



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 37/2013

In the matter between:

DAMOLINE MURUKO

and

ELLIS MIEZE

(HIGH COURT MAIN DIVISION REVIEW REF NO. 516/2013)

Neutral citation: *Muruko v Mieke* (CR 37/2013) [2013] NAHCMD 228 (31 July 2013)

Coram: HOFF J and VAN NIEKERK J

Delivered: 31 July 2013

Summary: Maintenance orders made in terms of the Maintenance Act 9 of 2003 are not subject to review in terms of section 304 of the Criminal Procedure Act 51 of 1977.

ORDER

The maintenance order of the magistrate is not reviewable in terms of the provisions of s 304(4) of Act 51 of 1977 and the record of the proceedings is accordingly returned to the clerk of the court.

JUDGMENT

HOFF J (VAN NIEKERK J concurring):

[1] This matter was sent on special review in terms of the provisions of s 304(4) of Act 51 of 1977 by magistrate Mr Endjala, who is the Head of Office of the Mungunda Street, Magistrate's Court in Windhoek.

[2] In a covering letter magistrate Endjala drew my attention to the fact that the presiding magistrate had antedated a maintenance order and he stated that the magistrates court, unlike the High Court, has no jurisdiction to do so, that such order is irregular and illegal, and asks for the rectification of such order.

[3] The order given by the presiding magistrate on 26 February 2013 reads as follows:

- '1. The defendant is ordered to pay monthly an amount of N\$2000 towards maintenance of the beneficiary.
2. Payments must be made to the complainant by depositing into her bank account, on or before the 3rd day of each month with effect from 03 July 2012.
3. This order substitutes all previous maintenance agreements and orders.'

[4] It is apparent from the record of the maintenance enquiry in the magistrate's court, that the reason why paragraph 2 was ordered, appears from the reasons for judgment by the magistrate, which reads as follows:

'Ms Kagnetta applied that the maintenance order be backdated to 03 July 2012. Her reason was that the defendant is the one who delayed the case for so long because he wanted a legal representative. This application was not opposed. Also the court is of the view that the defendant didn't contribute much during the past year, and that the complainant is entitled to a backdated order.'

[5] Section 25(1) of the Maintenance Act 9 of 2003 provides as follows:

'Save as otherwise provided in this Act, any order or direction made by a maintenance court under this Act has the effect of an order or direction of the said court made in a civil action.'

and s 13(4) reads as follows:

'Subject to subsec (5), the Civil Proceedings Evidence Act 25 of 1965 in so far as it relates to the admissibility and sufficiency of evidence, the competency, compellability and privileges of witnesses, subject to necessary changes, applies to an enquiry conducted under this Act and any matter related to the conduct of proceedings at an enquiry which is not provided for in that Act or this Act must be dealt with in accordance with the practice and procedure followed in civil proceedings in a magistrate's court.'

[6] The question is whether the magistrate could have, with due regard to sections 13(4) and 25(1), sent this matter on special review in terms of the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977 ? In my view it does not seem so since s 304(4) of Act 51 of 1977 deals with criminal cases where sentences had been imposed whereas s 25(1) in particular provides that an order made by the maintenance court has the effect of an order made in a civil action.

[7] A party therefore who is not satisfied with the order made by a magistrate in a maintenance enquiry may seek the necessary relief either by way of civil appeal or

by way of review in terms of the provisions of s 20 of the High Court Act 16 of 1990.
(See *Maguma v Ntengento* 1979 (4) SA 155 (CPA) at 157).

[8] The maintenance order of the magistrate is not reviewable in terms of the provisions of s 304(4) of Act 51 of 1977 and the record of the proceedings is accordingly returned to the clerk of the court.

E P B HOFF
Judge

K Van Niekerk
Judge