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

Case No: 10909/04

In the matter between:

NANCY SOLLER	Applicant
and	
THE MAINTENANCE MAGISTRATE OF WYNBERG	First Respondent
THE MAINTENANCE OFFICER OF WYNBERG	Second Respondent
PETER CLIVE SOLLER	Third Respondent
SANLAM PERSONAL PORTFOLIOS (PTY) LTD	Fourth Respondent

JUDGMENT: 04 NOVEMBER 2005

VAN ZYL J:

Introduction

[1] The applicant and the third respondent, who were previously married to each other, are the parents of a minor child. The child has been in the custody of the applicant since 3 February 1994, when their marriage was dissolved, with incorporation of the terms of an agreement, in the Witwatersrand Local Division of the High Court under case number 4824/93. In terms of paragraph 3 of the agreement the third respondent was ordered to pay maintenance for the child in the amount of R750,00 per month. Paragraph 4 provided that he also pay all reasonable medical, dental, hospital, optical and pharmaceutical expenses in respect of the child, while paragraph 5 made provision for payment of the costs of the child's education, including extramural expenses.

[2] On 3 May 1995 the agreement was amended in terms of a deed of settlement which was made an order of this court under case number 7559/94. Paragraph 7.1 thereof provided that the maintenance payable for the child would remain R750,00 per month, while paragraphs 7.2, 8 and 9 respectively dealt with the third respondent's obligation to pay for the child's schooling, extramural activities and medical expenses.

[3] On 10 November 1999 the third respondent consented, in terms of section 5(7) of the previous *Maintenance Act* 23 of 1963, to increase the amount of maintenance payable in respect of the child from R750,00 to R2 500,00 per month as from 1 December 1999. On the same day, under case number 0597017162, the first respondent granted a maintenance order in such terms, subject thereto that it amended only paragraph 7.1 of the agreement of 3 May 1995.

[4] As a result of the third respondent's continual defaulting on his obligation to pay the maintenance aforesaid, the applicant approached the first respondent to compel the fourth respondent to pay the said maintenance from the third respondent's annuity. On 19 February 2004 the first respondent granted an ancillary order, in terms of section 16(2) of the current *Maintenance Act* 99 of 1998. This required the fourth respondent to deduct the amount of R2 500,00 per month from the third respondent's annuity as from 1 March 2004 and to pay such amount to the applicant.

[5] As a result of the third respondent's withdrawing substantial amounts from his annuity, the applicant feared that the funds available in the annuity would soon be depleted. This would prejudice her right to future maintenance payments. She thereupon approached the first respondent with an application to interdict the fourth respondent from making any payments from the annuity to the third respondent until such time as the child became self-supporting. In addition she sought an order requiring the fourth respondent to pay the maintenance on an annual basis, namely R30 000,00 per year instead of R2 500,00 per month. The first respondent dismissed the application on the

basis that the maintenance court did not have the power to grant a prohibitory interdict of this nature and, in addition, that it might be exceeding its monetary jurisdiction.

[6] The applicant thereupon approached this court for relief. The notice of motion sought an order declaring that the maintenance court has unfettered authority to grant, execute and enforce maintenance orders of any kind, including the authority to issue prohibitory interdicts as aforesaid. In the alternative the applicant sought that the first respondent's order dated 19 February 2004 (par [4] above) be rescinded and that the fourth respondent be interdicted from making any payments whatever to the third respondent from the said annuity until such time as the child becomes self-supporting.

[7] On 23 June 2005 my learned brother Moosa J granted an order interdicting the fourth respondent from making any payment in excess of R100 000,00 to the third respondent pending the finalisation of the present application. In this regard he specified dates for the filing of answering and replying affidavits and ruled that heads of argument be filed in terms of the rules of this court. He then postponed the matter to the semi-urgent roll on 25 October 2005, reserving the question of costs.

[8] When the matter came before me on 25 October 2005, the third respondent had filed an answering affidavit and the applicant had replied thereto. Only the applicant's legal representatives, Adv M Abduroaf and Adv C O'Connor, filed heads of argument and appeared on behalf of the applicant. No heads were filed for the third respondent and there was no appearance on his behalf. After reading the papers and hearing useful argument by counsel for the applicant, I granted an order in the following terms:

1. The interim order granted by Moosa J on 23 June 2005 is rescinded.

2. The order granted on 19 February 2005 by the first respondent against the fourth respondent is likewise rescinded.

3. Except with the leave of the applicant, alternatively of the maintenance court, the fourth respondent is interdicted from making any payments to the third respondent from funds held by the fourth respondent in the Sanlam Personal Portfolios Life Annuity, Investment Portfolio Number: 602391, Investment Plan Number: 602049 ("the annuity"), until such time as Ross Soller, the biological son of the applicant and third respondent, becomes self-supporting.

4. The fourth respondent is directed to make annual payments to the applicant from the annuity in the amount of R30 000,00 on or before 30 June of each year, the first payment to be made on or before 30 June 2006, together with any amounts owing in terms of the order of court granted by the first respondent under case number 0597017162 on 10 November 1999, such amounts to be paid into the applicant's bank account.

5. The third respondent is ordered to pay the costs of this application, including the costs reserved by Moosa J on 23 June 2005.

[9] At the time of issuing the said order I was unable, because of time constraints, to furnish full reasons for doing so. In view of the great interest exhibited in the outcome of this application, however, I undertook to furnish such reasons as soon as possible. They appear from what follows.

The Nature of the Relief Sought

[10] It could be argued that Moosa J gave a provisional order with return day 25 October 2005, alternatively an interim order pending consideration, by the court dealing with the matter on 25 October 2005, of the relief sought by the applicant. As appears from the background facts set forth above, however, the applicant did not seek confirmation of Moosa J's order. She in fact required that it be rescinded and replaced by an order granting two-pronged relief relating, in general terms, to the powers of a maintenance court and, more specifically, to the maintenance relief sought by her.

[11] The difficulty with this approach is that the first prong appears to be directed at a declaratory order in terms of which recognition is given to the power of the maintenance court to grant maintenance relief without being constrained by legislative or other provisions ostensibly limiting its powers. This relief is not, strictly speaking, required for purposes of considering the specific relief sought by the applicant regarding maintenance for the child, since this court clearly has the power to grant an order such as that sought by the applicant. Our superior courts have regularly expressed the view that it is not their function to furnish opinions or advice to parties, or to make rulings on abstract, academic or hypothetical questions leading to no concrete or tangible results. See *Ex Parte Nell*

1963 (1) SA 754 (A) at 760B; *South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (A) at 658H; *Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa) (2)* 1980 (2) SA 516 (T) at 519H-520C; *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (T) at 125E-G; *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC) par [7] at 619B; *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) par [15] at 525F; *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T) par [59] at 430D-G; *Mohamed and Another v President of the Republic of South Africa and Others* 2003 (4) SA 64 (C) par [45] at 85I-J.

[12] On the other hand, the first respondent in the present matter refused the relief sought by the applicant. Although the applicant chose not to initiate an appeal or review procedure in respect of such decision, this court is empowered, by virtue of its inherent common law jurisdiction, to review any decision or ruling of a lower court, tribunal, body or person acting in an official capacity. See section 19(1)(a) of the *Supreme Court Act* 59 of 1959 and the discussion of “review under the common law” in Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4th edition by M Dendy, 1997) 937-948. In *Ex Parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585H, Vieyra J observed that the court's inherent power was "not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation".

[13] The more so is this the case where the interests of children are involved. This has been recognised unequivocally in section 28(2) of the Constitution, Act 108 of 1996, where it is stated that “[a] child’s best interests are of paramount importance in every matter concerning the child.” There is no doubt that this court, in its capacity as upper guardian of all minor children within its area of jurisdiction, has the inherent jurisdiction to review all manner of orders or rulings affecting the rights of such children. See *Narodien v Andrews* 2002 (3) SA 500 (C) at 506F-507C; *In Re Moatsi se Boedel* 2002 (4) SA 712 (T) par [30] at 717B-F; *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) par [24] at 375B-376A.

[14] In view of these considerations I am of the view that it is in the public interest that

this court consider whether or not the powers of the maintenance court include the power to grant an order such as that made by this court. It is of as much importance to applicants and their legal representatives as it is to the maintenance courts themselves.

The Maintenance Act 99 of 1998

[15] The *Maintenance Act* 99 of 1998 ("the Act"), which came into operation on 26 November 1999, repealed the *Maintenance Act* 23 of 1963 by virtue of the growing perception that the right of children to be properly maintained required a reconsideration and restatement of the law relating to maintenance. The need for such reconsideration was highlighted by the protection of the rights of children in section 28 of the Constitution, more particularly section 28(2) which emphatically underlined the paramountcy of the child's best interests. See *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) par [16]-[18] at 427G-429A. See also the *Bannatyne* case, *loc cit* (par [13] above).

[16] This mirrored the high priority given to children's rights in United Nations conventions to which South Africa was a signatory, namely the *Convention on the Rights of the Child* (1989) and the *World Declaration on the Survival, Protection and Development of Children* (1990). In article 3(1) of the former it is stated that, in all actions concerning children, "the best interests of the child shall be a primary consideration". See *Narodien v Andrews* (par [13] above) at 507C. See also the *Bannatyne* case (par [13] above), footnote 29 at 375H-J.

[17] Not surprisingly the South African Law Commission took the initiative in reconsidering maintenance matters by undertaking, as Project 100, a *Review of the Maintenance System* and calling for comments, by 30 May 1997, on its Issue Paper 5. In paragraph 4.28 of the Paper reference was made to the option of allowing a maintenance court to make a garnishee order for payment of maintenance from the income of the respondent. The possibility of ordering that such payments be made out of pension funds, annuities or the like does not, at the time of compilation and publication of the Paper, appear to have been considered.

[18] Against this background the preamble to the Act states the following:

WHEREAS the Constitution of the Republic of South Africa, 1996, as the supreme law

of the Republic, was adopted so as to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life of all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system;

AND WHEREAS the Republic of South Africa is committed to give high priority to the rights of children, to their survival and to their protection and development as evidenced by its signing of the World Declaration on the Survival, Protection and Development of Children, agreed to at New York on 30 September 1990, ands its accession on 16 June 1995 to the Convention on the Rights of the Child, signed at New York on 20 November 1989;

AND WHEREAS Article 27 of the said Convention specifically requires States Parties to recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child;

AND WHEREAS the recovery of maintenance in South Africa possibly falls short of the Republic's international obligations in terms of the said Convention;

AND WHEREAS the South African Law Commission is investigating, in addition to the recovery of maintenance for children, the reform of the entire South African maintenance system;

AND WHEREAS it is considered necessary that, pending the implementation of the said Law Commission's recommendations, certain amendments be effected in the interim to the existing laws relating to maintenance and that, as a first step in the reform of the entire South African maintenance system, certain of those laws be restated with a view to emphasising the importance of a sensitive and fair approach to the determination and recovery of maintenance …

[19] It is clear from these introductory words that the legislature accepts the need to introduce strong measures to ensure that maintenance required for children is paid by those persons obliged to do so. In its professed aim to establish a fair, just and reasonable system for determining and recovering maintenance, it appears to be contemplating a radical overhaul and far-reaching reforms to the clearly unsatisfactory existing maintenance system. The provisions introduced by the Act must hence be seen as

temporary or interim. In this regard they appear, in certain respects, to be somewhat unwieldy and less than effective, as pointed out by Mokgoro J in the *Bannatyne* case (par [13] above), where the learned judge says (par [26] at 376F-377A):

Despite the good intentions of this comprehensive legal framework specifically created for the recovery of maintenance, there is evidence of logistical difficulties in the maintenance courts that result in the system not functioning effectively.

[20] At the outset it must be pointed out that, in terms of section 3 of the Act, every magistrate's court may function, within its area of jurisdiction, as a maintenance court. When it functions in such capacity it does so in terms of the Act and must hence be regarded as *sui generis*. It has wide-ranging powers in enforcing the duty of parents to support their children, as provided in section 15 of the Act.

[21] In terms of section 16 it has equally wide-ranging powers to issue maintenance and ancillary orders. Section 16(1) provides that it may make a maintenance order, or substitute an existing order with a new order, providing for payment of maintenance from funds held by a financial institution and may make such order as it may think fit in regard to the payment of medical expenses. Section 16(2), again, empowers it, under certain circumstances, to order the person obliged to pay maintenance to make "periodical payments from moneys at present or in future owing or accruing" to such person.

[22] Maintenance orders may be enforced against defaulters, in terms of section 26 of the Act, by execution against their property, by the attachment of emoluments or by the attachment of any debt. Section 26(4) provides thus:

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.

[23] This section should be read with section 37A(1) of the *Pension Funds Act* 24 of 1956, the relevant portion of which reads as follows:

Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules

of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law … Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

[24] In *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others* 2004 (5) SA 388 (D) Nicholson J held (at 392F) that this subsection dealt with arrear maintenance and not with amounts which would become due in the future. With reference to section 37A(1) of the *Pension Funds Act* 24 of 1956, however, he considered the maxims *generalia specialibus non derogant* (at 393J-394C) and *expressio unius est exclusio alterius* (at 395C-D) and held (at 395I) that the legislature did not intend to restrict the applicant to the remedies contained in the Act. He then observed (at 396E-397B):

The law has never shrunk from interdicting a debtor from dissipating funds to thwart the rights of creditors. Such cases are decided because the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so. In general an applicant needs to show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors, except possibly in exceptional cases.

In those cases the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. I interpolate to state that *in casu* the children are creditors, though only admittedly insofar as each month's maintenance is due and payable, but have a *spes* in the lump sum in the future. Justice may require this restriction in cases where the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim …

It seems to me that it is no great leap for the courts to extend the last-mentioned principles to cover safeguarding a payout in the hands of a fund, such as the first respondent herein. The provisions of the Pension Funds Act apply to that situation - that is the payment of future maintenance - with full force more especially s 37A(1) and the proviso thereof which protects dependants and 'entitles the fund to pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine'.

To interpret the Pension Funds Act in such a fashion does no injustice to our new constitutional order. In fact it accords with the provisions thereof that deal with the rights of women and children.

[25] On this basis the learned judge was prepared to grant an order declaring that the minor children were entitled to share in the withdrawal benefit from the fund in question by means of monthly payments to be made to their mother. The fund was ordered "to retain third respondent's withdrawal benefit so as to make equitable and proper provision for the support and maintenance of the children, for such period as they are in need of such support and maintenance". I am in respectful agreement with this approach.

[26] A similar approach, with which I likewise respectfully agree, was adopted by Hlophe JP in *Magewu v Zozo and Others* 2004 (4) SA 576 (C). With reference to *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 371H-372C), the learned judge confirmed the common law right of a creditor to obtain an interdict to prevent a debtor from dissipating funds to frustrate the creditor's claim. He hence approved (in par [13] at 583G-H) the "anti-dissipation interdict" granted by Nicholson J in the *Mngadi* matter (par [24] above), stating in this regard (in par [14] at 583I-584A):

It is clear, upon a reading of the Maintenance Act and the relevant provisions of the Pension Funds Act, that the two Acts together do work in a manner to provide relief to an applicant who has a maintenance order that has not been abided by the judgment debtor. The Maintenance Act was designed to alleviate the manner and conditions under which the maintenance system was previously run, in that it opened new legal avenues to deal with recalcitrant fathers.

[27] The learned judge made it clear (par [15] at 584B-D) that the Maintenance Act "does not create a closed list of mechanisms available in law to assist children who have claims of maintenance and their specific situations are not expressly set out in the Act". There was "no reason, in logic, why such an order should not be made having regard to

the best interest of the child". By refusing relief where it was not specifically provided in the Act would, in his view (par [16] at 584E-G), constitute too narrow an interpretation of the Act. This would have the effect of ignoring “the constitutional duty of the Court to develop new mechanisms of granting the applicant a means to vindicate her constitutional rights by a narrow reading of the law”.

[28] Hlophe JP found support for this approach in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par [69] at 826G-I, where Ackermann J said:

> … I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld and enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.

The learned judge referred in this regard to foreign law, including the Canadian Supreme Court case of *Nelles v Ontario* (1989) 60 DLR (4^{th}) 609 (SCC) at 641-642, where Lamer J made the following observation:

> When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.

[29] I respectfully associate myself with the remarks of both Ackermann J and Lamer J. The Maintenance Act clearly does not provide for all the remedies maintenance courts may be called upon to grant, in which event innovative remedies should be considered. They would certainly be justified if the rights and best interests of a child, which are securely entrenched in section 28 of the Constitution, should be infringed or threatened.

This accords with the *dictum* of Mokgoro J in the *Bannatyne* case (par [13] above), where the learned judge observes as follows (par [27]-[29] at 377B-G):

> [27] Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law.
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> [28] It is a function of the State not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by s 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.
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> [29] Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.

[30] It follows from the aforesaid observations that not only this court, but also the maintenance court, is, and must necessarily be, fully empowered to make orders relating to the periodic payment of future maintenance from pension funds, annuities or the like. In my respectful view the first respondent erred in holding that the maintenance court did not have the jurisdiction to issue orders in the form of a prohibitory interdict or exceeding the monetary jurisdiction of magistrates' courts. As mentioned before (par [20] above), the maintenance court functions as a unique or *sui generis* court. It exercises its powers in terms of the provisions of the Maintenance Act and it does so subject to the relevant

provisions of the Constitution, more specifically section 28(2) thereof. This constitutional provision overrides any real or ostensible limitation relating to the jurisdiction of magistrates' courts. It would be absurd, and a costly time-wasting exercise, if an applicant for relief in a maintenance court should be compelled to approach the high court for such relief because of jurisdictional limitations adhering to the magistrate's court. This could never have been the intention of the legislature in enacting the Maintenance Act with the professed aim of rendering the procedure for determining and recovering maintenance "sensitive and fair".

The Relief in the Present Matter

[31] In the present matter the applicant has justifiably reached the end of her tether in view of the third respondent's continuous defaulting in making maintenance payments and, in the process, carrying on "a war of attrition" against the applicant. This started in 1994, when their divorce was pending and the third respondent was sequestrated at his own behest, thereby succeeding in reducing by half the maintenance payable to the applicant in terms of a rule 43 order. Thereafter followed a long history of violation by the third respondent of the maintenance order contained in the divorce agreement, as later amended. This took place over a period of ten years from 1994 to 2004, when the order of 19 February 2004 (par [4] above) was granted. Even then he remained in arrears until June 2004.

[32] During this period the applicant attempted by all means at her disposal to compel the third respondent to honour his maintenance obligations, including bringing criminal charges and a domestic violence interdict against him. He responded by bringing twelve

unsuccessful custody applications against her in an attempt to wrest from her the custodial rights over the child. According to the applicant he abducted the child on no less than four occasions and had a five-year suspended sentence imposed on him for contempt of court, despite the fact that he had been an attorney of some 37 years standing before being struck from the roll. In correspondence with the applicant he stated that it was his fixed intention to ruin her financially.

[33] Needless to say the applicant has experienced the conduct of the third respondent as emotionally exhausting and debilitating. As a single parent she has been unable to take annual leave because of the need to provide a stable environment for the child. The continuous litigation with the third respondent, which has taken her from one court to another over a lengthy period of time, has caused her endless frustration. It has also seriously hampered her career and inevitably affected her income and prospects of advancement.

[34] Although the applicant presently has an order requiring payment of monthly maintenance from the third respondent's annuity, she has good reason to believe that, unless interdicted from doing so, he will deplete the funds available in the annuity, making the said order a *brutum fulmen*. The order granted by Moosa J does not give her, or her child, the protection she requires against the third respondent's squandering the annuity. It simply provides that the fourth respondent should not make "any payment in excess of R100 000,00" to the third respondent, pending finalisation of the application. There is no limitation on the number of such payments or on the maximum amount which may be withdrawn from the annuity. This would enable the third respondent to dissipate

the annuity in its entirety long before the child becomes self-supporting, if not before the finalisation of this matter. Since the present balance of the amount available in the annuity apparently lies somewhere between R300 000,00 and R400 000,00, an anti-dissipatory interdict is quite clearly called for.

[35] It appears that the minor child is presently sixteen years old and has learning disabilities which require "special needs education" under the guidance of remedial educators. He has been enrolled at a private school with a view to addressing such needs. Due to financial constraints, however, the applicant has been unable to pay for extramural therapy, sport or additional lessons for the child. This is in part due to the fact that the third respondent has for some time been in arrears with his educational and medical contributions. The child is currently in grade 9 and will have three years of schooling before him, should he pass this year. It may, however, be some time before he becomes self-supporting.

[36] Other than denying that he was in arrears with maintenance payments, the third respondent did not, in his answering affidavit, place any of the aforesaid facts in dispute. He did, however, reserve the right to deal with the applicant's allegations in so far as it may in the future be necessary. His failure to do so should not, he said, be construed as "a consent to the truthfulness or correctness" thereof. In this regard he relied on a number of preliminary points of law as justifying his submission that the application should be dismissed with costs.

[37] Chief among these preliminary points was his rejection of this court's jurisdiction to deal with the present matter. He based such rejection on the alleged failure of this court, over the past fourteen years, to afford him a proper hearing in accordance with the principle of *audi alteram partem*. In the process he has had "acrimonious disputes" with a number of judges, including Judge President Hlophe, Deputy Judge President Traverso and Judges Selikowitz, Thring, Desai, Cleaver and Davis. He averred further that all the

judges of this court should be aware of the disputes in which he has been involved with members of the judiciary, as a result of which he has "a real perception" that this would influence them in dealing with any matter in which he is involved. He therefore requested that a judge from another division of the high court be appointed to deal with the present matter. Only once such appointment had been made would he deal with the merits of the application.

[38] In addition to the jurisdictional point, the third respondent also raised problems relating to service of the application on him, the nature of the relief sought and the fact that Moosa J's order (par [7] above) had been given in his absence. He did not suggest, however, that he had been prejudiced thereby or that it had obstructed or otherwise affected his opposition to the present application.

[39] There is not the slightest merit in any of these contentions. The third respondent has had more than sufficient time to respond to the applicant's allegations and has chosen not to do so. His suggestion that he would do so only if a judge from another division has been appointed to deal with the matter demonstrates supreme arrogance totally unbecoming a person who has been an officer of this court for more than thirty years. His inventory of judges with whom he has purportedly had "acrimonious disputes" and his "real perception" relating to other judges of this court is contemptuous and contemptible in the extreme. It surpasses belief that anyone in his position could deign to make such vituperative comments. By suggesting that all the judges in this division are aware of his so-called "disputes" with other judges constitutes no more than an exaggerated perception of his own importance. Needless to say, when I was allocated this matter I had no idea who he was and was totally unaware of any dispute between him and any other judge of this court. Quite clearly this court has unrestricted jurisdiction to hear and deal with this matter, regardless of any objections he may have thereto.

The Order of 28 October 2005

[40] For purposes of granting the applicant the relief she required it was, in my view, necessary to rescind the order granted by Moosa J on 23 June 2005 (par [7] above) and that issued by the first respondent on 19 February 2005 (par [4] above). The order granted by me on 28 October 2005 (par [8] above) constitutes new relief which could not be introduced simply by amending the existing orders.

[41] The new order makes it impossible for the third respondent to make any withdrawals from his annuity until such time as the child becomes self-supporting, except with the leave of the applicant or the maintenance court. The latter may be approached directly or in cases where the applicant should unreasonably refuse to give leave, for example in a case where the third respondent's request to make a withdrawal is reasonable and would not prejudice the rights of the child. In this way it may be ensured that the third respondent will not be able to deplete or dissipate the funds of the annuity, but at the same time it will allow him to make reasonable demands on it.

[42] The direction to the fourth respondent to make annual rather than monthly payments to the applicant is simply for the convenience of both the applicant and the fourth respondent. It is easier to monitor one annual payment than twelve monthly payments. The annual maintenance payment may be supplemented only by such amounts as the applicant may prove are owing in respect of educational, extra-mural, medical and other expenses of the child as provided for in the first respondent's order of 10 November 1999 (par [3] above). This order amended only clause 7.1 of the deed of settlement which was made an order of court on 3 May 1995, hence leaving the provisions of clauses 7.2, 8 and 9 intact (par [2] above).

[43] The third respondent was ordered to pay the costs of the application, including the costs reserved by Moosa J on 23 June 2005 (par [7] above) in view of his filing an opposing affidavit. He thereby compelled the applicant to file a replying affidavit and to require her counsel to prepare and file heads of argument in accordance with the directions in Moosa J's aforesaid order. Her counsel were entitled to appear on her behalf before this court on the day the matter was set down, regardless of whether the third respondent chose not to appear, to appear in person or to be represented by counsel.

[44] It is for these reasons I granted the applicant the relief set out in my said order.

D H VAN ZYL

Judge of the High Court