IN THE HIGH COURT OF SOUTH AFRICA Reportable Judgment

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no. A 104/2007

CAMILLA JANE MCDOWELL Appellant

v

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Respondent

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JUDGMENT DELIVERED THIS MONDAY, 21 MAY 2007

CLEAVER J

[1] The appellant sued the respondent, the Minister of Justice and Constitutional Development in the Wynberg Magistrates' Court for the payment of damages allegedly suffered by the appellant as a result of the negligence of the respondent.

[2] The appellant had previously been married to Mr G T Paget ("Paget") to whom the custody of a minor son born of the marriage between the parties had been awarded. In June 2001 Paget filed a complaint as defined in s 6 of the Maintenance Act No 99 of 1998 ("the Act") at the Wynberg Magistrates' Court in terms whereof he applied for the substitution of the existing maintenance order whereby the appellant was paying R250 per month to him as maintenance for the minor child with an order for the appellant to pay R3 300 per month.

[3] Paget's application was investigated by a maintenance officer who referred the matter to the maintenance court for an enquiry at which the appellant was represented by counsel. After hearing evidence from Paget, counsel for the appellant applied for an order dismissing the application without further hearing on the basis that good cause had not been shown for the substitution of the maintenance order. This application was upheld, the magistrate holding that the maintenance officer had failed in his duty properly to investigate the matter with the result that it should not have been referred to a maintenance court. However, since the magistrate considered that it was common cause between the parties that the appellant was prepared to increase her maintenance payments for the child *"by the amount which she has tendered from the date which she has tendered the court is more than willing to make an order in favour of the applicant for that amount alone effective from 1 March 2002".* In the result the appellant was ordered to increase her maintenance payments to R330 per month with effect from 1 March 2002.

[4] The claim against the respondent was unusual and probably novel, being based on allegations that employees of the respondent, acting within the course and scope of their employment, had acted negligently in referring Paget's request for the maintenance to be increased to a maintenance court. The amount claimed as damages was said to be the sum paid by the appellant in legal fees in order to secure legal representation at the enquiry

[5] The particulars of claim are not a model of clarity. In the main claim the appellant sought to hold the respondent liable on the basis of omissions ascribed to the respondent in that parties who dealt with the application for substitution of the maintenance order prior to it reaching the final investigation by a maintenance officer had not been properly appointed and/or had not been vested with the requisite authority and training. The alternative claim mixed alleged omissions and positive actions on behalf of the maintenance officer who conducted the final investigation, a Mr Zeeman ("Zeeman"), but ultimately the appellant's case was that Zeeman did not investigate the matter properly and was negligent in referring the matter to the maintenance court as good cause for the substitution of the existing maintenance order had not been made out. Since the appellant's claim could only arise once Zeeman had decided that the application should be dealt with by a maintenance court (her costs were incurred only after Zeeman took his decision), it is not necessary to consider the applicant's claim based on negligence by omission.

[6] In a judgment handed down on 1 October 2006 the appellant's claim against the respondent was dismissed with costs and the appellant now comes on appeal to us against this decision.

[7] In the court *a quo*, the appellant relied heavily upon the opinion of Mr N H Jones who was called as an expert witness by the appellant. It was a little surprising to find that Mr Jones was the magistrate who presided over the initial enquiry. Since the very basis of expert evidence is to provide objective, independent expertise, Mr Jones

clearly cannot be seen to meet that test, having regard to the findings which he had made in the maintenance court. I say this without in any way questioning his bona fides or honesty.

[8] The relevant portion of s 6 of the Act reads as follows:

> ***Complaints relating to maintenance.***—*(1) Whenever a complaint to the effect –*
> *(a) …..*
>
> *(b) That good cause exists for the substitution or discharge of a maintenance order, has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.*
>
> *(2) After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides with a view to enquiring into the provision of maintenance for the person so to be maintained."*

Section 7 of the Act gives a maintenance officer certain powers in order to investigate a complaint.

[9] Unfortunately, the need to distinguish between wrongfulness and negligence in a delictual claim was not properly dealt with before the magistrate, nor indeed before us.

[10] As explained by **Harms** JA in *Telematrix (Pty) Ltd v Advertising Standards Authority SA*[1]

> *"[I]n order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it."*

[11] Conduct is said to be wrongful if it either infringes a legally recognised right of the plaintiff or constitutes the breach of a legal duty. The legal duty may be a statutory one, or one stemming from the common law. In the present case we are concerned with the breach of a statutory duty.

[12] For the appellant to have succeeded in the court *a quo* she would have had to establish that the conduct of Zeeman was objectively unjustifiable. Midgley and Van der Walt, writing in Lawsa, give the following useful summary of the factors which are taken into account in order to determine whether conduct is wrongful:

> *"Wrongfulness is determined according to the general criterion of reasonableness, sometimes referred to as the criterion of objective reasonableness. Conduct is wrongful or unlawful if it is unreasonable, in other words when, in the light of all the circumstances, the defendant is expected to behave in a manner which will not harm the plaintiff. Courts also refer to concepts such as the* boni mores*, the prevailing conceptions in a particular community at a given time, or the legal convictions of the community. Each of these is merely a different expression of the general criterion of reasonableness. To determine whether conduct is reasonable or unreasonable, courts must consider and balance the particular conflicting interests of the parties, including facts which are subjective to them, the*

[1] 2006 (1) SA 461 at 468B

> *parties' relation to each other, the particular circumstances of the case, whether the harm was foreseeable, whether any superior legal rights exist, constitutional values and any other appropriate considerations of social policy. Each factual situation raises its own considerations. It is now openly acknowledged that the inquiry into wrongfulness involves considerations of public and legal policy, and that courts are required to render a value judgment as to what society's notions of justice demand, either to protect the plaintiff's interests, or to give judicial sanction to the defendant's conduct. In doing so, a court must consider all the circumstances of the case."*[2]

It has also been held that a society's *boni mores* or legal convictions are not static and evolve over time to accommodate changing values and in this connection it must also be borne in mind that the values expressed in the constitution reign supreme. In my view, regard must also be had to the position held by Zeeman. Although he was not a judicial officer, but a prosecutor appointed to carry out the functions of a maintenance officer, he certainly fulfilled a quasi-judicial role. In that position he had a duty to investigate complaints laid before him and not to err negligently. Dealing with the issue of wrongfulness in respect of a decision taken by a judicial officer **Harms** JA said the following in the *Telematrix* case:-

> *"To illustrate: there is obviously a duty – even a legal duty - on a judicial officer to adjudicate cases correctly and not to err negligently. That does not mean that a judicial officer who fails in the duty, because of negligence, acted wrongfully. Put in direct terms: can it be unlawful, in the sense that the wronged party is entitled to monetary compensation, for an incorrect judgment given negligently by a judicial officer, whether in exercising a discretion or making a value judgment, assessing the facts or in finding, interpreting or applying the appropriate legal principle? Public or legal policy considerations require that there should be no liability, i.e., that the potential defendant should be afford immunity against a damages claim, even from third parties affected by the judgment."*[3]

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[2] Lawsa (Second Edition) Volume 8, Part 1, p83, para 60

[3] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 at 469C-E; Cf *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 33D-E

In my view similar considerations would apply when assessing the conduct of a maintenance officer.

[13] In the present case counsel for the appellant relied on cases dealing with the establishment of 'good cause' for the variation of an order and, as it was termed in the previous act, 'sufficient cause' and in doing so, conflated the role of the maintenance officer, which is to investigate a complaint and thereafter in his or her discretion to institute an enquiry in the maintenance court, and the decision-making role of the magistrate in the maintenance court. Much was made of the manner in which the application by Paget was framed. In the form initiating the proceedings, the reasons for the substitution of the maintenance order were given as

> *"The cost of living has increased. First time that I am applying for an increase. My ex-wife's circumstances has* (sic) *improved since 1998 up till now."*

In his letter to the appellant he also justified his application on the basis that living expenses had increased and that it cost more to maintain the son by reason of him having grown older. Zeeman was criticised for having spent very little time interviewing the parties and for failing to insist that Paget provide documentation to support his claims as to the extent of his alleged expenses. In my view it is clear that Paget's application to increase the maintenance payments from R250 per month to R3 300 per month was unreasonable and Zeeman is on record as having expressed the same view. However, I am also prepared to accept that Paget adopted an unreasonable attitude during the investigation and that, as Zeeman testified, the discussions between the parties became heated. During the course of

the discussions, the appellant offered to increase the maintenance payment to R330 per month, but that was flatly rejected by Paget. Although Zeeman was of the view that the claim for increased maintenance was unreasonable, he testified that

> *"Irrespective of which reason Mr. Paget was using to this complaint, or request for an increase, in my opinion, at that specific time an increase was due."*

And further, in regard to the issue of the general costs of living

> *"But besides that, I was also of the opinion that seeing that the maintenance order was written up I think by the divorce court in 1998, it was already 3 years since that order had been written up, and the child had aged, and it is common knowledge that as children increase in age, their needs and expenses that need to be incurred on their behalf, also increase, and just the general cost of living that increases, I was of the opinion that there was cause for this matter to be considered a bit further than just that initial investigation stages."*

He then postponed the matter for trial on 17 September 2004. On that day, when the appellant had legal representation, a further brief investigation took place and the matter was then postponed, again for trial, on 11 November 2004.

[14] It is unfortunate that the terminology of referring the matter to trial was utilised, for the appellant testified that this caused her considerable concern and anxiety. Unfortunately it would appear that it was the custom to use this terminology and Zeeman says that he simply adopted the usage when he became the maintenance officer. It would obviously have been preferable not to refer to a trial and rather to an enquiry and it is hoped that this will occur in the future. Zeeman testified further that he had hoped that in discussion with the parties, he would have persuaded them to come to a mutually acceptable arrangement, but in view of the attitude of

Paget in particular, it was quite clear that he would not be able to reach agreement as to the amount of any increase. He was not authorised to make any order and for that reason referred the matter to the magistrate for an enquiry.

[15] Having regard to all the circumstances of the matter and in particular considerations of public and legal policy, I am of the view that the appellant failed to establish that Zeeman's conduct was delictually wrongful. Factors, not exhaustive, which are of importance, are:-

* It was the magistrate who had to decide whether good cause had been shown.
* The harm which the appellant says she suffered was not foreseeable.
* Ultimately the enquiry concerned the best interest of the child.
* In referring the matter to the maintenance court, Zeeman exercised his discretion to do so.
* Public policy requires that there should not be liability resulting from Zeeman's action in referring the matter to the maintenance court.

[16] As I have mentioned it was also contended that the respondent had been negligent in failing to provide Zeeman with proper training in order to perform the functions of a maintenance officer. Section 4(1)(a) of the Act provides that any public prosecutor shall be deemed to have been appointed as a maintenance officer. Zeeman was such a prosecutor and was appointed as a maintenance officer. The Act does not prescribe any training for a maintenance officer. Zeeman holds a B.Juris degree which he obtained in 1997 and was employed at the Wynberg Magistrates' Court as

a prosecutor/maintenance officer for the period July – October 2001. Although he did not receive any formal training, he had considerable experience by the time he dealt with the matter under review. Prior to commencing his work as a maintenance officer, he did volunteer work at the maintenance court in May 2001. During this period he sat in court each day observing the procedures and was also involved in the work done in other offices. During the last work of his volunteer stage, he was placed in the maintenance office where he sat and observed and took part in investigations on occasion. He took the files which were listed for the following day's investigation home with him in the evening and went through them carefully in preparation for the next day's matters. In the month of July 2001 he was the only maintenance officer in the Wynberg court, but he did have access to senior prosecutors whom he could consult and who would give him guidance and direction. He was acquainted with the Maintenance Act which he had studied. During his first month he handled over 300 maintenance cases and by the time that he met the parties he estimates that he would have handled more than 400 cases. Having regard to the fact that it is the appellant's case that she suffered damages because Zeeman referred the complaint to a maintenance court, it is strictly speaking not necessary to consider whether the failure of the defendant to provide proper training for Zeeman was the cause of the damage sustained by the appellant. Be that as it may, and having regard to the critical shortage of manpower in South Africa at the present time, I am satisfied that in the particular circumstances of this case, the appellant failed also to establish wrongfulness on the part of the defendant in so far as the alleged lack of training of Zeeman was concerned.

[17] In view of the conclusions which I have reached in regard to wrongfulness, it is not necessary to consider whether the appellant established whether Zeeman's conduct had been negligent. Applying the test laid down in *Kruger v Coetzee*[4] it is in any event doubtful whether the appellant would have succeeded under this heading.

[18] There is one last issue which may briefly be mentioned and that is the issue of causation. The question which must be asked is whether the result would not have been the same had Zeeman acted correctly. Having regard to the appellant's offer to increase the amount of her payments to R330 per month, it seems likely that the same order would have been made. In the result, causation has not been established.

[19] Although the magistrate dealt only with the question of negligence, it follows from the aforegoing that there is no reason to interfere with her ultimate finding. In the circumstances the appeal is dismissed with costs.

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R B CLEAVER

MOOSA J

I agree.

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[4] 1966 (2) SA 428 (A) at 430E-G

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