IN THE HIGH COURT OF SOUTH AFRICA
(Witwatersrand Local Division)

Case No: 05/2030
REPORTABLE

In the matter between:

JB Applicant

and

MB Respondent

JUDGMENT

WILLIS J:

[1] The Applicant seeks an order varying an agreement of settlement between the parties which was made an order of Court consequent upon a decree of divorce which issued by Vermeulen AJ in this Division on 12 April 2002 under case no. 2002/3546. In that case the applicant was the defendant and the respondent the plaintiff.

[2] The agreement of settlement provided that the custody of the minor child S A B, born of the marriage between the parties, be awarded to the respondent and that the applicant pay maintenance to the respondent for her. S was 19 years of age when this application was instituted. She is presently a university student. The applicant has sought to vary this agreement such that he be awarded custody of S and be relieved of the obligation to pay maintenance for her to the respondent. These aspects have been settled between the parties, with the agreement of S. The applicant is to have custody of her. I am content to make an order to this effect. The respondent concedes that, consequent upon the change of custody of S, the respondent would waive her claim for maintenance in respect of this child provided the applicant fully supports S.

[3] The issue in contention is the following clause which appears in the agreement of settlement:

"The defendant shall pay maintenance in respect of the plaintiff at the sum of R8 500 per month."

The applicant seeks a variation of this clause such that its operation shall be limited for a period of five years from the date upon which the first payment commenced, which was 12 April 2002. The applicant has sought to justify this variation by alleging that he has fallen on hard times and that the respondent is living in very comfortable circumstances, more comfortable indeed than his own. Unsurprisingly

for a matter of this nature, the respondent has denied these allegations.

[4] The applicant has hinted or suggested, without saying so expressly, that the intention of the parties was that the applicant's obligation to pay maintenance to the respondent in terms of the agreement of settlement was 'rehabilitative' only. This has been rejected by the respondent who says:

"I fail to understand the applicant's reference to rehabilitative maintenance. It was never the intention of either the applicant or myself that the applicant would pay rehabilitative maintenance."

[5] It is common cause that the applicant fell into arrears with his maintenance and applied to the maintenance court for a reduction of maintenance in terms of the Maintenance Act No. 99 of 1998. The parties settled the matter at court on 1 June 2004. The settlement was made an order of court. The detail of the terms thereof is not relevant save that it was agreed that the payment for maintenance which the applicant would pay to the respondent was reduced to R5418-00 per month. Furthermore, no limitation as to time was stipulated in respect thereof.

[6] That being so, Ms *Georgiou* who appears for the respondent, has relied on *Steyn v Steyn* 1990 (2) SA 272 (W) in which Streicher J, as he then was, said at 276D:

"In the light of the aforegoing I am satisfied that the Supreme Court cannot (except by way of appeal or review) vary a maintenance order made by the maintenance court in that the Supreme Court does not have the power to do so under common law and has not been empowered to do so by the Legislature" and at 276G:

"My conclusion is therefore that this Court has no jurisdiction to vary the maintenance order granted by the maintenance court and the applicant's application therefore has to be and is hereby dismissed with costs."

[7] Ms *Georgiou* also relied on *Purnell v Purnell* 1993 (2) SA 662 (A) in which Kriegler AJA, as he then was, delivered the unanimous judgment of the Court and, in my respectful opinion, was emphatic in coming to the same conclusion as Streicher J in the *Steyn* case. Kriegler AJA said at 667C-D:

"…the maintenance order replaces the former order, ie takes its place. The old order ceases to operate in its place."

[8] Undaunted, Ms *Engelbrecht* returned the volley with vehemence. She relied on *Cohen v Cohen* 2003 (3) SA 337 (SCA). This was a case which was concerned with a *dum casta* clause which provided for maintenance for a former wife until her death or remarriage or until she lived together as husband and wife with another man for a period aggregating six months, in any one year, or nine months in any consecutive three years. This clause had formed part of a consent paper entered into between the parties and which, furthermore,

formed part of the order of the Court which had issued the decree of divorce between the parties. Subsequently, the maintenance payable was increased by the maintenance court. When the former husband sought to invoke the *dum casta* clause, he was met with the defence that the clause had ceased to be of any force and effect by reason of the order of the maintenance court. The Court *a quo* was persuaded that this defence had to succeed. That decision was reversed on appeal. The Supreme Court of Appeal ("the SCA") found at para [12] that:

"It is obvious that the variation order made by magistrate Venter was limited to a variation of the amount of maintenance payable and was never intended to deal with, vary or delete the *dum casta* condition."

At para [17] the SCA distinguished the case from that of *Purnell* on the basis that *Purnell* dealt with the amount a payable whereas Cohen dealt with a "completely different question."

[9] Both Ms *Georgiou* and Ms *Engelbrecht* agreed that there was no reported case directly in point. Ms *Engelbrecht* argued faintly that section 8 of the Divorce Act No. 70 of 1979, as amended, gave me the power the vary the duration of the order made Vermeulen AJ. This reads as follows:

"A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of the Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by the court if the court finds that there is

sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or 2(b) of the Mediation in Certain Divorces Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court."

It seems to me that this subsection relates to orders given in respect of children and not spouses. Moreover, the interpretation contended for by Ms *Engelbrect* would, to say the least, be difficult to reconcile with the *Steyn* and *Purnell* cases.

[10] Section 16 (1) of the Maintenance Act No 99 of 1998 provides as follows:

"(1) After consideration of the evidence adduced at the enquiry, the maintenance court may-

(a) in the case where no maintenance order is in force-

(i) make a maintenance order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such person, officer, organisation or institution, or into such account at such financial institution, and in such manner, which manner may include that an arrangement be made with any financial institution for payment by way of any stop-order or similar facility

at that financial institution, as may be specified in the order, of sums of money so specified, towards the maintenance of such person, which order may include such order as the court may think fit relating to the payment of medical expenses in respect of such person, including an order requiring such other person, if the said other person qualifies therefor, to be registered as a dependant of such person at a medical scheme of which such person is a member;

(ii) make an order against such a person, if such other person is a child, for the payment to the mother of the child of such sum of money, together with any interest thereon, as that mother is in the opinion of the maintenance court entitled to recover from such person in respect of expenses incurred by the mother in connection with the birth of the child and of expenditure incurred by the mother in connection with maintenance of the child from the date of the child's birth to the date of the enquiry; or

(b) in the case where a maintenance order is in force-

` (i) make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order; or

(ii) discharge such maintenance order; or

(c) make no order. "

In the *Purnell* case[1] Kriegler J refers to the fact that the magistrate is armed with "a full panoply of powers" including a "a comprehensive variety of possible components, ie the *quantum*, duration, frequency and manner of payments made as well as a designated intermediary recipient." These

[1] At p667D-E

observations were made in relation to the previous Maintenance Act, No.23 of 1963 but it seems to me to be self-evident that they apply with at least equal force to the present Act. It seems to me from reading the *Steyn* case, as well as *Purnell* and *Troskie v Troskie* 1968 (3) SA 369 (W) at 371B-C (to which reference was made, with approval, in the *Steyn* case[2]) that the appropriate *forum* for the kind of relief which the applicant seeks is the maintenance court, from which an appeal or review would lie to this Court.

[11] It follows from the *Cohen* case that the order made by Vermeulen AJ as to the implicit indefinite duration of the maintenance due to the respondent still stands. Although the maintenance court varied the amount of maintenance, it did not deal with the question of the duration thereof.

[12] Even if I have some residual power to vary the order given by Vemeulen AJ in this Court order, I am not inclined to do so. In the papers before me, it has been disputed that the intention of the parties was that maintenance for the respondent be "rehabilitative" only. The respondent's answer to the applicant's vague assertion in this regard cannot, without further ado, be dismissed as not creating a real or genuine or *bona fide* dispute[3]. It also cannot be said that the respondent's denials are so far-fetched or clearly untenable that the

[2] at 276B-C
[3] See *Plascon –Evans Paints vVan Riebeeck Paints* 1984 (3) SA 623 (A) at 634I

Court would be justified in rejecting them merely on the papers.[4] Furthermore, there is the principle of *pacta sunt servanda*. In *Knox D'Arcy Ltd v Shaw and Another* 1996 (2) SA 651 (W) at 660F-G, Van Schalkwyk J said that this principle has a well established pedigree and referred to an illuminating article by Coenraad Visser, *The Principle Pacta Sunt Servanda in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade* (1984) 101 *SALJ* 641 in which Visser submits that it has not only been a principle of Roman and Roman-Dutch Law but has been received throughout the Western World.[5] Certainly, it seems to have become widely used internationally and in numerous different contexts.[6] In South Africa the principle has been affirmed in numerous different cases.[7] The phrase seems to have been invented or at least first popularised by Cicero[8]. It is generally translated into English as meaning 'agreements

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[4] ibid at 635C

[5] See also Christie, *The Law of Contract,* 4th ed, Butterworths, 2001 at pp 226, 412,549 and a search on www.google.com on the internet

[6] Search on www.google.com on the internet

[7] See, for example, also *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 470I; *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 763F and 777C-D; *Ex Parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others* 1995 (3) SA 1 (A) at 176H; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 17E-F; *Afrox Healthcare Bpk v Strydom* 2002 (6) 21 (SCA) at para [23]; *Ndlovu v Ngcobo* 2003 (1) SA 113 (SCA) at para [63.5]; *Juglal NO v Shoprite Checkers t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at para [10]; *Novick and Another v Comair Holdings Ltd and Others* 1979 (2) SA 116 (W) at 158D-E;*Commercial Grain Producers Association v Tobacco Sales Ltd* 1983 (1) SA 826 (ZS) at 832E; *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 70E; *Nedbank Ltd v Van der Berg and Another* 1987 (3) SA 449 (W) at 452D; *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 381H-I; *Sibex Engineering Services (Pty) Ltd v an Wyk and Another* 1991 (2) SA 482 (T) at 499E-F; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate(Pty) Ltd* 1992 (2) SA 459 (C) at 460H; *First National Bank of Soutern Africa Ltd v Boputhatswana Consumer Affairs Council* 1995 (2) SA 853 (BGD) at 867A; *Kotze & Genis (Edms) Bpk en `n Ander v Potgieter en Andere* 1995 (3) SA 783 (C) at 786C-D; *Living Image Interiors v Mather* 1996 (3) SA 445 (N) at 449B; *Garden Cities Inc Association v Northpine Islamic Society* 1999 (2) SA 268 (C) at 271D; *Fidelity Guards v Pearman* 2001 (2) SA 853 (SECLD) at 861A-F and the reference therein to the article by CJ Pretorius *Covenants in Restraint of Trade: An Evaluation of the Positive Law* (1997) *THRHR* 6; *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C) at 86H.

[8] Search in www.google.com on the internet

must be observed."[9] In my respectful opinion, translations into English do not do justice to the phrase. Apart from the poetry of assonance, rhythm and rhyme, it is not possible to capture in an English translation the majestic grandeur of the declamation, pregnant with authority, imperative morality and foreboding if its injunction is disregarded. Presumably this explains, at least in part, why we continue to use the Latin version. The order of the Court obliging the applicant to pay maintenance for the respondent had its origin in an agreement solemnly entered into between the parties in contemplation of their divorce. In this regard, there is a helpful article directly in point by H.R. Hahlo *Pacta Sunt Servanda* (1966) *SALJ* 4. It is a well know fact that, depending on a change in circumstances, the *amount* contained in an order of this kind may be varied up or down. The parties knew or ought to have been aware of this fact when they entered into the agreement. Quite apart from anything else, the ravages of inflation always skulk in such matters. The applicant's fortunes may change for the better as may the respondent's for the worse. Changes of such a nature may, of course, justify a further variation of the order by the maintenance court. It would be quite a different matter if the applicant were to be relieved of his obligations altogether in 2007. It seems to me that, at the very least, a compelling case would have to be made out for this to happen. In the papers before me there is no such case.

[9] ibid.

[13] The following order is made:

(1) The agreement of settlement between the parties dated 24 March 2002 and which was endorsed by an order of Court dated 12 April, 2002, under case no. 2002/3546, is varied by awarding the custody of S A B to the applicant (defendant in case no 2002/3546) subject to the respondent's rights of reasonable access.

(2) It is noted that the respondent has waived her right to receive maintenance in respect of S A B provided the applicant fully supports this child born of the marriage between the parties.

(3) The application to limit the applicant's obligation to pay maintenance for the respondent for a period of five years from 12 April 2002 is dismissed.

(4) The applicant is to pay the costs of this application.

DATED AT JOHANNESBURG THIS 5th DAY of MAY, 2005.

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Appicant: *T.Engelbrecht*
Attorney for the Applicant: D.A.Thompson

Counsel for the Respondent: *S.Georgiou*
Attorney for the Respondent: Raymond Vermooten

Date of Hearing: 18th April, 2005
Date of Judgment: 5th May, 2005