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**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Not Reportable**

Case no: AR155/2020

In the matter between:

**THOMAS WILHELM VOLKER**

**APPELLANT**

and

**RENATA MIGNON VOLKER  
OLD MUTUAL INVESTMENT SERVICES**

**FIRST RESPONDENT  
SECOND RESPONDENT**

**Coram: KOEN J et MOSSOP AJ**

**Date of set down:** 26 February 2021

**Date delivered:** 3 March 2021

This judgment will be handed down in open court and delivered electronically by circulation to the parties' legal representatives by email publication. The date and time for hand-down is deemed to be 09h30 on 3 March 2021.

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## ORDER

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**On appeal from:** The Maintenance Court, Paulpietersburg.

- (a) Condonation for the late delivery of the appeal is granted.
  - (b) Subject to what is set out below, the appeal is dismissed and each party is directed to pay his/her and its own costs.
  - (c) The order of the maintenance court is set aside and substituted with the following:
    - '(i) The Old Mutual Life Assurance Company South Africa Limited is joined as the third respondent to the maintenance proceedings.
    - (ii) The second respondent is ordered to pay to the applicant the sum of R172 810,03 on 18 June 2020 and R99 204,97 on 18 June 2021 in respect of arrear capital maintenance payments due by the first respondent to the applicant.'
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## JUDGMENT

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**Koen J et Mossop AJ**

[1] This is an appeal against an order of the Maintenance Court for the district of Paulpietersburg (the maintenance court), which granted an order directing the second respondent, Old Mutual Investment Services (Old Mutual), to make various payments to

Renata Mignon Volker (Mrs. Volker) in respect of maintenance owing to her by her former spouse, Thomas Wilhelm Volker (Mr. Volker).

[2] Mr. and Mrs. Volker were divorced in terms of an order of the High Court dated 4 November 2013, which granted the following relief:

‘1 The bonds of marriage subsisting between Plaintiff<sup>1</sup> and Defendant be and are hereby dissolved;

2. An Order adjourning to dates to be arranged all other issues, including:

2.1 the Defendant’s claim for maintenance;

2.2 the determination of the division of the joint estate; and

2.3 all questions of costs.

3. It is recorded that it has been agreed that the assets and liabilities of the Thomas and Mignon Volker Family Trust numbers 1, 2 and 3, the Montague Property Trust numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 and the Penvaan Property Trust shall be deemed to be assets and liabilities in the joint estate of the Plaintiff and the Defendant.

4. It is recorded that it is presently not possible to determine the value and extent of the assets and liabilities of the joint estate and the Trusts as aforesaid, and such will be capable of determination only as at the date of determination of the division in accordance with paragraph 2.2 hereinbefore.

5. It is recorded that the provisions of Rule 43 shall remain applicable to the Plaintiff and the Defendant, after the date of this Order, pending the determination of the issues in terms of paragraph 2 hereof.

6. The costs of the application for an adjournment are reserved.’

[3] On 3 September 2014 an order was granted pursuant to the provisions of rule 43 of the Uniform Rules of Court (the high court order) which directed that:

‘The Respondent<sup>2</sup> is to pay to the Applicant, a gross amount of R20 000 (twenty thousand rand) per month, pendente lite, with the [sic] effect from the 1<sup>st</sup> of October 2014.’

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<sup>1</sup> Mr. Volker was the plaintiff in the divorce action.

<sup>2</sup> Mr. Volker was the respondent in the rule 43 proceedings.

[4] It is not in dispute that Mr. Volker did not comply with the high court order. Accordingly, on 24 April 2018, Mrs. Volker applied for, and obtained, a warrant of attachment pursuant to the provisions of sections 26 and 30 of the Maintenance Act<sup>3</sup> (the Act) for arrear maintenance and executed on that order, which resulted in an amount of R856 932,92 being realized during November 2018. Mr. Volker, however, thereafter again defaulted in his maintenance payments, which resulted in a further similar application in terms of the Act being issued on 12 July 2019, in which Mrs. Volker claimed the following relief against Mr. Volker and Old Mutual:

‘1. The matter be heard as one of urgency and that the above Honourable Court dispense with the normal forms and service.

2. A rule nisi be granted calling upon the respondent to show cause, if any, why an order in the terms as set out hereafter, should not be granted:

- The second respondent be ordered to retain the first respondent’s full benefit in terms of an Old Mutual Wealth Linked Retirement Income Policy with policy number 1842 2939 (in the name of the first respondent) to which the applicant is entitled to R615 077.16 (R278 750.00 arrears maintenance together with R336 327.16 interest) in terms of the maintenance order read with the provisions of section 26 and 30 of the Maintenance Act, Act 99 of 98.
- The second respondent be ordered to pay the aforementioned amount in favour of the applicant, Renata Mignon Volker into below mentioned account
  - Bank Name: Standard Bank
  - Account Number [...]
  - Branch Code: [...]
  - Account Holder: Mills Fitchett Sec 32 1 Act 112
  - Reference Number: [...].
- That pending the finalisation of the matter in the Maintenance Court, the second respondent is interdicted from paying any benefit to the first respondent.
- The applicant be granted such further and/or alternative relief as to this Honourable Court seems fit.’

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<sup>3</sup> Maintenance Act 99 of 1998.

[5] The provisions of section 26 of the Act referred to above and material to this appeal provide:

‘(1) Whenever any person –

- (a) against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or
- (b) . . .

such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon—

- (i) by execution against property as contemplated in section 27;
- (ii) by the attachment of emoluments as contemplated in section 28; or
- (iii) by the attachment of any debt as contemplated in section 30.

(2) . . .

(2A) . . .

(3) . . .

(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.’

[6] The provisions of section 30 of the Act material to this appeal provide:

‘(1) A maintenance court may –

- (a) on the application of a person referred to in section 26(2)(a); or
- (b) when such court suspends the warrant of execution under section 27(4)(b), make an order for the attachment of any debt at present or in future owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall direct the person who has incurred the obligation to pay the debt to make such payment as may be specified in that order within the time and in the manner so specified.

(2) . . .

(3) An order made under subsection (1) may be enforced as if it were a civil judgment of the court.’

[7] On 21 February 2020, the maintenance court granted the following order:

'The second respondent is ordered to pay the applicant the amount of R172, 810.03 on the 18<sup>th</sup> June 2020, R172,810.03 on the 18<sup>th</sup> June 2021, R172, 810.03 on the 18<sup>th</sup> June 2022, and R56 124,92 on the 18<sup>th</sup> June 2023. To be paid in the name of the applicant Renata Mignon Volker Bank Name: Standard Bank, Amount [sic] Number [...] Branch Code: [...].

The first respondent is ordered not to reduce the percentage of the annual benefit it must remain at 17.5%.

The first respondent is further ordered not to vary the date of receiving annual benefit until the maintenance debt is paid in full.

The application of costs by the second respondent is dismissed.'

The total of the payments provided for in terms of the order accordingly amount to R574 555,01.

[8] It is this order which forms the subject of this appeal. Only Mr. Volker has filed heads of argument. Mrs. Volker has filed a notice stating that she abides by the decision of this court. Although she has declared that she does not oppose the appeal, her notice to abide with annexures comprises some six pages in which she sets out and refers to various submissions which she wishes to bring to this court's attention, and which effectively amounts to an argument in opposition.

[9] It was not in dispute before the maintenance court that Mr. Volker was required to pay maintenance of R20 000 per month in terms of the high court order and that he was in arrears with his maintenance payments in the sum of R272 015 (Mrs. Volker alleged in her founding affidavit that the arrear maintenance amounted to R278 750). What was in dispute before the maintenance court, or has been questioned, and is in dispute before this court, and requires consideration in this judgment, are the following:

(a) whether condonation for the late delivery of the appeal should be granted;

- (b) whether the high court order qualifies as a '*maintenance order*' for the purposes of the Act;
- (c) whether the quantum of Mr. Volker's unpaid arrear maintenance, and interest thereon, had been proved;
- (d) whether the annuity held by Mr. Volker with Old Mutual could be attached by requiring Old Mutual to pay the amounts which may become payable to Mr. Volker to Mrs. Volker;
- (e) whether there is a fatal non-joinder of Old Mutual Life Assurance Company SA Limited; and
- (f) whether it was competent for the maintenance court to have directed that Mr. Volker could be ordered not to reduce the annuity income he receives from the annuity, and when he receives it. This was not part of the relief claimed in the application. These issues will be considered *seriatim*.

### **Condonation**

[10] The application initially served before the magistrate on 11 December 2019 and was adjourned to 21 February 2020 for judgment. On that day the court experienced load shedding and the matter could not proceed. It was, however, agreed that the magistrate would produce a written judgment which she would hand down by emailing it to the parties' legal representatives. On 23 March 2020, the Mr. Volker's attorney inquired from Old Mutual's attorney whether he had received the judgment, to be told that he had not. After making further inquiries with the magistrate, Mr. Volker's attorney ascertained that the judgment had been emailed to the parties' attorneys on 24 February 2020, but for some unexplained reason was not received by him or Old Mutual's attorney. At the request of Mr. Volker's attorney, the judgment was resent by the magistrate and received by him on 26 March 2020. The next day, the country went into a hard lockdown arising out of the COVID-19 pandemic.

[11] Due to the consequences of the lock down, the notice of appeal was filed on 13 May 2020, when it ought to have been filed by 28 April 2020.

[12] We are satisfied that the explanation provided is reasonable, the delay has not been inordinate, nor has it been dilatory in nature, and no prejudice has been occasioned thereby. Condonation is accordingly granted.

**Is a rule 43 maintenance order a maintenance order as contemplated by the Act**

[13] Section 1 of the Act defines 'maintenance order' as:

'any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person.'

[14] The definition must be given a purposive interpretation. There is no reason why giving these words their ordinary meaning in the context in and for the purpose for which they are applied, that a maintenance order *pendente lite* pursuant to the provisions of a rule 43 order should not qualify as a maintenance order for the purposes of the Act. The suggestion that a rule 43 order would not be included in the definition is not supported by any authority and has no substance. The point was not persisted with in argument.

**Whether the amount of the arrears, inclusive of interest, was established.**

[15] The evidence adduced by Mrs. Volker in this regard was unsatisfactory. Initially, the quantum of her claim, inclusive of interest, in the amount of R515 077,16 was sought to be established with reference to a schedule, being annexure 'MV4' to the founding affidavit. With regard thereto, Mr. Volker referred to certain payments that had been made by him but which were not reflected in that annexure. Mrs. Volker admitted these additional payments but did not reflect all of them in a subsequent schedule, being annexure 'RMV5' to her replying affidavit to Mr. Volker's answering affidavit. The rate at which interest was calculated on the arrears and the calculation of such interest was also disputed by Mr. Volker. It was furthermore contended by Mr. Volker that the interest claimed exceeded the capital amount and contravened the *in duplum* rule.



[16] Once all the papers had been filed, the quantum of the claim was sought to be established with reference to a revised version of the original schedule, annexed as annexure 'RMV12' to Mrs. Volker's replying affidavit to Old Mutual's answering affidavit, reflecting a claim in respect of arrear maintenance, together with interest, in the sum of R574 555,01. This was the total amount for which the attachments and payments were authorised. It is however trite law that an applicant is required to make out her case in the founding affidavit, and not in the replying affidavit. The reason is obvious, namely that the respondent must have the opportunity to respond to the calculation of the claim in the answering affidavit.

[17] It is not disputed that Mr. Volker had fallen into arrears with the capital maintenance payments due by him. This was candidly admitted by Mr. Volker's attorney at the outset of the hearing, when he advised the magistrate that there was an amount in arrears and, later, that the amount of such arrears was R272 015. There is accordingly no difficulty with attachments up to that amount from future annuity income that may become due to Mr. Volker from Old Mutual. It was also not in dispute that the annuity income that would become due to Mr. Volker on 18 June 2020 and 18 June 2021<sup>4</sup> would be in the amount of R172 810,03. An order that R172 810,03 of the capital arrears in the sum of R272 015, payable on 18 June 2020 and the balance of R99 204,97 (R272 015,00 less R172 810,03), when the next annuity income payment would accrue on 18 June 2021, would be unassailable.

[18] The difficulty arises in respect of the payment of interest on the arrear capital payments. The calculation of Mrs. Volker's claim for interest was difficult to follow.

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<sup>4</sup> According to the annuity fund rules the interest rate at which annuity income will become payable and the intervals at which they will be paid, may be varied by the annuitant annually. The interest rate at which the annuity interest is payable and that it would be payable annually up to 18 June 2021, has not been varied.

[19] It is clear from the provisions of section 30(1) of the Act that the debt that may be attached may be the amount 'necessary to cover the amount which (the person against whom the maintenance or other order in question was made), *together with any interest thereon*, as well as the costs of the attachment or execution.' The provisions of the Prescribed Rate of Interest Act<sup>5</sup> material to this appeal provide:

**'1. Rate at which interest on debt is calculated in certain circumstances.** – (1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2)(a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.

(2) (a) For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum.

(b) The Cabinet member responsible for the administration of justice must, whenever the repurchase rate is adjusted by the South African Reserve Bank, publish the amended rate of interest contemplated in paragraph (a) by notice in the Gazette.

(c) . . . '

**2. Interest on a judgement debt.** – (1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.

(2) Any interest payable in terms of subsection (1) may be recovered as if it formed part of the judgment debt on which it is due.

(3) In this section "judgment debt" means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt.'

[20] Unfortunately, the schedules attached to Mrs. Volker's papers did not specify the interest rate at which interest was to be calculated from time to time, otherwise the

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<sup>5</sup> Prescribed Rate of Interest Act 55 of 1975.

calculation might have been possible independent of the schedules submitted. Instead, a single rate of interest was applied to each schedule, being either 15,5% or 9%. But more significantly, apart also from the admitted payments not all being taken into account, a major difficulty with regard to the calculation of interest arose from the fact that the substantial credit of R856 932,92 in November 2018 was all applied to capital and not, in accordance with common law principles, firstly to interest and only thereafter to capital. Interest was also not confined to a calculation of interest on the admitted unpaid arrear capital of R272 015,00, which accumulated over the period from May 2018 to June 2019, but, if regard is had to annexure 'RMV12', was seemingly calculated over a period which dates back for five years. Furthermore, in the first two schedules interest had been calculated at 15,5% per annum whereas in the last schedule the interest was apparently calculated on unpaid capital maintenance payments at 9% per annum. This was sought to be justified by Mrs. Volker with reliance on the judgment in *Davehill (Pty) Ltd and others v Community Development Board*.<sup>6</sup> But that judgement is only authority for the view that if interest runs from a particular date in respect of a particular judgement debt because it is due, then that interest rate will continue to prevail notwithstanding subsequent fluctuations in the interest rate. In respect of unpaid arrear maintenance payments, the debt falls due in respect of each and every monthly maintenance payment when not honoured, and the interest to be calculated on each unpaid capital amount, or any unpaid portion thereof, would be the rate prevailing as at that date. Subsequent arrears falling due on dates by when the interest rate had changed, would only attract interest at the interest rate then prevailing. One rate does not apply to the whole period.

[21] A perusal of any of the schedules also indicates that on Mrs. Volker's calculation, from November 2018, and for some period thereafter, the total interest exceeded the capital amount of the arrears outstanding, which would suggest that the *in duplum* rule was contravened.

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<sup>6</sup> *Davehill (Pty) Ltd and others v Community Development Board* 1988 (1) SA 290 (A).

[22] We are very alive to the sensitivity with which courts approach claims for unpaid maintenance and that a court should endeavour always, if possible, to ensure that unpaid maintenance claims and interest are corrected. A substantial sum in interest might be due to Mrs. Volker. It is, however, impossible to determine with any reasonable degree of accuracy, what that figure should be. Mrs. Volker has failed to establish the claim for interest for which any attachment may be ordered. The appeal accordingly must succeed to correct the amount outstanding for which an attachment could validly be effected.

### **The attachment of annuity income**

[23] The interest of Old Mutual in the litigation was piqued by Mrs. Volker's claim to attach the full amount of Mr. Volker's annuity. Old Mutual contends that such an order is not competent. It contends that the capital amount of a purchased living annuity vests in the entity which provides the annuity, Old Mutual Life Assurance Company South Africa Limited, with the annuitant only being entitled to the annuity income which may become available periodically, whether that be monthly or annually and at the percentage rate<sup>7</sup> chosen by the annuitant. That argument was advanced by Mr. Volker both before the maintenance court and also before this court. The factual allegations of Mr Volker and Old Mutual in regard to the nature of an annuity and the capital and income components thereto, stand unchallenged.

[24] Mrs. Volker has sought to counter this argument on the basis:

- (a) that it is inconsistent with the provisions of section 26(4) of the Act;
- (b) that the capital amount of a pension payable, would be liable to attachment (as in fact happened with the previous attachment), and that Mr. Volker, spurred on by that successful attachment of pension fund monies, had deliberately converted the remaining capital amounts after a portion of each policy was paid to him in cash, which accrued under policies 6067185, 8430423, 119281193, 14870562 and 16819853 to purchase the

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<sup>7</sup> The rate can vary between 2.5 and 17.5%.

annuity under policy number 18422939, to place the capital of that policy beyond the reach of an attachment by Mrs. Volker.

[25] It seems implied from the judgment of the learned magistrate that she accepted the argument, correctly it would seem, that only the annuity income which becomes payable periodically could be attached as the capital amount would vest in Old Mutual,<sup>8</sup> as she confined her judgment to payment by Old Mutual of the amount of the annuity income, which it was common cause at an interest rate of 17,5% amounts to R172 810,03 annually and which is payable on 18 June 2020 and 2021, and no more. None of the parties dispute that the income payable in terms of the annuity is capable of attachment. There is no cross appeal by Mrs. Volker that a larger amount than the amount of the annuity income should have been ordered by the learned magistrate to be payable to her. Whether a larger amount, being the capital amount of the annuity, could lawfully be attached is accordingly not an issue in this appeal and need not be considered further.

[26] As regards the argument in paragraph 24(b) above, the obvious answer again is that there is no cross appeal to lay claim to an amount greater than that awarded. But that aside, it is not clear exactly what relief Mrs. Volker would wish to claim based on any such alleged *mala fides* on the part of Mr. Volker. It seems, in the absence of her appearing before this court and advancing argument, that she suggests that Mr. Volker *mala fide* placed the capital amount of his former pension benefits beyond attachment. There has, however, been no specific relief claimed in that regard, such as for example a declaratory order in the high court setting aside those transactions, or claiming some form of anti-dissipatory relief. It also does not appear that this issue was raised in the maintenance court. On the allegations advanced in the application papers, no cause of action for any such relief was established.

## Non-joinder

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<sup>8</sup> This was argued with persuasive reliance on the judgment of the Supreme Court of Appeal in *ST v CT* [2018] ZASCA 73; 2018 (5) SA 479 (SCA) and *CM v EM* [2020] ZASCA 48; 2020 (5) SA 49 (SCA).

[27] As a matter of strict law, there was a non-joinder of Old Mutual Life Assurance Company South Africa Limited, being the holder of the capital amount of the annuity from which the annuity income is paid.

[28] The uncontroverted allegations, however, established that the annuity is administered by Old Mutual. In an exchange of email correspondence between the maintenance officer and the legal adviser of Old Mutual the latter, on 5 July 2019, stated that 'Old Mutual Life Assurance Company South Africa is not the administrator for Old Mutual Wealth'. He advised that '[t]he correct party to be cited is Old Mutual Investment Services ("OMIS")', that is the second respondent. There is no doubt from the papers that Old Mutual Life Assurance Company South Africa Limited is aware of the litigation. Although the capital amount of the annuity appears to vest in it, the payment of the annuity interest is administered by Old Mutual, as cited, which will be the entity to give effect to any order of attachment. In those circumstances, the failure previously to join Old Mutual Life Assurance Company South Africa Limited formally is not a fatal non-joinder, and can be corrected now. The order to be issued will accordingly provide for such joinder to formally regularise the position.

### **The order not to reduce the percentage of the annual benefit**

[29] The magistrate ordered that Mr. Volker was not to reduce the percentage of the annual benefit that he receives from the living annuity below the current level of 17,5 percent per annum. Such relief was, however, not sought from the court nor was a case for that relief set up in Mrs. Volker's founding affidavit.

[30] It is for the parties in their affidavits to define the limits and nature of their dispute. There may be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. provided that no prejudice will be caused to any party by its being decided. Beyond that, it is for

the parties to identify the dispute and for the court to determine that dispute and that dispute alone.<sup>9</sup>

[31] That portion of the magistrate's order must accordingly be set aside.

[32] What is apparent from the wording of clause 3.12 of the annuity is that Mr. Volker may only change his income level, and frequency of the annuity payment that he receives each year, on the anniversary date of the policy. If Old Mutual does not receive a request to change the annuity income level before the anniversary date the income level and frequency thereof will remain unchanged. Accordingly, the rate at which the annuity income is earned and the date of payment up until 18 June 2021 cannot be varied by Mr. Volker.

### **Costs**

[33] As regards costs, Mr. Volker has been successful to a limited extent, reducing the attachment to what was admitted as the capital amount in arrears. The participation by Old Mutual in this appeal was unnecessary. The effect of the judgment of the maintenance court did not imperil its construction of the correct legal position which it contends applies in respect of an annuity. In the exercise of this court's discretion on costs, it seems appropriate that each party, including Old Mutual, be directed to pay their own costs.

### **The order**

[34] The following order is granted:

- (a) Condonation for the late delivery of the appeal is granted.
- (b) Subject to what is set out below, the appeal is dismissed and each party is directed to pay his/her and its own costs.
- (c) The order of the maintenance court is set aside and substituted with the following:

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<sup>9</sup> *Tau v Mashaba and others* [2020] ZASCA 26; 2020 (5) SA 135 (SCA) para 19.

- '(i) The Old Mutual Life Assurance Company South Africa Limited is joined as the third respondent to the maintenance proceedings.
- (ii) The second respondent is ordered to pay to the applicant the sum of R172 810,03 on 18 June 2020 and R99 204,97 on 18 June 2021 in respect of arrear capital maintenance payments due by the first respondent to the applicant.'

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KOEN J

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MOSSOP AJ



### **APPEARANCES**

For appellant:	C. Pretorius SC
Instructed by:	G. Vonkemann Attorneys c/o Tatham Wilkes Inc. 200 Hoosen Haffejee Street PIETERMARITZBURG
For first respondent:	No appearance
For second respondent:	No appearance