Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No 11887/05

In the matter between:

THELMA GEORGHIADES
(Previously JANSE VAN RENSBURG) Applicant

and

JACOBUS FREDERICK JANSE VAN RENSBURG Respondent

JUDGMENT: DELIVERED 14 JULY 2006

GRIESEL J:

Introduction

1]The parties were divorced in terms of an order issued by this court on 19 June 2003 under case number 5558/02. In terms of clause 3 of a consent paper, signed by the parties on 25 April 2003 and incorporated in the order of divorce, the respondent (then the plaintiff) was obliged to pay to the applicant the sum of €200 per week for a period of three years or until her remarriage, whichever event occurred first.

2]The applicant now applies in terms of s 8(1) of the Divorce Act 70 of 1979 (*the Act*)[1] for a variation of clause 3 'by the extension of the period for which maintenance is payable by the respondent to the applicant from the period of three years to an indefinite period until the applicant's death or remarriage, whichever event occurs first'.

Factual background

3]The parties were married to each other on 20 May 1997 in South Africa, which marriage was dissolved six years later as set out above. (The parties had previously also been married to each other, which marriage subsisted from March 1992 to mid 1996.)

4]Clause 3 of the consent paper, under the heading 'Maintenance/financial payments and support provisions', contains *inter alia* the following provisions:

> *'That the Plaintiff will pay to the Defendant the sum of €200.00 per week for a period of three years or until her remarriage, whichever event occurs first, only for the support of the Defendant. The first payment shall be made on the 1st day of February 2003 and shall cease on the 1st day of February 2006.'*

1 '8(1) *A maintenance order … made in terms of this Act, may at any time be rescinded or varied or … suspended by a court if the court finds that there is sufficient reason therefor.*'

5]The consent paper contains various other provisions regarding the financial arrangements between the parties. Thus, in terms of clause 3.1, the respondent undertook to pay –

- an amount of €300 owed by the applicant to a certain Dr Oliver;
- an amount of €1 800 in respect of shipping costs and the cost of a one-way airline ticket to South Africa for the applicant;
- a further cash payment of €2 000 to the applicant.

6]In terms of clause 4.1, the parties agreed that the applicant's share in the 'family home' in Ireland, registered in their joint names, would be transferred to the respondent. In return, the respondent undertook, in terms of clause 5, to transfer the sum of €50 000 to the applicant 'for the purchase of a residence in South Africa … for the ultimate benefit of the children of this marriage'. (In terms of clause 2 of the consent paper, the respondent became the 'sole guardian' of the two minor children in question, whose 'usual place of residence' would be with him in Ireland.)

7]Finally, clause 7 provides as follows:

> *'The plaintiff and the defendant mutually acknowledge, agree and confirm that this Consent is made in full and final settlement of all present and future property and financial claims which*

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either of them may have against the other.'

8]In her founding affidavit in these proceedings, the applicant stated that prior to the 2003 divorce the parties had been living in Ireland. She was unemployed at the time and had been hospitalised on a number of occasions due to 'acute depression brought about by the death of (her) daughter from cancer'. According to the applicant, she was reluctant to sign the consent paper, as she was of the opinion that she 'may very well require maintenance for a longer period due to (her) ill health'. She was reassured by her Irish solicitor, one Margaret Fortune, however, that in the event of ill health preventing her from obtaining employment in future, she would be 'at liberty to approach the relevant court having jurisdiction, and apply to have the duration of the maintenance payments extended'. (A confirmatory affidavit to this effect by the solicitor in question was filed by the applicant together with her replying affidavit herein.) The applicant, in her founding affidavit, proceeded as follows:

> *'11. At the time that I signed the said Consent Paper I had no intention of permanently waiving my right to apply for an extension of the maintenance should I require same after the expiry of the three year period.*

> *12. After the Divorce my health declined and I was diagnosed as suffering from Bipolar Mood Disorder Type 2, with recurrent major depressive episodes.*
>
> *13. I have been under treatment by a psychiatrist, Dr Lawrence Oliver, who has prescribed medication for me which I have to take on a permanent basis, and I am also under regular psychiatric supervision.'*

9]The applicant subsequently relocated to South Africa and took up employment 'in a very limited capacity … on a part-time basis' in her son's retail store at the Waterfront. However, her son had recently indicated that as from January 2006 he could no longer afford to employ her, from which date she would have no income other than the maintenance paid to her by the respondent. She accordingly claimed that she needs continued maintenance from the respondent in order to cover her monthly expenses amounting to approximately R12 450.

10]In his answering affidavit, the respondent contended that the applicant was being 'less than candid' in suggesting that it was only *after the divorce* that she was diagnosed as suffering from bipolar mood disorder type 2, with recurrent major depressive episodes. He annexed a copy of a 'statement of means' signed by the applicant in Ireland on 26 September 2002 – approximately nine months prior to the divorce – in which she stated *inter alia* that

her income was 'Nil' and that she was suffering from 'bipolar 2 – manic depression which is a life-threatening disease that one is born with'. In the statement of means, the applicant further alleged that she 'must take medication for life together with therapy to control this disease'. The respondent accordingly denied that the applicant's health declined 'after the date of the divorce'. He further contended that the applicant was 'contractually precluded by the terms of the consent paper from applying for a variation of the relevant maintenance order in terms of s 8(1) of (the Act)'.

11]The applicant, in reply, conceded the correctness of the respondent's averments regarding her psychological condition prior to the divorce and apologised for this 'error' on her part. She attributed this to the fact that '(her) recollection of that time period is exceptionally sketchy'. She explained that, although she was suffering from 'severe depression' at the time of the divorce, she was 'hopeful that in due course (she) would recover from the severe depression caused by (her) daughter's illness and be able to obtain some form of employment on the open job market, but this has not occurred'.

12]Against the foregoing background, the question for decision is whether the applicant is entitled to invoke the provisions of s 8(1) of the Act.

Sufficient reason

13]Section 8 of the Act creates an exception to the general rule that an order of court, once pronounced, is final and immutable. It permits the court, for 'sufficient reason', to rescind, vary or suspend a maintenance order granted earlier. This provision was introduced so as to authorise the court to amend maintenance orders on good cause shown so as to enable spouses to come to court 'to redress injustices occasioned by a maintenance order which no longer fits the changed circumstances'.[2]

14]A prerequisite to the exercise of the court's power in terms of s 8(1) of the Act is the existence of a 'maintenance order made in terms of this Act'. Unlike the Maintenance Act 99 of 1998,[3] the Act in question does not contain a definition of 'maintenance order'. I shall assume for present purposes, however, that the maintenance provisions contained in the consent paper under consideration do indeed fall within that concept.

15]The onus of proving that there is 'sufficient reason' to vary the original maintenance order rests upon the applicant.[4] As far as the meaning of the term

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2 *Copelowitz v Copelowitz* 1969 (4) SA 64 (C) at 74B. See also Hahlo 'Non-variation clauses in maintenance agreements: a commentary on *Claassens v Claassens'* (1981) 98 *SALJ* 330 at 339.

3 Section 1 *sv* 'maintenance order'.

4 See Hahlo *The South African Law of Husband and Wife* (5ed 1995) at 364 and cases referred to in n57; 16 Lawsa (1st reissue, 1998) *sv Marriage* para 201; *Osman v Osman* 1992 (1) SA 751 (W) at 754H–I.

is concerned, it is the view of our courts that a precise definition of the term is neither possible nor desirable, but that the particular circumstances of each case must be considered.[5] It can fairly be equated with the term 'good cause', which was used in the Matrimonial Affairs Act 37 of 1953, the predecessor of the Act as far as variation of maintenance orders is concerned.[6] The Afrikaans version of both expressions is 'voldoende rede'. 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.[7] In *Havenga v Havenga*,[8] 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.

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

5 Clark (ed) *Schäfer Family Law Service* at C32 and the cases referred to in n17; *Roels v Roels* [2003] 2 All SA 441 (C) para 17.

6 *Levin v Levin* 1984 (2) SA 298 (C) at 303D–G.

7 See eg *Roos v Roos* 1945 TPD 84 at 88; *Hancock v Hancock* 1957 (2) SA 500 (C) at 501; *Levin v Levin* 1984 (2) SA 298 (C) at 303G–H; *Reid v Reid* 1992 (1) SA 443 (E) at 445J–446A.

8 1988 (2) SA 438 (T) at 445C–F.

order in question is contained in a consent paper, which was made an order of court at the time of the 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'.[9] 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'.[10] The principle of *pacta sunt servanda* is equally relevant in this context.[11]

17]In *Claassens v Claassens*,[12] Didcott J made the following perceptive remarks regarding the dynamics of similar agreements:

> *'Agreements governing maintenance often cover other topics too. They are frequently compromises over hotly contested issues of all sorts, and the product of hard and protracted bargaining. Everyone with experience of negotiations in*

9 *Id.*

10 *Laws v Rutherford* 1924 AD 261 at 264 per Innes CJ.

11 Cf eg *Reid v Reid,* n7 above at 447A–B; *Botha v Botha* 2005 (5) SA 228 (W) at 233G–234E.

12 1981 (1) SA 360 (N) at 371A–E.

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> *matrimonial cases is well aware of that. Questions of "guilt" and "innocence", fundamental to the wife's claim for alimony while the 1953 Act lasted and not entirely irrelevant to it since then, may have been disputed. So may the amount she needed, and how much of that the husband could afford. Property had perhaps to be settled or divided, maintenance for children to be resolved. The alimony eventually agreed can seldom be isolated from such surroundings. Like the rest of the compromise, it is the result of give and take. Sometimes it is more than the Court is likely to have awarded the wife had there been none and, in return for a concession elsewhere, she has won by contract what she could not have expected from the litigation. On other occasions it is less, but some contractual benefit the Court would never have decreed has compensated her for the difference. The applicant, one recalls, was promised R15 000. I do not know why, or whether she had a good claim to it. That does not, however, matter. Suffice it to say that capital payments like that are familiar enough as substitutes for or supplements to regular alimony. The kind of waiver under discussion must be viewed against this background. It may well have been the* quid pro quo *for something of value which was not otherwise obtainable. Or the parties may simply have wanted certainty, so that they could plan for the future accordingly.'*

18]Similar sentiments were expressed by Erasmus J (with whom Jansen J concurred) in *Reid v Reid*:[13]

13 *Supra* at 447B–G.

'In making an order for maintenance on divorce, the Court has regard to all the circumstances mentioned in s 7(2) of the Divorce Act in deciding what constitutes a "just amount". Where the parties enter into a consent paper they arrive at a settlement on these issues. They agree on what constitutes a just maintenance order on the basis of the factors mentioned in s 7(2). When the consent paper is then made an order of Court, res judicata *is established on the just amount payable as maintenance. A Court may order variation of its own order only on the limited grounds available at common law or in terms of Uniform Rule of Court 42(1). Section 8(1) relaxes the principle of the immutability of judgments. On the canon of construction that an Act of Parliament is to be interpreted in such a way as to accord with existing law, s 8(1) should be construed so as to affect the operation of* res judicata *as little as possible. To allow an ex-spouse freely to attack the justness of the divorce order could open a door to abuse of the Court process. A litigant who finds himself in difficulties in the divorce could agree to an unfavourable settlement in the knowledge that he could later, under the guise of the variation, undo the settlement agreement. Apart from the objections in principle, it is from a practical point of view highly undesirable that a court (not being a Court of appeal) should rule on the correctness or justness of another court's order. Such an inquiry would require evidence as to all the factors relevant to the previous order. As the instant case demonstrates, this could lead to a lengthy rehash of the divorce. A court could find it difficult to decide what motivated the parties to sign a settlement agreement; or to identify and define*

> *all the factors relevant to the justness of the order.*
>
> *There are, it appears, obvious and grave objections, both in principle and from a practical point of view, against allowing an applicant in a s 8(1) variation enquiry not only to reopen the divorce action, but also to raise the considerations which influence the parties to sign the consent paper.'*

19]In his note on the *Claassens* decision,[14] Hahlo made the following point:

> *'Where the parties have agreed that their maintenance agreement shall be final, the courts will, as a general rule, give effect to it, and it is only in the most exceptional circumstances– years have passed since the divorce and the change in the circumstances of the parties has been such as to cry out to high heaven for a variation of the original maintenance order–that they will vary the original order.*

Even more emphatic are the further remarks of the learned author later in the same note:[15]

> *'I have suggested that even where a non-variation clause forms part of an agreement which provides for periodical payment of maintenance only, the court, while retaining the power of variation, should exercise it only in exceptional circumstances.*

14 See n 2 above at 339.

15 *Id* at 340 *in fin*.

> *The circumstances will have to be even more exceptional where the provision as to the payment of maintenance forms part of a comprehensive "package deal", providing for the payment of a lump sum or a property transfer, as well as for the payment of maintenance, and this, it is suggested, applies even where the agreement does not contain a non-variation clause.'*

20]In my view, similar considerations apply to the present situation. While the present consent paper does not contain a non-variation clause as such, it is clear from the terms thereof that the parties – through a process of give and take – arrived at an overall compromise, which was embodied in their consent paper as a 'package deal'. The desire to achieve a clean break between the parties after a period of three years is evident from the terms thereof, read as a whole. In these circumstances, a court should, in my view, be slow to find that 'sufficient reason' exists for the variation of the original maintenance order.

21]In the present matter, the applicant sought to explain what motivated her to sign the consent paper subject to an unexpressed *reservatio mentalis.* In this regard, as I have shown above, the case made out by the applicant in her founding affidavit to justify the radical variation of the original consent paper rests upon an extremely shaky factual foundation inasmuch as she originally sought to suggest that it was only *after* the divorce that her health declined and she was diagnosed as suffering from 'Bipolar Mood Disorder Type 2, with

recurrent major depressive episodes'. As demonstrated by the respondent, these allegations by the applicant do not bear scrutiny. Her attempts, in her replying affidavit, to explain or to rationalise her earlier misstatement were unconvincing.

22]On the facts as stated by the applicant, therefore, I am not satisfied that she has succeeded in showing any material change in the respective positions of the parties to justify the variation she claims, nor have I been persuaded that sufficient reason for the variation of the present consent paper has been shown. On the contrary, I am of the view that there are further cogent reasons why the consent paper ought *not* to be varied. This is so, not only for the reasons set out above, but also because the applicant has, in my view, waived her right to claim extended maintenance beyond the period as set out in the consent paper.

Waiver

23]It is settled law, since the decision of the Appellate Division in *Schutte v Schutte*,[16] that a waiver of the right to apply in terms of s 8(1) of the Act for a variation of a maintenance order contained in a consent paper in a divorce action, is not contrary to public policy. (In that case, the relevant clause

16 1986 (1) SA 872 (A). See also 16 Lawsa (1st reissue, 1998) *sv Marriage* para 195.

stipulated that the maintenance payable by the one party to the other would not be subject to any increase or reduction.)

24]It is true, as argued on behalf of the applicant herein, that the onus rests on the party relying on waiver to prove that the other party has waived his or her rights, and that waiver is not lightly presumed.[17] Nonetheless, as pointed out by Nienaber JA in *Road Accident Fund v Mothupi*,[18] the question whether or not a party has waived a right is first and foremost a matter of intention and the test to determine intention to waive is an objective one:

> *'[16] …That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations…; secondly, that mental reservations, not communicated, are of no legal consequence…; and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.'* [19]

25]In support of her denial that she had waived her right to apply for a variation of the maintenance order in this case, the applicant relied heavily on the judgment of Roux J in *Purnell v Purnell*,[20] where it was held that the court has the power in terms of s 8(1) of the Act to shorten or extend the period

17 *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708B–D and cases referred to therein.

18 2000 (4) SA 38 (SCA) para 15.

19 Other case references omitted.

20 1989 (2) SA 795 (W).

during which maintenance is payable if circumstances justify it.[21] In that matter, however, there was no consent paper between the parties. Instead, the trial court, after a 'protracted hearing', issued an order in terms of s 7(2) of the Act, directing the former husband to pay maintenance to his former spouse for a period of two years. The position is therefore entirely distinguishable from the present matter, as the potential problem of the court making an agreement for the parties did not arise in *Purnell*. In any event, Roux J's judgment was set aside on appeal to the Appellate Division in *Purnell v Purnell*,[22] because the preliminary point submitted to the court *a quo* – namely whether s 8(1) of the Act permitted a court to extend the period of operation of a maintenance order – was held to be irrelevant in the light of the circumstances of that case. The Appellate Division accordingly did not find it necessary to deal with the merits of the decision of the court *a quo*.

26]Counsel also relied on the cases of *Girdwood v Girdwood, supra*, *Davis v Davis*,[23] and *Hoal v Hoal.*[24] Comparisons were made, *inter alia*, between relevant clauses of the consent papers in those matters and those of the consent paper in the present matter. In this regard, it bears repetition that limited assistance can be obtained from considering the terms of agreements which

21 At 797G–H.

22 1993 (2) SA 662 (A).

23 1993 (1) SA 621 (C).

24 2002 (3) SA 209 (N).

featured in other cases and that each case must be decided on its own facts.[25] In any event, this matter has important features which distinguish it from the *Girdwood* and *Davis* matters. In the consent papers in both those matters, the parties agreed that the one party would pay maintenance to the other in a fixed amount *until death or remarriage*. In both cases, it was in issue whether a clause in the consent paper to the effect that the consent paper constituted a full and final settlement of all the issues between the parties and that they would have no further claims against each other, precluded a variation of the *amount of maintenance* payable by the one party to the other. In both cases, it was held that the respective applicants had not waived their rights to claim an increase in maintenance in future. This is not the situation that pertains here. To my mind, there is a distinct difference between a consent paper where provision is made for payment of maintenance in a fixed amount until the former spouse's death, remarriage or co-habitation, as in *Girdwood* and *Davis*, and a consent paper that provides for payment of a fixed amount of maintenance *and*, in express terms, for a limited period, as here.[26]

27]The third decision, which bears a closer resemblance to the facts of the present matter, is the judgment of McLaren J in *Hoal v Hoal, supra.* In that

25 *Hoal v Hoal, supra*, at 214A.

26 Cf para below.

matter, the consent paper provided *inter alia* for the payment of 'rehabilitative maintenance' by the husband to the wife at the rate of R3 000 per month for 24 months commencing from the date of divorce; R100 000 interest free, within a period of two years commencing from the date of divorce; R4 000 on the granting of the divorce; R3 000 30 days after the granting of the divorce; as well as a maximum amount of R2 500 for 'educational courses' for the wife. In addition, the husband undertook to retain the wife on his medical aid policy for a period of five years or her earlier remarriage.

28]The consent paper also contained the following provisions:

> *'10. <u>General</u>*
>
> *10.1 This agreement contains all the terms and conditions of the agreement between David and Sylvia and shall be binding upon them on signature by them both.*
>
> *10.2 No variation of or abandonment or waiver of rights or obligations shall be binding unless contained in this agreement or subsequently reduced to writing and signed by David and Sylvia.*
>
> *10.3 Save as is provided in this agreement, neither David nor Sylvia shall have any further claims against the other and hereby waives and abandons all and any such claims.'*

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29]Before the expiry of the period of 24 months referred to in the consent paper, the former wife launched an application to extend the period of 24 months for an indefinite period and to increase the monthly amount of maintenance from R3 000 to R5 500. The preliminary question that had to be decided was whether the applicant was entitled to bring the application at all or whether she was contractually precluded from applying for a variation of the terms of the consent paper. In the course of his judgment on this preliminary issue, McLaren J held that a court does indeed have the power in terms of s 8(1) of the Act, not only to increase or reduce the amount of maintenance, but also to vary the period during which it is payable.[27] The only authority referred to in support of that conclusion was the decision of Roux J in *Purnell.*[28]

30]With respect to McLaren J, I do not find his reasoning helpful to a resolution of the present issue. In the first place, as noted above and as the learned judge himself pointed out,[29] limited assistance can be obtained from considering the terms of the agreements which featured in other cases and each case must be decided on its own facts. Secondly, there is at least one significant difference between the terms of the consent paper in the present

27 At 214C.

28 Cf para above.

29 At 214A.

case that distinguishes it from the consent paper in that case: In clause 3 of the consent paper in this matter, it was expressly recorded that after the maintenance period of 3 years, the payment of maintenance '*shall cease* on the 1st day of February 2006' (my emphasis). The meaning of 'cease' is clear and unambiguous: 'stopping, ending, discontinue, come to or be at an end, no longer exist'.[30] The word 'cease' is in fact the exact opposite of 'continue', and leaves no room for the possibility that the period of the duration of the maintenance obligation can be extended. The consent paper in *Hoal* did not contain this word or a similar word or phrase.

31]In any event, McLaren J did not refer to the fact that the *Purnell* judgment of Roux J had been overturned on appeal (albeit on different grounds), nor did he refer to any of the persuasive comments of Didcott J in *Claassens, supra*. In the circumstances, to the extent that the reasoning in *Hoal* appears to lead to a different conclusion from the one reached by me above, I respectfully disagree with it.

32]Applying the above test to the relevant provisions of the consent paper under consideration in this case, I am satisfied that the applicant had indeed waived her right to claim maintenance from the respondent beyond the period of three years as agreed. The terms of clause 3, read with clause 7, stipulate

30 See: The Shorter Oxford English Dictionary (Vol I, at pp 364, 365).

quite specifically that maintenance will be payable for a period of three years, until the 1st day of February 2006, after which it 'shall cease'. On the evidence before the court the applicant was well aware, when she signed the consent paper, of the relevant considerations – including her unemployment due to ill health, which ill health was caused by a permanent condition present since birth. In the circumstances, the alleged mental reservations to which the applicant referred in her founding affidavit are of 'no legal consequence' in the circumstances.[31]

33]Counsel for the applicant also sought to find support for his argument against waiver in the wording of clause 3 of the consent paper, where it was recorded in the introductory paragraph that the parties 'agree to the following financial arrangements *for the foreseeable future*' (my emphasis). Counsel argued that these words evinced an intention that the agreement between them would not be a final and binding one.

34]I do not find this argument persuasive. In my view, the words in question must be read in the context of the agreement as a whole. The terms of clauses 3 and 7, to which I have referred above, are clearly the dominant terms and amount, in my view, to a waiver by the applicant to claim maintenance for any

31 Cf *Mothupi's* case, *supra, loc cit.*

period beyond the original period of three years, as stipulated in the agreement.

Conclusion

35]For the reasons set out above, **the application is dismissed with costs.**

B M GRIESEL

Judge of the High Court