

SOUTH AFRICA / JUDGMENT

Cohen v Cohen (born Coleman) (010/2002) [2003] ZASCA 5; 2003 (3) SA 337 (SCA) (3 March 2003) [2003] ZASCA 5

COURT

Supreme Court of Appeal

BEFORE

Olivier, Brand, Conradie

CASE / FILE NUMBER

010/2002

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REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

REPORTABLE

Case Number : 010 / 2002

In the matter between

ROY SELWYN COHEN Appellant

and

BRENDA COHEN (born Coleman) Respondent

Composition of the Court OLIVIER, BRAND and CONRADIE JJA

Date of hearing : 1 NOVEMBER 2002

Date of delivery : 3 MARCH 2003

SUMMARY

Maintenance - Variation of part of Supreme Court order by maintenance court - whether whole order is varied.

J U D G M E N T

OLIVIER JA

[1] The crisp question in this appeal is whether an order made by a maintenance court (ie a magistrate's court) varying the amount of maintenance payable by the appellant to the respondent in terms of a previous Supreme Court order issued in a divorce action and incorporating a consent paper entered into between the parties, also varied and in effect eliminated a 'dum casta' clause which was a part of the consent paper and consequently of the divorce order made by the Supreme Court. The issue turns on the interpretation of the order made by the maintenance court.

[2] In February 1995 the parties were divorced and a consent paper signed by them was incorporated in the divorce order issued by the Cape of Good Hope Provincial Division of the Supreme Court. It provided inter alia for the payment of maintenance by the present appellant ('the plaintiff') to the present respondent ('the defendant').

[3] The relevant clause reads as follows:

'4. MAINTENANCE FOR DEFENDANT:

- (a) Plaintiff shall maintain Defendant with effect from the date of her vacating the former common home in terms of sub-paragraph 5.3 hereinbelow and thereafter on the 1st day of each and every succeeding month until her death or remarriage or until she shall live together as husband and wife with another man for a period aggregating more than 6 months in any calendar year or alternatively 9 months in any period of 3 years, by:
 - (i) effecting payment of the sum of R3 000,00 per month, and such sum shall be increased or decreased on each anniversary of the date of the granting of a Final Order of Divorce on a percentage basis in accordance with such rise or decline as has occurred in the Consumer Price Index in respect of the Republic of South Africa, as notified by the Central Statistical Service from time to time, based on the twelve urban areas as reflected in the middle income group for a period of 1 year expiring on the last day of the month preceding the aforesaid anniversary date;
 - (ii) effecting payment of all reasonable medical, dental, pharmaceutical (incurred on doctors' prescriptions), surgical, hospital, orthodontic, ophthalmic (including the provision of spectacles and/or contact lenses) expenses or medical treatment reasonably incurred, but excluding any form of cosmetic or prosthetic surgery;
 - (iii) effecting payment of the servicing costs in respect of the motor vehicle utilised by Defendant from time to time;
 - (iv) replacing the said motor vehicle presently utilised by Defendant in 5 years time and every 5 years thereafter with a motor vehicle equivalent to a Toyota Corolla automatic of approximately 2 litres in engine capacity. Plaintiff shall be entitled to purchase such vehicle second hand provided it shall be no more than 15 months old;

- (v) effecting payment of the levies on such townhouse as Defendant and the minor children may from time to time occupy. This obligation shall continue for so long as at least one of the minor children formally reside with Defendant or until his liability to maintain Defendant terminates, whichever event shall first occur.'
- [4] The phrase in contention is the one in the introductory portion of paragraph 4 of the consent paper viz that maintenance is payable by the plaintiff to the defendant 'until her death or remarriage or until she shall live together as husband and wife with another man for a period aggregating more than 6 months in any calendar year or alternatively 9 months in any period of three years.' I will refer this phrase as the *dum casta* condition.
- [5] The consent paper and divorce order gave rise to a series of opposed applications and counter-applications between the parties. In 1997 the plaintiff approached the maintenance court. He requested the total discharge of his maintenance obligation because the defendant was now employed and did not require maintenance payments from him. The defendant counter-applied for an increase of the maintenance. Magistrate Ludick who heard the application and counter-application, reduced the maintenance payable by the plaintiff to the defendant from R 3 000 to R 1 500 per month.
- [6] In May 1998 the plaintiff once again approached the maintenance court, seeking an order against the defendant for payment of maintenance for their two children (who were in his custody) in the sum of R1 000 per month per child. The defendant launched a counter-application, seeking a variation of the existing maintenance order, ie the order made by magistrate Ludick in January 1998, by increasing the amount of maintenance payable to herself from R1 500 to R3 500 per month plus payment of her medical expenses.
- [7] At the end of a hearing lasting four days, the presiding magistrate, Mr Venter, made the following order :

'ORDER

In regard to the Applicant's (ie the plaintiff's) application for maintenance for the two children, NO ORDER IS MADE.

In respect to the Respondent's (ie the defendant's) application for variation, the Court Orders that the Maintenance Order of the High Court, Cape of Good Hope, Provincial Division dated the 10th of February 1995 as varied by the Order of the Magistrate, Cape Town on the 15th of January 1998, IS VARIED by the substitution thereof with the following Order:

ORDER

The Defendant, Roy Selwyn Cohen, is ORDERED to pay the sum of R3 500 per month as maintenance for the Complainant, Mrs Brenda Cohen. Such Order to operate retrospectively from the 1st December 1998 and thereafter on the 1st day of each succeeding month. Such sum shall be increased or decreased in accordance with the Order set out in paragraph 4.1(i) of the Consent Paper. Clauses 4.1(ii) to (iv) of the Consent Paper also remain in force. All payments are to be made directly to Mrs Cohen.'

[The references to paragraph 4.1 should read 4 (a)]

- [8] In January 2000 the plaintiff instituted action against the defendant in the Cape of Good Hope Provincial Division of the High Court. In his amended particulars of claim, the plaintiff referred to the dum casta condition mentioned above, averred that the defendant had violated the said condition by living together as husband and wife with another man, and concluded that he was consequently relieved of his obligation to pay maintenance to the defendant. He prayed for a declaratory order to that effect, including an order for the repayment of all maintenance payments made after 1 January 2000.
- [9] The main defence raised by the defendant, and the only matter now before this Court, was that the dum casta condition ceased to be of any force and effect by virtue of the substitution of clause 4 (a) of the consent paper by the aforesaid order of the maintenance court (per magistrate Venter) on 21 December 1998, quoted above.
- [10] On behalf of the defendant it was argued in the court a quo and in this Court that the effect of the order made by magistrate Venter was to delete the dum casta condition. In the court a quo Comrie J was persuaded by the arguments submitted on her behalf. The appeal is before us with his leave.
- [11] It is not necessary to repeat all the arguments presented by counsel appearing for the parties in this Court or the reasoning of Comrie J in the court a quo. In my view it is clear that the appeal must succeed, for the reasons set out below.
- [12] Firstly, it is obvious that the variation order made by magistrate Venter was limited to a variation of the amount of maintenance payable and was never intended to deal with, vary or delete the dum casta condition. It is a significant feature of the magistrate's judgment and order that he nowhere alludes, even faintly or en passant, to the dum casta condition. All the evidence led before the magistrate related to the parties' standard of living and their expenditure and needs.

The existence, deletion or survival of the dum casta condition was never raised. It was not one of the issues which the magistrate was called upon to determine, nor did it have any bearing on the issue which he was called upon to determine. This is reflected in the order made, because it makes no reference to paragraph 4(a) of the consent paper, which contains the dum casta condition. Only sub-paragraphs (i) to (iv) of paragraph 4 (a) of the consent paper were referred to, sub-paragraph (i) being the only paragraph which contained the terms which were in issue before the magistrate.

- [13] It is also significant that magistrate Venter expressly recorded that 'clauses 4 (a) (ii) to (iv)' of the consent paper 'remain in force'. These sub-paragraphs require an introductory paragraph in order to make grammatical sense. This introductory paragraph, viz par 4(a), was not varied or substituted by the magistrate and, it follows, remains in force.
- [14] Consequently, one must give a common sense interpretation to the judgment and order made by the magistrate. The point of departure is to identify the issue between the parties that the maintenance court has been called upon to decide and then to compare the order made with that issue. If there is any ambiguity, the order should be interpreted restrictively, so as to be limited to the said issue. The analogy with the basic principle of statutory interpretation, viz that the statute must be restrictively interpreted having regard to its object and rationale, is both convincing and obvious (see eg *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 78 C - D; *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* [1990] ZASCA 92; 1990 (4) SA 720 (A) at 726 D - E; *Engels v Allied Chemical Manufacturers (Pty) Ltd and Another* 1993 (4) SA 45 Nm HC); *Plaaslike Oorgangsrade, Bronkhorstspuit v Senekal* 2001 (3) SA 9 (SCA) at 18 J - 19 A; *S v Radebe* 1988 (1) SA 772 (A) at 778 C - G and see *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A), at 715 F et seq; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 928 (A) at 304 D - H).
- [15] But reliance was also placed on behalf of the defendant on ss 16(1)(b)(i) and 22 of the Maintenance Act 99 of 1998 ('the Act').

Section 16(1) outlines the powers of a maintenance court. It provides that after considering the evidence adduced at the enquiry, the maintenance court may

'(b) in the case where a maintenance order is in force -

- (i) make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order; or
- (ii) discharge such maintenance order; or
- (c) make no order.' (My emphasis)

Section 22 reads as follows:

'22. Notice of substitution or discharge of maintenance orders. - Whenever a maintenance court -

- (a) makes an order under section 16 (1) (b) in substitution of a maintenance order; or
- (b) discharges a maintenance order under section 16 (1) (b),

the maintenance order shall cease to be of force and effect, and the maintenance officer shall forthwith give notice of the decision to the registrar or clerk of the court in the Republic where the maintenance order was issued or where the sentence concerned was imposed, as the case may be, who shall deal with the relevant records or registers in the prescribed manner.' (My emphasis)

[16] The argument proceeded on the basis that the order made by magistrate Venter totally replaced the order made by the High Court, with the result that the *dum casta* condition, since it was not repeated, also fell away. The absurdity of this argument if taken to its logical conclusion is obvious. Does a mere variation order of the amount of maintenance payable bring about that an obligation to deliver certain items of furniture or transfer a residence automatically falls away if it is not expressly repeated and confirmed by the maintenance court when it varies the amount of maintenance payable? Faced with the absurdity of this consequence, Ms Gordon-Turner, who appeared for the defendant, argued that the *dum casta* clause was an inherent and indivisible part of the maintenance order and that a variation order that varied the amount of maintenance payable in effect substituted the whole of the consent paper and the divorce order incorporating it, which then ceased to be of any force and effect. Reliance was placed on a passage in the judgment in *Purnell v Purnell* [1993] ZASCA 22; 1993 (2) SA 662 (A) at 667 I - 668 A, where it was said:

'Counsel for the plaintiff sought to argue, albeit faintly and as a last resort, that the magistrate's order did not replace the whole of the maintenance order made in the WLD in the divorce action but only that part of it fixing the monthly amount payable. That, so the argument ran, had been the common intention of the parties before the magistrate and again in the proceedings before Roux J and Zulman J. The argument is untenable. It flies in the face of the underlying rationale of the Maintenance Act, which contemplates the replacement of the previous order and not its amendment, and in any event lacks any factual foundation in the papers.'

[17] However, the question posed in the present case is quite different. It does not relate, as was the position in *Purnell*, to the effect that a variation of the amount payable has on the previous order relating to the amount payable, but to a completely different question, ie whether a variation of the amount payable also affects another part of the consent paper which does not deal with the amount of maintenance payable, but with other terms and conditions.

[18] The principle is clear : the existing Supreme or High Court order ceases to be of force and effect, but only insofar as the order of the maintenance court expressly or by necessary implication replaces such order. In the present case the effect of the order of the maintenance court was to vary the amount of maintenance payable. It did not deal expressly or by necessary implication with the resolute conditions in clause 4(a), and they remain of full force and effect.

[19] In argument before us, various other matters were touched upon by counsel, inter alia the question whether the whole of the order made by the Supreme Court, incorporating the consent paper, has now become an order of the maintenance court or whether it remains a Supreme Court order. This question relates to the jurisdiction of the High Court to issue a declaratory order in respect of the dum casta clause. However, this question was not in issue before us, and it would be unwise to express an opinion on it. It is also clear that the judgment of the Constitutional Court in *Bannatyne v Bannatyne*, delivered on 20 December 2002 does not affect the conclusion reached herein.

[20] The following order is made:

1 The appeal is upheld with costs.

2 The defence raised by the defendant in paragraphs 2.1 to 2.3 of her Plea to the plaintiff's Amended Particulars of Claim dated 15 October 2001 is struck out.

3 The costs of the hearing before Comrie J in the court a quo and of the application for leave to appeal will by agreement between the parties stand over for decision by the court hearing the merits of this matter.

P J J OLIVIER JA

CONCURRING:

BRAND JA

CONRADIE JA

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