

MAINTENANCE ORDERS CAN BIND YOU FOR 30 YEARS

S A v J A and Others (7531/2020) [2020] ZAWCHC 155 (10 November 2020)

A novel question arose for consideration in this matter. Are maintenance matters that form part of a consent paper, and incorporated in a divorce order, part of the 'judgment' and hence susceptible to prescription only after 30 years? Or is this component of the divorce order an ordinary debt that prescribes after 3 years, because of the fact that it is capable of being varied and is therefore not a final judgment? In the present matter, the spouse claimed substantial arrears from her ex-husband, shortly after he had a windfall, 17 years after their divorce order.

The Judgment can be viewed [here](#).

FACTS

Mr A and Mrs A divorced in 1993. The divorce order incorporated the provisions of a consent paper which, in turn, dealt substantially with the interests of Mrs A and the minor children, including matters relating to guardianship, care and contact, and maintenance. In so far as maintenance was concerned, Mr A agreed to pay Mrs A R750 per month for each child and to pay their educational and medical expenses until the children became self-supporting. Mr A furthermore agreed to pay Mrs A maintenance of R2000 per month until her death or re-marriage, and to bear all her medical expenses.

Mr A failed to pay the cash maintenance portion agreed to in the consent paper from the time of divorce until January 2019. Mrs A did not demand payment of arrear maintenance until December 2018 when, apparently, Mr A received an inheritance from his mother's estate. Mr A commenced paying cash maintenance from January 2019, substantially in compliance with the consent paper.

Mrs A caused a writ of execution to be issued against Mr A in respect of the arrear maintenance, dating back to July 1993, in an amount of some R3,2 million. The writ was stayed pending the outcome of these proceedings. (Mr A had also applied for a retrospective discharge of his maintenance obligations under the divorce order, which application is pending in the magistrates' court.)

For purposes of this matter, Mr and Mrs A had agreed that the sole issue to be determined was the question of prescription. Did the undertaking to pay maintenance in a divorce consent paper which is made an order of the High Court give rise to a 'judgment debt' or 'any debt' (contemplated in sections 11(a)(ii) and 11(d) of the Prescription Act 68 of 1968 ("the Prescription Act"))? This would determine whether Mrs A could claim for arrear maintenance as far back as 1993 or not, as an 'ordinary debt' prescribes after 3 years and a 'judgment debt' prescribes after 30 years.

Mr A argued that a court order for the payment of maintenance pursuant to a consent paper gives rise to an ordinary 'debt'. This was because: (i) a judgment debt is final and conclusive in nature and cannot be altered by the court which pronounced it. Further, because maintenance orders are capable of being varied, substituted, discharged on good cause, or even varied with retrospective effect, a maintenance order is not final and conclusive and lacks the attributes of a final judgment and is, therefore, not a 'judgment debt'; (ii) various provisions of the Maintenance Act draw a distinction between maintenance orders for the payment of maintenance and orders for the payment of a once-off specified amount of money, with only the latter order giving rise to a civil judgment; and (iii) the policy imperatives underlying the Prescription Act are not served by interpreting the words 'any judgment debt' in section 11(a)(ii) as including a maintenance order: a creditor is responsible for enforcing his or her rights timeously and must suffer the consequences of failing in this regard and, conversely, a debtor must be protected against a stale claim which has existed for such a long time that it is difficult to defend against it.

Mrs A submitted, in essence, that when a consent paper is made an order of court, the status of the rights and obligations of the parties to that agreement changes into a judgment debt with the consequence that a 30-year prescription period applies to the agreement. Whilst it was possible for a maintenance order to be varied as circumstances change, that did not mean that when the consent paper was made an order of court, the dispute between the parties was not definitively settled at that point in time.

HELD

- Although all divorce proceedings commence by way of action, often highly contested at the outset, the usual outcome is a negotiated settlement, the terms of which are recorded in a written document and subsequently made an order of court.
- Section 7(1) of the Divorce Act 70 of 1979 ("the Divorce Act") empowers a court granting a decree of divorce to make a maintenance order in accordance with a written agreement between the parties. The Maintenance Act 99 of 1998 ("the Maintenance Act") provides that any order made under section 7(1) of the Divorce Act may at any time be rescinded, varied or suspended if the court finds that there is sufficient reason therefor. In addition, such an order may also be substituted or discharged on good cause shown by a maintenance court.
- The granting of a consent judgment is a judicial act since the terms of the agreement are incorporated in an order of court. The agreement entered into between the parties as envisaged in section 7(1) of the Divorce Act brings about a change in the status of the rights and obligations of the parties to the settlement agreement. Thus, when a consent paper is incorporated in an order of court by agreement between the parties in a matrimonial suit, it becomes part of that order and its relevant contents then form part of the decision of that court.
- Once a court has made a consent judgment, it is *functus officio* and the matter becomes *res judicata* (literally, 'a matter judged').
- However, in relation to matrimonial disputes, the general rule that a consent to judgment becomes *res judicata* between the parties does not necessary apply in all circumstances. The principle of *res judicata* only applies to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. Orders dealing with custody, guardianship, or access to and maintenance for any of the minor children do not assume the character of final judgments as they relate to matters which fall within the exclusive jurisdiction of the court and are always subject to variation in terms of section 8(1) of the Divorce Act or the relevant provisions of the Maintenance Act.
- From the foregoing principles, it is apparent that a consent paper that is made an order of court must be construed as a judgment of the court and, as such, is a 'judgment debt'. Accordingly, the 30-year prescription period applies to such an agreement.
- The issue that arises is whether *the maintenance portion* of the consent paper is also to be considered as a judgment debt given the fact that such an order does not have the character of a final judgment.
- The maintenance order which forms part of a consent paper should be treated no differently to any other part of the order. A maintenance order is final and enforceable until varied or cancelled and the order, like any other order, must be carried out immediately.
- The settlement agreement, and the resultant consent order, disposes of the underlying dispute and any subsequent litigation that may ensue in respect of compliance with the settlement order does not have to

traverse the merits of the original underlying dispute. Thus, any rescission, variation, or a suspension of the maintenance order granted earlier becomes a new dispute between the parties where the original order granted may form the basis of any new contemplated action.

- Thus, once a maintenance order which is part of a consent paper is made an order of court, it is a judgment like any other. Because it imposes a monetary obligation, it is, accordingly, a 'judgment debt' for the purpose of section 11(a)(ii) of the Prescription Act and prescribes after 30 years.

Policy considerations

- It was argued that a maintenance order is in the nature of things intended to provide for immediate living expenses and sustenance and should therefore be promptly enforced. Permitting a maintenance creditor to wait up to 30 years to enforce a maintenance order can result in great financial hardship for a maintenance debtor who has been lulled into a false sense of security by the inaction of the creditor and who has not provided for the liability, only to be surprised by a substantial claim for arrear maintenance plus accumulated interest (as is argued to be the case in the proceedings before this court). It was further submitted that it is unreasonable and burdensome to expect a maintenance debtor to keep records for up to 30 years in order to deal with possible maintenance claims.
- These policy considerations do not fit easily with maintenance matters and it appears to misconceive the true nature of maintenance. Maintenance is premised on a duty to support and cannot be characterised as a normal debtor-creditor obligation. The liability to support children, for example, is a statutory obligation imposed in terms of section 15(1) of the Maintenance Act. It is also not the maintenance debtor who is the victim when it comes to the issue of maintenance payments; it is invariably the maintenance creditor.

CONCLUSION

Accordingly the Court held that the maintenance obligations contained in the consent paper that was made an order of court in 1993 was subject to a 30-year prescription period.