NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, DURBAN

CASE NO. 9052/2008

In the matter between:

Appellant

B J P

and

L M P Respondent

JUDGMENT

Delivered on: **11 JUNE 2009**

SISHI, J :

[1] This is an application in which the Applicant seeks an order that the warrant of execution issued out of this Court on the 31 October 2007 be set aside. The application is opposed by the Respondent.

[2] The following facts are either common cause or not disputed by the parties:

The parties were divorced on the 20 October 1993 by the order issued by this Court. Custody of the minor child was awarded to the Respondent. The said Court order also contained the following maintenance provisions:

The Applicant was to pay:

(i) maintenance on behalf of the minor child at the rate of R300.00 per month until he becomes self-supporting or married, whichever shall happen first;

(ii) all medical, dental and optical costs reasonably incurred on behalf of the minor child including all costs of hospitalisation, surgical treatment, spectacles and prescribed medication;

(iii) an amount equivalent to one-half of all costs consequent upon the minor child's education, which shall include crèche fees, pre-primary school fees, aftercare fees, educational fees, books and stationery, school uniforms together with fees and costs of extra-mural activities and equipment relating thereto.

(iv) The Applicant was to retain the minor child on any medical aid benefits scheme to which the Plaintiff is entitled to membership;

(v) The Applicant was also to pay any excess not covered by that medical aid benefit scheme in respect of the child.

[3] On 20 November 1998 the Respondent obtained a Consent Order in terms of the Maintenance Act 23 of 1963 from the Bethal Magistrate's Court.

In terms of the Consent Order granted by the Maintenance Court in Bethal, the Applicant was ordered to pay the sum of R600.00 per month for the minor child which amount was to increase at the rate of 10% per annum.

The Applicant contends that the Bethal Magistrate's Court maintenance order substituted the High Court order ***in toto*** thereby exonerating the Applicant from payment of any medical or educational expenses incurred in respect of the minor child.

[4] As a result of the aforementioned substitution ***in toto,*** the Warrant of Execution should not have been issued by virtue of the fact that the Applicant is not liable for payment of the minor child's educational and medical expenses and has, on his version, paid amounts in excess of the cash component he was obliged to pay.

[5] It is the Respondent's contention that the Magistrate's Court order did not replace the whole of the High Court order but only that part of it fixing the monthly amount payable. The Applicant submits that the Respondent's contention is untenable when one has regard to the wording of section 6(1) of the Maintenance Act 23 of 1963 ("the Act") which provides that whenever a maintenance court makes an order under section 5 in substitution of or discharging a maintenance order, such maintenance order shall cease to be of force and effect.

[6] Ms Smart for the applicant referred the Court to the case of **Purnell v Purnell** 1993(2) SA 662 (A) at 667, where the Court discusses and explains its interpretation of the word "substitution". She submits that the **Purnell** case was reliant upon the previous Maintenance Act 23 of 1963 specifically section 5(4)(b), which deals with the powers of the Maintenance Court and it refers specifically to where a maintenance order is in force the Maintenance Court may make an order in substitution of such maintenance order, so it substitutes an existing maintenance order. She submits that that Act was then repealed by the further Maintenance Act of 1998 and the section is almost word for words repeated in section 16(1)(b) where it states as follows :

> **"In a case where a maintenance order is in force the Maintenance Court may make a Maintenance Order in substitution of such maintenance order".**

[7] Ms. Smart submits that in the **Purnell** judgment at page 667 the Judge specifically says that the word used, namely "substitution", which he then refers to the Afrikaans translation of "vervanging", describes a possible action that a Magistrate may take and its powers under section 5(4)(b) and he says that that is explicit. He says substitution means that the maintenance order made by the Magistrate replaces the former order i.e. it takes its place. The old order ceases to operate while the new order operates in its place. Then the Court goes on to say in addition that the substitution aspect of section 6(1) of the old Act as well refers to what should happen to any orders that are varied and that section states that :

> **"Whenever a Maintenance Court makes an order under section 5 in substitution of or discharging a maintenance order such maintenance order shall cease to be of force or effect."**

Section 6(1) of the old Act has been included in the new Maintenance Act at section 22 which also reads :

> **"Whenever a Maintenance Court makes an order in substitution of a maintenance order in terms of section 16 the maintenance order shall cease to be of force or effect."**

[8] Ms. Smart submits that the definition of the word "substitute" in the 9th Edition of the Oxford Dictionary "substitute" is defined as something in place of another, alternatively, where it serves in exchange and it replaces with another.

Ms. Smart submits that the Respondent's contention based on the Supreme Court of Appeal decision is completely different. According to her as far as the Respondent is concerned, one can take a portion of the order and decide what is to be substituted. She submits that that is certainly not what the Act intended and that is specifically dealt with by the Court in the **Purnell** judgment.

[9] Ms. Smart also referred to page 667 paragraphs F-G of the **Purnell** judgment where the Court stated as follows :

> **"But the draftsman of the Act made assurance doubly sure by adding section 6(1) which commences with the following unambiguous pronouncement :**
>
> **'Whenever a Maintenance Court makes an order under section 5 in substitution of or discharging a maintenance order, such maintenance order shall cease to be of force or effect …'**

Ms. Smart submits that there is nothing that says that a portion shall cease to be of force and effect. If there is a maintenance order it replaces the High Court order in its entirety.

[10] Ms. Smart submits that the **Purnell** judgment was referred to in the Constitutional case of **Bannatyne v Bannatyne** (CGE as ***amicus curiae*)** 2003(2) SA 363. This case dealt with a High Court order which was then varied in the Maintenance Court and there was no payment of that maintenance order. The ex-wife in attempting to obtain maintenance had brought a number of contempt of court applications which were then argued in front of the Court ***a quo*** which found in her favour, where it was taken on appeal to the Full Bench. It was then taken on appeal to the Constitutional Court and throughout there was no reference to the **Purnell** judgment and it was only when leave to appeal was sought that the Court was then referred to the **Purnell** judgment and leave to appeal was granted to the Constitutional Court.

In paragraph 8 of the Constitutional judgment **JUSTICE MOKGORO** stated as follows:

> **"… The effect of this order was to discharge the High Court order and to substitute for it the order made by the Maintenance Court."**

Reference is made in paragraph 13 of the Bannatyne case that the intention of a Judge who dealt with the matter in the High Court was not drawn to the provisions of section 22 of the Act, or to the decision of the Appellate Division in Purnell v Purnell. The Judge goes on to say in paragraph 14 that had the Judge's attention been drawn to this he would have had to consider whether it was competent to enforce the order of the Maintenance Court by way of contempt proceedings in the High Court. He did not consider the question. Instead, he ordered that the Respondent be committed for contempt of Court for failing to comply with the order made at the time of the divorce. This was not a competent order. When the application was made to him for leave to appeal against the order and his attention was drawn to section 22 of the Act in the Purnell case he immediately granted leave to appeal.

Ms. Smart submits that what is significant is that the order that is attached to the Warrant of Execution is not the Maintenance Court order, it is in fact the High Court order, and that is the order, armed with this order the Respondent then obtained a Writ of Execution, and this is where the procedural mistake was made.

[11] She then referred to the consent maintenance order granted by the Bethal Maintenance Court, paragraph 1(d) thereof which reads as follows :

> **"That the maintenance order dated 20 October 1992 made by the Supreme Court of South Africa, Durban be substituted by the foregoing order".**

She then submitted that the term "substituted" once again comes in.

She then submitted that she recognised the case of **Cohen v Cohen** 2003(3) SA 337 SCA referred to on behalf of the Applicant and submitted that the **Cohen** judgment does not overrule the **Purnell** judgment. It does not find that **Purnell's** decision was incorrectly decided. It merely distinguishes. **Purnell. I**t does not necessarily imply that **Purnell** was incorrectly decided.

[12] She then referred to the case of **Botha v Botha** 2005(5) SA 228 at page 231 paragraph 7 and submitted that there the Judge agrees with the **Purnell** decision and that it is confirmed that the **Purnell** decision was a unanimous judgment for what it is worth.

However paragraph 7 of the Botha case reads as follows :

> **"Ms Georgiou also relied on Purnell v Purnell 1993(2) SA 622 (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 Steyn's case. KRIEGLER AJA said at 667 C-D :**
>
> > **'The Maintenance order replaces the former order i.e. it take its place. The old order ceases to operate in its place.'"**

It does not precisely say that the Judge agrees with the Purnell decision as Ms. Smart submitted.

[13] Ms. Smart finally submitted that the Applicant persists in its submission that the Warrant of Execution is ***ultra vires***, the decision to issue the Warrant of Execution is ***ultra vires*** and should be set aside on those grounds. She submits that the application should succeed and the Respondent be ordered to pay the costs which costs should include the reserved costs of the 1 October 2008.

[14] Mr. Pistorius for the Respondent submits that what the Applicant contends is that the maintenance order substituted the entire High Court order. The result is that the only obligation the Applicant was then called upon to provide was R600.00 per month, nothing about educational expenses and nothing about medical expenses. He submits that that argument is not sustainable.

[15] He submits that the **Purnell** case relied upon by the Applicant is indeed a Supreme Court of Appeal case but the facts of that case were markedly different from the facts of the present case. What transpired

in that case was that there was a High Court order dealing with maintenance. That order was subsequently varied by the Maintenance Court, and what the Applicant in that scenario did was, that she sought to vary the High Court order and approached the Court for a variation, and what the Court said was that it cannot vary the first order because it has been substituted by a second order. He was at liberty to substitute or vary the subsequent order but not the first order.

[16] Mr. Pistorius submits that the case he referred to is a subsequent decision to the **Purnell** case i.e. the **Cohen** case ***supra.*** He agrees with the Applicant's counsel that it did not overturn what was stated in **Purnell's** case, it merely distinguished it and clarified what was intended by **Purnell.**

[17] Mr. Pistorius referred to paragraph 16 of the **Cohen** judgment, the SCA decision which reads as follows :

> **"The argument proceeds on the basis that the order made by Magistrate Venter totally replaced the order made by the High Court, with the result that the *dum casta* condition, since it was not repeated, also fell away. The absurdity of this argument, if taken to its logical conclusion, is obvious. Does a mere variation order of the amount of maintenance payable bring about that an obligation to deliver certain items of furniture or transfer a residence automatically falls away if it is not expressly repeated and confirmed by the Maintenance Court**

when it varies the amount of maintenance payable?
…"

Mr. Pistorius submits that it is illogical to suggest otherwise. That if you do not expressly repeat provisions they are then ***de facto*** substituted by the subsequent order. He then submits that in that case the Court went on to discuss **Purnell's** case and quoted a section from the **Purnell** judgment and on paragraph 17 page 343 of the **Cohen** case, the Judge stated the following:

> **"However, the question posed in the present case is quite different. It does not relate as was the position in Purnell's case to effect that the variation of the amount payable has on the previous order relating to the amount payable, but to a completely different question, i.e. whether a variation of the amount payable also affects another part of the consent paper which does not deal with the amount of maintenance payable but with other terms and conditions."**

In paragraph 18 the Judge went on to say the following :

> **"The principle is clear: the existing Supreme Court or High court order ceases to be of force and effect but only insofar as the order of the maintenance court expressly or by necessary implication replaces such order. In the present case the effect of the order of the Maintenance Court was to vary the amount of maintenance payable. It did not expressly or by necessary implication with the**

resolutive condition in Clause 4(a) and they remain of full force and effect."

[18] What is clear from the **Cohen** case is that cognisance was taken of what the **Purnell** decision is saying. However, in **Cohen's** case a maintenance order which was varied by a High Court only does so insofar as it expressly deals with the provisions of that order and that is the law. The consent maintenance order issued in the Bethal Magistrate's Court requires the Applicant to pay the sum of R600.00 per month from the 1 December 1998 towards the maintenance which increases at the rate of 10% per annum each year. This order does not say anything about the educational expenses nor does it say anything about the medical expenses referred to in the initial order granted by the Durban High Court.

[19] Mr. Pistorius then referred to the Supreme Court of Appeal case **Bannatyne v Bannatyne** 2003(2) SA 359 SCA 361 paragraph 6 where NUGENT, J.A. stated the following :

"….in terms of section 22 of the Act the effect of that substitution was that the High Court order thereupon ceased to be of force or effect, at least insofar as it dealt with matters that were provided for in the Maintenance Court order. (Cf Purnell v Purnell 1993(2) SA 662 (A) in relation to the equivalent provision of the earlier Legislation laws). When that was drawn to his attention the Learned Judge readily granted the Appellant leave to appeal to this Court".

What is clear from the SCA **Bannatyne** case is that it supports the decision in **Cohen's** case.

[20] It was contended correctly in my view by Mr. Pistorius that in the light of these decisions if it was the intention of the parties to revoke those provisions of the initial order the order should have expressly said so. The initial maintenance order was R300.00 per month and it was subsequently increased in the Maintenance Court to R600.00 per month with the 10% annual escalation. It is clear from the papers that no-one would have consented to such an order. If one has regard to the school fees and the medical expenses alone those would have far out-weighed any R600.00 contribution from the Applicant.

[21] In the light of what the decisions of **Cohen** and **Bannatyne** SCA says there is no express revocation of the maintenance and educational expenses expressly or impliedly in the present case. If there is going to be such express or implied revocation it must be contained in the order. In **Cohen v Cohen, *supra*** paragraph 19, the Supreme Court clearly stated that it is also clear that the judgment of the Constitutional Court in **Bannatyne v Bannatyne (Commission for Gender Equality, as *amicus curiae*)** delivered on 20 December 2002 does not affect the conclusion reached herein. The Court was referring to the same judgment reported in 2003(2) SA 363. So what is clear from this judgment is that the Constitutional Court decision referred to by

Counsel for the Applicant in **Bannatyne v Bannatyne CGE as *amicus curiae*** does not affect the decision reached in **Cohen's** case.

[22] Mr. Pistorius submitted that the application can also not succeed on the evidential basis, he then referred to what happened when the Bethal Magistrate's Court was approached to give the order it gave. He then referred to the Respondent's affidavit where she states the following at paragraph 12.1, 12.2 and 12.3:

> **"During 1998 the Maintenance Court in Bethal was approached for a variation of the cash amount payable by the Applicant to me in terms of the High Court order. No formal enquiry was held and the order granted on the 20 November 1998 was an order granted by consent. The reason, therefor, that the order does not refer to the Applicant's obligations to continue paying the minor child's medical expenses and half of his educational expenses was that a variation and substitution of these orders was not being sought."**

[23] What the Applicant does is just to deny these allegations and refers back to his Founding Affidavit. Mr. Pistorius submits that by virtue of the **Plascon-Evans** rule, the matter is going to be decided on the papers the Respondent's version must be preferred and what she says is that the order is silent on the medical and educational expenses because they did not go to Court to fight about those issues. Those issues were not referred to the Magistrate for determination. The Respondent says that the only thing the Magistrate was called upon to

determine is that what was going to happen to the R300.00 per month. Her version is further supported by the conduct of the Applicant because it is common cause that the order taken was a consent order and the Magistrate did not conduct and enquiry because the parties reached consent on the issue. After the granting of the consent order the Applicant continued to pay some medical expenses and some educational expenses. If what the Applicant contends is true, that the R600.00 per month was only to cover everything, the medicals and educational expenses why would he make payments of some of those expenses. He submits that the inference is quite clear that he knew what a consent order meant, he knew that the R600.00 was only in respect of the cash contribution and he continued making payments in respect of certain of the other expenses which originally the High Court ordered or compelled him to pay.

[24] In paragraph 13 of his affidavit the Applicant says the following :

> **"Moreover pursuant to the consent order granted (the Bethal order) the Respondent continued to make payments towards the minor children's medical and educational expenses".**

Mr. Pistorius submits that that is underpinned by his own evidence where he puts up a schedule of payments made relating to medical and educational expenses.

[25] On the evidence on the papers and applying the test in **Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd** 1984(3) SA 623 at 634 F-H, I find that the application to the Maintenance Court in Bethal was a variation of the cash component only of the High Court order.

[26] The Applicant's contention that the Bethal order substituted the High Court order ***in toto*** thereby exonerating the Applicant from payment of any medical and educational expenses incurred in respect of the biological child is unsustainable. It is neither supported by evidence nor supported by the authorities.

[27] In the light of the **Cohen** decision referred to above, the principle is clear. The existence of a Supreme or High Court order ceases to be in force and effect but only insofar as the order of the maintenance court expressly or by necessary implication replaces such order. This is supported by the SCA **Bannatyne** decision wherein Justice Nugent stated the following :

> **"In terms of section 22 of the Act the fact of the substitution was that the High Court order thereupon ceased to be in force and effect at least insofar as it dealt with the matters that were provided for in the Maintenance Court order."**

[27] The Applicant's contention that the Warrant of Execution is fatally defective as the maintenance order made by this Court had been superseded by the Maintenance Court is untenable. The Warrant of

Execution is not ***ultra vires***. Also that the Maintenance Court order causes an existing High Court order to cease to be of force and effect. The maintenance order made by Maintenance Court replaces the former order and the previous order ceases to operate while the new order operates in its place is also untenable in the light of the decisions referred to above. These contentions are unsupported by evidence on the papers, unsupported by authorities and unsupported by logic. Having considered all the material properly placed before me, I am satisfied that the Applicant's application should be dismissed with costs.

In the result I make the following order :

1. The Applicant's application is dismissed with costs.

SISHI, J.

JUDGE OF THE HIGH COURT
KWAZULU-NATAL, DURBAN

Date of hearing	:	23 March 2009
Date of Judgment	:	11 JUNE 2009
Applicant's Attorneys	:	Goodrickes 6TH Floor, 6 Durban Club Place DURBAN
Applicant's Counsel	:	C.S.A. Smart
Respondent's Attorneys	:	Lister & Company c/o Johan Jooste Ground Floor Masonic Grove Chambers 32 Masonic Grove DURBAN
Respondent's Counsel	:	L.D. Pistorius