REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA35/2022
REPORTABLE: YES/~~NO~~
OF INTEREST TO OTHER JUDGES: YES/~~NO~~
REVISED
Date 18 July 2023

In the matter between:

L[…] J[…] **APPELLANT**

and

P[…] H[…] A[…] J[…] **RESPONDENT**

JUDGMENT

MONENE AJ

[1] This is an appeal against the judgement and orders of the Learned Acting Magistrate Mr Nkgapele M A("The Learned Acting Magistrate") seating as a Maintenance Court out of the Tzaneen Magistrate Court on 14 July 2022.

[2] The judgement and orders appealed against varied a maintenance order on terms prayed for by the respondent who had applied to vary a maintenance order which had arisen from his divorce from the appellant.

[3] The appeal is opposed by the respondent, it being his contention that the decision of the lower court to vary the maintenance order is unassailable.

THE FACTUAL BACKGROUND

[4] The Appellant and the respondent, both persons of very advanced age, were parties to a marriage which ended in a divorce before the High Court of South Africa, then called the Transvaal Provincial Division, in September 1992.

[5] Pursuant to their divorce they entered into a settlement agreement which entailed in it a maintenance clause as against the respondent to the benefit of the appellant. The settlement agreement having been made an order of court, the High Court ordered the respondent to pay an amount of R4 500.00 per month as maintenance towards the appellant, which amount was subject to an annual escalation until either the appellant remarried or perished.

[6] As a result of the annual escalation order the respondent was by July 2022 paying a maintenance amount of R19 500.00 in observance of the now thirty- year-old order.

[7] The Respondent approached the Tzaneen Magistrate Court praying for variation of the maintenance order arguing that he was no longer in a financial position to honour the order and praying for a reduction of the maintenance amount from R19 500.00 per month to R10 000.00 at most.

[8] The variation application, which was opposed by the appellant, evolved into a lengthy hearing where the applicant (respondent in casu) did not himself testify but led the evidence of his auditor and his lawyer to try and prove that his means had depreciated to a point where the maintenance order constituted a financial throttle for him. For her part the appellant testified and called a financial practitioner from Sanlam arguing that the respondent had fallen woefully short of showing good cause for the variation of the maintenance order.

[9] In a very short judgement, neither *per se* characterized by much reflection on the tons of evidence led nor by much reasoning, the Learned Acting Magistrate found in favour of the respondent couching his ruling in the following terms at paragraphs 6.4 and 6.5 of his judgement:

> "6.4. *The court is however going to shy away from the issue of ownership of properties and what the parties should or should not do to bring in more income to each relevant party as that is not of the court's concern, in the matter in casu, given the fact that, both parties have property they can utilize to derive income; and*
>
> *6.5. The Applicant has successfully demonstrated that the current maintenance order,* as *it stands, is not sustainable, having regard to his finances."*

[10] The Learned Magistrate then granted the variation application ordering that the maintenance amount be reduced from R19 000.00 to R15 000.00 per month subject to no escalation and effective from 31 August 2022.

[11] Aggrieved by the variation order the appellant then approached this court on appeal.

THE ISSUE

[12] As is evident from the above background information, the crisp issue for determination before this court is whether, on the record before us, a proper case has been made justifying the variation order. Put differently, it is whether the respondent has made out a cogent case, factually and legally, proving that he no longer has the means to honour the 1992 maintenance order.

[13] As alluded to supra, the two parties before this court stand on opposing lines of the key question much like they did before the Learned Acting Magistrate with the respondent virtually saying, 'I cannot afford' and the appellant responding, 'Yes, you can afford'.

THE APPLICABLE LAW

[14] It is so that in terms of both sections 6 and 19 of the Maintenance Act 99 of 1998 it is available to a party to a maintenance order to approach the court seeking variation of the order. In the same vein section 8 of the Divorce Act 70 of 1979 provides, inter alia, that a maintenance order may be varied if there exists sufficient reason or good cause to do so.

[15] In **Georghiades v Janse van Rensburg 2007(3) SA 18 (C) ("Georghiades")** it was held as follows at paragraph 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 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 *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 'the court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered'. The principle of pacta sunt servanda is equally relevant in this context'.

[16] **Prophet v Prophet 1948(4) SA 325(0), Stone v Stone 1966(4) SA98(C)** and **Claassens v Classens 1981(1) SA 360(N)("Claassens")** are among authority through the years to the effect that the approach of courts in variation of existing maintenance orders is primarily that there must be changed circumstances which militate for interfering with and order whether the quantum therein is reduced or increased. I hasten to indicate that those changed circumstances may be circumstances of either of the parties to the maintenance order.

[17] In **Havenga v Havenga 1988(2) SA 438(T)("Havenga")** the court held that in the absence of a real change in circumstances there would not be sufficient reason for the variation of a maintenance order.

[18] In **Strydom v Strydom 2012 (6) SA 482 (KZP) at paragraphs 12 and 13** it was stated that it was incumbent on a variation applicant to show inability to pay the amount ordered by not only proving a reduced income but further showing that the reduction in the income translates into an inability to pay the amount sought to be varied.

APPLYING THE LAW TO THE FACTS

[19] In argument before this court, Ms De Klerk on behalf of the appellant

agreed that the resolution of the dispute *in casu* turns on the evidence tendered by Mr Hartman of Sanlam who testified for the appellant and Mr Linde an auditor who testified on the respondent's behalf. Indeed, Mr Van Der Merwe on behalf of the Respondent also centered his argument on the evidence of the two witnesses.

[20] If the evidence of Hartman to the effect that there were no changed circumstances in the respondent's finances holds water in this court's view then the appeal should succeed. If, however, the court is persuaded by Mr Linde's testimony that the financial circumstances of the respondent have depreciated to the point of disabling him to continue honouring the existing maintenance order then the appeal should be dismissed.

[21] In pith and in substance the evidence of Hartman which was relied upon by the appellant before the Learned Acting Magistrate, in the appellant's heads of argument and in submissions by the appellant before this court was the following:

> [21.1] The Respondent has two Living Annuity Plans with Sanlam the first of which was valued at R1.7 million. The second was valued at R8.8 million.
>
> [21.2] The respondent was receiving an income of R38 229.72 per year from the first plan which was computed at an income level of 2.5% of the underlying assets held in terms of the annuity.
>
> [21.3] The respondent was receiving an income of R154 769.32 per year payable monthly which amount was computed at a 2.5% of the value of the underlying assets held in terms of the annuity.

[21.4] The 2.5% income levels in respect of both annuities is the baseline level available for selection by the respondent in circumstances where it was permissible at the election of an annuitant like the respondent to go as high as 17.5%.

[21.5] It is available to the respondent if he so wishes to earn an income much higher than the current income by adjusting the income levels in both annuities from the 2.5% minimum to any percentage up to the maximum of 17.5%.

[21.6] On the basis of all the afore going the respondent, argued the appellant, had failed to prove depreciation in his financial means and ought not to have been granted the variation order.

[22] The evidence of Mr. Linde, a chartered accountant, and to a limited extent that of Mr. Thomas, an attorney who testified on his understanding of how trusts work, on which the respondent relied throughout and in submissions made before this court was briefly as follows:

[22.1] The cold hard facts were that the income currently received by the respondent as derived from the annuities (being the R38 229.72 and the R154 769.32 per year, payable monthly as testified to by Hartman) were not enough to carry the burdens of the existing maintenance order.

[22.2] It would not be economically sensible for the respondent to upscale the income levels from the minimum of 2.5% upwards.

[22.3] There would be tax implications if the respondent sought to adjust anything related to his income from the annuities and trusts.

[22.4] Beyond an income of R16 872.00 per month received from the Sanlam Annuities, the respondent was earning an amount of R19 879.00 per month from a family trust in which he is a trustee which trust had a net value of R28 million and generated a yearly income of approximately R1.5 million per year.

[22.5] While not immediately unable to honour the existing maintenance order, in the future which was 'within a year or so' the respondent will be unable to make good on the maintenance order payments.

[23] I must from the outset mention that I find the meagre and threadbare reasoning of the court a *quo* in paragraphs 5 and 6 of its judgement to be a clear misdirection as it did not even attempt to go into the above-mentioned key aspects of the parties' cases. Instead, it expressly curiously stated that it was not concerned with properties owned by the parties from which they derived income (it is unclear which properties if not assets subject to the living annuities and/or trusts) in a manner which clearly indicated either adulteration or misreading of the issues.

[24] I do not understand the appellant's reliance on the *pacta sunt servanda* doctrine as referred to in **Georghiardes** *supra* to have been suggesting that because a maintenance order arising from a divorce settlement agreement is part of a bigger contract, then variation is *ipso facto* unavailable. If that was the case, then I would be disinclined to agree with the appellant and agree with the respondent's submission that it is permissible to vary the maintenance component of a divorce order without tampering with the balance of the contract. I need not belabor this point as the law is settled thereon.

[25] As I understand the respondent's case he is currently (or at least was when the matter was heard by the Learned Acting Magistrate) in a position to honour the existing maintenance order but may struggle to do so in a year or so.

However, he wants this court to find that factually in the present or when the matter served before the lower court, he is/was unable to pay as per the maintenance order.

[26] The onus of proving that there is sufficient reason to vary the original maintenance order lies with the variation applicant. **See in this regard Hahlo; The South African Law of Husband and Wife (5th Edition) 1995 at page 364.**

[27] Nowhere does it appear expressly from the appellant's evidence as to exactly from when and by how much and from what reason the respondent has started to suffer from lack of means.

[28] We are simply told that he is no longer capable of honouring the order and that we should close our eyes to contingencies attendant to investments because those cannot be relied upon as they may fall victim to tax issues and are generally the subject of the uncertainty of the markets. However, there is just no detail as to why the scenarios of the reasonable possibilities of the respondent making more money arising from upscaling the income levels of the annuities to anything above 2.5% as testified to by Hartman are improbable.

[29] As alluded to supra, the trite approach to variation applications is that the applicant must demonstrate an inability to pay maintenance which commences with proving, not merely alleging without substantiation, reduced income.

[30] The respondent is a trustee of a R28 million trust, has annuity investments of more than R12 million from which he chooses to derive the barest minimum as an income, drives a 2021 model luxury motor vehicle, is 84 years of age and thus does not have a financially demanding long life ahead of him as a youngster would. He has an obligation to maintain an equally very old appellant whom he must maintain until remarriage or death. He has, in my view, an asset

base which, without even investing further, is more than enough to sustain him and the appellant up to their deaths. With investments as they currently are with or without the contingencies of a hostile economic environment he is, in my view, a very wealthy man by anybody's definition.

[31] In my view the court a quo failed to appreciate that, on the basis of the evidence before it, the respondent had barely even begun to summit the section 6 of the Maintenance Act, **Claassens, Havenga,** and **Strydom** threshold of proving just cause, sufficient reasons or merely changed circumstances referred to supra.

[32] Griese! J in **Georghiades** approvingly quoted the learned author Hahlo as follows at paragraph 19 of his judgement:

> "In *his note on the Claassens decision, 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 ...*
>
> *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 ...'"*

[33] Like the court in **Georghiardes** I align myself with Hahlo as quoted above and not persuaded that in *casu* there are such exceptional circumstances crying out to high heaven for a variation to have been granted.

[34] Beyond the objective facts of what the respondent has in terms of assets available to him, I see no reason to fault Hartman's evidence that it is feasible for the respondent to increase his income by increasing his income levels from the two annuities to a higher amount than the baseline he is using currently.

[35] I am not persuaded by an argument which says that the intimations of Hartman should be looked at with circumspection merely because of the unpredictability of the economic markets or worse still because some taxes will then be due. It is in the very nature of people who derive an income from economic prospecting to stand the risk of either making it big or coming crumbling down. It cannot, in my view, be reason enough to vary an order simply because of a party's subjective view that somewhere in the distant uncertain future, 'in a year or so', there may be economic gloom approaching. It would benefit all concerned to await that gloom, verify objectively that it is in fact a disabling gloom and then and only then tilt towards variation. Furthermore, tax is part of our lawful economic intercourse and cannot and should not be used by the respondent as a reason to deliberately try to impoverish himself in fear or avoidance thereof and thereafter claim diminished means to maintain.

[36] For all the above reasons I find that the appeal must succeed.

REGARDING THE ABSOLUTION FROM THE INSTANCE ISSUE

[37] It is indeed so that at the end of the case for the respondent as applicant in the court a quo, the appellant who was the respondent therein unsuccessfully applied for absolution from the instance.

[38] Although mention is made of the absolution from the instance issue in both parties' heads, I did not get the impression that the parties gave more than

a passing glance at the issue. We certainly were not addressed on this aspect in submissions before us. The appellants' heads of argument also did not go beyond citing authority to the effect that absolution is as available in maintenance hearings as it is in all civil claims' proceedings. No prayer was made in the heads of argument of the appellant in relation to absolution and the refusal of absolution did not find space within the appellant's grounds of appeal in the notice of appeal.

[39] I find therefore, that this court was not called upon to decide this aspect of whether absolution was correctly refused or not. Suffice to state, purely for the sake of completion, that it does not appear, at first blush, to be an area where this court would have interfered with the Learned Acting Magistrate's finding.

[40] Resultantly, the following order is made:

40.1. The appeal is upheld.

40.2. The judgement and orders of the Learned Acting Magistrate Nkgapele dated 14 July 2022 in which His Worship varied the maintenance order dated 25 September 1992 is set aside.

40.3. The maintenance order of 25 September 1992 is revived and retained.

40.4. The Respondent shall pay the costs of the appeal on a party and party scale.

M S MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I AGREE.

MV SEMENYA
ACTING JUDGE PRESIDENT
LIMPOPO DIVISION, POLOKWANE

This judgment was handed down electronically by circulation to the parties' legal representatives via their e-mail addresses and released to SAFLII. The date and time for hand-down are deemed to be 18th JULY 2023 at 10h00.

APPEARANCES

Heard on:	**14 APRIL 2023**
Judgment delivered on:	**18 July 2023**

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