

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

JUDGMENT

Not Reportable

Case no: 2025-073213

In the matter between:

D[...] D[...] B[...]

APPLICANT

and

T[...] D[...] B[...]

FIRST RESPONDENT

MILTONS MATSEMELA INC.

SECOND RESPONDENT

Neutral citation: *D D[...] B[...] v T D[...] B[...] and Another* (Case no 2025-073213) [2025] ZAWCHC (19 June 2025)

Coram: MANTAME J

Heard: 11 June 2025

Delivered: 19 June 2025

Summary: Preservation of proceeds from the sale of immovable property for the benefit of a minor child for future maintenance in terms of a maintenance order is valid – S28(2) of the Constitution – reciprocal duty of care – applicant to prove that the respondent displayed conduct indicating that he will not abide by his maintenance obligations – both parents have a reciprocal duty to maintain the child. Additionally, a court cannot amend a settlement agreement that was made an order of court that was not granted by it – the court cannot tamper with a final order through the back door as it offends or violates the principle of finality of the order or judgement. An order or judgment from a lower court can be amended or varied by the said court and/or through a process of appeal or review. Absent a proper procedure such order is incompetent.

ORDER

1. The second respondent is directed to transfer an amount of R345 220.15 to the applicant's attorney to be retained in an interest-bearing trust account in compliance with clauses 5.1, 5.2, 6.1 and 6.2 of the Agreement of Settlement incorporated into a Final Decree of divorce on 23 October 2023.

2. The applicant shall pay her half of R345 220.15 which represents her half share of an amount of maintenance. Should the said amount not be readily available, the applicant shall contribute an equivalent amount to the amount that she would withdraw monthly from her attorneys' trust account for the child maintenance and her contribution shall be reflected monthly in the attorneys account.

3. The aforementioned amount shall be utilized for payment of the monthly cash maintenance payments, future school fees and medical aid cover with a medical aid fund comparable to that which is defined in the settlement agreement dated 01 June 2023 until the child becomes self-supporting.

4. The applicant's attorney shall provide the applicant and first respondent with a debatement of the account annually commencing on 31 December 2025 until such time as the funds are depleted or the child becomes self-supporting, whichever first occurs; whereafter the attorney shall transfer the remainder of the proceeds, if any, to the first respondent.

5. The amendment of clauses 5.3 and 6.1 of the Agreement of Settlement is refused.

6. Each party to bear its own costs including costs of 22 May 2025.

JUDGMENT

Mantame J

Background

[1] This is an urgent application which first came before Mayosi AJ on 22 May 2025. That court granted interim relief, and the matter was postponed by agreement for hearing on the urgent roll of 11 June 2025. Despite the fact that the Court raised some misgivings about the issue of urgency, it allowed the parties to argue the matter to its finality. In terms of that order, the prayers sought in the applicant's notice of motion under paragraphs 2(a) and 2(b) were materially granted. It is common cause that the arrear maintenance has since been paid to the applicant and the remaining proceeds of the sale are held in trust. When the matter was heard on 11 June 2025 what remained were essentially the merits which could have been heard in the normal course.

[2] The applicant seeks an order preserving funds which is a portion of the nett proceeds of a sale of the first respondent's immovable property which funds is presently held in trust with the second respondent. It was not stated exactly how much was held in the trust account. The applicant stated that the respondent bought a property in 2022 for R1 700 000.00 and sold it in 2024 for R2 300 000.00. After the bond was settled in full, the nett proceeds are now sought to be preserved and transferred to the applicants' attorneys. After divorce, the sectional title became too big for the first respondent alone and he decided to downscale. He subsequently bought another property for R1 400 000.00, a Harley Davidson motorcycle for R200 000.00 and a Ford Ranger which was said to have some high value. The first respondent did not dispute that he bought the movable items. However, he stated that the motorcycle was R185 000.00 and the second-hand Ford Ranger with two trailers was R165 000.00. Clearly, not much profit was made from this sale.

[3] The remaining funds to be preserved it was contended are for the future maintenance obligations of the first respondent towards his minor child in terms of a divorce settlement agreement.

[4] In addition to the preservation order the applicant seeks the amendment of two clauses contained in the settlement agreement for the purpose of shifting liability for payment of the education and medical costs from the first respondent to the applicant. The court accepts that the logic here stems from the fact that she seeks to secure the respondent's total maintenance liability in advance. However, not much authority has been given to support this order.

[5] The applicant further seeks an order substantively that, once the funds are preserved in the trust account, her attorney will be entitled to effect the necessary maintenance payments for the minor child until such time as he becomes self-supporting. It is envisaged that these payments will be made by her attorney directly to the applicant. The attorney would account annually to the applicant and first respondent. Upon the child becoming self-supporting the applicant's attorney shall prepare a final debatement account and transfer any remaining funds to the first respondent.

[6] In support of her case the applicant has set out grounds which endeavour to illustrate that the respondent is a recalcitrant payer; without consideration of his child's needs, he just resigns from his job; that he wilfully and deliberately disregards the court orders for maintenance and that he wilfully constructs his circumstances so that he cannot afford to pay maintenance. According to the applicant the respondent has not conducted himself in a manner that reflects that he has the best interests of the child at heart.

[7] Counsel for the applicant submitted that this is not an anti-dissipation interdict but rather a preservation interdict for the future maintenance of the minor child. The first respondent does not dispute the fact that he has an obligation to support his own son.

[8] Counsel for the respondent in opposing this application was of the view firstly, that the urgency relied upon by the applicant is self-created because she was aware that the property in question was on the market since May 2024. Further, that this application is an abuse of process because the applicant is blatantly placing patently false information before court. The respondent has indeed resigned jobs but has not

neglected his duty to support his own child. In fact, there was no bad blood between the applicant and the first respondent despite the fact that they are divorced. In fact, both of them made some calculations for the child's future maintenance after the proceeds were paid from the sale of the property. According to the applicant's own calculation, the first respondent said these expenses totalled an amount of R248 329.00. It was after she consulted with her attorneys that she demanded an amount of R887 761.00.

[9] In response to this inflated amount, the applicant stated that her calculations did not take into account the three-year vocational training that the child wishes to undertake after Grade 12. The additional maintenance has to be paid by the first respondent until the child is self-sufficient. However, after further calculations the amount claimed is R690 440.31 which is made up as follows:

- 9.1 R430 904 – cash maintenance up to December 2032;
- 9.2 R150 089.94 – future school fees; and
- 9.3 R109 446.37 – medical aid cover with Momentum up to December 2032.

[10] The respondent was of the opinion that there is no need for this litigation given the fact that he has limited financial resources. In fact, he undertook to invest an amount of R334 176.00 to cater for the above expenses. He was cognisant of the fact that the applicant equally has a duty to maintain the child. There is no need for the settlement agreement to be amended. After the sale of the property, he had registered his son to a medical aid once more. The applicant disputed that the said scheme was a medical aid. According to the applicant, such scheme paid medical expenses to the maximum of R150 000.00 per annum. In her understanding, the child needed proper medical aid as per the terms of their settlement agreement in the regional court.

Discussion

[11] As stated this matter was postponed by a judge in an urgent duty to another judge in the urgent duty roll three weeks down the line. This was clearly a self-

created urgency. There was no need for this matter to perpetually serve in the fast lane.

[12] With regards to maintenance, a claim was made to preserve funds in the trust account for future maintenance. At this point, the applicant asked for a transfer of an amount of R 690 440.31 of the net proceeds from the sale of the sectional title property to her attorneys' trust account.

[13] It is unequivocally recognised in section 28(2) of the Constitution, Act 108 of 1996 that '[a] child's best interests are of paramount importance in every matter concerning the child.' This court, in its capacity as upper guardian of all minor children within its area of jurisdiction, has a duty to guard and protect their interest.

[14] The applicant seeks to secure future maintenance for the child to the extent that will secure the first respondent's maintenance obligations from the date of order and extending to a further three years after completion of Grade 12. In addition, the secured funds will provide the medical and educational needs for the child's remaining schooling years.

[15] The question this court must however determine is whether the respondent's conduct is of such a nature that it can be safely concluded that he will not honour his future maintenance obligations.

[16] In *Magewu v Zozo & Others*¹ the court dealt with facts similar but not the same to that before this court. The respondent was not in arrears with his maintenance although he had been in the past. The respondent in that matter contended that he had no intention of dissipating the proceeds of his pension fund to defeat the applicant's maintenance claim. The applicant in *Magewu* argued that the respondent's past conduct did not give her security that he would comply with his maintenance obligations.

¹ 2004 JOL 12662 (C).

[17] Counsel for the applicant relies on *Magewu* where the court held:² 'In my view, although the First Respondent is not currently in arrears, he has been in arrears on several occasions before. Though he does not indicate the intention to thwart his future maintenance claims towards Xola, the child in this instance has no security that his future maintenance claims will be met. The First Respondent has not conducted himself in a manner that would create the impression that the provision of Xola's maintenance is of paramount importance to him.'

[18] In *Magewu*³ the court found the applicant's fears reasonable that the Pension Fund benefits may be lost in the vague business dealings of the First Respondent and she will have no claim against the First Respondent to ensure that the minor child receives maintenance.

[19] In *Soller v Maintenance Magistrate of Wynberg and Others*⁴ the court, relying on the principles expounded by Nicholson J in *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others*⁵ held that justice may require that a respondent's right to freely deal with his own property may be interdicted where it is shown that he is acting mala fide and dissipating funds to thwart the rights of his children. It was further held that the children have a *spes* in the lump sum in the future. Just as the court in *Soller* extended the applicant's claim to include future maintenance for her child, that extension should similarly apply in the present matter as it is not clear at this stage how his business will thrive.

[20] However, while the views dealt with in the authorities above finds support on those facts, this court is of the view that the conduct of the respondent in this matter does not squarely fall in the same genre.

[21] Prior to having lost his employment the respondent upheld his maintenance payments. He conceded that he fell into arrears during the periods that he was unemployed. For instance, when the first respondent received a tax refund of R60 000.00 without being prompted, he paid an amount of R30 000.00 towards the

² At para 21.

³ Para 23.

⁴ (109090/04) [2005] ZAWCHC 83; 2006 (2) SA 66 (C) (4 November 2005) at para 24.

⁵ 2004 (5) SA 388 (D).

child's school fees. The court notes that when he sold his property, he readily granted authorisation to the conveyancing attorney to pay the full arrear amount to the applicant.

[22] In the same vein, when the first respondent sold his property, the applicant sought to create an impression that he chose to spend his money on a motorcycle and a Ford Ranger. If the first respondent was so irresponsible as the applicant wants this court to believe, he would not have downscaled and bought a property first. The respondent explained that he was not in arrears with the maintenance payments at that stage. It follows that there was no need for him to utilise any of those funds toward maintenance when he was up to date with payments.

[23] It is common cause that the first maintenance order taken in Cape Town Magistrates Court in April 2023, together with the order for payment of the arrears in full as well as the order preserving the sale proceeds in trust were all taken by agreement between the parties. These agreements are all indicative, in this court's view, of the first respondent's *bona fide* intentions to honour his maintenance obligations. The first respondent's conduct does not sustain the applicant's claims that he disregards the court orders and behaves in a manner that wilfully frustrates her claim. Consequently, the first respondent's conduct does not fall within the same scope as that contemplated in *Magewu*.

[24] In the present matter, the first respondent undertook⁶ to invest an amount of R334 176.00 in an interest-bearing account for the benefit of the child. He extended a further gesture that he will grant the applicant access to this account and undertook not to withdraw any funds therefrom except for the purpose of effecting payments toward the child's maintenance and educational needs. This offer is a substantial one and can only be construed as one made in good faith.

[25] Despite the settlement agreement that was concluded on divorce, this court has not lost sight of the fact that both parents have a reciprocal duty to support their

⁶ Record pg. 70 AA para's 5.11 and 29.

child. Section 15 of the Maintenance Act,⁷ deals with the duty of parents to support the children. There is no requirement that a child should be supported by one parent more especially if he or she has means to do so. The uncontroverted evidence was that applicant owns a business (DDB Professional Accountant) as a professional accountant in addition to her employment with Merlot Group. No disclosure was made towards her financial circumstances. The first respondent on the other laid bare his financial circumstances. He confirmed that he was unemployed and said to be soon starting a business of hiring out some motorcycles to get an income. The first respondent does not have vague business ideas as it was the case in *Magewu*. He has purchased a motorcycle, a Ford Ranger with two trailers with the sole purpose and in preparation of starting a motorcycle hiring business. On the other hand, what is sought for preservation is an undisclosed amount of money at the conveyancers' trust account which in my view cannot cover all that the applicant claims for future maintenance of the child.

[26] In addition, despite what the applicant claims, the first respondent equally has to make a living from the net proceeds of the property while he is building his business. The applicant has no right to thwart and/or dismiss the respondent's business plans without even seeing them taking off from the ground and shaping up.

[27] As a result thereof, having considered that the respondent's employment situation has changed completely, he only has a balance of the sectional title property proceeds to live from and to pay future maintenance. Without a doubt, despite the court not having been privy to the total balance of the net proceeds this court accepts that the respondent at this stage cannot afford to transfer an amount of R690 440.31 given the transactions as mentioned above that have been made by the respondent to date utilizing the proceeds of sale.

[28] However, this court is of the considered view that it should order that the said bill of R690 440.31 should be shared by both parents as they have a duty to support and/or maintain their child until self-supporting. Such an order would uphold the objectives of our Constitution and the Maintenance Act by ensuring the protection of

⁷ Act 99 of 1998

the rights of the child particularly insofar as it relates to the duty of care and support. The fact that the parties entered into a settlement agreement that put the obligation of support squarely to the first respondent does not annihilate the applicants' obligation to support her child when circumstances have changed.

[29] With regard to the issue of amendment of certain clauses of the settlement agreement that was made an order of court by the regional court, that prayer is incompetent for the following reasons. The order was agreed to by both parties in the court below. It follows therefore that if an amendment is sought, both parties should approach a competent court that made it for its amendment. This Court can only amend or vary an order that was made by it in terms of Rule 42 of the Uniform Rules of Court. The order that was granted by the regional court was final in nature. For this Court to amend an order that was not granted by it would offend and/or violate the principle of finality of orders and/or judgment. This Court can only tamper with such order through the process of an appeal or review to set aside portions of that order. Absent such an appeal or review, this Court cannot tamper with the said order through the back door, and more especially that there are no cogent reasons that have been put forward for the applicant to take over control and maintenance of the child single handedly and such expenses to be borne by the first respondent. That on its own has a potential of alienating the child from another parent.

[30] Turning to the issue of costs, in the ordinary course costs shall follow the event. In the present matter the applicant has partially succeeded in its claim. The respondent too has partially succeeded in that his tender of having a lesser portion of the proceeds of the sale preserved in trust was considered for the benefit of his child in honouring his maintenance obligations and it forms part of the order of this court. Consequently, the court is inclined to deviate from the usual costs order.

ORDER

[31] The following order is made:

31.1 The second respondent is directed to transfer an amount of R345 220.15 to the applicant's attorney to be retained in an interest-bearing

trust account in compliance with clauses 5.1, 5.2, 6.1 and 6.2 of the Agreement of Settlement incorporated into a Final Decree of divorce on 23 October 2023.

31.2 The applicant shall pay her half of R345 220.15 which represent her half share of an amount of maintenance. Should the said amount not be readily available, the applicant shall contribute an equivalent amount to the amount that she would withdraw monthly from her attorneys' trust account for the child maintenance and her contribution shall be reflected monthly in the attorney's account.

31.3 The aforementioned amount shall be utilized for payment of the monthly cash maintenance payments, future school fees and medical aid cover with a medical aid fund comparable to that which is defined in the settlement agreement dated 01 June 2023 until the child becomes self-supporting.

31.4 The applicant's attorney shall provide the applicant and first respondent with a debatement of the account annually commencing on 31 December 2025 until such time as the funds are depleted or the child becomes self-supporting, whichever first occurs; whereafter the attorney shall transfer the remainder of the proceeds, if any, to the first respondent.

31.5 The amendment of clauses 5.3 and 6.1 of the Agreement of Settlement is refused.

31.6 Each party to bear its own costs including costs of 22 May 2025.

MANTAME J
JUDGE OF THE HIGH COURT

Appearances

For applicant: Adv. T Smit
Instructed by: Thomson Wilks Attorneys
Cape Town

For first respondent: Adv A Oosthuizen
Instructed by: BDP Attorneys, Tygervally

Bellville

For second respondent: no appearance