[2016] JMCA Civ 53

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 15/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**GARY MORGAN**	**APPELLANT**
AND	**NATALIE WILLIAMSON-MORGAN**	**RESPONDENT**

Miss Bianca Samuels and Miss Stacy Knight instructed by Knight, Junor & Samuels for the appellant

Respondent in person

27 September and 21 November 2016

MORRISON P

[1] I have read the draft reasons for judgment of McDonald-Bishop JA. I entirely agree with her reasoning and conclusion and I have nothing useful to add.

MCDONALD-BISHOP JA

[2] This is an appeal brought by the appellant, Mr Gary Morgan, against an order of the Judge of the Family Court for the Corporate Area Region ("the Family Court") made on 8 April 2014. The learned judge refused an application by the appellant for variation

of a maintenance order that was made on 11 August 2011, in favour of the respondent, Mrs Natalie Williamson–Morgan, in respect of the relevant child of the marriage.

[3] On 27 September 2016, we heard the appeal and made the following orders:

> "1. The appeal is allowed.
>
> 2. The order of the learned judge of the Family Court for the parishes of Kingston and Saint Andrew made on 8 April 2014 is set aside.
>
> 3. The matter is remitted to the Family Court for hearing before a different judge of the court.
>
> 4. The matter is to be listed for mention at the Family Court on 19 October 2016 at 10:00 am.
>
> 5. Any order for variation of the maintenance order made previously on 24 July 2013 shall take effect as of the date of the order appealed against, that is, 8 April 2014.
>
> 6. There is no order for costs of the appeal."

[4] We promised then to give our reasons in writing at a later date. These are the reasons for my concurrence in the decision of the court.

The background

[5] The parties were married on 18 November 1999 and are now separated. The union produced one child. In or around 2011, the respondent made an application to the Family Court for a maintenance order to be made against the appellant for the maintenance of the relevant child. On 9 August 2011, a final order was made for the

appellant to pay $8,000.00 per month plus half educational and all medical expenses not covered by the respondent's health card.

[6] Upon an application made by the respondent, in or around November 2012, for variation of the sum from $8,000.00 to $16,000.00, an interim order was made on 2 April 2013, varying the sum from $8,000.00 to $10,000.00, and another was made on 24 June 2013, increasing the sum to $12,000.00.

[7] On 24 July 2013, the learned judge after hearing from the parties and the probation officer (from whom a means report was requested and obtained), made a final order in these terms:

> "UPON APPLICATION BY Natalie Williamson-Morgan for a Variation of Maintenance Order made on the 24th of July, 2013 for Maintenance of child [of the marriage] born on the 25thday of July 2000. Order was made on the 9th of August, 2011 for $8,000 and varied on the 2nd of April, 2013 for $10,000 and on the 24th of June, 2013 for $12,000 and is **now varied** on the 24th of July, 2013 and upon hearing from the Applicant/mother, Natalie Williamson-Morgan and the Respondent/father, Gary Morgan, in relation to the said child **BY CONSENT, FINAL ORDER MADE** for the Respondent/father, Gary Morgan to pay the sum of Twenty Two Thousand Dollars ($22,000) per month (including lunch, transportation, juice money, snacks i.e. $14,000 per month for Maintenance [sic] and $8,000 per month for lunch snacks, transportation and juice) plus half (1/2) educational expenses (excluding lunch, juice, transportation and snacks), and all medical expenses not covered by the Applicant's health card for maintenance of the said [child].
>
> Payments are to be made to the Collecting officer, Kingston and St. Andrew, Family Court."

[8] On 12 February 2014, the appellant submitted an application before the learned judge for the order made on 24 July, 2013 to be varied from $22,000.00 to $12,000.00. The application was supported by an affidavit containing a statement of his income and expenses.

[9] The appellant's application for variation was denied on 8 April 2014 without a hearing. The order made by the learned judge was simply this:

> "UPON APPLICATION by Gary Morgan for a Variation of Maintenance Order made on the 24th of July, 2013; Application Denied. No new evidence of change of circumstances presented."

[10] By way of a letter dated 19 June 2015, counsel for the appellant requested from the clerk of the court of the Family Court the record of the proceedings as well as the notes of evidence, among other things. By an undated letter in response, the clerk of the court responded, in so far as is relevant:

> "… [P]lease note that there are no notes of evidence for the matter being appealed.
>
> This is because on the 24th of July, 2013 His Honour Mr. Charles Pennycooke presided over the trial of an application to vary the maintenance order of the parties. A copy of the varied order is attached. Notes of evidence of that trial is attached as well for your perusal.
>
> On the 12th of February, 2014 Mr. Morgan applied before the same court to further vary that order which was varied on July 24, 2013. His Honour Mr. Charles Pennycooke took the view that the application should be denied without a trial as there was no new evidence that Mr. Morgan presented to the Court.

> Since there was no trial there are no notes of evidence. It is that application which was denied which Mr. Morgan now appeals."

[11] In an affidavit filed on 4 January 2015, in support of the appeal, the appellant explains as follows at paragraphs 14-16:

> "14. I attended Court on April 8, 2014 with a list of my expenses, which had by then increased, in order to show the Court that I was having serious difficulties with the payment of Twenty-Two Thousand Dollars ($22,000.00), in light of my state of bankruptcy.
>
> 15. When my application for variation of the order made on July 24, 2013 was called up on April 8, 2014, the judge asked me what I wanted from the Court. I told him that I was asking the Court to vary the order for maintenance made on July 24, 2013 because I could not afford the Twenty Two Thousand Dollars ($22,000.00) maintenance payment each month. I was prepared to present the said list of my expenses to the Court which I had typed out and had in my hand to give evidence about but the judge did not allow it. Instead, the judge told me he had already dealt with the matter of my maintenance payments and before I could explain what my hardships were or the reasons why I could not afford the maintenance payments, the judge denied my application for variation. My application for variation was denied without a trial, without allowing me to give evidence on oath and without allowing me an opportunity to present my case with or without going in the witness box.
>
> 16. I have been shown a document labelled [sic] 'Formal Order' which states that the order granted on July 24, 2013 for the maintenance payment of Twenty-Two Thousand Dollars ($22,000.00) per month plus half (1/2) education costs and all medical expenses not covered by the Respondent's health card, was consented to by me.... However I did not consent to that order; the judge had invited me to sign but I declined, as I knew I could not afford that amount.

> To the contrary, that order was made after evidence was heard from myself and the Respondent..."

[12] The letter from the clerk of the court fully supports the appellant's case that his application for variation was denied without a trial.

The grounds of appeal

[13] The appeal was brought on two grounds, set out by the appellant as follows:

> "a. The Learned Resident Magistrate erred in refusing the Appellant's application to vary the order for maintenance for his [child].
>
> b. The learned judge erred in that he denied the Appellant's application for variation of the order for maintenance of his [child], without first allowing the Appellant to be heard."

[14] Although the complaint of the appellant is set out in two separate grounds, in essence, there is only a single ground of appeal, which, when reformulated, would be that the learned judge erred when he refused the appellant's application for variation of the maintenance order without a hearing.

The submissions

[15] The main thrust of Miss Samuels' submissions on behalf of the appellant was that there was no information before the learned judge upon which he could have made a determination that the application for variation of the order should have been denied. She pointed out that section 18 of the Maintenance Act, pursuant to which the application was brought, requires that upon an application for variation, the court is to

first ascertain whether the circumstances warrant such an order. According to learned counsel, these circumstances would guide the discretion of the judge hearing the application.

[16] She argued that in the instant case, "the learned judge having failed to hear a scintilla of evidence on oath or affirmation from the appellant, and having failed to embark on a hearing for the determination of the application for variation, was as a consequence, unable to ascertain whether the 'circumstances so warranted' a variation as required by the Act".

[17] Learned counsel submitted that section 18 of the Maintenance Act has laid down a pre-condition, which must be satisfied before the discretion is exercised. That pre-condition is that the learned judge must first ascertain whether the circumstances warrant a variation. The learned judge, she argued, did not embark on such an enquiry and so the discretion conferred on him by the section to vary the order was not properly exercised. Consequently, the learned judge erred in law.

[18] In support of this aspect of her submissions, in urging the view that a hearing was required under section 18 of the Maintenance Act, learned counsel relied on the decision of this court in **Ableton Lawes v The Attorney General of Jamaica and Uton Fairweather v The Attorney General of Jamaica** [2014] JMCA Civ 40 ("**Ableton Lawes and Uton Fairweather**").

[19] Miss Samuels submitted further that the learned judge was required to have a hearing by virtue of Order XVI rule 3 of the Resident Magistrate's Courts Rules 1933

(now the Parish Courts Rules), which applies to the Family Court by virtue of section 4 of the Judicature (Family Court) Act. She maintained that the Family Court, like the Parish Court, is a creature of statute and so the same strictures relating to the exercise of a Parish Judge's powers must apply, in like manner, to those of a judge of the Family Court. The learned judge, she maintained, did not adhere to the rules of court that governed the procedure before him. For this argument, reliance was placed on the dicta of K Harrison JA in **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6.

[20] Learned counsel was also propelled by the failure of the learned judge to hold a hearing to advance the argument that there was a breach of the appellant's constitutional right to a fair hearing enshrined in section 16(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 ("The Charter of Rights"). In her words:

> "... [F]rom the undated letter of the Family Court, the application for variation was 'denied without a trial'. This must necessarily amount to a flagrant contravention of the [Appellant's] fundamental right secured by s. 16(2) of the Constitution, as that Constitutional right must include an opportunity to be heard. The natural consequence of this approach by the learned trial judge is that the summary denial of Mr. Morgan's application, without allowing him to be heard, created the unfortunate impossibility of a fair hearing. The denial of an opportunity to be heard is, it is submitted, an axiomatic breach of the right to a fair hearing."

[21] She also contended further, that the learned judge's failure to hear the appellant's application, also constituted a breach of the rules of natural justice.

[22] Although the respondent was given an opportunity by this court to present her case in defence of the decision of the learned judge, nothing she urged on us was sufficiently grounded in the applicable law that could lead us to a finding that the decision should stand. We empathise with her, of course, for the concerns she expressed concerning the delay in resolution of the matter and the attendant hardships in attending court repeatedly, but, unfortunately, those are not matters that we could use as a basis to hold that the learned judge's order should not be disturbed.

Analysis and findings

[23] I found that the complaint of the appellant and the flawless submissions of counsel on his behalf have derived strong support from law so much so as to lead to the irresistible conclusion that the learned judge erred in law and in principle in refusing the application for variation without a hearing.

[24] The appellant's reliance on section 18 of the Maintenance Act is, not at all, misplaced as it has managed to serve as an apt starting point for the consideration of this appeal. The section provides:

> "At any time after a maintenance order or an order of attachment has been made under this Act, a Court may upon the application of-
>
> (a) any of the parties to the proceedings in which such order was made;
>
> (b) any person having the actual care and custody of a child who is a dependant; or

(c) any person to whom any payment was directed in such order to be made,

vary the order in such manner as the Court thinks fit, suspend the order, revive a suspended order or cancel the order ***if circumstances so warrant***." (Emphasis added)

[25] Section 18 is clear that the appellant would have had the legal right to seek a variation of the maintenance order at any time after the order was made. There is evidently no limit to the number of times he could choose to do so. The same would apply to the respondent.

[26] Furthermore, the emphasised portion of the section '**if the circumstances so warrant**', strongly suggests that it was within the contemplation of the legislature that there must be some consideration of the circumstances surrounding the application, the reasons for the application and the likely impact of the variation on the relevant parties before the order for variation is granted. A judge would never know if the circumstances "so warrant", if there is no enquiry into all the relevant circumstances attendant on the application or which would have a bearing on it. Miss Samuels' submission that the examination of the circumstances of the particular case is a necessary pre-condition to the exercise of the discretion to vary a maintenance order is accepted. Therefore, the learned judge was obliged, by virtue of section 18, to enquire into the relevant circumstances that would have touched and concerned the grant or refusal of the variation order. That was the only way he would have been able to ascertain whether the circumstances warranted a variation of the order.

[27] In terms of the procedure to be adopted in the conduct of such an enquiry into the circumstances of the case, the appropriate starting point for the consideration of the learned judge would have been the statute that governs the exercise of his jurisdiction, that being, the Judicature (Family Court) Act. In so far as is immediately relevant, section 4(4) provides:

> "Subject as otherwise provided by or under this Act, **the like process, procedure and practice as relate to the exercise of jurisdiction of a [Parish Court], and otherwise to the conduct of its business, shall be observed, in so far as they are applicable (with necessary adaptations),** in relation to the exercise of jurisdiction, and otherwise to the conduct of business, of the Family Court and, without prejudice to the generality of the foregoing, the judgments and orders of the Family Court and the attendance of persons before it, whether as accused persons or witnesses or otherwise, may be enforced accordingly." (Emphasis added)

[28] Given that the statute specifically incorporated by reference "the process, procedure and practice" of the Parish Courts as being applicable to the conduct of business in the Family Court, then the procedure and practice that obtained in the Parish Courts would have to be observed, in so far as they are applicable and with necessary adaptations, where the circumstances demand.

[29] Within the context of the procedure and practice relative to the conduct of an enquiry in the Parish Court, Order XVI rule 3 of the Parish Court Rules now assumes prime significance. The rule reads:

> "Except where otherwise provided by these rules, **the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally on oath**;

> and where by these rules evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally on oath if the Court, on any application before or at the trial or hearing, so directs." (Emphasis added)

[30] In this case, the appellant sought to present to the court a list of his expenses and to explain to the court the hardship he was facing in complying with the variation in the maintenance order that was made on 24 July 2013. Whatever evidence he had to present in support of his application ought to have been considered because it was an entirely new application before the court. Also, the respondent ought to have been given the opportunity to respond by her own evidence, since she was clearly not consenting to the application, so that all the circumstances relevant to the consideration of the application would have been before the learned judge.

[31] There are no special rules of procedure expressly stated in the Maintenance Act or in the Rules of court as being applicable to the taking of evidence in matters arising under the Maintenance Act. Therefore, in the absence of such special and specific provisions in the Rules that are applicable to the Family Court, then the general rule laid down in Order XVI rule 3 of the Parish Court Rules would apply, that is to say that the evidence of any witness in the "hearing of any matter" shall be taken orally. There must be a hearing of oral evidence, in other words. The rule provides even further that the oral evidence must be taken on oath. So, once it is accepted that it was incumbent on the learned judge to have held a hearing, which is accepted, then based on the provisions of Order XVI rule 3, it would follow that evidence should have been "taken orally on oath".

[32] Counsel for the appellant relied on the decision of **Ableton Lawes and Uton Fairweather** in support of her submission that a hearing was required under the Maintenance Act. In that case, the appellants (in two separate matters, the hearing of which was consolidated) sought judicial review of the decision of the learned judge of the Family Court to have them committed to prison pursuant to sections 20(3) and 21(1) of the Maintenance Act for failure to make payments due under a maintenance order, without first conducting a hearing. There was no hearing conducted on oath.

Section 20 of the Maintenance Act provides:

> "20.-(1) Where any amount ordered by a maintenance order to be paid to the Collecting Officer is fourteen clear days in arrears, a Resident Magistrate may, on the application of the Collecting Officer, issue a warrant directing the sum due under the order or since any commitment for disobedience as hereinafter provided and the costs in relation to the warrant, to be recovered by the respondent.
>
> (2) If upon the return of the warrant issued under subsection (1) it appears that no sufficient distress can be had, the Resident Magistrate may issue a warrant to bring the respondent before the Court.
>
> (3) If the respondent neglects or refuses without reasonable cause to pay the sum due under the maintenance order and the costs in relation to the warrant, the Resident Magistrate may commit the respondent to an adult correctional institution for any period not exceeding three months unless the sum and costs and the costs of commitment, be sooner paid."

Section 21(1) then reads:

> "(1) A person shall not be committed to an adult correctional institution for default in payment under a maintenance order unless the Court is satisfied that the default is due to the wilful refusal or culpable neglect of that person."

[33] The Full Court concluded that there was no provision in the Maintenance Act, which indicated that there needs to be a formal hearing and, so, although there was no such hearing in the case, the learned judge had material before her by which she could have come to the conclusion that there was wilful refusal or culpable neglect as required for the committal to be made. Although the Full Court found that the rules of natural justice demanded that the applicants be given an opportunity to be heard, it concluded that that did not necessarily mean a formal enquiry. The Full Court refused to find that the learned judge acted in excess of jurisdiction by committing the applicants to prison without a formal hearing.

[34] On appeal by the applicants, this court agreed with the Full Court's decision. Dukharan JA, with whom the other members of the court agreed, reasoned at paragraphs [25], [26] and [27] of the judgment, in so far as is relevant:

> "[25] It seems to me that as a precondition to ordering committal to prison, the magistrate or tribunal must be satisfied that the respondent or person who is obligated to pay under the maintenance order must have neglected or refused to pay the sums owing without having a reasonable cause for doing so. If there is no reasonable cause, then the refusal of neglect may be regarded as culpable or wilful. The magistrate can be satisfied of this only where he/she is possessed of information or has knowledge of the

circumstances concerning the person who has the obligation to pay and his/her non-payment of the sum. Miss Brown has contended that there ought to be a full means enquiry conducted. However, the English authorities on which she has relied in support of this contention all involved statutory provisions in which there was a specific requirement that an enquiry be conducted...Therefore, to the extent that these cases are based on statutory provisions which provide for a specific procedure to be adopted before the order for committal is made, they are of no assistance since the provisions of our Act are not identical.

[26] **Based on my reading of the section, it is my view that the Full Court was correct in its finding that section 21 does not impose a requirement to conduct a formal hearing on the magistrate who is considering whether to commit a non-paying person under a maintenance order to prison. Nor does the section expressly state that there must be an enquiry. Indeed, there is no stipulation in sections 20 or 21 as to the procedure to be adopted, but I agree with the Full Court that an individual ought not to be deprived of his or her liberty without the opportunity to be heard and accordingly, the appellants ought to have been heard; this position accords with natural justice. Also, it is by allowing the person in arrears the opportunity to be heard that the magistrate will obtain information as to the circumstances surrounding the person's non-payment.**

[27] **There is no set procedure established at common law as to how a hearing is to be conducted..."** (Emphasis added)

[35] The reasoning and decision of the court that there must be a hearing, even though the relevant provisions of the Maintenance Act under consideration did not

expressly say so, cannot be faulted and so is accepted by this court as strenghtening the appellant's contention on this appeal that he ought to have been heard.

[36] It should be noted though that in stating only that "[t]here is no set procedure established at common law as to how a hearing is to be conducted, Dukharan JA, evidently, did not have regard to Order XVI rule 3 of the Parish Court Rules and the Judicature (Family Court) Act, which would have been applicable to the proceedings with which the court was concerned. Indeed, it would appear that none of the parties at the time had brought those statutory provisions to the attention of either the Full Court or this court. Unfortunately, the focus was, seemingly, on English authorities, which were based on English statutory provisions and on the wording of the sections of the Maintenance Act that were in issue. The Maintenance Act is, indeed, silent on the procedure to be adopted and that is what had led both courts to hold, without more, that there is no set procedure for the conduct of the hearing. This conclusion, however, cannot be supported in the light of the clear dictates of the Rules of court that the evidence of witnesses on the trial of any action or the **"hearing of any matter"** must be by taken orally on oath, unless the Rules otherwise direct.

[37] The conclusion of the court cannot be supported for yet another reason apart from the provisions of the Rules. The second reason is that a previous decision of this court had already established in 1963, in considering very similar, if not almost identical provisions, under the then Bastardy Law, that a hearing on oath was required before a committal order could have been made for disobedience of an affiliation order. The case is **Campbell v Sterling** (1963) 8 JLR 225. The pertinent facts may prove instructive. A

summary of those facts is as follows: an order was made for the putative father to pay a sum for maintenance pursuant to an affiliation order. It was ordered that payment was to be made to the Collecting Officer for the parish of Kingston. The putative father fell in arrears and the Collecting Officer applied for a distress warrant, which, upon being issued, was returned "*nulla bona*". An application was then made for a warrant to commit the putative father to prison. The learned Resident Magistrate, without making any proper enquiry, made an order imprisoning the putative father, unless he paid the sum owed. There were no notes of evidence of the proceedings that were made available to the court for the purpose of the appeal and when the learned Resident Magistrate was asked to indicate what had transpired before him, he said that he had no recollection of the matter.

[38] Section 7(1) of the Bastardy Law provided:

> "Where under an affiliation order, which provides that payment thereunder shall be made to the Collecting Officer, payment is fourteen clear days in arrear, the Resident Magistrate may, upon the application of the Collecting Officer, issue a warrant directing the sum due under such order...to be recovered by distress and sale of the goods and chattels of the putative father, and if upon the return of such warrant it shall appear that no sufficient distress can be had, the Resident Magistrate may issue a warrant to bring the putative father before him, and in case the putative father **neglect or refuse without reasonable cause to make payment of the sum so due,...** the Resident Magistrate may commit him to prison." (Emphasis added)

[39] The court held that the Resident Magistrate had acted in excess of his jurisdiction as, among other things, the order was made **without an enquiry on oath**. Lewis JA, stated the position of the court in this way, in no uncertain terms:

> "No notes of evidence whatever have been obtainable from the learned Resident Magistrate. **That is one extraordinary aspect of this case: that she appears to have made an order in a case where the law calls for an enquiry without having made any enquiry upon oath. This is not the only case in which the court has become aware that Resident Magistrates in various parts of Jamaica are acting in this manner, a manner of which the court strongly disapproves**." (Emphasis added)

[40] Interestingly, as can be seen, section 7 of the Bastardy Law was not worded much differently from section 20 of the Maintenance Act, which was under consideration in **Ableton Lawes and Uton Fairweather,** concerning what the court should be satisfied about before a committal order under the statute could be made. Nowhere in the Bastardy Law was it specifically and expressly stipulated that there must be a hearing and, further, that it should be on oath but this court, nevertheless, held that that an enquiry on oath was required. In coming to that position, no reference was made by the court to the Rules, which are absolutely clear as to the procedure to be followed.

[41] It is evident, that in coming to the finding that a formal hearing was not required under the Maintenance Act, neither the Full Court nor this court in **Ableton Lawes and Uton Fairweather**, had the benefit of the previous decision of this court in **Campbell v Sterling** as well as the provisions of the Parish Court Rules, Order XVI

rule 3 and the Judicature (Family Court) Act. For this reason, it is my view that the decision that there need not be a formal hearing, that is to say, one conducted on oath, would seem to have been arrived at *per incuriam* and so, regrettably, I would have to depart from that aspect of the decision. I have found it necessary to make my position clear because of the two different lines of authority from this court regarding the same procedural issue that could arise under the Maintenance Act.

[42] Having reviewed the salient law, it does appear to me that in the light of Order XVI rule 3 of the Parish Court Rules, the Judicature (Family Court) Act, and the previous decision of this Court in **Campbell v Sterling**, that the better view must be that under section 18 of the Maintenance Act, where an enquiry is required to be conducted into the circumstances attendant on an application for a variation of a maintenance order, that enquiry must be in the form of the taking of oral evidence on oath from the parties involved and the notes of evidence are to be preserved for the benefit of this court, in the event of an appeal. An informal hearing by the learned judge or the mere consideration of information in writing before him would not have sufficed. Accordingly, I would hold that the learned judge in this case, in failing to conduct an enquiry on oath, would have erred as a matter of law.

[43] Indeed, I would venture to say that an application of this nature, once contested, would require the testing of the credibility and the reliability of the evidence of the parties or any witness they may call in support of their respective case. The best and most appropriate way to do so would be through the adduction of oral evidence, where cross-examination and the observance of the witnesses' demeanour could be facilitated.

[44] I am quite satisfied to say, however, after an examination of the record of appeal, that the learned judge knew that a hearing of such a nature in such matters is required because he had conducted a hearing in 2013 before arriving at a decision to increase the sum to $22,000.00. Although, he had erroneously endorsed the record that the order was arrived at "by consent", he had made the final order after a trial. It does appear that his remark that there was “no new evidence” was informed by the fact that he had been dealing with the parties for a period and had recently made an order increasing the sum. Evidently, he believed he knew the circumstances of the case so as to make a determination without any hearing. His familiarity with the parties and circumstances of the case, however, did not relieve him of the duty to consider each new application as it arose and to treat with it fairly and objectively according to law. The merits of the new application should have been explored through the conduct of a formal hearing before a decision was made to refuse it.

[45] The need for the learned judge to have conducted an enquiry on oath was even more pressing because he had previously varied the order on 24 July 2013 for the appellant to pay the sum of $22,000.00, which was not only far in excess of what the appellant had indicated that he could afford to pay, but was also in excess of what the respondent had applied for and what the Probation Officer had recommended, after the preparation of a means report that was requested by the court. The respondent had applied for $16,000.00 and the probation officer recommended $12,000.00 but the learned judge proceeded to make an order, on his own initiative, which was considerably higher. In those circumstances, he was obliged to hold a hearing to

ascertain the grouse of the appellant with the new order as well as to give the respondent an opportunity to be heard.

[46] Miss Samuels had relied on the dictum of K Harrison JA in **Metalee Thomas v The Asset Recovery Agency**, in advancing her point that the learned judge was duty bound to follow the procedural rules, which required a hearing to be done. In speaking of the jurisdiction of Parish Court Judges in treating with matters before them concerning applications for forfeiture of assets under the Proceeds of Crimes Act, for which no rules had been provided, K Harrison JA instructed:

> "[34] Resident Magistrate's Courts, it should be remembered, are essentially creatures of statute. "They are inferior courts without any inherent jurisdiction and with only such jurisdiction as is conferred upon them by Statute": **Lindo v Hay** Clarke's Reports 118. It is therefore reasonable to think that Resident Magistrate's Courts may exercise only such powers as are given to them by statute, and that in doing this they must act in accordance with the procedures laid down in the statute and not otherwise.
>
> [35] The practice which prevails in the Resident Magistrate's Court is that witnesses must be examined upon oath or affirmation when they give evidence in court..."

[47] The learned judge, being a Judge of the Family Court, is expected to act no differently in the exercise of his power and was required to observe the practice and procedures that obtained in the Parish Courts in the hearing of the matter.

[48] In concluding, I hold the view that the learned judge, in the absence of any consent from the respondent that the order be varied, was required under section 18 of

the Maintenance Act, Order XVI rule 3 of the Parish Court Rules and by previous decisions of this court to conduct an enquiry upon the appellant's application. The enquiry to be conducted was to have been in the form of a formal hearing, which means, by the taking of evidence from the relevant parties orally on oath. The learned judge by failing to conduct such a hearing fell in error in refusing the appellant's application for variation of the maintenance order. This error is sufficient to justify the interference of this court with his decision.

[49] I must also say, out of deference to the industry of learned counsel for the appellant, that I accept the arguments that there was also a breach of the appellant's right to a fair hearing under section 16(2) of the Charter of Rights as well as a breach of the rules of natural justice when the decision was made to refuse his application without a hearing.

[50] It is for the foregoing reasons that I agreed with my learned colleagues that the appeal should be allowed and that the consequential orders detailed in paragraph [3] be made.

P WILLIAMS JA

[51] I, too, have read in draft the reasons for judgment of my learned sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.