THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 177/2001

In the matter between :

LAURIE NOËL BANNATYNE Appellant

and

NADENA BANNATYNE Respondent

Before:	**OLIVIER, NAVSA & NUGENT JJA**
Heard:	**10 MAY 2002**
Delivered:	**16 MAY 2002**

Maintenance Court order replacing order of High Court – High Court order no longer enforceable.

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] The parties to this appeal were formerly married to one another but were divorced by order of the Pretoria High Court on 4 February 1999. At the time the marriage was dissolved the court made an order, by consent, that required the appellant, *inter alia,* to pay maintenance for the respondent and their minor children, to retain them on his medical aid scheme, and to bear certain medical costs.

[2] The consent order recorded that, notwithstanding their agreement, both parties regarded the amounts of maintenance to be inappropriate (naturally for opposing reasons) and that in the circumstances either party would be entitled to approach the maintenance court for the amounts to be re-evaluated.

[3] Soon after the order was made the appellant applied to the maintenance court for the amounts to be reduced. On 5 January 2000 that court issued an order requiring the appellant to pay reduced amounts of maintenance, plus "medical costs as per original order", with effect from 1 March 2000, in substitution for the order that had been made by the High Court on 4 February 1999.

[4] Thereafter the appellant fell into arrears. He also withdrew the children from his medical aid scheme and failed to pay certain of their medical costs. The appellant attributes his failure to meet his obligations to a deterioration in his financial circumstances. Whether or not that explanation is truthful is irrelevant to this appeal.

[5] The respondent invoked certain of the mechanisms provided for in the Maintenance Act 99 of 1998 to enforce the order that was made by the

maintenance court but to no avail. She then approached the High Court, on Notice of Motion, for an order committing the appellant to prison for "contempt of the order made on 4 February 1999" but suspending that part of the order on certain conditions. The application came before Roux J in the urgent motion court who granted an order in the terms that were sought.

[6] At the time the order was sought the attention of the learned judge was not pertinently drawn to the fact that the High Court order of 4 February 1999 had been substituted on 5 January 2000 by an order of the maintenance court. In terms of s. 22 of the Act the effect of that substitution was that the High Court order thereupon ceased to be of force or effect, at least insofar as it dealt with matters that were provided for in the maintenance court order (cf. *Purnell v Purnell* 1993 (2) SA 662 (A) in relation to the equivalent provisions of the earlier legislation). When that was drawn to his attention the learned judge readily granted the appellant leave to appeal to this Court.

[7] Clearly it was not competent to commit the appellant to prison for contempt of the High Court order (which is what the court *a quo* purported to do) and on those grounds the order falls to be set aside. The respondent submitted, however, that the court *a quo* was nonetheless entitled to commit the appellant to prison for contempt of the substituted order made by the maintenance court and for that reason its order should be permitted to stand.

[8] When the High Court entertains civil proceedings for committal for contempt it does so in the exercise of its inherent jurisdiction to ensure that its orders are obeyed. A maintenance court does not have those inherent powers, but there are statutory remedies for the enforcement of its orders. Its orders may be enforced by execution upon the property of the person against whom the order has been made, or by the attachment of emoluments or debts due to him (s. 26) and the failure to comply with such an order might also constitute

a criminal offence (s. 31). The respondent submitted, however, that those remedies are not exclusive and that the High Court, in the exercise of its inherent jurisdiction (more particularly when the order affects children), is entitled to commit for contempt of such an order.

[9] I am willing to assume for purposes of this appeal that the High Court is indeed entitled to commit for contempt of the order of a maintenance court. If that is so then clearly it is a matter that falls within its discretion. In my view any such discretion is one that ought to be exercised sparingly and only in exceptional circumstances for the legislature has provided effective remedies that were not intended to be ignored. In my view there would have been insufficient grounds for that discretion to be exercised in favour of the respondent in the present case. Two attempts were made to execute against property that was believed to belong to the appellant but both attempts came to nought. On one occasion the property concerned was found to belong to a

bank, and on the other occasion the appellant's current partner, and the children of a former marriage, alleged on oath that the property belonged to them, and on the present papers those allegations cannot be found to have been false. The respondent alleges further that when she wanted to prefer a criminal charge against the appellant for failing to meet his obligations he immediately applied for a further reduction of the amount that was payable, and that that application was subsequently postponed on various occasions. No doubt the appellant was entitled to make that application and there is no suggestion that the magistrate failed in his duty by postponing the hearing on inadequate grounds. Nor, I might add, is there any explanation for why a prosecution was not initiated in any event.

[10] In my view it has not been established that the statutory remedies have been fully and diligently pursued and have been found to be wanting. In those circumstances there were no adequate grounds upon which the court *a quo*

might have made a committal order, even if the correct facts had been to hand, and there is no reason why its order should be permitted to stand.

[10] The appeal is upheld with costs. The order of the court a quo is set aside and the following order is substituted:

"The application is dismissed with costs."

NUGENT JA

OLIVIER JA)
NAVSA JA) CONCUR