SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 09/37186

In the matter between:

MRS. S (formerly S) Applicant

And

MR S Respondent

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MEYER, J

[1] The applicant and the respondent were married to each other. Two sons, M and N were born of this marriage on 14 August 1991 and 12 October 1993 respectively.

[2] The respondent instituted divorce proceedings against the applicant in the Durban and Coast Local Division of the High Court. On 21 April 2004, the parties entered into an agreement of settlement (annexure FCS1). The agreement of settlement *inter alia* provides for custody of the children to be awarded to the

applicant and for the respondent to have the right of reasonable access to them. Clauses 6.2 – 6.5 of the settlement agreement are relevant. They relate to the payment of maintenance for the children by the respondent to the applicant:

> '6.2 R [the respondent] shall pay maintenance to F [the applicant] for the children at the rate of R5 000.00 per month, per child, the first payment to be made on the first day of the month succeeding the month in which the order of divorce is granted.
> 6.3 R shall pay the maintenance:
> 6.3.1 into F's Nedbank Musgrave Bank Account No. 1301282626, Branch Code 130-126 or any other place which she may specify in writing, on 30 days notice to R;
> 6.3.2 in advance on or before the first day of the month for which the maintenance is due, and will ensure that the funds are available to F on that day;
> 6.3.3 without any demand or deductions of any nature whatsoever.
> 6.4 R shall continue to pay maintenance for the children stated in clause 6.3 until the children –
> 6.4.1 turn 21 years old; or
> 6.4.2 become self-supporting; or
> 6.4.3 marry;
> whichever shall occur first.
> 6.5 The amount of maintenance payable by R to F in terms of this agreement as at the date of signature, shall be increased by a minimum amount which shall be calculated in accordance with the CPIX for all goods, for the Durban area or other area in which F may reside. The adjustment shall be effected annually on the anniversary of the divorce each year.'

[3] On 18 May 2004, their marriage was dissolved by an order of the Durban and Coast Local Division ('the divorce order'). Only certain terms of the agreement of settlement were incorporated in the divorce order (annexure FCS2). The applicant states that she had been advised that it is not the practice in the Durban High Court to make the agreement of settlement an Order of Court. Paragraphs 3.1 and 3.2 of the divorce order read as follows:

> ‘3 That the plaintiff is directed to:-
> 3.1 pay maintenance to the defendant for the minor children at the rate of R5 000,00 per month per child, the first payment to be made on the 1st June 2004;
> 3.2 increase the maintenance payable to the defendant by a minimum amount which shall be calculated in accordance with the CPI for all goods, for the Durban area or other area in which the defendant may reside. The adjustment to be effected annually on the 18th May each year;’

The provisions of *inter alia* clauses 6.3 and 6.4 of the settlement agreement are accordingly not incorporated in the divorce order.

[4] During November 2008, the respondent instituted proceedings in the Maintenance Court, Randburg, for a reduction of the amount of the maintenance that he was obliged to pay for the children. The parties concluded a variation agreement on 17 November 2008. The parties specifically recorded that the variation agreement only varies their settlement agreement in certain specified respects and that all the terms and conditions of their settlement agreement remain otherwise of full force and effect. In clause 3.1 of the variation agreement the parties agreed to delete clause 6.2 of the settlement agreement and to substitute it with the following clause:

> ‘R shall pay maintenance to F for the children at a rate of R2 500,00 per month, per child, the first payment to be made on the first day of December 2005.’

Part B of the variation agreement *inter alia* provides that the respondent would pay an amount of R5 000.00 per month into an investment account for the children. Clauses 6.3, 6.4, and 6.5 of the settlement agreement were not varied. The variation agreement was not made an order of the Maintenance Court.

[5] Acting for the applicant, Bowman Gilfillan Attorneys in a letter dated 25 May 2009, advised the applicant as follows:

> '4. Your oldest child, M, will turn 18 on 14 August 2009.
> 5. In such circumstances, this letter serves to confirm that our client will, from the date of M's 18th birthday, since M will on that date become a major, be paying maintenance directly to M and no longer to yourself. From that date all arrangements regarding M's future maintenance requirements will be concluded directly between M and our client.'

An exchange of correspondence followed between the applicant's attorneys, Martini-Patlansky, and the respondent's attorneys, but the respondent remained steadfast in his stance. The respondent stopped paying M's maintenance payments to the applicant when M turned eighteen on 14 August 2009. Since M's eighteenth birthday the respondent seeks to discharge his obligation to maintain M by making payments directly to him and the respondent also seeks to make arrangements regarding M's maintenance requirements directly with him.

[6] In paragraphs 1 and 2 of her notice of motion the applicant seeks that various provisions of the settlement agreement and the entire variation agreement be made an order of this Court. In paragraph 3 of the notice of motion the applicant, in the alternative, seeks that

> 'the Respondent is ordered to pay the maintenance in respect of the minor children as varied in terms of the Variation Agreement, annexure FCS3 hereto, directly to the Applicant.'

The reference to the 'minor' children seems to be an error since M became a major in terms of the Children's Act 38 of 2005 on 14 August 2009. In a

supporting affidavit M expressed a preference that the maintenance payable to him by the respondent be paid to the applicant.

[7] The respondent states the following in paragraphs 17.2 – 17.6 of his answering affidavit:

> '17.2 In terms of the Children's Act 38 of 2005, the age of majority was reduced with effect from 01 July 2007, from twenty one to eighteen.
> 17.3 M turned eighteen on 14 August 2009.
> 17.4 I do not deny, and have never denied, an ongoing obligation to contribute towards M's maintenance until he becomes self-supporting.
> 17.5 I submit, however, that once M attains majority that obligation is mine direct to M and his right to enforce directly against me. The Applicant, as "receiver of payments for and on behalf of a minor child" no longer has *locus standi* to receive such payments since the child is no longer a minor.
> 17.6 Having received advice that there is clear authority to this effect in law, I instructed my attorneys to communicate this to the Applicant which was done in May 2009.'

[8] At no time during argument was I referred to the 'clear authority' referred to by the respondent. But adv. RR Rosenberg, who appeared for the respondent, referred me to a judgment of the Supreme Court of Appeal in the matter of *Graham John Bursey v Jane Noelle Bursey and Others* (delivered on 30 March 1999). The following passage in the judgment given by Vivier, JA (Nienaber JA, Howie JA, Olivier JA and Plewman JA concurring), is, in my view, apposite to this matter:

> 'It was next submitted, also on the strength of Richter's case, that John's maintenance in terms of the order was payable to the first respondent in her capacity as his custodian so that when this status terminated upon majority the appellant's obligation to pay her either ceased or was henceforth enforceable only by John and not by the

> first respondent. The maintenance order is, as I have said, ancillary to the common law duty of support and merely regulates the incidence of this duty as between the parents. The effect of this order is simply that after John'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 his common parental duty to support. This she was fully entitled to do in terms of the order.'

[9] The maintenance provisions of the divorce order, those of the settlement agreement that were not incorporated into the divorce order, and those contained in the subsequent variation agreement regulate the incidence of the duty of support as between the applicant and the respondent. Clause 6.4 of the settlement agreement contains the express agreement between the applicant and the respondent as to the duration of the duty to maintain the children. The respondent undertook to pay maintenance for the children until they attain the age of 21 years or become self-supporting or marry, whichever occurs first. Clause 6.2 of the settlement agreement, as substituted *inter partes* and extra-curially by clause 3.2 of the variation agreement, and clauses 6.3, 6.4, and 6.5 of the settlement agreement do not limit the applicant's entitlement to recover from the respondent his contribution to M's maintenance to M's attainment of majority. The respondent is obliged to continue to pay over his maintenance contribution (that is the part of his maintenance contribution referred to in clause 6.2 of the settlement agreement and as substituted by clause 3.2 of the variation agreement and read with clause 6.5 of the settlement agreement) to the applicant and the applicant is entitled to recover the respondent's said

maintenance contribution for M until the first of the events referred to in clause 6.4 of the settlement agreement occurs.

[10] The respondent's contention that the settlement agreement was superseded by the divorce order and that the divorce order, in turn, was superseded by the variation agreement, has no merit. The divorce order clearly only incorporated certain salient terms relating to the parties' agreement on the issues of custody and maintenance in respect of their children and their settlement agreement remains of full force and effect between them, except insofar as they varied it in terms of their variation agreement. The express provisions of the variation agreement make this clear.

[11] Adv. S Nathan, who appeared on behalf of the applicant, submitted that this Court does not have jurisdiction to grant the applicant relief, because the variation agreement was concluded pursuant to proceedings instituted in the Maintenance Court. The High Court has no jurisdiction to vary the order of a Maintenance Court otherwise by appeal or review. See: *Steyn v Steyn* 1990 (2) SA 272 (WLD); *Rabie v Rabie* 1992 (2) SA 306 (WLD); *De Witt v De Witt* 1995 (3) SA 700 (TPA); and *Purnell v Purnell* 1993 (2) SA 662 (AD). But the applicant does not seek the variation of an order of the Maintenance Court. It is undisputed that the Maintenance Court made no order and it appears that the parties, by means of the variation agreement, extra-curially amended the settlement agreement. The relief prayed for in terms of paragraphs 1 and 2 of

the notice of motion amounts to a variation of the divorce order granted by the Durban and Coast Local Division. Under the common law this Court would have no jurisdiction to vary the order for maintenance granted by the Durban and Coast Local Division. See: *Steyn v Steyn (supra)* at p. 274B – G. Subsections 8(1) and 8(2) of the Divorce Act 70 of 1979 brought about a change of the common law position. Section 8(1) *inter alia* provides that a maintenance order made in terms of the Divorce Act may at any time be rescinded or varied if the Court finds that there is sufficient reason therefore, and section 8(2) provides that a Court other than the Court which made such order may rescind, vary or suspend it if *inter alia* the parties are domiciled in the area of jurisdiction of the Court which is approached to rescind, vary, or suspend the order. 'Court', in terms of section 1 of the Divorce Act, *inter alia* means 'any High Court as contemplated in section 166 of the Constitution of the republic of South Africa (Act 108 of 1996).' It is common cause that the applicant and the respondent are domiciled within the area of this Court.

[12] The respondent is acting in breach of the relevant provisions of the settlement and variation agreements. His unilateral conduct in the circumstances of this case, in my view, establishes 'sufficient reason' for the divorce order to be varied. I am, however, of the view that the relief claimed in paragraphs 1 and 2 of the Notice of Motion extends beyond the actual dispute between the parties and the case put forward in the applicant's founding papers. The relief prayed for in paragraph 3 of the notice of motion is aimed at compelling performance in

accordance with the relevant provisions of the settlement and variation agreements, and the plaintiff is, in my judgment, entitled to enforce such performance *vis-à-vis* the respondent insofar as M is concerned.

[13] There is, in my view, no reason why the costs of the application should not follow the event. Adv. Rosenberg S.C. submitted that a punitive costs order is warranted in the circumstances. I think not. The respondent acted with confidence on legal advice that he had received.

[14] In the result the following order is made:

1. The respondent is ordered to pay the maintenance for M, which is provided for in clause 3.2 of the variation agreement (annexure FCS3 to the founding affidavit) as read with clause 6.5 of the settlement agreement (annexure FCS1 to the founding affidavit), directly to the applicant.
2. The respondent is ordered to pay the applicant's costs of the application.

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P.A. MEYER
JUDGE OF THE HIGH COURT
18 November 2009