

SOUTH AFRICA / JUDGMENT

S.A v J.H.A and Others (7531/2020)

[2020] ZAWCHC 155; 2021 (1) SA 541 (WCC) (10 November 2020)

[2020] ZAWCHC 155

COURT

Western Cape High Court, Cape Town

BEFORE

Francis

CASE / FILE NUMBER

7531/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

REPORTABLE

Case

No: 7531/2020

In

the matter between:

SA Applicant

And

JHA First

Respondent

GA Second

Respondent

CA Third

Respondent

THE

CHIEF REGISTRAR, WESTERN CAPE DIVISION Fourth

Respondent

THE

HIGH COURT SHERIFF, CAPE TOWN

WEST Fifth

Respondent

ORDER

[a]

It is declared that the maintenance

obligations contained in the consent paper that was made an order of

this court on 27 July 1993
under case number 7177/93, is subject to a
30-year period as prescribed in section 11(a)(ii) of the Prescription
Act 68 of 1969.

[b]

The applicant is directed to pay the
costs of the first respondent.

FRANCIS,

AJ

JUDGMENT

ELECTRONICALLY DELIVERED ON 10 NOVEMBER 2020

- [1] The applicant is the former husband of the first respondent, and the second and third respondents are children of the marriage that was concluded between the applicant and the first respondent.
- [2] The marriage was dissolved in terms of an order made by this court on 27 July 1993 which incorporated the provisions of a consent paper entered into between the parties. The consent paper dealt substantially with the interests of the first respondent and the minor children, including matters relating to guardianship, care and contact, and maintenance. In so far as maintenance is concerned, the applicant agreed to pay the first respondent the amount of R750 per month for each child and to pay their educational and medical expenses until the children became self-supporting. The applicant, furthermore, agreed to pay the first respondent maintenance of R2000 per month until her death or re-marriage, and to bear all her medical expenses.
- [3] The applicant failed to pay the cash maintenance portion agreed to in in the consent paper from the time of divorce until January
- 2019. The first respondent did not demand payment of arrear maintenance until December 2018 when, apparently, the applicant received an inheritance from his mother's estate.
- [4] The applicant commenced paying cash maintenance from January 2019, substantially in compliance with the consent paper.
- [5] The first respondent caused a writ of execution to be issued against the applicant in respect of the arrear maintenance, dating back to July 1993, in the (amended) amount of R3 223 190.70. The writ of execution was stayed pending the outcome of these proceedings. The applicant also applied for a retrospective discharge of his maintenance obligations under the divorce order, which application is pending in the magistrates' court.

- [6] The parties have agreed that the sole issue to be determined by this court is that relating to prescription. The legal question for determination is whether an undertaking to pay maintenance in a divorce consent paper which is made an order of the High Court gives rise to a 'judgment debt' or 'any debt' contemplated in sections 11(a)(ii) and 11(d) of the Prescription Act 68 of 1968 ("the Prescription Act")[1], respectively. A maintenance obligation involves the payment of a fixed amount of money and, therefore, is a 'debt' for the purposes of the Prescription Act[2].
- [7] The applicant was represented by Ms Davis SC (with Ms Smit) and the first respondent was represented by Mr Kantor SC. None of the other respondents entered the fray. The court is indebted to counsel for their extensive heads of argument and oral submissions.
- [8] Both counsel submitted that they could not find any authority dealing with the issue in dispute. Although there are cases which deal tangentially with the issue[3], I, too, could not find any reported case exactly on all fours with the issue relating to the prescription period for a maintenance order embodied in a consent paper that is subsequently made an order of court.
- [9] The applicant contends that a court order for the payment of maintenance pursuant to a consent paper gives rise to an ordinary 'debt', which prescribes in 3 years, and not a 'judgment debt', which only prescribes after 30 years. The applicant advanced the following arguments in support of this contention:
- [9.1] A judgment debt is final and conclusive in nature and cannot be altered by the court which pronounced it, i.e. one the effect whereof is *res judicata*. [4] Because maintenance orders are capable of being varied, substituted, discharged on good cause, or even varied with retrospective effect, a maintenance order is not final and conclusive and lacks the attributes of a final judgment[5] and is, therefore, not a judgment debt.
- [9.2] Various provisions of the Maintenance Act draw a distinction between maintenance orders for the payment of maintenance and orders for the payment of a once-off specified amount of money, with only the latter order giving rise to a civil judgment[6]; and
- [9.3] The policy imperatives underlying the Prescription Act are not served by interpreting the words 'any judgment debt' in section 11(a)(ii) as including a maintenance order, regardless of the fact that such an order may emanate from a judgment of the High Court: a creditor is responsible for enforcing his or her rights timeously and must suffer the consequences of failing in this regard and, conversely, a debtor must be protected against a stale claim which has existed for such a long time that it is difficult to defend against it.[7]
- [10] The first respondent submitted, in essence, that when a consent paper is made an order of court, the status of the rights and obligations of the parties to this agreement changes into a judgment debt with the consequence that a 30-year prescription period applies to the agreement. It was further submitted that whilst it is possible for a maintenance order to be varied as circumstances change, this does not mean that when the consent paper is made an

order of court, the dispute between the parties is not definitively settled at that point in time. Finally, it was argued that the policy considerations underpinning the Prescription Act, as contended for by the applicant, are not applicable to maintenance orders.

DISCUSSION

[11] Although all divorce proceedings commence by way of action, often highly contested at the outset, the usual outcome is a negotiated

settlement, the terms of which are recorded in a written document and subsequently made an order of court. Section 7(1) of the Divorce Act 70 of 1979 ("the Divorce Act") empowers a court granting a decree of divorce to make a maintenance order in accordance with a written agreement between the parties. The record of this agreement is commonly referred to as a 'settlement agreement', a 'deed of settlement', or a 'consent paper' and usually deals with matters such as the division of the assets of the parties, the payment of maintenance, the custody of and contact with children, and the payment of the costs of the proceedings[8]. Section 7(2) of the Divorce Act empowers a court to make a maintenance order in the absence of a written agreement between the

parties, having regard to factors such as the existing and prospective means of the parties, their financial needs and obligations, and their standard of living prior to the divorce. A maintenance order made in terms of the Divorce Act qualifies as a maintenance order for the purpose of the Maintenance Act 99 of 1998 ("the Maintenance Act")[9].

[12] In terms of section 8(1) of the Divorce Act, any order made under section 7(1) of the Divorce Act may at any time be rescinded, varied or suspended if the court finds that there is sufficient reason therefor. In addition, such an order may also be substituted or discharged on good cause shown by a maintenance court[10]. In terms of section 6(2) read with section 16(1)(b) of the Maintenance Act, a maintenance court is empowered to hold an inquiry into any complaint relating to a failure to pay maintenance and may substitute or discharge an existing maintenance order. Maintenance orders can also be varied with retrospective effect[11].

I now turn to consider the specific submissions advanced by the applicant.

The consent order and variation

[13] In *PL v YL*, Van Zyl ADJP, writing for a full Bench of the Eastern Cape High Court (Grahamstown), dealt extensively with settlement agreements in the context of matrimonial proceedings where the parties have agreed that the terms of their agreement be made an order of court. The following salient points may be extracted from that judgment which are of relevance to this case:

[13.1] When a settlement agreement is concluded in the context of a civil action, its aim is to relieve the court of its duty to decide the issues in the action and, where it has the effect of disposing of the issues between the parties as raised by the action itself, the agreement constitutes a compromise (*transactio*)[12].

[13.2] A distinction must be made between settlement agreements in divorce actions and those concluded in other types of litigation. This distinction is a necessary consequence of the fact that the dissolution of the marriage relationship and its consequences are primarily regulated by statute and concern issues of status and the welfare of children in respect whereof the court fulfils an important function as upper guardian[13].

[13.3] The granting of a consent judgment is a judicial act since the terms of the agreement are incorporated in an order of court. Accordingly, the agreement entered into between the parties as envisaged in section 7(1) of the Divorce Act brings about a change in the status of the rights and obligations of the parties to the settlement agreement. The act of making the consent paper an order of court vests the settlement agreement with the authority, force, and effect of a judgment[14]. Van Zyl ADJP quoted with approval the following comments of MT Steyn J in *Hermaindes v Pauls*[15]:

"When a consent paper is incorporated in an order of court by agreement between the parties in a matrimonial suit it becomes part of that order and its relevant contents then form part of the decision of that court ... and must be construed upon that basis."

[13.4] Once a court has made a consent judgment, it is *functus officio* and the matter becomes *res judicata* (literally, 'a matter judged')[16]. However, in relation to matrimonial disputes, the general rule that a consent to judgment becomes *res judicata* between the parties does not necessarily apply in all circumstances. The principle of *res judicata* only applies to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause[17]. Orders dealing with custody, guardianship, or access to and maintenance for any of the minor children do not assume the character

of final judgments as they relate to matters which fall within the exclusive jurisdiction of the court and are always subject to

variation in terms of section 8(1) of the Divorce Act or the relevant provisions of the Maintenance Act.

[15] From the foregoing legal principles, it is apparent that a consent paper that is made an order of court must be construed as a judgment of the court and, as such, is a judgment debt. Accordingly, the 30-year prescription period applies to such an agreement[21]. The issue that arises is whether the maintenance portion of the consent paper is also to be considered as a judgment debt given the fact that such an order does not have the character of a final

judgment.

[16] In my view, the maintenance order which forms part of a consent paper should be treated no differently to any other part of the order. A maintenance order is final and enforceable until varied or cancelled[22] and the order, like any other order, must be carried out immediately[23]. In *Reid v Reid*[24], Erasmus J (with whom Jansen J concurred) stated that:

"(w)hen the consent paper is then made an order of court, *res iudicata* is established on the just amount payable as maintenance" (own emphasis).

The settlement agreement, and the resultant consent order, disposes of the underlying dispute and any subsequent litigation that may ensue in respect of compliance with the settlement order does not have to traverse the merits of the original underlying dispute[25]. Thus, any rescission, variation, or a suspension of the maintenance order granted earlier becomes a new dispute between the parties where the original order granted may form the basis of any new contemplated action.[26]

[17] The powers granted to a court to change a maintenance order granted earlier is discretionary in nature and has a statutory basis; there is also a strong policy element underpinning the power to vary[27]. Even prior to the enactment of legislation which allowed courts to vary maintenance orders, the courts recognised that a variation of a maintenance order was necessary in order to accommodate changes in conditions that existed when the original order was made and that it would be unfair if such an order was allowed to stand in its original form[28]. It would certainly redound to the prejudice of all the parties, especially children, if maintenance orders were final and immutable. As Griesel J commented in *Georghiades v Janse Van Resburg*[29]:

"[section 8 of the Divorce Act] was introduced so as to authorise the Court to amend maintenance orders on good cause shown, so as to enable spouses to come to Court 'to redress injustices occasioned by a maintenance order which no longer fits the changed circumstances'".

[18] Having considered the applicable legal principles, I am of the view that once a maintenance order which is part of a consent paper is made an order of court, it is a judgment like any other. Because it imposes a monetary obligation, it is, accordingly, a 'judgment debt' for the purpose of section 11(a)(ii) of the Prescription Act.

The Maintenance Act provisions

[19] The Maintenance Act was enacted after the South African Law Commission

conducted a review of the maintenance system in South Africa.[30] Chapter 4 of the Act makes provision for the granting of maintenance and ancillary orders by a maintenance court, while chapters 5 to 6 set out the civil and criminal procedures applicable in enforcing such orders.

[20] The applicant submitted that sections 24, 26, and 40(1)(a) of the Maintenance Act provides an indication that maintenance orders are not regarded as giving rise to judgment debts inasmuch as a clear distinction is drawn between maintenance orders and orders for the once-off payment of a specified sum of money, with only the latter type of order being afforded the status of a civil judgment.

[21] Section 24 of the Maintenance Act deals with the effect of maintenance orders and reads as follows:

"24.

- (1) Save as is otherwise provided in this Act, any order or direction made by a maintenance court under this Act shall have the effect of an order or direction of the said court made in a civil action.
- (2) Any order made under section 16(1)(a)(ii), 20 or 21(4) shall have the effect of a civil judgment of the maintenance court concerned and shall be executed as provided in Chapter 5."

[22] Section 24(1) makes reference to an order granted by a maintenance court while section 24(2) makes reference to fixed sums of money: section 16(1) deals with the payment of any expenses relating to the birth of a child, section 20 relates to the cost of the service of process in a maintenance enquiry, and section 21(4) makes reference to the cost of a paternity test. The term 'civil judgment' is mentioned in section 24(2) with reference to an order for the payment of fixed sums of money but this term is absent in section 24(1). From this omission, the applicant seeks to draw the conclusion that an order for maintenance granted by a magistrates court is not to be treated in the same manner as an order granted by such a court for fixed sums of money. In other words, a maintenance order is not viewed as a civil judgment whilst the order for the payment of a fixed amount of money is to be considered as such.

[23] I do not agree with the submission that the difference in the wording of the respective sections of the Maintenance Act has the legal consequences contended for by the applicant. On the contrary, as argued by counsel for the first respondent, section 24 in fact provides support for the argument that a maintenance order is in effect a civil judgment and attracts a prescription period of 30 years. The plain wording of section 24 read in context, and having regard to the subject matter of the Maintenance Act, certainly bears out this argument[31]. In terms of section 24(1), when a court orders a maintenance debtor to make payment of a sum of money, that order has the effect of a civil judgment: an order - read judgment - of a court in a civil action is the same thing as a civil judgment of that court.

[24] Turning to section 26 of the Maintenance Act, it provides that:

"Enforcement of maintenance or other orders

26.

- (1) Whenever any person -
- (a) against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or
 - (b) against whom any order for the payment of a specified sum of money has been made under section 16(1)(a)(ii), 20 or 21(4) has failed to make such a payment,

such order shall be enforceable in respect of any amount which that person has so failed to pay together with interest thereon - "

[25] Once again, the applicant attempts to draw a distinction between a failure to pay in terms of a maintenance order and a failure to make payment of a specified sum of money in order to somehow draw the conclusion that a maintenance order is not treated as a civil judgment for the purposes of the Maintenance Act. This argument is even more tenuous. All that section 26 means is that the same enforcement mechanisms may be applied for the recovery of any monies that may be owing pursuant to a maintenance order or to an order for a specified sum of money made by a maintenance court.

[26] Section 40(1) of the Maintenance Act deals with the recovery of arrear maintenance and reads as follows:

"Recovery of arrear maintenance

40

- (1) A court with civil jurisdiction convicting any person of an offence under section 31(1) may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court and shall subject to subsection (2), be executed in the prescribed manner."

[27] In essence, section 40(1) of the Maintenance Act makes provision for a court to grant an order for the recovery of arrear maintenance whereupon the order so granted shall have the effect of a civil judgment of the court. In my view, far from advancing the argument of the applicant, this section is another indication that a maintenance order has the effect of a civil judgment. If an order for arrear maintenance payments is to be regarded as a civil judgment, why should the principle amount payable in terms of the original maintenance order be considered to be something other than a civil judgment?

[28] My view that a maintenance claim that forms part of a consent order is a judgment debt is fortified by the provisions of the Maintenance Act referred to above. It is evident that a maintenance order granted by a maintenance court has the effect of a civil judgment which, accordingly, attracts a 30-year prescription period. This being the case, there is no good reason why a maintenance order granted by a High Court, which has the same effect as a maintenance order granted by a magistrates court, should be treated any differently.

Policy considerations

[29] The applicant submitted that the policy imperatives underlying the Prescription Act are not served by interpreting the words 'any judgment debt' in section 11(a)(ii) of the Prescription Act as including a maintenance order, regardless of the fact that such an order may emanate from a judgment of the High Court. It was argued that a maintenance order is in the nature of things intended to provide for immediate living expenses and sustenance and should therefore be promptly enforced. Permitting a maintenance creditor to wait up to 30 years to enforce a maintenance order can result in great financial hardship for a maintenance debtor who has been lulled into a false sense of security by the inaction of the creditor and who has not provided for the liability, only to be surprised by a substantial claim for arrear maintenance plus accumulated interest (as is argued to be the case in the proceedings before this court). It was further submitted that it is unreasonable and burdensome to expect a maintenance debtor to keep records for up to 30 years in order to deal with possible maintenance claims.

[30] I align myself with the argument proffered by the first respondent's counsel that the policy considerations advanced by the applicant do not fit easily with maintenance matters. Indeed, the argument advanced by the applicant appears to misconceive the true nature of maintenance and appears to be premised on an ahistorical understanding of the unequal burden that has to be borne by maintenance claimants.

[a] Maintenance is premised on a duty to support and cannot be characterised as a normal debtor- creditor obligation. The liability to support children, for example, is a statutory obligation imposed in terms of section 15(1) of the Maintenance Act which is buttressed by the entrenched constitutional guarantee for every child to have the right to "basic nutrition, shelter, basic healthcare services, and social services".[32]

[b] The gendered nature of the maintenance system is undeniable. In *Bannatyne v Bannatyne* (CGE as Amicus Curiae)[33], Mokgoro J, speaking for a unanimous court, stated as follows:

"The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden."

[c] It is not the maintenance debtor who is the victim when it comes to the issue of maintenance payments; it is invariably the maintenance

creditor. In this regard, the comments of the Constitutional Court in *Bannatyne* are salutary and still apposite^[34]:

"[27] Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustained legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.

[28] It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system."

[31] In any event, the arguments posited by the applicant on the policy considerations in support of a 3-year prescription period is premised on what, in the applicant's opinion, the law ought to be and not what it in fact is. As the Constitutional Court stated in *Makate*^[35], the operation of section 39(2) of the Constitution with regard to interpretation "does not depend on the wishes of the litigant".

In *Myathaza*^[36], the Constitutional Court held that the 3-year prescription period is meant for claims and disputes "which are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay". Indeed, this may well be the simple and complete answer to the question whether an obligation to pay maintenance which is incorporated into a court order is a 'judgment debt' or an ordinary 'debt' for the purposes of the Prescription Act. Being an order of court, the maintenance question has been determined and there is no claim or dispute "yet to be determined" in respect of which the 3-year prescription period would apply; therefore, the 30-year period must apply.

[32] In the circumstances, I make the following order:

[32.1] It is declared that the maintenance obligations contained in the consent paper that was made an order of this court on 27 July 1993 under case number 7177/93, is subject to a 30-year period as prescribed in section 11(a)(ii) of the Prescription Act 68 of 1969.

[32.2] The applicant is directed to pay the costs of the first respondent.

[1] The relevant parts of section 11 of the Prescription Act reads as follows: "The period of prescription of debts shall be the following -

(a) Thirty years in respect of-

(i) any debt secured by a mortgage bond (ii) any judgment debt (iii) any debt owed to the State .. . in respect of the right to mine minerals or other substances; (b) (c) Save where an Act of Parliament provides otherwise, three years in respect of any debt." [emphasis added]

[1] The relevant parts of section 11 of the Prescription Act reads as follows:

"The period of prescription of debts shall be the following -

(a) Thirty years in respect of-

(i) any debt secured by a mortgage bond

(ii) any judgment debt

(iii) any debt owed to the State .. . in respect of the right to mine minerals or other substances;

(b)

(c)

Save where an Act of Parliament provides otherwise, three years in respect of any debt." [emphasis added]

[2] cf. *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344E-G; and *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para [85].

[3] See, for example, *NAR v JMR* (Case No. 95368/16 and 22/2/18) GPJSC, unreported judgment dated 22 February 2018; *M v M* [2012] ZAKZDHC 17 (1 January 2012); and *S S v V VS* 2018 (6) BCLR 671 (CC) at para [15].

[4] *Lurlev (Pty) Ltd V Unifreight General Services (Pty) Ltd and Others* 1978 (1) SA 74 (D) at 79A-D.

[5] *Greathead v Greathead* 1946 TPD 404

[6] No legal authority was cited in support of this argument.

[7] See, *Oliff v Minnie* 1953 (1) SA 1 (A) at 4 G, and *MM Loubser Extinctive Prescription* (1996) at pp 22-24.

[8] See, *PL v YL* 2013 (6) SA 28 (E) at 30 G-H.

- [9] Section 1 of the Maintenance Act defines a maintenance order as "any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic". In terms of section 1(1)(i) of the Maintenance Act, a "High Court" is included in the definition "court in the Republic".
- [10] In terms of section 1 (1)(iv) read with section 3 of the Maintenance Act, every magistrates court serves as a maintenance court.
- [11] *Herfst v Herfst* 1964 (4) SA 127 (W); and *Fluxman v Fluxman* 1958 (4) SA 409 (W); and *Mulder v Mulder* (Appeal Case A 275/2010) WCHC, unreported judgment dated 1 February 2011.
- [12] at para [9].
- [13] at para [11].
- [14] at para [32].
- [15] 1977 (2) SA 450 (O) at 452 G-H.
- [16] at para [45].
- [17] at para [45].
- [18] 2016 (3) SA 37.
- [19] *Eke v Parsons* at paras [29] and [31].
- [20] *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 1 SA 523 (A) at 532 D-G.
- [21] See also, *M v Rat* para [8].
- [22] *Strime v Strime* 1983 (4) SA 850 (CPD) at 852B.
- [23] See, *S S v V VS* at paras [18] to [23].
- [24] 1992 (1) SA 443 (E) at 447 B-C.
- [25] *Eke v Parsons* at para [31].
- [26] In this regard, section 13 of the Maintenance Act provides that where a maintenance court holds an inquiry in respect of an existing maintenance order, it may accept as prima facie proof any finding of fact in the initial maintenance proceedings and evidence led at those proceedings is admissible.
- [27] *Knight v Knight* 1967 (1) SA 40 (CPD) at 44 C-D.
- [28] See, for example, *Roos v Roos* 1945 TPD 84 at [88]; and *Strauss v Strauss* 1974 (3) SA 79 (A).
- [29] 2007 (3) SA 18 at 22D.
- [30] Preamble to the Maintenance Act.

[32] Section 28(1)(c) of the Constitution.

[33]

[2002] ZACC 31; 2003 (2) SA 363 (CC) at para [29].

[34] See, *S S v V* VS 2018 (6) BCLR 671 (CC).

[35] at para [90].

[36] at para [44].

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