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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 11672/2017

In the matter between:

P P

Applicant

and

M P

Respondent

Coram: Justice J Cloete

Heard: 16 August 2018, judgment reserved on 28 August 2018 after parties advised settlement negotiations had failed.

Delivered: 6 November 2018

JUDGMENT

CLOETE J:

- [1] The parties were divorced on 26 November 1991. In clause 3 of their Consent Paper, the applicant undertook to maintain the respondent until her death or remarriage, whichever occurred first. The cash portion of the maintenance was agreed at R2 500 per month. Clause 4 provided that this would increase annually on the anniversary of the divorce at the fixed rate of 12% per annum but that *'notwithstanding the foregoing, either party may apply to vary the said maintenance payable on good cause shown'*.
- [2] The applicant has approached court in terms of s 8 of the Divorce Act¹ which reads in relevant part as follows:

'8. Rescission, suspension or variation of orders.-(1) A maintenance order... made in terms of this Act, may at any time be rescinded or varied... if the court finds that there is sufficient reason therefor.'

- [3] The applicant does not rely on inability to afford the maintenance or on a deterioration in his financial circumstances. He only seeks to vary the annual escalation fixed at 12% per annum on the cash component to an annual escalation in accordance with the Consumer Price Index ("CPI").
- [4] When the applicant agreed to the annual 12% escalation in 1991 the prime lending rate was 21% per annum and the CPI over the following year (December 1991 to November 1992) was 9.6% per annum. He alleges that the R2 500 per month cash maintenance was considered by the parties as sufficient to cover the respondent's reasonable and actual needs in 1991 (excluding her

¹ Act 70 of 1979.

accommodation and almost all of her medical expenses which the applicant also agreed to pay).² This allegation is admitted by the respondent, who merely contends that the applicant is an astute businessman who was legally represented, was fully apprised of the significance of each provision of the Consent Paper and '*went into the agreement with his eyes open*'. She denies that the applicant, as he alleges, failed to appreciate the future effect of the annual escalation provision over time.

[5] The monthly amount currently paid by the applicant (i.e. R2 500 plus the 12% annual escalation) is R47 767.73. This will increase to R53 499.86 per month on 26 November 2018. It is common cause that the respondent has a fully paid home in Bantry Bay. The applicant alleges that it is worth in excess of R15 million. This allegation was met with a bald denial by the respondent who elected not to disclose any details of her assets and liabilities or income and expenses.

[6] It is the applicant's case that the annual fixed escalation of 12% (which is of course compounded) has meant that, given the common cause fact of the respondent's reasonable needs at the time of divorce, the monthly amount paid by him far exceeds what her current reasonable needs should be. By comparison, had the cash component been linked to an annual CPI escalation, the applicant would currently pay R12 870 per month. The respondent concedes that the increases she has received over the years have exceeded the inflation rate. Importantly, the applicant only seeks a variation of the annual escalation as

² Clauses 3 and 6 of the Consent Paper.

from 26 November 2018 which means that, if granted, the respondent will continue to receive R47 767.73 per month escalating annually in accordance with the CPI at her current age of 67 years.

[7] The applicant previously approached the maintenance court in 2016 but the maintenance officer refused to entertain his application on the erroneous basis that he had not supported it with full information concerning his own financial position, despite the fact that this was irrelevant, given that his ability to pay was not in issue. In *Havenga v Havenga*³ it was held that the magistrate's view that there had to be a material change in circumstances before he could hear the matter was incorrect; the presence or absence of changed circumstances was not a statutory jurisdictional fact; and parties were therefore entitled to agree that this procedural requirement would not be applicable to them. It also found that the appropriate remedy which should have been employed was a review of the magistrate's decision and not an appeal. However in the present matter the parties specifically agree that neither wishes to approach the maintenance court any further.

[8] In the maintenance court the applicant was provided with the statutory Form J107 E for completion, which required him to set out why '*good cause/reason*' exists for a substitution of the existing maintenance order as contemplated in s 6(1)(b) of the Maintenance Act⁴.

[9] The explanation he provided was as follows:

³ 1988 (2) SA 438 (TPD).

⁴ Act 99 of 1998.

'The cash amount payable by the deponent as and for maintenance has for the past 25 years artificially been increased annually in terms of the High Court Order, at 12% per annum, a percentage vastly in excess of a rate equal to the annual Consumer Price Index, when the needs of the said M P have not increased at such a rate over the past 25 years and will not in future increase annually at such a rate.'

Future automatic and unsubstantiated increases at 12% per annum, without good cause being shown for such increases, will be unjust to the deponent and it would be unfair to the deponent that the High Court Order, as granted on 26th of November 1991, should be allowed to stand and remain in force in its original form, thereby enriching the said M P at the expense of the deponent.'

[10] The parties are *ad idem* that there is no precise definition of '*sufficient reason*' or '*good cause*' and that this depends upon the particular circumstances of each case.

[11] There is not a single averment in the respondent's answering affidavit that she reasonably requires cash maintenance of R47 767.73 per month as currently paid by the applicant. She simply denies the applicant's averment that her current standard of living is higher than it was during the marriage because of an artificially increased cash component.

[12] The respondent's case is that the application should be dismissed because:

12.1 The applicant wishes to have this court interfere with the bargain struck between them by making '*a new agreement*'. This allegedly entails the

variation of one provision while at the same time retaining all others such as *'the provision that I would have no further claims against him'*; and

12.2 The increase in the cash component as a result of the 12% fixed annual escalation cannot be described as *'significant'*. No explanation was provided by the respondent for this bald assertion other than that *'the calculation of an abstract inflation-based increase is irrelevant to this application... moreover, there is no absolute right to base a maintenance increase on the Consumer Price Index'*, although she admits the purpose and nature of the CPI *'in general terms'*.

[13] The respondent's counsel correctly submitted that the principle of *pacta sunt servanda* applies equally to divorce settlement agreements. For present purposes however it is worth considering the context in which this principle was applied in the judicial decisions relied upon by the respondent.

[14] In *Claassens v Claassens*⁵ the Consent Paper provided that the husband was to pay his wife a fixed amount in cash plus a monthly amount as maintenance. There was a further clause which stipulated that the wife *'will not be entitled to apply for an increase'* in the monthly amount. She applied for an increase and it was held that she was precluded from doing so by virtue of her express waiver.

⁵ 1981 (1) SA 360 (N).

[15] In *Reid v Reid*⁶ the husband agreed in the Consent Paper to pay a monthly amount of maintenance to his wife. About two years after the divorce he applied for a reduction in the amount payable, contending that he had agreed to an unjust settlement and that since the divorce his financial situation had deteriorated substantially. After the maintenance court had granted a reduction the appeal court confirmed the magistrate's decision, but on the basis that the husband had indeed established a deterioration in his financial circumstances since the divorce. However it also held that s 8(1) of the Divorce Act should be construed so as to affect the operation of the *res judicata* rule as little as possible; that to allow an ex-spouse to freely attack the justness of a divorce order without showing special circumstances could open the door to abuse of the court process, and that in respect of his complaint that he agreed to an unjust settlement, no special circumstances had been proven.

[16] In *Botha v Botha*⁷ the husband agreed in the Consent Paper to pay the wife R8 500 per month maintenance for an unspecified period. The husband applied to the maintenance court for a reduction and the parties settled on a reduced amount. The husband thereafter applied to the High Court for an order limiting the period of his maintenance obligation to 5 years from the date of first payment, suggesting that the parties had intended that he would only pay rehabilitative maintenance to the wife. The latter disputed this. The court, following *Cohen v Cohen*,⁸ found that the implicit indefinite duration of the maintenance obligation continued to exist, notwithstanding the reduction in the quantum of that obligation. The court also held that:

⁶ 1992 (1) SA 443 (E).

⁷ 2005 (5) SA 228 (W).

⁸ 2003 (3) SA 337 (SCA).

*'The order of the Court obliging the applicant to pay maintenance for the respondent had its origin in an agreement solemnly entered into between the parties in contemplation of their divorce. In this regard, there is a helpful article directly in point by H R Hahlo 'Pacta Sunt Servanda' (1966) 83 SALJ 4. It is a well-known fact that, depending on a change in circumstances, the amount contained in an order of this kind may be varied up or down. The parties knew or ought to have been aware of this fact when they entered into the agreement. Quite apart from anything else, the ravages of inflation always skulk in such matters. The applicant's fortunes may change for the better as may the respondent's for the worse. Changes of such a nature may, of course, justify a further variation of the order by the maintenance court...'*⁹

- [17] In *Georghiades v Janse van Rensburg*¹⁰ the ex-wife sought an extension of the period for which the ex-husband was to maintain her in their Consent Paper from 3 years to an indefinite period on the ground of her alleged ill-health. Clause 7 of their Consent Paper stipulated that the provisions contained therein were *'in full and final settlement of all present and future property and financial claims which either of them may have against the other'*.

- [18] Dismissing the application, the court held that:

'[15] ...Generally speaking, our courts accept that circumstances must have changed substantially and that it would be unfair to allow the order to stand in its original form before rescission, variation or suspension of an existing maintenance order will be granted. In Havenga v Havenga, however, Harms J pointed out that, although, in general, there will not be sufficient reason for the variation or rescission of a maintenance order in the absence of a real change in circumstances, changed circumstances are not a statutory prerequisite and there may sometimes be sufficient reason although circumstances have not changed.'

⁹ At 234B-D.

¹⁰ 2007 (3) SA 18 (CPD).

[16] *In considering whether or not sufficient reason for variation of the present maintenance order has been shown, it is important to bear in mind that the order in question is contained in a consent paper, which was made an order of court at the time of divorce. The consent paper deals not only with “the payment of maintenance by the one party to the other”, as contemplated by s 7(1) of the Act, but also with, inter alia, “the division of the assets of the parties”. As such, it constitutes a composite, final agreement entered into by the parties, purporting to regulate all their rights and obligations inter se upon divorce. For the Court now to interfere in that arrangement by varying one component of the agreement, while leaving the balance of the agreement intact, would fly in the face of the time-hallowed principle that “(t)he court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered”. The principle of pacta sunt servanda is equally relevant in this context.’*

[19] As is evident from the above decisions, it was only in those cases where there was an express agreement that the maintenance payable, whether in terms of amount or duration, could not be varied that the parties were held to the principle of *pacta sunt servanda*. This makes sense because they agreed to a composite package deal.

[20] The respondent’s counsel submitted that, read as a whole, the provisions of the Consent Paper show that the parties intended a package deal because clause 10 provides that the settlement is *‘full and final’*. However clause 10 itself also contains the express provision that *‘save and except as herein provided, neither party shall enjoy any claim of whatsoever nature against the other’*. Clearly therefore the package deal was subject to a variation in the maintenance payable for sufficient reason or on good cause shown. Given that the fixed annual 12% escalation forms an integral part of the maintenance, it follows that this too is subject to such variation.

[21] It was also submitted on behalf of the respondent that it was incumbent on the applicant to show, not only with reference to his own financial position but also that of the respondent, that the variation sought is justified. That it was not required of the applicant to rely on a deterioration in his own financial circumstances was made clear in *Havenga (supra)*. Moreover, it is difficult to conceive how the applicant was to have disclosed full details of the respondent's financial position 26 years after their divorce.

[22] As previously stated, the respondent did not even allege in her answering affidavit that the amount currently paid by the applicant is reasonably required for her maintenance needs. Nor did she attempt in the slightest to deal with the material issue, namely why a continuation of the fixed annual 12% escalation is reasonably necessary for her future maintenance needs.

[23] The closest one comes to any allegation of this kind is in a letter from the respondent's attorneys dated 9 November 2016 where it was stated that:

'My client is not agreeable to any reductions towards her personal maintenance, of neither the capital monthly amount nor the annual increase. She reasonably requires the sum payable in terms of the Consent Paper signed by the parties for her monthly expenses.'

[24] This letter was annexed to the applicant's founding affidavit and the above paragraph expressly quoted therein. In her answering affidavit the respondent dealt with this paragraph as follows:

'47. I admit the exchange of correspondence.'

48. *Insofar as the contentions raised by Applicant in his correspondence and in these paragraphs are at odds with the contents of this affidavit, such contentions are denied.'*

[25] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*¹¹ the Supreme Court of Appeal, referring to the Plascon-Evans rule, stated that:

'[13] 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. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[26] To my mind, the respondent's approach to the allegations in the founding affidavit is of the type referred to in *Wightman (supra)*. She has failed to raise a

¹¹ 2008 (3) SA 371 (SCA).

real, genuine and *bona fide* dispute of fact in circumstances where those facts self-evidently lie purely within her own knowledge. She has also laid no foundation for her bare denials.

[27] I am persuaded that the applicant is not attempting to evade his obligation to pay lifelong personal maintenance to the respondent. He remains willing to meet the obligation to which he agreed in 1991. He has maintained the respondent for the past 27 years and has clearly indicated that he will continue to do so. He has undertaken to continue to meet her reasonable living expenses, and an adjustment to the annual increase as sought will undoubtedly achieve this. It is common cause that the 12% fixed annual escalation has meant that the maintenance received by the respondent has consistently exceeded inflation or, put differently, the cost of living over the past 27 years.

[28] Having regard to the foregoing, I am also persuaded that the applicant has shown sufficient reason for a variation in the annual escalation of the maintenance payable to the respondent. I am, however, mindful of the fact that, although at the time of divorce in 1991 the prime lending rate was 21% per annum, the CPI for the year that immediately followed was 9.6% per annum. Adopting a robust approach (as foreshadowed in *Wightman (supra)*), it appears to me that a just and equitable escalation should be the CPI plus 2.4%, which for convenience I will round up to 2.5%, i.e. the agreed escalation in the Consent Paper of 12% less the CPI of 9.6% for the year that immediately followed. This will be subject to a maximum escalation of 12% in any given year.

[29] Neither party has been wholly successful. There is no question that the applicant can pay his own legal costs. The appropriate costs order is the one that follows.

[30] In the result the following order is made:

1. The Consent Paper incorporated in the parties' Final Order of Divorce in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) on 26 November 1991 under case number 12960/1990 is varied as set forth hereunder.
2. By the insertion of the words '*subject to clause 4 below*' at the beginning of the first unnumbered paragraph in clause 3.
3. By the deletion of clause 4 in its entirety and by replacement thereof with the following clause:
 - '4.1 *The maintenance paid by Plaintiff to Defendant in the current amount of R47 767.73 shall be adjusted annually with effect from 1 December 2018 by the percentage change in the Consumer Price Index plus 2.5%, but subject to a maximum escalation in any given year of 12%;*
 - 4.2 *For purposes hereof, the Consumer Price Index is the headline Consumer Price Index as notified by Statistics SA in respect of the Republic of South Africa for the preceding 12 months. Such percentage change shall for purposes of convenience be deemed to be equal to the latest index available from Statistics SA on the internet on the date of adjustment.'*

4. There shall be no order as to costs.

J I CLOETE