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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A3115/2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date:

WHG VAN DER LINDE

In the matter between:

[P.....], [A.....] [D.....]

Appellant

And

[P.....], [J.....] [Z.....]

Respondent

JUDGMENT

Van der Linde, J:

Introduction

- [1] This is an appeal against a judgment of the magistrates' court at Springs¹ which held that a maintenance obligation owed by the respondent to the appellant in terms of an order of divorce granted by the high court, had ceased.² The issue came up when the appellant applied for an increase in the maintenance of R11500 pm that the magistrates' court at Benoni had previously ordered. In turn, this latter court had ordered an increase in the maintenance of R10000 pm which was payable in terms of the high court order.
- [2] The parties were agreed that this court was not concerned with the quantum of the maintenance payable. If we were to conclude that the appeal should succeed, the matter was to be referred back to the magistrate for a decision on the merits of the appellant's application for an increase in the maintenance.
- [3] The appellant's argument was that on a proper interpretation of the order, the maintenance obligation did not cease. The respondent argued to the contrary, but also submitted that the appeal should be dismissed because it was potentially academic. By this submission was meant that there was the potential that the appellant would not be able to succeed in showing before the magistrates' court that the respondent could actually afford paying any maintenance, if the matter were to be referred back. That being so the appeal should not be allowed to succeed, according to the argument.
- [4] The parties were also agreed that the only material available to us to aid in the interpretation function was the high court order itself. There was no extraneous evidence that could provide the milieu to the order. Against this background we proceed to interpret the court order.

Interpretation principles

- [5] We approach the interpretation of the high court order on the basis that this function is, in principle, no different from that of interpreting a will, an insurance policy, or any other

¹ On 25 June 2015, by additional magistrate DJ Van Vuuren, in the district of Ekurhuleni East.

² The order was by Mojapelo, J, on 30 November 2011.

commercial document; or even a statute.³ The essential principles are first to determine the ordinary meaning of the words used; but then immediately the examination, a unitary, integrated endeavour, flows to the context within which the words appear in the instrument; the scheme and structure of the instrument; the material outside of the document that was known to the parties when the document came into being; and the legal framework within which the document operates, particularly the broader constitutional background from which all law in this country now flows.⁴

[6] In *Endumeni Municipality* Wallis, JA put it thus:⁵

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words 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

³ Compare generally, Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, fifth edition, vol 1, by Cilliers, Loots and Nel, p.936.

⁴ See generally *Cool Ideas 1186 CC v Hubbard*, 2014 (4) SA 474 (CC) at [28]; *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA) at [18] to [26].

⁵ At [18].

they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[7] There have developed through the years what may be termed rules of interpretation, but are probably better described as simply approaches, because their application is dependent on the context. One of these is the approach that drafters are usually taken to have intended that meaning be given to all of the words they used; in other words, superfluous or unnecessary words or phrases are not readily assumed.

[8] Applied to the particular context here relevant, one such principle of law is that unless the court granting a decree of divorce orders that one marriage partner has to pay maintenance to the other, neither partner has the right afterwards to claim maintenance in a magistrates' court when engaging on a maintenance enquiry.⁶

The court order

[9] We may now gainfully turn to the high court divorce order itself. Two paragraphs are material:

"3. The Plaintiff shall pay the Defendant maintenance of R10 000 per month for a period of 12 months from date of this order ('the payment period').

3.1 ...

3.2 ...

4. The aforesaid order, relating to the payment of maintenance, is made without prejudice to the rights of either party to apply, subsequently to the payment period, for a variation thereof, and, in such event, the maintenance Court is directed to make an appropriate order, in light of all the relevant facts and circumstances."

⁶ Schutte v Schutte, 1986(1) SA 872 A at 882 E, per Van Heerden, JA; Strauss v Strauss, 1974(3) SA 79 (AD) at 93 A, 93 H, per Rabie, JA. See s.7(2) of the Divorce Act 70 of 1979.

[10] The question, crisply put but requiring more thorough reflection, is whether when the so-called payment period of twelve months will have lapsed, the appellant's entitlement to claim maintenance from the respondent will also have lapsed. The court a quo held in favour of the respondent's argument that the entitlement did in fact lapse after the initial twelve month payment period.

[11] The elephant in the room of that conclusion is paragraph 4. It is required to be given meaning and cannot be ignored. One meaning is certainly that the variation there envisaged applied to the amount of maintenance payable during the payment period. On this meaning, either party may after the payment period apply to change the maintenance that was payable during the payment period, retrospectively. In other words, the variation would operate retrospectively to change such maintenance as was paid (the R10 000 per month) either by reducing it, requiring a repayment; or by increasing it, requiring a top-up.

[12] On this meaning, the appellant could conceivably apply retrospectively to be paid a top-up, and the respondent could conceivably apply retrospectively for the appellant to pay back to him what would then be determined, with hindsight, as having been an overpayment.

[13] The other conceivable meaning to be attached to paragraph 4 is that after the lapse of the initial twelve month payment period the maintenance obligation continues, on the basis that either party may then, but not before then, apply to the maintenance court for an increase or decrease, depending on the applicant's perspective, of the maintenance that would then, and thereafter going forward, be payable. The maintenance court will then investigate the circumstances then prevailing and make an appropriate order for the future.

[14] We prefer, on reflection, the second meaning. The main driver for this conclusion is the reference in the last line of paragraph 4 to "*all the relevant facts and circumstances.*" That phrase suggests that the court was alive to the common sense fact that the quantum of maintenance should be determined with reference to the time when it is required to be paid. That is, after all, when the disbursements are required to be incurred.

[15] On this approach the purpose of paragraph 3 is not to define an obligation of a rehabilitative nature, of only one year. On this approach paragraph 3 is in fact less ambitious, and simply fixes the quantum of the payable maintenance for one year, leaving it up to the parties and the maintenance court to fix the quantum of the maintenance that is payable after that first year.

[16] In our view this interpretation affords recognition to the context of the document and its scheme, whereas the first meaning mooted above does not. The second interpretation also gives meaning to paragraph 4, which the first interpretation does not.

[17] We have considered the argument that one would have expected express language had the court intended to saddle the respondent with a maintenance obligation for life, and not simply a tacit provision. There is much force in this argument, but ultimately the coherence of paragraphs 3 and 4 militate so strongly in favour of a continued maintenance obligation, that we cannot accede to the argument.

[18] In the result the appeal must succeed. We make the following order:

- (a) The appeal succeeds, with costs.
- (b) The order of the court a quo is set aside.
- (c) The matter is referred back to the magistrates' court for the district of Ekurhuleni East, at Springs, to be disposed of in the light of this order.

WHG van der Linde
Judge, High Court
Johannesburg

I agree.

HW Sibuyi
Acting Judge, High Court
Johannesburg

For the appellant: Adv. L.L. Norman
Instructed by De Jager Kruger & Van Blerk Attorneys
Cnr 5th Street and 8th Avenue
Springs

C/O Mark-Anthony Beyl
94 Pritchard Street
Johannesburg
Tel: 011 333 7790

For the respondent: Adv. De Beer
Instructed by C Coetzee Attorneys
9 Eva Road, Cnr Jay Road
Fairleads, Benoni
Tel: 011 968 9944/3/2

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