

SOUTH AFRICA / JUDGMENT

S.P v S.P (6700/2018) [2023] ZAWCHC 158 (30 June 2023)

[2023] ZAWCHC 158**COURT**

Western Cape High Court, Cape Town

BEFORE

Mantame

CASE / FILE NUMBER

6700/2018

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Source record**FLYNOTES:**

FAMILY – Divorce – Amendment of order –
Reference to wrong addendum – Sole guardianship
order to
enable child to travel overseas – Clear that purpose was not
to terminate respondent's maintenance obligations,
but to
terminate his rights of guardianship – Necessitated by his
stance of being voluntarily absent from his own children's
upbringing and developmental milestones – Order amended and
declared that amount referred to is the amount payable
by the
respondent per month per child.

SAFLII Note: Certain

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 6700/2018

In the matter between: S[...] P[...]1
Applicant
vs
S[...] P[...]2
Respondent
Matter Heard: 7 June
2023
Judgment Delivered: 30
June 2023

JUDGMENT

MANTAME J

Introduction

- [1] The applicant seeks an amendment of the order of this Court granted on 23 August 2018.[1] According to the applicant the date on the order made reference to an incorrect addendum and not the one that was intended. The applicant intended to refer to paragraph 1 of the Addendum to the Settlement Agreement dated 18 September 2009[2] and not to the Addendum to the Settlement Agreement dated 20 November 2009.[3]
- [2] The respondent opposed this application and filed a counter-application seeking declaratory relief on the interpretation of a term (paragraph 1) of an Addendum to the Settlement Agreement dated 20 November 2009; as well as an order granting contact rights to the minor children. This relief was opposed by the applicant.
- [3] When the matter last served on the court roll on 2 February 2023, it was postponed to 7 June 2023 for the Family Advocate report. When the matter appeared before this Court On 7 June 2023, two (2) comprehensive reports were filed on record by the Family Advocate[4] and by a Social Worker[5](Family Counsellor) based at the Office of the Family Advocate who interviewed and assessed the parents and their two (2) minor

children. The Family Advocate requested this Court to incorporate the Social Worker's (Family Counsellor) report in

its order.

- [4] At the commencement of these proceedings the applicant and the respondent agreed that they will abide by the Social Worker's (Family Counsellor) recommendations.

The recommendations read as follows:

"13 RECOMMENDATION

In light of the assessment conducted and having considered Section 7 and 10 of the Children's Act No. 38 of 2005 as amended, and taking into consideration the information received from S... and S..., the undersigned respectfully recommends the following and is of the professional opinion that it will serve the best interest of the minor children.

S P, a boy child born 1[...] J[...] 2006, currently 17 years old, and

S P, a girl child born 1[...] M[...] 2010, currently 12 years old.

"13.1 GUARDIANSHIP

The applicant shall remain sole-guardian as contemplated in Section 18(2)(c) of the Children's Act 38 of 2005; in respect of the minor children namely;

13.2 PRIMARY CARE

The minor children, S... and S..., shall remain in the primary care of the Mother.

13.3 CO-PARENTING INTERVENTION AND REINSTATING OF FATHER'S CONTACT WITH MINOR CHILDREN

Both parents should participate in mandatory co-parenting intervention to assist them to effectively resolve their conflict, work towards effective communication and learn to always focus on the best interest of S... and S....

13.4 The Father should participate in structured intervention with a professional skilled in Positive Parenting techniques. The course must focus on the role of the father in the family and being actively involved in raising his children.

13.5 Subsequent to the Father completing the above parenting skills workshop, he should participate in a structured reunification program together with S... and S... to address the lack of attachment and mistrust in their relationship. The focus of the intervention or reunification would be to assist the Father and the children to understand the nature of their current relationship and work towards rekindling of their relationship, aimed at restoring the Father's contact.

13.6 Subsequent to the Father and the minor children completing the reunification program for regular but short contact time to be introduced and phased in with the Father by the same professional offering reunification services to establish a bond, emotional attachment, and trusting relationship. The specific period to be determined by the professional."

[5] In light of this recommendation, the respondent did not persist with the relief he sought for custody rights to the minor children. The respondent proceeded only with his counter-claim in which he sought declaratory relief based on the interpretation of paragraph 1 of an Addendum to the Settlement Agreement dated 20 November 2009.

Factual

Background

[6] The applicant and the respondent had previously been married. Their marriage was terminated by divorce on 20 August 2010 in the South Gauteng High Court. Judging from the amount of documents accumulated in this matter, running into thousands of pages, it was evident that they had an acrimonious divorce. The first born child was four (4) years old and the second born child was five

(5) months old when the parties parted ways.

[7] The parties signed three (3) settlement agreements before the dissolution of their marriage, the main Settlement Agreement dated 5 July 2009, an Addendum to Settlement Agreement, and an Acknowledge of Debt dated 18 September 2009, and a second Addendum to the Settlement Agreement dated 20 November 2009. These agreements were made an

order of court on 20 August 2010.

[8] Although the parties attempted to rekindle their relationship after divorce, these attempts dismally failed. After the respondent moved out of the matrimonial home, the parties frequently appeared in the Randburg Magistrate's court for various charges against each other. The applicant stated that she spent approximately

twenty-four (24) days in various courts defending these actions within a period of approximately fifteen (15) months. This

happened between September 2013 to December 2014. The respondent stopped paying maintenance, or paid frugally and removed

the applicant and their minor children as beneficiaries of his Medical Aid without notification to the applicant.

[9] On 31 January 2014, the respondent alleged to have purposefully resigned from his position as an Accountant and Chief Financial Officer at Avbob Mutual Assurance. At the time, he earned a salary of R107 665.50 per month. Prior to his resignation, on 13 September 2013, he launched an application for a reduction in maintenance of an amount of R10 000.00 per month per child, medical aid for the applicant and minor children, private school fees and crèche fees. From June 2014, he contributed an amount of R3 000.00 per month per child. There were no contributions to medical aid, private school fees and related expenses. The maintenance payments that he made were said to be irregular. In November 2017, he contributed an amount of R3 250.00 per month per child, without any other contributions to other expenses. From November 2018 to date, he has contributed an amount of R3 500.00 per month per child without any contributions to other expenses. The Family Advocate stated in its report that there have been no maintenance contributions by the respondent since February 2023.

- [10] The applicant relocated from Gauteng to Cape Town for employment purposes in December 2014. After relocating to Cape Town, the applicant consulted a mediator to intervene in their ongoing dispute. The respondent was requested to attend mediation regarding parental and visitation responsibilities, as well as maintenance for the minor children. The respondent did not participate in the mediation process. The applicant proceeded with an application for a parenting plan and on 19 November 2015 an interim Parenting Plan was forwarded to the respondent, but no response was received. On 18 February 2016, an interim Parenting Plan was made an order of Court. Having been made aware of this Parenting Plan, it was stated that the respondent failed to co-operate and or perform in terms of the Parenting Plan.
- [11] In 2017, it was said that the parties started communicating with each other. The respondent requested that he be accommodated more. He requested a mediation take place on 27 April 2017, and a Draft Parenting Plan was drawn. Certain amendments were made including a permission by the respondent being granted for the application of passports and visas for the minor children to travel abroad. The respondent unfortunately reneged on his consent for the children to travel abroad.
- [12] Furthermore, since the respondent at that time was paying R6000.00 for both children for maintenance, R10 000.00 maintenance per month per child was discussed with an annual increase of 10% on the anniversary of the Parenting Plan. At all times, the respondent, led the applicant to believe that he had been unemployed since 2014, when in reality he was employed as the Chief Financial Officer of Consumer Goods Council of South Africa since 2016. This information was acquired by the applicant through Google search. On 2 May 2017, the Draft Parenting Plan was forwarded to the respondent for signature, the respondent however elected not to sign it.
- [13] On 12 December 2017, a letter was sent to the respondent reminding him of his obligations to pay the agreed amount of R10 000.00 since August 2017. Instead, he tendered to pay R6 500.00 because he did not agree to R10 000.00. Despite being asked for permission to allow his son to visit London, he refused permission if he cannot visit him in Gauteng. The applicant state that as early as 2015, the respondent refused to co-sign for the minor children to travel overseas to the applicant's sister in the Isle of Man, United Kingdom at applicant's sister's costs. Following the respondent's refusal, the applicant proceeded with an application to the Children's Court for the issue of the children's passports without respondent's consent. That application was granted on 20 April 2016 and the respondent was present at Court. On 6 July 2016 the passports were issued for both children without the respondent's consent.
- [14] The first born child was nominated to attend the Euro Soccer Tournament in England at the end of 2017. However, the venue was later relocated to Dubai. Again, the respondent withheld his consent despite the applicant's offering the respondent to travel with S... internationally and despite offering the respondent to accompany S... with other parents.

- [15] In order for S... to travel to Dubai, a visa was necessary. The applicant had to launch an application to this Court for her to obtain sole guardianship of the minor children. The sole guardianship order was granted on 23 August 2018.
- [16] Despite this application being launched on 18 April 2018, the respondent alleged that he did not receive this application as he was hospitalised from approximately 5 June 2018 – 13 July 2018 (as per detailed claim statements attached). He was in a coma, and literally on his death bed. Further period is unaccounted for in the answering affidavit.
- [17] The applicant lost her job in 2020. It was during this period that the shoe pinched as she had no income, no financial support from the respondent, and had the two (2) minor children to support. In 2021, she then approached the Cape Town maintenance court to enforce the Settlement Agreements which were made an order of Court.
- [18] In opposing this application, the respondent stated that paragraph 1 of a Settlement Agreement dated 20 November 2009 was deleted and / or done away with pursuant to an order granted by this Court granted on 23 August 2018. It was at this point that the applicant realised that her attorney has made reference to the incorrect Addendum in her application for the sole guardianship and subsequent order. She then approached this Court for the amendment of the order.

Issues

- [19] First, whether the order granted on 23 August 2018 made reference to an incorrect Addendum; and whether the date in the order needs to be amended to reflect the correct date, and the correct Addendum. Second, whether paragraph 1 of the Addendum to Settlement Agreement dated 20 November 2009 could be interpreted to refer to the R10 000.00 in maintenance for both minor children.

Submissions

- [20] The applicant submitted that reference to the wrong Addendum was a patent error as it was not her intention to refer to that Addendum. In any event, her application was for the termination of the respondent's guardianship. Nothing from that Addendum refers to the respondent's rights and guardianship. If due regard is had to the relief sought, the respondent's rights are dealt with in the Addendum dated 18 September 2009. This Court should grant an order amending the error.

- [21] The respondent raised a point in limine stating, that there does not seem to be a jurisdictional basis in terms of Rule 42 of the Uniform Rules of Court for the amendment

sought by the applicant. It is not clear from the applicant's founding affidavit what rule or error the application is based upon. For purposes of this application, the respondent will assume that the application is based on Rule 42(1)(a) or Rule 42(1)(b). Further, it was not the applicant's case that there was an omission, ambiguity, irregularity or error in the Court order. The mistake is not

common to both parties. In respondent's view, it seems that the relief sought by the applicant in 2018 does no longer suit her, hence this present application three (3) years later. In *Duncan t/a San Sales v Herbor Investments (Pty) Limited*,^[6] the Court held that:

"A litigant who asks for an indulgence should act with reasonable promptitude ... Other neglectful acts in the history of the case are relevant to show this attitude and motives. ... A litigant who asks for an indulgence must be scrupulously accurate in his statement to the court."

The respondent submitted that the applicant has dismally failed in this regard.

[22] With regard to the interpretation of paragraph 1 of the Addendum in Settlement Agreement dated 20 November 2009, the respondent argued that upon the perusal of that clause of the second Addendum, the wording is clear: "that R10 000.00 per month would be payable as maintenance for both children and not per child."

[23] The respondent submitted that the parole evidence is inadmissible and cannot be used to modify, vary or add to the written terms of the agreement. It is the role of Court to interpret a document and not the witness. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*^[7], the Court stated as follows:

"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law or the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School [2008] ZASCA 70; 2008(5) SA 1 (SCA) paras 16-19]. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the word used in a document, be it legislation, some other statutory instrument, or contract, having

regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the

circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself" [a reference to *Re Sigma Finance Corp*

[2008] EWCA Civ 1303 (CA) para 98], read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[24] It was the respondent’s submission that the counter-application seeking the declaratory relief should succeed.

Discussion

Error committed when order was granted

[25] In *Gollach & Gromperts v Universal Mills and Produce*,^[8] it was held that a reasonable mistake on the part of either party could be used as a valid ground for variation or rescission. It is common cause that the respondent disputes that the applicant made an error in her application when she referred to a wrong Addendum to the Settlement Agreement. The respondent went on to raise a point in limine that there seem to be no jurisdictional basis in terms of Rule 42 of the Uniform Rules for the amendment as sought by the applicant.

[26] I agree with the respondent in this regard. The applicant’s application is not a source of clarity. However, Rule 42(1)(a) states that “(i) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. (Emphasis added)

[27] In spite of the applicant’s lack of precision in her application however, this Court understood and comprehended the application before it. For instance, in *Endumeni* (*supra*), it was stated “... Interpretation is the process of attributing meaning to the word used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence The process is objective not subjective.”

[28] On consideration of the application that was filed by the applicant seeking an order for the sole guardianship of the minor children in 2018, reference could not have been made in the Addendum of the Settlement Agreement dated 20 November 2009 as there was no mention of the rights and guardianship of the respondent in that Agreement. An Addendum to the Settlement Agreement dated 18 September 2009 is the agreement with A clause 1 which reads:

“1 CUSTODY AND GUARDIANSHIP

S[...]1 shall be awarded full custody including inter alia parental rights responsibilities and primary care of THE SECOND CHILD and the parties shall retain their rights of guardianship over THE SECOND CHILD.’

- [29] That application, in my opinion, was premised on the main settlement agreement and the clause as stated above. It is quite opportunistic for the respondent to point out that his maintenance responsibilities were ceased by the order of 23 August 2018. On consideration of that application it is patently clear that its purpose was not to terminate the respondent's maintenance obligations, but to terminate the respondent's rights of guardianship. That was necessitated by his adopted stance of being voluntarily absent from his own children's upbringing and developmental milestones.
- [30] In fact, it is quite shocking that a father and a parent would celebrate (by taking a legal point) on a patent error that has been made unintentionally, on the fact that he would not be required to pay maintenance. This has been a trend he adopted since he parted ways with the applicant, which resulted in him being estranged from his own children. The respondent has always maintained an upper hand towards providing maintenance of his minor children. He contributed financially as and when it pleased him. This attitude is insensitive, vindictive and spiteful to say the least. In fact, the report of the Family Advocate portrays a picture of an absent father where there is no relationship between the minor children and himself. They consider their own father a total stranger in their lives.
- [31] When the parties' divorce, they somehow forget that it is the husband and wife that get divorced and not the children. The children must and should not be used as pawns to fight the battle of the parents and settle scores. This feature was very much pronounced in these proceedings. The children should not bear the brunt of the consequences of a divorce.
- [32] In my view, a date error is a matter that could have been resolved by agreement between the parties by merely approaching the Judge concerned in chambers and requesting the variation of the order. The order flows and reads logically by incorporating the provisions of paragraph 1 of the agreement dated 18 September 2009. In light thereof, despite the applicant's failure to specify which jurisdictional basis she relied on, this Court is empowered by Rule 42(1) to vary the order *mero motu*. However, in this instance, the applicant has also filed an application requesting an amendment of the order. In the circumstances I am satisfied that the applicant was justified in approaching this Court to vary the order. It is in the interest of justice that such order be granted.
- [33] The respondent contended that if this Court issues an order amending the order, it lacks the authority to order that its amended order apply retrospectively. This Court agrees that it does not need to order any retrospective effect of the order. The fact that the Court will order the deletion of the date of 20 November 2009 to read 18 September 2009 simply means that the correct order would read as such from the date of the order, i.e. 23 August 2018, nothing more and nothing less.

Respondents Counter-claim

- [34] The applicant argued that the respondent's counter-claim for declaratory relief based on the interpretation of paragraph 1 of an addendum dated 20 November 2009, should be dismissed. It was submitted that the respondent could not argue that the stated clause has been deleted by the order of 23 August 2018 and at the same time request this Court to interpret the same provisions that it argued had no force and effect to be interpreted.
- [35] As stated above, the respondent raised this defence while being fully aware that his argument regarding paragraph 1 which relates to his maintenance obligations has been deleted, was not supported by the notice of motion, the founding affidavit, and the subsequent order that was granted on 23 August 2018. Despite the fact that the error was discovered three (3) years after the granting of the order, the applicant has approached this Court for it to be corrected.

The allegations on the deletion of his maintenance obligations is not founded upon any legitimate legal process. Hence, he sought clarification on the interpretation of that paragraph.

[36] Clause 1 of that agreement reads:

"1.1 Save that the maintenance in respect of S... and the SECOND CHILD will be reduced to R10 000.00 per month the remainder of the terms and conditions of the Main Agreement and the Addendum under the MAINTENANCE heading will remain ..."

On reading the clause in isolation, without a contextual meaning, it would appear that the R10 000.00 per month would be for both children. However, due consideration and regard should be had to the two (2) settlement agreements which were concluded prior to this agreement. The main agreement concluded on 5 July 2009 reads as follows:

"8 MAINTENANCE

8.1 S[...]2 shall pay S[...]1 maintenance in respect of herself at the rate of R1.00 per annum in order to preserve her rights, and for S... (the first born child) at the rate of R15 000.00 per month until such time as S... becomes self-supporting."

[37] The agreement concluded on 18 September 2009 reads as follows:

"3 MAINTENANCE

3.1 S[...]2 shall pay S[...]1 maintenance for THE SECOND CHILD at the rate of R15 000.00 per month until such time as THE SECOND CHILD becomes self-supporting."

- [38] The respondent was well aware that his maintenance obligations in respect of the first and the second child in the Addendums dated 5 July 2009 and 18 September 2009, have been dealt with separately. Each child on both agreements had to receive maintenance of R15 000.00 per month. In my objective interpretation reference to the maintenance being reduced to R10 000.00, means reduction from R15 000.00 to R10 000.00 per month per child. In the Addendum dated 20 November 2009, it was specifically said that "the remainder of the terms and conditions of the Main Agreement and the Addendum under the MAINTENANCE

heading will remain.” The terms and conditions were that the amount was payable per month per child. Judging from the income he received at that time, the amount payable was reasonable.

- [39] In any event, this Court was referred to several applications on record where, in his handwriting the applicant requested that the amount of R10 000.00 per month per child be reduced to R3500.00 per month per child. It is now disconcerting and or disheartening for the respondent to seek interpretation of the terms and conditions of which he is fully aware, having failed, or unwilling to contribute the bear minimum to the upbringing of his offspring.
- [40] I find the applicant’s conduct to be disingenuous when he singled out the Addendum to Settlement Agreement dated 20 November 2009 to be interpreted without considering the two (2) previous agreements entered into by the parties, being read into that agreement. It is my considered view that reference to reduction of maintenance to R10 000.00 refers to payment of maintenance per month per child.
- [41] The order of 23 August 2009 envisaged that the respondent be stripped of his rights to guardianship as contained in paragraph 6, 7.3, 7.4 and 7.5 of the Main Settlement Agreement entered into on 5 July 2009 as well as paragraph 1 of the Addendum to the Settlement Agreement dated 18 September 2009 ... is deleted and sole guardianship of the two (2) minor children be granted to the applicant.
- [42] In the circumstances, the following order shall issue:

42.1 The Court Order granted by Fortuin J on 23 August 2018 is amended to read:

“Paragraph 6, 7.3, 7.4 and 7.5 of the Settlement Agreement entered into on 5 July 2009 as well as paragraph 1 of the Addendum to the Settlement Agreement dated 18 September 2009, and which has been made an order of the court on 20 August 2010 under case number 23085/2010 by the South Gauteng High Court is deleted. Sole guardianship and sole care of the minor children “SP” born 1[...] J[...] 2006 and “SP” born on 1[...] M[...] 2010 is granted to the applicant.”

42.2 It is declared that the amount of R10 000.00 referred to in paragraph 1 of the Addendum to the Settlement Agreement dated 20 November 2009 is the amount payable by the respondent per month per child.

42.3 The recommendations by the Family Advocate in paragraph [4] above are made an order of Court

42.4 Each party is ordered to pay its costs.

WESTERN CAPE HIGH COURT

[1] Record page 19

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- [2] Record page 63 - 70
- [3] Record page 75 - 77
- [4] Report by Adv MZ Edwards, Family Advocate Cape Town dated 17 March 2023 at record page 895 - 910
- [5] Report by HL Le Roux, Family Counsellor, Western Cape dated 3 April 2023 at record page 913 - 933
- [6] 1974(2) SA 214 (T)
- [7]
- [2012] ZA SCA 13, 2012 (4) SA 593 (SCA)
- [8] 1978 (1) SA 914 (AD)
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