

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

No. 541 of 2005

BETWEEN

GAIL BOVELL

APPLICANT

AND

WINSTON BOVELL

RESPONDENT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2015: March 20

2018: October 5

Ms. Duana M. Peterson, Attorney-at-Law for the Applicant/Wife

Mr. Kevin A. Miller, Attorney-at-Law for the Respondent/Husband

DECISION

Introduction

- [1] This is an application by the Wife, filed on 14 March 2014, to enforce court orders with respect to maintenance due to her from the Husband for two minor children of the marriage.

Background

- [2] Goodridge J. (as she then was) made a consent order on 16 December 2005, in which the parties agreed that the Husband would pay \$50 per week as maintenance for each child, together with one half of the usual expenses.
- [3] Nine months later, in September 2006, the Wife filed an application seeking to recover arrears of maintenance in the sum of \$2,305. Crane – Scott J. entered a consent order for the Husband to pay maintenance in the sum of \$150 from 28 November 2008. (Order filed 03 February 2009). By a further consent order made on 02 June 2009, the parties agreed that \$150 per week would be deducted by the Husband’s employer and deposited to the Wife’s bank account. This \$150 comprised maintenance of \$100 per week for both children, and \$50 per week towards outstanding arrears of \$13,145. This order was not filed until 13 January 2014, almost five years after it was made.
- [4] The Wife took no further action through the courts for arrears of maintenance until the current application before this Court. McCarthy J. (Ag.) made an interim order on 01 July 2014 for the Husband to pay \$100 per week towards the arrears of maintenance, in addition to the weekly maintenance of \$150. There is an error in the interim order, as at that time the weekly maintenance was not \$150 per week. It was \$100 per week for the two children, with an

additional \$50 per week payable towards the arrears of maintenance. If McCarthy J's order is interpreted against the backdrop of the previous orders, the Judge required the Husband either to pay \$150 towards the arrears, or the maintenance was increased by another \$50 per week.

The Evidence

- [5] The Wife filed an affidavit in support of the most recent application on 14 March 2014. In that affidavit she claimed maintenance arrears of \$51,150. (Para.6). In addition, a statement of financial circumstances and an affidavit deposing to arrears were filed by her on 31 July 2014. She deposed in the second affidavit that between November 2009 and February 2010 the Husband made only three deposits totaling \$700 to her account. One cash payment of \$200 was received from the Husband in June 2013. As at 31 July 2014 the maintenance claimed was \$58,550. (Exhibit GB2).
- [6] The Husband filed his affidavit in reply and statement of financial circumstances on 06 June 2014. He admitted arrears of maintenance because he was not in full time employment due to the slow down in the construction industry. He contested a figure of \$54,150 as maintenance due, alleging that between 2013 to 2015 he had made direct payments to the Wife totaling \$865. (Para.6 of affidavit). Also, he claimed to have spent \$340 on purchasing back to school items for his children. (Para. 9).

- [7] Part of the Husband's affidavit included an application that:
1. the maintenance order be suspended; or
 2. alternatively, the order be varied to \$100 per week. (Para.15).
- [8] The parties gave oral evidence before this Court on 20 March 2015. The Husband admitted arrears of maintenance, but not to the extent claimed by the Wife. He admitted owing her just over \$29,000.
- [9] The Wife admitted in her oral evidence that the amount claimed by her did not take into account payments she received directly from the Husband. She estimated the amounts received directly from him as approximately \$6,000, but not in excess of \$10,000. This contradicted her affidavit evidence of a single direct cash payment of \$200 in 2013. (See para. [5] supra).
- [10] The Court prefers the evidence of the Husband, who from the outset accepted that he was in arrears of approximately \$29,000. His only objection was to the amount claimed by the Wife. Although he had no receipts to prove his direct cash payments, the Wife conceded that she had received a number of payments in this way. The Court finds that the Wife was not consistent in her evidence.

Issues

- [11] Counsel for the Husband submits that the Husband should only be required

to pay arrears of maintenance for twelve months. Understandably, counsel for the Wife resists this submission. Another issue is the Husband's application for the variation or reduction of the existing maintenance order.

Discussion

- [12] Counsel for the Husband described this as “the perfect case for the 12 months limitation rule”. (See para.11 of Written Submissions filed on 30 April 2015). He was referring to a rule of practice in the Australia family law courts in certain circumstances to exercise a judicial discretion to limit the enforcement of arrears to 12 months. (See **Biggs v. Dienes 12 ALR 590; In the Marriage of Spry and Roet (1977) FLC 90-301; and In the Marriage of Reid (1978) FLC 90-529**).
- [13] The rule has also come to the attention of our High Court and Court of Appeal in **Koves v. Roach, Suit No.344 of 1991 (HC), decision dated 03 October 1997**; inferentially in **Marshall v. Marshall, No. 1 of 1993 (CA), decision dated 09 October 1996**; and in **Sinckler v. Sinckler, No.1 of 2014 (CA), decision dated 12 May 2016**). In **Sinckler**, the Court of Appeal offered guidelines for determining the amount of arrears to be enforced.
- [14] Speaking on behalf of a unanimous court, Goodridge JA opined that:

“[41] The framers of the [Family Law Act and Rules] used as their model the 1975 Family Law Act and Rules of Australia. In interpreting and applying our legislation, both the courts and legal

practitioners have generally been guided by the Australian authorities. However, the 12 months rule has not been adopted or applied in this jurisdiction. While no time limit has been set out in **section 61**, the practice has been that a person seeking to recover arrears of maintenance must take action within a reasonable time.

[42] In **Marshall** this Court, while not expressly dealing with the issue of the application of the 12 months rule, made it clear that it was not simply a case of a court making an order for enforcement when there had been some lapse of time between the non-payment of maintenance and the making of an application for enforcement. In allowing the appeal and remitting the case for inquiries to be carried out, and an appropriate order made, this Court stated:

“After the lapse of about 3 years without payment being made, it was not simply a matter of applying to collect arrears that were outstanding. All the circumstances, including the children’s current needs and the husband’s circumstances, had to be inquired into in order to determine what order the court should make with respect to the amounts that had not been paid.”

[43]As can be seen from **Marshall**, while a party is not precluded from recovering arrears after a period of 12 months, when an application is made after a lapse of time, the court is duty bound to inquire into all the circumstances of the case in order to determine what order should be made with respect to the amount which has not been paid”.

[15] The Court of Appeal in **Sinckler** clearly disavowed any automatic 12

months limitation on the collection of arrears of maintenance from a defaulting party. This Court must consider all the circumstances of this case, the history of the matter, and the needs of the children, in arriving at an amount of arrears that reasonably should be paid by the Husband.

[16] The first application was filed by the Wife less than a year after the maintenance order of December 2005. The application before this Court is the second such application, and was filed five years after orders made in June 2009 in relation to the first application. According to the Wife's affidavit deposing to arrears, the majority of the arrears were accumulated between January 2009 and July 2014 (approximately \$43,650). (See Exhibit GB2 annexed to the affidavit of arrears).

[17] The Court accepts that the Wife is now experiencing hardship while maintaining the two children of the marriage. However, no explanation was offered for her waiting five years before pursuing the Husband through the courts for the arrears of maintenance. And this is all the more puzzling given that in September 2011 her landlord obtained a judgment for \$4,500 of unpaid rent. (See Exhibit GB6 attached to her affidavit in support of 14 March 2014). What is also of interest is that, according to her, her co-debtor for the rent died in November 2013, leaving her solely responsible for repaying the debt. This caused the Court to wonder whether the co-debtor was living with the Wife

and/or assisting her with her financial needs. She offered no evidence as to whether all or part of this debt was repaid.

- [18] Other questions remain unanswered. What obviated the need for the Wife to return to Court, between 2009 and 2014, in the face of a high amount of maintenance arrears owed by the Husband? Were the needs of the children being looked after from other sources? The Court finds that the Wife did not take action within a reasonable time to enforce the arrears. Neither has she adequately explained why she took so long to seek enforcement of the arrears.
- [19] The Court noted from paragraph 13 of the Wife's affidavit filed on 14 March 2014, that despite the non-payment of a significant amount of maintenance by the Husband, she was able to accumulate savings. She described the use of these savings to maintain her children as "an absolute last option". The reasonable inference drawn here is that prior to her 2014 application, the Wife was not compromised by the absence of consistent maintenance from the Husband. There is no mention of the savings in her statement of financial circumstances.
- [20] The Court accepts the Husband's explanation that he was unable to pay the maintenance as it fell due because work slowed down in the construction

industry, and that at times there was no work. The Court has not formed the impression that the Husband deliberately sought to avoid maintaining his children. The Wife did not object to or attempt to disprove his evidence of intermittent employment.

[21] Given the history of this matter, the circumstances of the parties, and the needs of the children, the Court will absolve the Husband from full liability for the arrears of maintenance that he admits that he did not pay. The Court is also mindful of his application to suspend or reduce the existing order.

[22] The Court compared the statements of financial circumstances filed by the Husband and the Wife on 06 June and 31 July 2014 respectively. Neither party challenged the content of the statements. From these documents it is obvious that the Wife's gross annual income is nearly doubled that of the Husband. His unchallenged affidavit evidence is that he had to give up his accommodation and move in with his family. In June 2014 he was surviving on a gross income of \$750 per month. The Wife has a gross monthly income of just under \$1,500 per month, with sole responsibility for the living expenses and the maintenance of two children who are now aged 17 and 16 years.

[23] The Court has not been informed of any significant changes in the financial or other circumstances of the parties, between the filing of the Wife's

application and today's date.

Disposal

- [24] In the absence of evidence that the needs of the two children were never adequately met between 2009 and 2014, this Court is of the considered opinion that the Husband should not be liable for all the arrears of accumulated maintenance during this period.
- [25] The Husband is required to pay arrears for the year prior to the Wife's application, that is, \$10,400. In addition, he is liable to pay the sum of \$3,000 towards the arrears. The figure of \$3,000 is the difference between his admitted arrears of \$29,000, and the sum of \$26,000 which represents maintenance due for the five year period between 2009 and 2014. The Husband's total liability for arrears of maintenance is \$13,400.
- [26] The current maintenance order is suspended with effect from 30 June 2014, until further order of the Court. The Court is cognisant of the fact that the Husband is obligated to maintain his children. However, the Court also accepts from his unchallenged statement of financial circumstances, that he is experiencing difficulty in maintaining himself. In any event, he remains liable for a portion of the arrears of maintenance.

[27] The parties are required to file and serve updated statements of financial circumstances on or before 26 October 2018. The Husband shall also file and serve his proposals for payment of the arrears by that same date.

Sonia L. Richards
Judge of the High Court