

SOUTH AFRICA / JUDGMENT

I.K.L v S.E.L and Others (11212 / 2013) [2023] ZAGPJHC 1235 (26 October 2023)

[2023] ZAGPJHC 1235**COURT**

South Gauteng High Court, Johannesburg

BEFORE

D Van Niekerk

CASE / FILE NUMBER

11212 / 2013

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Policy**IN THE HIGH COURT****OF SOUTH AFRICA****(GAUTENG DIVISION,****JOHANNESBURG)****CASE NO: 11212 / 2013****In the matter between:**

L, I K
Applicant
And
L, S E
First
Respondent
DISCOVERY LIFE
INVESTMENT SERVICES (PTY) LTD
Second
Respondent
DISCOVERY
RETIREMENT ANNUITY FUND
Third
Respondent
DISCOVERY
LIFE LIMITED
Fourth
Respondent

Delivered: Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 26 October 2023.

JUDGEMENT

CORAM: VAN NIEKERK AJ

1. This is an application terms of which the applicant seeks an order:

1.1 declaring the minor daughter of the applicant and the first respondent, B E L (“B”), born on 24 March 2009, to be entitled to share in the first respondent’s withdrawal benefit and any other benefits in:

1.1.1 the discovery retirement annuity fund with policy number: [...] (“the retirement annuity”); and/or

1.1.2 any other pension or retirement annuity of the first respondent held or administered by the second, third or fourth respondents.

1.2 that:

1.2.1 the registrar of this court issue a writ of execution, in favour of the applicant, for the sum of R872,119.40 (by the time of the hearing of this application, this amount had increased to an amount of R1,004,772.36), plus interest on this amount a tempore morae, at the maximum rate of interest permissible under the applicable laws, per annum, calculated to date of final payment, the costs of this application, and the costs of the execution of an order granted herein;

1.2.2 the sheriff be directed and authorised to attach and execute against the retirement annuity and/or any other pension or retirement annuity of the first respondent held or administered by the second, third or fourth respondent, in favour of the applicant for the sum of R872,119.40 (increased to an amount of R1,004,772.36), plus interest on this amount a tempore morae at the maximum rate of interest permissible under the applicable laws, per annum, calculated to date of final payment, the costs of this application and the costs of the execution of the order granted herein;

1.3 an order that the second and/or third and/or fourth respondent:

1.3.1 be interdicted immediately upon the granting of an order herein, from making any payments to the first respondent from the funds held by the second and/or third and/or fourth respondent in the retirement annuity and/or any other pension or retirement annuity of the first respondent held or administered by the second, third or fourth respondent, except with the leave of the applicant, alternatively, a competent court, until B becomes self-supporting;

1.3.2 retain the first respondent's withdrawal benefit and any other benefits of the retirement annuity and/or any other pension or retirement annuity of the first respondent held or administered by the second, third or fourth respondent that remain after the attachment in execution has been affected in accordance with paragraph 1.2 above, and make periodical payments of the following on the first respondent's behalf to the applicant, into her bank account, from monies owing at present or accruing in future to the first respondent in terms of the retirement annuity and/or any other pension or retirement annuity of the first respondent held or administered by the second, third or fourth respondent:

1.3.2.1 payment of the sum of R9,475.31 per month to the applicant, commencing on the first of the month following the granting of an order herein, until B becomes self-supporting, which amount shall increase annually in accordance with the Consumer Price Index ("the CPI"), which increase shall commence on 24 May 2023 and thereafter on the 24th of May each year;

1.3.2.2 payment to the applicant of the amount of the fees and costs of B's educational expenses, including but not limited to: primary and secondary tuition fees at a private school; uniform; stationery; books; sports equipment and uniforms and extra curricular activities, within 7 days of the presentation of a valid invoice or proof of payment thereof to the second, third and/or fourth respondent, from the date of the granting of an order herein, until B becomes self-supporting;

1.3.2.3 payment to the applicant of the amount of the monthly premiums payable in respect of retaining B on a medical aid scheme, within seven days of presentation of a valid invoice or proof of payment thereof to the second and/or the third and/or the fourth respondent, from the date of the granting of an order herein until the minor child becomes self-supporting;

1.3.2.4 payment to the applicant of the amount of any excess medical expenses incurred on B's behalf which are not covered by a medical aid scheme, including all homeopathic, medical, dental, orthodontic, prescribed pharmaceutical, hospital, psychological, psychiatric, optometric and ophthalmic costs reasonably incurred on B's behalf, within seven days of the presentation of a valid invoice or proof of payment to the second and/or the third and/or the fourth respondent, from the date of the granting of an order herein until B becomes self-supporting; and

1.3.2.5 payment to the applicant of any other amounts which may become due and payable to her by the first respondent in respect of the maintenance order, from the date of the granting of an order herein until B becomes self-supporting.

1.4 an order declaring that once B is no longer in need of maintenance, the first respondent or his estate, is entitled to retain any balance that remains from the sum retained and attached in terms of the above paragraphs;

1.5 an order that the first and second respondent, jointly and severally, the one paying the other to be absolved, pays the costs of a joinder application dated 4 October 2022, under the above case number, on the scale as between attorney and client;

1.6 an order that the first respondent pay the costs of this application on the scale as between attorney and client;

1.7 an order that the third and fourth respondents pay the costs of this application only in the event of them opposing same; and

1.8 an order that all costs payable by the first respondent in terms of an order granted herein, be paid from the retirement annuity and/or any other pension or retirement annuity of the first respondent held, or administered by, the second, third or fourth respondents.

2. The relief sought by the applicant is cumbersome to say the least, but the essence of what she seeks is an order authorising the issue of a writ of attachment, in order to attach the first respondent's pension fund benefit, in order to pay arrear maintenance and future maintenance due in respect of B, as well as interest and costs.
3. Prior to the hearing hereof, the applicant gave notice that she did not intend to pursue her claim in respect of the attachment of the first respondent's pension interest in respect of future maintenance. Accordingly, this application only concerns the issuing of a writ of execution against the first respondent's pension fund in order to pay arrear maintenance.
4. Between the institution of these proceedings and the hearing thereof, the applicant delivered three supplementary affidavits, in terms of which her arrear maintenance claim was updated, because the first respondent continued to fail in his obligation to pay maintenance. The last such supplementary affidavit, dated 23 August 2023, states that an amount of R1,004,772.36 was due to the applicant in respect of arrear maintenance as at 31 July 2023.
5. Further in this supplementary affidavit of 23 August 2023, the applicant revealed that B had moved to the United Kingdom, and that she had been residing with the first respondent from 6 August 2023. Consequently, the applicant no longer sought the payment of future maintenance from the first respondent.
6. The first respondent has also delivered three supplementary affidavits, the final such supplementary affidavit having been delivered on or about 3 October 2023.
7. In his final supplementary affidavit, dated 3 October 2023, the first respondent purported to introduce a counter application in terms of which he sought an order:

7.1 dismissing the applicant's application restricting access to his "RA" (being a reference to an interim interdict obtained by the applicant, which I will refer to later on);

7.2 to "determine the way forward for arrear and future maintenance"; and

7.3 "punitive costs on the scale as between Attorney and Client against the applicant and/or legal counsel for the applicant".

8. As at the date of the hearing of the application, the applicant had not answered to the first respondent's counter application, as the dies for the delivery of such an answer had not yet expired. The counter application cannot be dealt with until the applicant has answered

thereto. Therefore, the counter application will not feature any further herein.

9. The supplementary affidavits delivered on behalf of both the applicant and the first respondent have been received by the court, in the interests of determining the matter on the full facts.

10. The issues which I am called upon to determine are:

10.1 has the applicant made out a case for the issuing of a writ of execution against the first respondent's pension fund benefit held by the third respondent, in order to effect the payment of arrear maintenance; and

10.2 the appropriate costs order in the circumstances.

11. The acrimony and litigation between the applicant and the first respondent goes back many years and is reflected in the volume of the papers delivered herein. A brief history of the litigation follows.

12. The applicant and the first respondent were married in 2007, and B is the only child born of their marriage.

13. Following upon the irretrievable breakdown of their marital relationship, the applicant and the first respondent were divorced on 24 May 2013. A decree of divorce, along with an order making a settlement agreement ("the settlement agreement") an order of court, was granted on 24 May 2013.

14. Clause 6 of the settlement agreement constitutes a "maintenance order", as contemplated by the Maintenance Act 99 of 1998 ("the maintenance act"),[1] and provides that:

14.1 the first respondent would make monthly payments, to the applicant, in the sum of R6,000.00 for B's maintenance, before the 30th day of each and every month;

14.2 the maintenance payable by the first respondent would increase annually, commencing on the anniversary date of the granting of a decree of divorce, in accordance with the CPI;

14.3 the first respondent would be liable for the fees and costs of B's educational expenses, including, but not limited to: primary and secondary tuition fees at a private school (provided that the first respondent was in a position to do so); uniforms; stationery; books; sports equipment and uniforms; and extracurricular activities, which will be paid directly to the various service providers;

14.4 the first respondent would retain B as a dependent on his medical aid scheme, which would, subject to his financial position, remain full cover; and

14.5 the first respondent would cover any excess medical expenses incurred on B's behalf, which were not covered by his medical aid scheme, and would fully reimburse the applicant for all homeopathic, medical, dental orthodontic, prescribed pharmaceutical, hospital, psychological, psychiatric, optometric and ophthalmic costs reasonably incurred on B's behalf, within seven days of the presentation of a valid invoice or proof of payment.

15. The terms of the maintenance order are not in dispute.
16. In her founding affidavit, the applicant alleges that a written addendum to the settlement agreement was entered into between herself and the first respondent on 30 December 2014, but that the content of this addendum is irrelevant for the present purposes. The first respondent does not seriously, or at all, contend to the contrary.
17. It is common cause between the parties that the first respondent breached his obligations in terms of the maintenance order, in that he failed to make payment, to the applicant, of all amounts due in this regard.
18. The first respondent contends that he was financially unable to comply with his obligations under the maintenance order. The applicant does not seriously, or at all, challenge this contention, as she appeared to accept that the first respondent was unemployed for periods of time and unable to pay maintenance, in terms of the maintenance order, by virtue of this circumstance.
19. As a consequence of the first respondent's breach of his maintenance obligations, and his contentions to the effect that he was unable to meet his maintenance obligations by virtue of his employment status, various proceedings were launched in the Magistrate's Court, Randburg, including an application launched by the applicant to enforce the maintenance order and two applications made by the first respondent to reduce his maintenance obligations.
20. The first respondent's applications to reduce his maintenance obligations were unsuccessful, and the maintenance order, in the terms as set out above, remains in force. This is not in dispute between the parties.
21. Moreover, the applicant's attempt to enforce the maintenance order was also not successful.
22. In her founding affidavit herein, as well as in the three supplementary affidavits submitted after the institution of these proceedings, the applicant sets out how the outstanding arrear maintenance has been calculated, together with supporting vouchers in respect of expenses which she had incurred.
23. Calculation of the arrear amount due to the applicant insofar as the first respondent failed to make payment of the monthly amount of R6,000.00 does not present a difficulty. Similarly, the increase in this amount, in line with the CPI, poses no difficulty in calculation.

24. The remainder of the arrear amounts due to the applicant relate to so-called “expense clauses”, in terms of which the applicant would make payment of expenses relating to B’s medical and schooling needs, and then claim such payment from the first respondent by presenting him with a valid invoice or proof of payment relating to the expense.
25. In *Butchart v Butchart*, [2] a Full Bench of this court held that:
- “I consequently come to the conclusion that a writ may be validly issued based on an ‘expenses clause’ contained in a maintenance order on condition that the amount is easily ascertainable and is ascertained in an affidavit filed on behalf of the judgment creditor.”*
26. Before dealing with the prevailing law and the application of the law to the facts herein, mention must be made of the participation of the second, third and fourth respondents in these proceedings.
27. In short, the second, third and fourth respondents have all been cited as parties herein, as the applicant was unsure as to which one of the three of them was the “fund” which was holding, or administering, the first respondent’s pension benefits, which the applicant sought to attach in order to secure the payment of arrear maintenance.
28. It can now be accepted that the third respondent, the Discovery Retirement Annuity Fund, is the party holding the first respondent’s pension benefit, and against whom a writ of execution should be issued.
29. For the reasons which appear hereunder, I do not propose dealing any further with any controversy surrounding the entity against which a writ of execution should be issued in respect of the attachment of the first respondent’s pension benefits.
30. Turning now to the prevailing law.
31. The applicant’s claim for the payment of arrear maintenance falls within the ambit of the maintenance act, which came into operation in 1999.
32. The preamble to the maintenance act accepts the need to introduce strong measures to ensure that maintenance required for children is paid by those persons obliged to do so. In this instance, the first respondent’s obligation to pay maintenance, and his failure to do so are not in dispute.
33. As observed by Savage AJ (as she was then) in *JM v LM and Another*: [3]
- “The enforcement of court orders is a critical component of the exercise of judicial authority. The unlawful and intentional disobedience of*
- a court order not only violates the dignity, reputation or authority of the court (*S v Beyers* 1968
- (3) SA 70 (A) per Steyn CJ) but also undermines the effect of the order. Orders are enforced primarily, although not exclusively, through the issuance of a writ of execution in the high court (a warrant in the magistrates’ court) or by way of contempt proceedings.” [4]

34. Maintenance orders may be enforced against defaulters, in terms of section 26 of the maintenance act, by execution against their property, by the attachment of emoluments or by the attachment of any debt. Section 26(4) provides that “notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.” This application the applicant asks for a writ to be issued in order that she may attach funds standing to the credit of the first respondent’s retirement annuity. This writ will then be used as an instrument to attach the first respondent’s retirement annuity.
35. Section 26 of the maintenance act must be read together with section 37A(1) of the Pension Funds Act 24 of 1956 (“the pension funds act”), which provides that:
- “Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law. . . . Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.”*
36. In *MV v CV*[5], the court held that the “authorisation of the issue of a warrant of execution is a very important step in the issue of a warrant of execution. In these days when many parties in need of maintenance are left destitute, all methods of execution at their disposal, unless expressly excluded, should be available to exact satisfaction of outstanding claims to maintenance. The only jurisdictional prerequisites are that:
1. there must be a valid maintenance order (even if subject to appeal);
 2. against the respondent against whom the warrant is sought;
 3. which creates obligations which have remained unsatisfied for a period of ten days.”
37. Although this aspect is not directly addressed in the papers, it is not disputed that these three jurisdictional prerequisites have been met.
38. The procedure for obtaining and serving a writ in the maintenance court is prescribed in sections 27(1) and (2) of the maintenance act.
39. Section 27(1) of the maintenance act provides that the maintenance court may, on the application of a person referred to in section 26(2)(a), authorise the issue of a warrant of execution against the movable property of the person against whom the maintenance or

other order in question was made and, if the movable property is insufficient to satisfy such order, then against the immovable

property of the latter person to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the execution.

40. Section 27(2) provides that a warrant of execution authorised under section 27 of the maintenance act shall be:

40.1.1 prepared in the prescribed manner by the person in whose favour the maintenance or other order in question was made;

40.1.2 issued in the prescribed manner by the clerk of the maintenance court; and

40.1.3 executed in the prescribed manner by the sheriff or maintenance investigator.

41. Section 27(2)(b) provides that the maintenance investigator or, in the absence of a maintenance investigator, by the maintenance officer

in taking the prescribed steps to facilitate the execution of the warrant.

42. Section 27(1) of the maintenance act does not expressly refer to the High Court's power to issue a warrant of execution. Reference is made to "the maintenance court".

43. Section 1 of the maintenance act defines a "maintenance court" to mean "a maintenance court as contemplated in section 3" of the maintenance act.

44. Section 3 of the maintenance act provides that "every magistrate's court for a district, established in terms of section 2 (1) (e) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), is within its area of jurisdiction a maintenance court for the purposes of this Act". A High Court is not a "maintenance court" as contemplated by the maintenance act.

45. However, in *Greenhill v Discovery Preservation Pension Fund* administered by: Discovery Life Investments Services Ltd.,[6] Manoim J held that a warrant of execution may be issued by the High Court and that section 26(4) of the maintenance act must be given this interpretation.[7]

46. Therefore, the applicant was entitled to approach the High Court to issue a warrant of execution as contemplated by the maintenance act and the first respondent's insistence that she ought to have approached a maintenance court in order to enforce the payment of arrear maintenance is misplaced.

47. Neither section 27 of the maintenance act, nor the form prescribed for such an application, makes provision for the application for the authorisation of the issue of a warrant of execution to be on notice to the party against whom the maintenance order had been made. It appears competent for such an application to be made *ex parte*. [8]

48. In this instance, the applicant did not proceed on an ex parte basis, but rather brought a substantive application to have a warrant of execution issued by this court.
49. The question which then arises is whether a dispute of fact exists on the papers, which precludes me from granting the applicant the relief which she seeks.
50. The first respondent seems to contend that disputes of fact exist regarding, in particular, the following material aspects:
- 50.1.1 the quantum of the applicant's claim for arrear maintenance; and
- 50.1.2 an alleged variation of the maintenance order, in terms of which the first respondent's maintenance obligation was reduced by R2,000 per month.
51. When dealing with the quantum of the applicant's claim for arrear maintenance, in his answering affidavit, the first respondent contented himself with a bald and unsubstantiated denial, coupled with an equally bald allegation to the effect that "the annexures" (being a reference to the applicant's quantification of the arrear maintenance claim together with supporting vouchers) referred to in the applicant's founding affidavit are not an accurate reflection of "the present alleged indebtedness". Allegations of this sort do not create a genuine dispute of fact.
52. A real dispute of fact does not arise in this instance where the first respondent has lead no evidence himself to dispute the truth of the applicant's statements, but merely relies on bare denials.
53. As held by the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*:^[9]
- "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment."*
54. Insofar as the first respondent's contentions regarding the amendment of the maintenance order is concerned, clause 16 of the settlement agreement provides that same is the entire agreement between the party and that no variational cancellation would be of any force or effect unless reduced to writing and signed by the applicant and the first respondent.
55. No variation of the settlement agreement, as required by clause 16 thereof, is contended for, or relied upon, by the first respondent.
56. It is settled law that any attempt to agree informally on a topic covered by a non-variation clause, or to vary informally a contract

containing a non-variation clause must fail.[10]

57. In the circumstances, the first respondent's reliance upon an alleged variation of the settlement agreement and the maintenance order contemplated therein must also fail.

58. In *VDB v VDB*,[11] Siwendu J held that:

[24] Under s 27(2)(b) the first respondent, as a person in whose favour the maintenance was issued, is generally assisted by the maintenance investigator or, in the absence of a maintenance investigator, by the maintenance officer in taking the prescribed

steps to facilitate the execution of the warrant. In circumstances where there is a dispute about the amount owing under a pre-existing

maintenance order, it seems the only remedy for an aggrieved party lies in s 27(3) which provides that:

'A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section, set aside the warrant of execution if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question.'

[25] The provisions of the Maintenance Act do not confer the right, claimed by the applicant in *casu*, on the applicant. Where there is a pre-existing maintenance court order, there is no mechanism to resolve a dispute about the quantum owing before the issue of a writ, nor a requirement for a notice before the issue of such a writ. The only redress I can discern afforded to the applicant is in s 27(3) as aforesaid."

59. In the circumstances, I make an order in the following terms:

a.) the registrar of this court is directed to issue a writ of execution, in favour of the applicant, for the sum of R1,004,772.36, plus interest on this amount *a tempore morae*, at the maximum rate of interest permissible under the applicable laws, per annum, calculated to date of final payment;

b.) the first respondent is directed to pay the cost of this application, the urgent application dated 12 May 2022 and the joinder application dated 4 October 2022;

c.) the sheriff is directed and authorised to attach and execute against the retirement annuity and/or any other pension or retirement annuity of the first respondent held or administered by the third respondent, in favour of the applicant for the sum of R1,004,772.36, plus interest on this amount *a tempore morae* at the maximum rate of interest permissible under the applicable laws, per annum, calculated to date of final payment, the costs of this application and the costs of the execution of the order granted herein; and

d.) insofar as the proceedings between the applicant and the second, third and fourth respondents are concerned, each party shall be responsible for their own costs.

D Van Niekerk AJ

REPRESENTATIVES:

For the applicant:

Adv. C Gordon

Attorneys for the applicant:

Holing Attorneys

For the respondent:

S Lg

Hearing date: 11 October 2023

Delivered: 26 October 2023

[1] see, for example, *Greenhill v Discovery Preservation Pension Fund* administered by: Discovery Life Investments Services Ltd [2021] JOL 51735 (GJ) at [22]

[2] 1997

(4) SA 108 (W)

[3] 2014

(2) SA 403 (WCC)

[4] at [14]

[5] 2014 (3) SA 1 (KZP) at [32]

[6]

[2021] JOL 51735 (GJ)

[7] at [66]

[8] *MV v CV* supra at [21]

[9] 2008 (3) SA 371 (SCA) at [13]

[10] See *SA Sentrale Ko-op Graan mpy Bpk v Shifren* 1964 (4) SA 760 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Christie: The Law of Contract in South Africa* 5th Edition at page 448.

[11] 2022

(5) SA 633 (GJ)

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