, clarified that in circumstances where there is a dispute about the amount owing under an existing maintenance order, it seems the only remedy for an aggravated party is found in s 27(3) which provides that:

'A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section,

set aside the warrant of execution *if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question*' (my italics).

An aggrieved party wanting to set aside the warrant of execution after the maintenance court was satisfied that the pre-existing maintenance order was complied with could bring such an application by completing the prescribed J435 Form: 'Application for setting aside a warrant of execution in terms of section 27(3) of the Maintenance Act, 1998' ([www.justice.gov.za](http://www.justice.gov.za), accessed 31-5-2022).

Siwendu J ruled that 'where there is a pre-existing Maintenance Court Order, there is no mechanism to resolve a dispute about the quantum owing before the issue of a writ nor a requirement for a notice before the issue of such a writ. The only redress I can discern afforded to the applicant is in section 27(3) as aforesaid.'

Furthermore, the judge remarked that it is clear from the wording of s 27 that the Legislature saw it fit not to afford the applicant a right to a notice before the issue of a writ of execution was issued and accordingly dismissed the appeal.

The clarification in *VDB v VDB* is welcomed and seemingly follows the *September v September* (WCC) (unreported case no A388/11, 15-2-2012) (Binns-Ward J) case where Binns-Ward J emphasised that 'the appellant can adequately protect his interests by paying the arrear maintenance under protest and contingent upon his right to recover the expenditure from the respondent subsequent to obtaining a rectification of the deed of settlement and a consequential amendment of the court order'.

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