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

CASE NO: 5995/14
WITH CASE NO: 11887/12
AND CASE NO: 3801/12

REPORTABLE

In the matter between:

P[…] D[…] T[…] H[…] Applicant

and

M[…] H[…] First Respondent

THE SHERIFF FOR WYNBERG NORTH Second Respondent

JUDGMENT : 25 JUNE 2014

GAMBLE, J:

INTRODUCTION

[1] The Applicant and the First Respondent are embroiled in on-going divorce litigation in this Court. In 2012 the First Respondent made application for interim relief under Rule 43 against her husband, the Applicant. The parties settled their differences on 26 October 2012 and presented to this Court an order to be taken by agreement. The case therefore falls into that category of cases in which the parties' contractual arrangement is made an order of Court without the Court itself having pronounced on the merits of the dispute [1] .

[2] In terms of clause 1 of the agreement the Applicant undertook to maintain the parties' minor son P[…] by the payment of cash in the amount of R7 000.00 per month to the First Respondent, by covering his reasonable medical expenses and by paying his school fees. The relevant part of the order recording the agreement in regard to maintenance reads as follows:

> ***"IT IS ORDERED BY AGREEMENT THAT:***
>
> *1. For as long as the respondent continues to support the parties' daughter L[…], by paying her full academic fees and cost of academic books as well as her medical expenses, the respondent shall only contribute to the maintenance of the parties' minor child, P[…], pendente lite as follows:*

[1] Johannesburg Taxi Association v Bara-City Taxi Association and Others 1989 (4) SA 808 (W) at 810E

1.1 By paying an amount of R7 000.00 per month to the Applicant before or on the first day of every month…

1.2 By covering the applicant and the minor child as dependents on his current medical aid scheme and by bearing the reasonable costs of all additional expenditure in respect of medical, dental, surgical, hospital, orthodontic, ophthalmological and orthopaedic treatment needed by the minor child, including any sums payable to a physiotherapist, occupational therapist, speech therapist, psychiatrist, psychologist and chiropractor, the costs of medication and supplements (incurred on prescription only) and the provision, where necessary, of spectacles and/or contact lenses.

1.3 By paying the school fees in respect of the minor child."

[3] P[…] was born on […] and so at the time that the agreement was reached he was already seventeen years old. He turned eighteen some eight months later, in the middle of his Grade Twelve school year.

[4] The Applicant continued to pay the maintenance in respect of P[…] up to the beginning of 2014. It then transpired that the First Respondent decided to enroll P[…] in a so-called "*cram college*" (A[…] C[…]) in 2014 to enable him to improve his Matric grades in respect of certain of his subjects. The Applicant evidently took umbrage at the lack of consultation which accompanied this decision and consulted his attorney for advice.

[5] The Applicant's attorney held the view that since P[…] was then eighteen, the Rule 43 order no longer applied and that the Applicant was no longer required to pay maintenance directly to the First Respondent. He told the Applicant that it was a matter for discussion between father and son.

[6] A flurry of lawyers' letters then ensued in which the First Respondent was cautioned against taking any formal steps to enforce the Rule 43 order *vis-a-vis* P[…]. This notwithstanding, on 5 March 2014 the First Respondent's attorneys took out a writ of execution with the Registrar of this Court for the attachment of movables belonging to the Applicant in the amount of R65 770.40. The amount was made up as to one month's maintenance (R7 000.00) and fees payable to A[…] C[…] in the sum of R58 770,40. The Sheriff attended on the Applicant and attached goods in that amount but did not remove same.

[7] After a further flurry of correspondence the Applicant launched the present urgent application on 3 April 2014 in which he sought to set aside the writ in its entirety and asked for an order:

> *"2. Declaring that the order of this Honourable Court granted on 26 October 2012 under case no. 11887/2012 had lapsed ex lege insofar as it relates to the Applicant's obligation to contribute to the maintenance of the parties' son P[…] H[…], as contained and set out in paras 1.1 and 1.3 of the said order, due to the said P[…] H[…] attaining the age of majority during the currency of the said order."*

[8] The application is opposed by the First Respondent, principally on the basis that the mere fact that P[…] attained the age of majority did not necessarily bring about the termination of this Court's order. Ordinarily, the position is that upon the attainment of majority of the child, the parent in whose care the child is, no longer has the *locus standi* to claim the payment of maintenance on behalf of the child. In Smit [2] Flemming J explained the position thus:

> *"(W)hen the child turns 21 [as the age of majority then was] a claim by one parent against the other for the latter's portion of the common parental duty to support is, usually at least, no longer*

[2] Smit v Smit 1980 (3) SA 1010 (0) at 1018B-C

> *relevant. It is the child itself who henceforth must claim directly against one or both parents to the extent that he may have a claim for support with effective content."*

[9] In Richter [3] the Court was called upon to determine for how long an order of divorce contemplated that maintenance payable in terms thereof would continue. It held that, where there was no time limit specified in the order, the order ceased to operate upon the attainment of majority.

[10] In Kemp [4] the Court found that it depended on the terms of the divorce order: If the order expressly fixed a time period or a date up to which maintenance was payable, that was finally determinative of the duty of support:

> *"It would seem that if the order stipulates periodic payment of a fixed sum of money until the minor reaches a certain age, there should be no room for an implication that the order wil ipso jure cease to operate before that time if the child becomes self-supporting."*

[11] In Gold [5] the Court dealt as follows with the implications that flowed from a maintenance order that did not fix a period of time for its duration:

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[3] Richter v Richter 1947 (3) SA 86 (W)
[4] Kemp v Kemp 1958 (3) SA 736 (N) at 738H
[5] Gold v Gold 1975 (4) SA 237 (D) at 239D

> *"As the maintenance order did not fix any period for its operation it was implied that the respondent's liability thereunder in respect of each child would cease when the child reached the age of majority or earlier if he became self-supporting. The liability would cease ipso jure in either of those events, without the necessity for a variation of the order by the Court."*

[12] Richter was considered by the Supreme Court of Appeal in Bursey [6], a case in which the divorce order provided for payment of a fixed amount of money "*until the said children became self-supporting".* Given the fact that the wording of the order before it differed materially from those in Richter and Gold, the Supreme Court of Appeal held that it was unnecessary to decide the correctness of the two earlier cases. However, the Court was unequivocal about the import of the clause before it:

> *"The effect of this order is simply that after [the child's] majority the maintenance payable to him by his parents would continue to be paid to him by the first respondent who would recover under the court's order the appellant's contribution to this common parental duty to support. This she was fully entitled to do in terms of the order. [The child's] position was not affected as he could at any time during the operation of the order have enforced his common-law right to an upward variation of the maintenance payable by his parents upon proof of the requisites for such a variation. I cannot,*

[6] Bursey v Bursey and Another 1999 (3) SA 33 (SCA)

> *therefore, agree with the submission that the mere fact that [the child's] maintenance was payable to the first respondent meant that the maintenance ceased upon his majority."*[7]

[13] In Bursey, Viviers JA noted the fact that the order in question arose from an agreement between the litigants and concluded by observing that the following at 38I-J.

> *"In my view, the present order fixed a time for its duration, i.e. until [the child] becomes self-supporting, and it will cease to operate when that event occurs (or conceivably when [the child] becomes capable of supporting himself, a matter which I need not decide). Whether that event has indeed occurred may be the subject of dispute but it is an objective fact capable of being established with sufficient certainty."*

[14] All of the reported cases to which I have referred involved the liability for maintenance incorporated in orders of divorce at the conclusion of the litigation process. The present matter, however, involves maintenance *pendente lite* which is governed by the provisions of Rule 43. In Butcher [8] Gassner AJ dealt extensively with a Rule 43 claim by a mother on behalf of two major children who were still living with her. The Court found that there was no bar to it granting an order that compelled the father to pay maintenance *pendente lite* to the mother where the sum payable included the costs

[7] 37 D-F
[8] Butcher v Butcher 2009 (2) SA 421 (C)

associated with the childrens' co-habitation in the erstwhile common home. Gassner AJ was not prepared, however, to make an order directing the father, at the request of the mother, to pay certain amounts directly to the daughters. Such claims, she found, vested only in the daughters.

[15] In JG [9] Symon AJ disagreed with Gassner AJ and found in a similarly considered and reasoned judgment that Gassner AJ was wrong in regard to the absence of *locus standi* on the part of the mother to claim payments directly by the father to the children, and went on to find that such a situation was, *inter alia*, constitutionally unsound. It is not necessary to address the dissonance between these judgments since both Judges recognized, and accepted (basing their respective judgments on, *inter alia*, Bursey), that a claim by the mother for interim maintenance payable directly to her to cover the costs of the continued residence by the children in the matrimonial home was permissible under Rule 43.

[16] In my view, the principles which have been applied in respect of agreements to pay maintenance incorporated into orders of divorce can usefully be applied to agreements in relation to Rule 43 applications, as the following passage in Bursey [10] demonstrates:

> *"According to our common law both divorced parents have a duty to maintain a child of the dissolved marriage. The incidence of this*

[9] JG v CG 2012 (3) SA 103 (GSJ)

[10] 36C-H

duty in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time. The duty does not terminate when the child reaches a particular age but continues after majority…That the duty to maintain extends beyond majority is recognized by s6 of the Divorce Act 70 of 1979. Section 6(1)(a) provides that a decree of divorce shall not be granted until the Court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. Section 6(3) provides that a Court granting a decree of divorce may make any order which it deems fit in regard to the maintenance of a dependent child of the marriage. This provision must be contrasted with the provision in the subsection relating to the custody or guardianship of, or access to, a minor child. A maintenance order does not replace or alter a divorced parent's common law duty to maintain a child. In Kemp v Kemp (supra) Jansen J stated at 738A-B that as a matter of expediency the Court, as the upper guardian of the child, usually regulates the incidence of this duty as between the parents when it grants the divorce and that its order for maintenance is ancillary to the common law duty to support."

[17] What then was the parties' intention when they concluded the agreement embodied in the draft order? The "*golden rule*" is to have regard to the language of the

written instrument in question, and to give it its grammatical and ordinary meaning. [11] In my view, it is clear from the language which the parties employed in the draft order presented to the Court that they did in fact intend that the order to maintain P[...] was to be time bound. In the first place, the payment of maintenance to the First Respondent in the amount of R7 000.00 was to be linked to the Applicant's duty of support to their daughter L[…] (who, it was common cause, was already a major when the order in respect of P[…] was made). Then, it seems to me that the parties in fact contemplated that once the duty to support L[…] had lapsed the duty to support P[...] would continue if the divorce action was still unresolved, hence the further reference in the draft order to the *pendente lite* status of the action. But, either way, it is clear that the parties contemplated continued payments by the Applicant directly to the First Respondent after P[…]'s majority, which, after all, was just six months away when the agreement was concluded.

[18] To the extent that it may be argued that there is ambiguity in the agreed order (and that assumption flows from the fact that Counsel on either side took up differing positions in respect of the same clause), it is permissible in interpreting a written instrument to have regard to, *inter alia*, background and surrounding circumstances which prevailed at the time of conclusion thereof, as well as the subsequent conduct of the parties in giving effect to the order [12].

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[11] Coopers and Lybrand v Bryant 1995 (3) SA 761 (A) at 767E-768E.

[12] Christie and Bradfield: The Law of Contract in South Africa 6th ed at 226-7; Rane Investments Trust v Commissioner, SARS 2003 (6) SA 332 (SCA); Telcordia Technologies Inc. v Telkom SA Ltd 2007 (3) SA 266 (SCA).

[19] In this regard, the evidence shows that P[…] suffers from ongoing severe mental health conditions, including a Bipolar Disorder, an Obsessive Compulsive Disorder and Asperger's Syndrome, all of which impact severely on his ability to study and enter the open labour market. Furthermore, there was no debate that, after the separation of the Applicant and the First Respondent, P[…] would continue to reside with his mother who was required to bear the primary responsibility for his day-to-day needs.

[20] Finally, there is the fact that the Applicant did not stop maintaining P[…] when he attained majority – he continued to do so for more than six months as he no doubt appreciated he was obliged to do under the order – and the Applicant only stopped paying maintenance when advised by his attorney that he was not legally bound to do so. And even then, the Applicant did not adopt the stance that P[...] was not entitled to be maintained. Rather, he invited his son to negotiate directly with him and the Applicant has subsequently paid amounts to P[…] from time to time. The Applicant's objection it seems was aimed at releasing him from the obligation to pay anything directly to his wife in respect of P[...]'s maintenance needs.

[21] In the light of the aforegoing, I am not persuaded that the Applicant's obligation to maintain P[…] under the order which I granted on 26 October 2012 under case no. 11887/2012 has lapsed *ex lege*. It follows that the Applicant is not entitled to the declaratory relief sought under prayer 2.

[22] A further aspect which was argued by Counsel related to the extent of the debt attached under the writ. Counsel for the Applicant, Mr. Spamer, pointed out that the evidence showed that the First Respondent had managed to negotiate a payment plan with A[…] C[…], and that the annual fee of R58 770.40 was payable in monthly instalments of R5 565.61, after payment of two capital sums of R7 418.94 and R6 312.27. Counsel for the First Respondent, Ms. Anderson, confirmed this and pointed out that although the fee was payable in full at the commencement of the academic year, the First Respondent had been able to arrange otherwise with Abbotts when the Applicant had refused to pay the school fees.

[23] The upshot of the arrangement between the First Respondent and Abbotts is that a lesser amount was due and payable by the Applicant when the writ was issued. Mr. Spamer argued that this meant that the entire writ fell to be set aside given that it was issued in an amount not then due and payable.

[24] Ms. Anderson, however, referred the Court to a number of cases to the contrary [13] and asked that the amount of the writ be varied downwards to R32 705.76. I did not understand Mr. Spamer to challenge this proposition in reply in light of the case law. It seems to me then that the writ falls to be adjusted accordingly.

[25] As to costs, although the effect of my order is that the Applicant has achieved some success in attacking the writ as issued and procuring a reduction in the

[13] Perelson v Druain 1910 TPD 458; Dunlop Rubber Co v Stander 1924 CPD 431; Du Preez v Du Preez 1977 (2) SA 400 (C)

extent thereof, I consider that the First Respondent has nevertheless been substantially successful in warding off the substantial challenge brought under prayer 2 and that she is entitled to her costs. Given that the Applicant acted on the advice of his attorney, there is no basis for costs on a punitive scale as sought by the First Respondent.

[26] **ORDER OF THE COURT**

1. The writ of execution issued in favour of the First Respondent on 5 March 2014 under case no. 11887/2012 is amended by substituting the amount of R65 770.40 in paragraph 1 thereof with the amount of R32 705.76.

2. Save as aforesaid, the application is dismissed with costs.

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GAMBLE, J

[27] **ORDER OF THE COURT**

1. The application is dismissed with costs.

2. The writ of execution issued in favour of the First Respondent on 5 March 2014 under case no. 11887/2012 is amended by substituting the amount of R65 770.40 in paragraph 1 of the writ of execution with the amount of R32 705.76.

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L VAN BILJON