

Legal update 4 of 2021: Failure to pay maintenance

Introduction

This update deals with a case decided by the Gauteng High Court, Johannesburg which related to an application for contempt of court order where a father did not pay maintenance as ordered in a divorce order. Below is a summary of the case and insight into how we deal with these issues on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund ('the Funds'). We have also included more detail on the case in the document.

Summary

Case: AR v MN: Gauteng High Court, Johannesburg
(Case No: 26583/2014) Unreported
(21 September 2020)

Can a court order the arrest of a person who has failed to pay maintenance in terms of a court order?

- **The finding:** Yes, a court can order the arrest of a person who has failed to pay maintenance in terms of a court order. The father's failure to pay maintenance was not based on his inability to pay due to his misconduct or unwillingness to work. He earned almost R150 000 a month and decided to continue driving an expensive car. His failure to pay maintenance was therefore found to be acting in bad faith beyond reasonable doubt because

he claimed that it was more important for him to pay his other debts than to comply with the court order.

- **How we deal with this:** The Pension Funds Act allows for maintenance to be deducted from a member's retirement fund benefit. The Funds will deduct arrear maintenance, in terms of a court order, from the member's benefit and pay it as a lump sum to the person entitled to the maintenance. Where the order includes or provides for future maintenance, the Funds will pay the future maintenance as a lump sum if there is proof of *mala fides* (bad faith) on the part of the member.

More detail of the case

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In this matter, the applicant, who was the mother of the respondent's two minor children, applied to the High Court to have the father of the children declared to be in

contempt of court (disregarding a court order). The mother and the father were divorced in 2017 and in terms of the divorce order the father was to pay maintenance of R7 500 per child per month. This amount would increase every year by inflation (CPI). The father was also supposed to pay half of the children's medical aid expenses, school fees, tuition fees, school uniforms and extra murals and various other expenses.

The father had stopped paying maintenance since February 2018 and was in arrears by R742 000 by August 2020.

The father objected to the application on the basis that:

- He had applied to the Maintenance Court to have the maintenance amount reduced to an amount he claimed he could only afford, which was R2 500 per child per month and one third of the children's school fees, which would amount to some R220 000 per year for the two children together, i.e. some R6 000 per month.
- According to a schedule of alleged income and expenses he produced in August 2019, he earned a net amount of R74 000 a month in income. He listed numerous creditors and expenses and alleged in August 2019 that he had a surplus of only some R2 600 per month.

The court rejected the father's claim that he was unable to pay maintenance for the following reasons:

- The father was earning a gross salary of almost R150 000 a month.
- He continued to drive a BMW that cost him more than R11 000 a month.
- His employer was contributing more than R10 000 per month towards his retirement savings.
- He spent around R13 800 a month on gambling and online trading.

The Court further found that in terms of section 31 of the Maintenance Act, a person cannot avoid being prosecuted

for failing to pay maintenance because the inability to pay is due to his misconduct or unwillingness to work. In that case if the person, who can show that he is unable to pay based on a true absence of means, is unable to avoid being convicted because of misconduct or unwillingness to work, then a man who earned almost R150 000 a month and decided to continue driving an expensive car could only be found to be acting in bad faith beyond reasonable doubt because he claimed that it was more important for him to pay his other debts than to comply with the court order.

The Court also found that even if the father's debts were ignored, the Court could not ignore the fact that he spent almost R14 000 a month on gambling and online trading. This indicated that the father may have a gambling problem. As the father denied having a gambling problem, this could only lead to the conclusion that he wilfully did not meet his maintenance obligations. Furthermore, the father also showed bad faith by not paying the reduced maintenance amounts that he claimed he could afford.

The Court found the father to be in contempt of the 2017 divorce order and ordered that he be arrested and jailed for 30 days. The order for the father's arrest was suspended for a year, on condition that he pay R537 499 in instalments of R30 000 a month to the mother by 30 September 2021.

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