IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no.032/06

In the matter between

PETER CECIL ODGERS **Appellant**

and

MARY DE GERSIGNY **Respondent**

CORAM: **ZULMAN, BRAND, MAYA JJA et THERON, MALAN AJJA**

HEARD: **3 NOVEMBER 2006**
DELIVERED: **30 NOVEMBER 2006**

Summary: Divorce – maintenance for spouse – wife remarrying shortly after divorce - whether an implied term could be imputed by law into a deed of settlement not made an order of court, providing that payment of maintenance shall terminate upon wife's remarriage or death.

Neutral citation: This case may be cited as Odgers v De Gersigny [2006] SCA 153 (RSA).

JUDGMENT

MAYA JA

MAYA JA

[1] On 5 March 1998 the parties' marriage was dissolved. It had lasted some seven years and did not produce any children. Prior to the divorce, on 21 January 1998, the parties had concluded a written deed of settlement which was intended to be incorporated into the decree of divorce. This agreement, which included a non-variation clause, provided for a variety of issues relating to the respondent's future upkeep such as medical insurance, housing subsidy and maintenance. The clause dealing with maintenance, which is the subject of this dispute, provided that the appellant would pay maintenance in a specified monthly amount for a fixed period. It was however silent on whether the obligation to pay maintenance would terminate upon death or remarriage. For some reason which the appellant could not explain, the agreement was not made an order of court.

[2] On 2 May 1998, the respondent remarried. The appellant, having paid maintenance for April 1998 as agreed, declined to make any further payments on the basis that on the law and a proper interpretation of the agreement, his obligation to pay maintenance terminated upon the respondent's remarriage. The respondent's action against the appellant, instituted in the magistrate's court for the payment of outstanding maintenance, housing subsidy, medical insurance and ancillary relief was successful. The magistrate found that on a proper interpretation of the agreement the appellant's obligation to pay maintenance, which was contractual, did not terminate upon her remarriage. An appeal to the Natal Provincial Division (Niles-Duner J, Van der Reyden J concurring) having failed, the appellant appeals, with that court's leave, to this court.

[3] The essential issue in this appeal, as in the court below, is the interpretation to be afforded to the maintenance clause in the parties' agreement in view of the respondent's remarriage. The relevant provisions are contained in clause 4 which reads:

'MAINTENANCE

4.1 Peter Cecil Odgers (Plaintiff) undertakes to pay maintenance to Mary Odgers (Defendant) to the amount of R14 000.00 until the 31st May 1998. Thereafter Peter Cecil Odgers (Plaintiff) undertakes to pay maintenance to Mary Odgers (Defendant) for a period of twenty-four months to the amount of R1 000.00 commencing from the 1st June 1998.

4.2 Peter Cecil Odgers (Plaintiff) will pay a housing subsidy of R4 000.00 per month to Mary Odgers (Defendant) or nominee for a house purchased by Mary Odgers (Defendant) for a period of twelve consecutive months commencing from the 1st June 1998.'

[4] The appellant's case rested, mainly, on the use of the term 'maintenance' in the agreement which it was submitted should be interpreted in accordance with the common law. It was contended that absent an express provision to the contrary, it was implicit in the concept of the appellant's obligation to pay maintenance that it would terminate upon the death or remarriage of the respondent. Reliance for this contention was placed on two authorities, *Glass v Santam Insurance Ltd & another* 1992 (1) SA 901 (W) and *Van der Vyver v Du Toit* 2004 (4) SA 420 (T).

[5] In *Glass*, the court dealt with a wife's claim for damages for loss of support arising out of the negligent driving which caused the death of her husband and breadwinner. It was held that her subsequent 'remarriage marks the end of the period of calculation of loss'[1] and that she had no

[1] At 905B.

further entitlement. Quite obviously, there being no question of any agreement, the case dealt with a situation entirely different from the present matter to which different considerations apply. The *Glass* case is thus distinguishable.

[6] In *Van der Vyver*, the *dictum* on which the appellant relies is expressed at paras 19 and 20 of the court's judgment. There, Legodi AJ held:

'A party against whom an order is made for maintenance in terms of s 7(1) should only be made liable to continue to pay maintenance after remarriage if he has expressly waived his rights to be relieved from liability to maintain his or her ex-spouse upon death or remarriage. Unless such waiver is apparent from the agreement in terms of s 7(1), such an obligation to maintain should automatically terminate upon remarriage or death.

In my view, the intention of the Legislature underlying s 7(2) can also be used to interpret contracts or agreements under s 7(1) or what the intention of the Legislature is under s 7(1). I do not think that it can ever have been the intention of the Legislature to allow a situation where an ex-spouse who is remarried should have double gain for maintenance unless such a gain is a result of an express provision in the agreement order, s 7(1) obliging such a party against whom an order was made to maintain even after remarriage.'

[7] The provisions of s 7 of the Act govern the division of assets and maintenance of parties upon their divorce.[2] Section 7(1) confers a power

[2] The section reads:
'7(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other *for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.'* Emphasis added.

upon the court to make a written agreement concluded by divorcing parties relating to the payment of maintenance an order of court on the grant of a divorce. There are no restrictions to the quantum and time frames to which the parties may bind themselves relating to payment of maintenance[3] irrespective of whether the recipient spouse remarries. The obligation may endure even beyond the death of the maintaining spouse if they so choose.[4] On the other hand, where no settlement agreement is concluded by the parties, the court is at large to make a maintenance order in terms of s 7(2) which, however, endures only until the death or remarriage of the recipient spouse.

[8] As previously indicated, the agreement in the instant case does not come within the purview of s 7(2). There is no bar to agreeing on the duration and extent of the payment of maintenance which is to be made, irrespective of any change in the parties' circumstances,[5] the agreement is valid and purely contractual in nature. It falls to be governed by the rules applicable in that sphere.

[9] In *Hodges v Coubrough* [6], Didcott J stated the following:

'The field of contract is very different from the one where the present case lies. Everybody may bind his estate, by contract no less firmly than by will, to pay maintenance after his death. And he may settle the maintenance on whomsoever he chooses, on his current wife, a former wife, a mistress, an employee or anyone else. Whether in a given instance that result has been produced, whether the liability which was incurred survives the death of the person who assumed it and passes to his estate, depends of course on the terms of the contract, or their true meaning. And that goes too for the kind of contract in question, an agreement between spouses which is made

[3] *Hodges v Coubrough NO* 1991 (3) SA 58 (D) at 66D; H.R. Hahlo *The South African Law of Husband and Wife* 5ed p 353.
[4] *Ex Parte Standard Bank Ltd and others* 1978 (3) SA 323 (R) at 327A.
[5] *Schutte v Schutte* 1986 (1) SA 872 (A).
[6] Supra at 66D – G.

an order of Court on their divorce. So, like the legislation whenever its meaning is sought, the agreement must be interpreted. By no means is the enquiry the same, however, since the objects of the exercise differ. The intention which has to be ascertained in the one case is that of Parliament, legislating in general terms and with general effect. In the other it is the intention of private individuals, minding their own business and dealing solely with that. They have no occasion to reckon with the common law. They have no reason to worry about issues of policy. Nor do they care a fig if the party who is maintained under their arrangements turns out better off than somebody else's widow. Then there is a further consideration, a rule governing contractual obligations which has no counterpart in the area of those generated statutorily…'

In my view, this is the correct approach to follow. I respectfully disagree with the approach followed in *Van der Vyver*.

[10] It does not matter whether the agreement is made an order of court in terms of s 7(1) for its interpretation - the essence of the agreement remains the same. It remains to consider whether there is scope for the implied term imposed by common law contended for by the appellant's counsel – effectively that the obligation to pay maintenance shall, in all cases, terminate on remarriage or death. Interestingly, the appellant's counsel studiously avoided placing any reliance on a tacit term in the agreement.[7] In this case, the express provisions of the maintenance clause, which are specific regarding the duration of the obligation, are in conflict with the contradictory implied term contended for. A term imposed by law may not be implied in total disregard of the parties' intention and will not be implied if it is in conflict with the express

[7] Indeed, such an argument could not have succeeded regard being had to the express provisions of clause 4 specifying the duration of the obligation which conflict with the meaning contended for and surrounding circumstances, including the appellant's own testimony to which regard could be had in ascertaining the true intention of the parties, which showed clearly that that the issue of the termination of the maintenance never arose when the agreement was concluded.

provisions of the contract.[8] The contradictory clauses cannot co-exist. An example illustrating the anomaly which would result if the appellant's contention were upheld which readily comes to mind is that of an ex-wife who cohabits permanently with another man. Since our law does not necessarily disentitle her to maintenance[9] she would be in a better position than an ex-wife who remarries.

[11] Finally, it remains to be said that whilst the principle of the matter may be important to the parties, regard must be had to the amount of the disputed maintenance which is trifling compared to the costs which they must have incurred in bringing their case this far. It is most regrettable that they could not resolve it otherwise.

[12] For these reasons I conclude that the appeal should be dismissed with costs.

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MML MAYA
JUDGE OF APPEAL

CONCUR:
ZULMAN JA
BRAND JA
MALAN AJA
THERON AJA

[8] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531E; *Group Five Building Ltd v Minister of Community Development* 1993 (3) SA 629 (A) at 653F-G.
[9] *Owen-Smith v Owen-Smith* 1982 (1) SA 511 (ZS) at 515A-F; *Schlesinger v Schlesinger* 1968 (1) SA 699 (W) at 700E.