IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14994/2013

DATE: 18-11-2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED. YES
DATE 15 March 2023
SIGNATURE

In the matter between

LYNETTE TIEDEMANN Applicant

and

PETER EDWARD TIEDEMANN Respondent

J U D G M E N T

WANLESS AJ

Introduction

[1] In this application one LYNETTE TIEDEMANN, an adult female, *("the Applicant")* sought a declaratory order and an order that her ex-husband, one, PETER EDWARD TIEDEMANN, an adult male *("the Respondent")*, pay to her an amount in respect of

arrear maintenance. The relief sought is in terms of a settlement agreement entered into between the parties at the time when they were divorced and which was made an order of this Court.

[2] Apart from the aforegoing, there are two interlocutory applications before this Court namely, an application for condonation in respect of the late filing of the Respondent's Answering Affidavit which was opposed and an application for condonation in respect of the late filing of the Applicant's Answering Affidavit to the Respondent's condonation application, together with the late filing of the Applicant's reply to the Respondent's Answering Affidavit, which is not opposed.

With regard to the former application the Applicant's opposition was withdrawn at the commencement of the hearing. Both parties sought an order for costs. In respect of the latter interlocutory application, it was agreed that there should be no order as to costs.

[3] The Applicant had raised a point *in limine* in respect of the manner in which the Respondent's Answering Affidavit had been commissioned. The commissioning of this affidavit had been rectified by the Respondent prior to the hearing of this

application and the Applicant withdrew this point *in limine.*

The Applicant sought an order that the costs occasioned by the postponement of the matter on the 17th of August 2021 be paid by the Respondent on the scale of attorney and client. It was conceded, during the course of argument, that the Respondent should pay these costs but not on a punitive scale.

The facts

[4] The real issue to be determined by this Court is when, upon a proper interpretation of the settlement agreement *("the agreement")* maintenance became payable by the Respondent to the Applicant. The agreement was entered into between the parties on the 25th of February 2021 in settlement of the divorce action between them and paragraph 3 thereof reads as follows:-

"From the first day of the month following the winding up of High Road –

3.1 The Defendant shall pay maintenance for the Plaintiff, in the amount of R22 000,00 per month;

3.2 The maintenance aforesaid shall –

3.2.1 be paid on or before the 1st

day of each consecutive month;

3.2.2 be without any deductions of any nature whatsoever;

3.2.3 be paid directly into an account nominated by the Plaintiff in writing from time to time;

3.2.4 continue to be made to the Plaintiff until her Death, remarriage or living with another man as husband and wife;

3.2.5 shall increase annually on 1 March at a rate equal to the average CPI for the preceding 12 months;

3.3 from six months after the commencement of the payment of the amount set out in 3.1 above, either party shall be entitled to approach a Court with the requisite jurisdiction to vary the quantum of maintenance payable without having to prove a change in circumstances.

Thereafter, either party shall be entitled to approach a Court with the requisite jurisdiction to vary the quantum of maintenance payable subject to proving a change in circumstances."

[5] In terms of sub-paragraph 2.5.1 of the agreement, the following was agreed to in respect of the company known as "High Road":-

"2.5.1 The winding-up application of High Road launched by the Applicant under case number 13466/2013 shall be enrolled for hearing and an order taken by consent within 30 days of payment having been made to the parties arising out of the sale of 178 Sable Hills Estate ("the final winding-up of High Road")."

[6] The following facts were either common cause or not seriously disputed in this application, namely:-

[6.1] The Applicant is unemployed and the Respondent is employed;

[6.2] The Applicant is not able to work due to the fact that she suffers from

degenerative disc disease and was medically boarded in 1996;

[6.3] The Respondent maintained the Applicant before the settlement agreement was entered into;

[6.4] The Applicant previously received a rental income from the company;

[6.5] The company's final winding-up order was granted on 23 December 2016;

[6.6] The Respondent has not paid anything in terms of paragraph 3 of the settlement agreement;

[6.7] The parties have already received payment as provided for in the reconciliation of payments from the liquidators; and

[6.8] The Respondent has a maintenance obligation towards the Applicant.

The Applicant's case

[7] The Applicant's case can best be summarised as follows:-

[7.1] Since a final winding-up order was granted on 23 December 2016 the Respondent became liable to pay maintenance to the Applicant as provided

for in paragraph 3 of the agreement on the 1st of January 2017, which is the first day of the month following the winding - up of the company.

[7.2] The Respondent has refused and/or failed to pay maintenance in terms of paragraph 3 of the settlement agreement to the Applicant from the 1st of January 2017 to date; and

[7.3] Accordingly the Respondent is in arrears with his maintenance obligation.

[8] On the other hand the Respondent opposes the date upon which the Respondent is liable to pay in accordance with the maintenance obligation set out in the agreement in that he alleges that his maintenance obligation is suspended pending a Master's final certificate, certifying that the company's winding up/liquidation has been finalised, including the dissolution thereof.

The law

[9] In the matter of *Botha-Botho Transport (Edms) v S Bothma & Seun Transport (Edms) Bpk.* [1] the SCA held, *inter alia*, the following:-

[12] That summary is no longer consistent with the approach to

[1] *2014 (2) SA 494 (SCA)*

interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier

approach." [2]

[10] Of course, no consideration of the correct legal principles to be applied in respect of interpretation of contracts would be complete without mentioning the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality,* [3]where*, inter alia,* Wallis JA held:-

"The present state of the law can be expressed as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of a document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those

[2] *Emphasis added.*
[3] *2012 (4) SA 593 (SCA)*

responsible for its production.'"

[11] The law regulating the winding-up of a company is contained in Part G of the Companies Act, Act 71 of 2008 *("the new companies act")* and Chapter XIV of the Companies Act, Act 61 of 1973 *("the old companies act").*

[12] In terms of item 9(2) of schedule 5, sections 342, 344, 346 and 348 to 353 do not apply to the winding-up of solvent companies, which are now dealt with in terms of sections 79 to 81 of the new companies act, and their deregistration is dealt with in terms of sections 82 and 83 thereof.

[13] As part of the definitions in the old companies act, a "winding-up order" is defined as:

"*Any order of court whereby a company is wound up and includes any order of court whereby a company is placed under provisional winding-up for so long as such order is in force*."

[14] In terms of subsection 79(1), a company may be dissolved voluntarily or by:

"*(b) winding-up and liquidation by a court order, as contemplated in section 81.*"

[15] In terms of the commentary to be found by the learned authors in *Henochsberg on the Companies Act 71 of 2008* at page 310 and more particularly

the notes in respect of section 79, subsection 79(1)(b) refers to winding-up and liquidation as two separate words indicating two separate definitions. The learned authors state the following:

"*It is difficult to think of circumstances where the use of these words in this context would lead to any difficulties, and so it is submitted that the term 'winding-up' refers to the order granted by the Court under s81, and the term 'liquidation' to the process of liquidating the company and distributing the assets or proceeds amongst those entitled to it.*"

[16] Subsection 81(4) of the new companies act states that:

"*(4) A winding-up of a company by a Court begins when:*

(a) An application has been made to the Court in terms of subsection (1)(a) or (b); or

(b) The court has made an order applied for in terms of subsection (1)(c), (d), (e) or (f)."

[17] Section 82 of the new companies act, which is to a large extent a re-enactment of section 419 of the old companies act, except for new grounds of

deregistration of a company under subsection (3) of section 82, deals with the dissolution of companies and the removal of the company's name from the register of companies. It states as follows:

"*(1) The Master must file a certificate of winding up of a company in the prescribed form when the affairs of the company have been completely wound up.*

(2) Upon receiving a certificate in terms of subsection (1), the Commission must:

(a) record the dissolution of the company in the prescribed manner; and

(b) remove the company's name from the companies register."

[18] In terms of section 83 of the new companies act, upon deregistration of a company it is dissolved. Dissolution follows the winding up of a company.

Findings

[19] In the first instance, it is fairly trite that upon a court granting a final winding-up of a company what occurs is a *concursus creditorum* and for all intents and purposes the company (in liquidation) ceases to trade. Having regard to the present matter, it is clear that prior to the winding-up of High Road *("the*

company") the maintenance of the Applicant was paid by the company. From the context in which the agreement was born and the clear language thereof, it is further clear that upon the winding-up of the company the obligation of the company to provide maintenance to the Applicant would cease and would be replaced by a personal obligation which fell upon the Respondent.

In further amplification hereof, it is common cause that prior to the winding-up of the company the Applicant's maintenance was paid by way of rental income received by the company. Upon the final winding-up order being granted, this income (if any) became payable to the appointed liquidators and was no longer payable to the Applicant. In the premises, it is this meaning of "winding-up", namely the date upon which the final order was granted by this Court, that should be given to the wording in paragraph 3 of the agreement. [4]

[20] As dealt with earlier in this judgment, there is a clear distinction between the definitions of a winding-up order, as contained in the companies act and the terms used to describe a "winding-up" and a "liquidation" or "dissolution" of a company.

[4] *C B & Another v H B [2021] JOL 49207 (SCA)*

Put simply, there is the winding-up order of the Court which, as we know, creates the *concursus creditorum* and which is thereafter followed by the liquidation process leading up to the final dissolution of a company by the distribution of all of its assets; its deregistration and the issuing of a certificate by the Master.

In the context of this agreement, it would never have been envisaged that the Respondent's maintenance obligation would only commence on the dissolution of the company and not, as so clearly stated in the agreement, upon the first day of the month following the winding-up of the company.

[21] It was submitted on behalf of the Respondent that the agreement must be interpreted as a commercial agreement and not one dealing with maintenance. If this was so the Respondent may have had a case but it is clear from the facts of this matter that the relevant paragraphs of the agreement, which the Court has been called upon to interpret, clearly deal with the Respondent's maintenance obligations and must therefore be interpreted in this context.

[22] In the premises, this Court finds that the interpretation as contended for on behalf of the

Applicant in respect of paragraph 3 of the agreement should be applied and that the Respondent is liable to pay maintenance to the Applicant from the 1st of January 2017.

[23] At the hearing of this application, Adv Van der Westhuizen (after taking instructions in respect thereof), confirmed the correctness of the amount claimed by the Applicant in respect of arrear maintenance should this Court find in favour of the Applicant and order the Respondent to pay to the Applicant arrear maintenance from the 1st of January 2017 to the date claimed in the application. That amount, as per the Applicant's Notice of Motion, is the sum of R1 333 909.56.

Costs

[24] It is trite that not only is the question of costs within the Court's discretion but that, unless exceptional circumstances exist, costs should normally follow the result. In this matter it is clear that the Applicant is entitled to the costs of the application. No exceptional circumstances exist. The Applicant has asked this Court to make a costs order on the punitive scale. Upon serious consideration this court must agree that the opposition to the application was frivolous and

vexatious. Not only has it deprived the Applicant of maintenance but it has burdened the roll of this Court unnecessarily. On this basis the Respondent should pay these costs on the scale of attorney and client.

[25] With regard to the application for condonation in respect of the late filing of the Respondent's Answering Affidavit, two factors are clear. Firstly, the Applicant gave the Respondent many indulgences to file that affidavit and, secondly, the Respondent sought the indulgence of this Court to do so. On the basis the Respondent should pay those costs on the party and party scale.

[26] The last cost issue is that pertaining to the postponement of the matter on the 17th of August 2021. Those costs have been conceded by the Respondent. It is only the scale of those costs which remains an issue for this Court to decide. On the facts before this Court and on the basis that the Respondent has ultimately sought to delay the finalisation of the application, together with his duty to pay to the Applicant the maintenance due to her and in light of the frivolous defence referred to earlier in this judgment, it would be just and equitable if these costs were also paid on the

attorney and client scale.

Order

[27] In the premises, this Court makes the following order:

[27.1] It is declared that the date from which the Respondent became liable to pay maintenance to the Applicant is from 1 January 2017, as provided for in paragraph 3 of the Deed of Settlement dated 28 February 2015, which was incorporated in the Decree of Divorce granted in this court under the case number 2013/14994 on 2 March 2015.

[27.2] The Respondent is to pay to the Applicant within seven (7) days of the granting of this order the sum of R1 333 909.36 (one million, three hundred and thirty three thousand, nine hundred and nine rand, thirty six cents), which is the arrear maintenance payable by the Respondent to the Applicant for the period 1 January 2017 to 1 January 2021.

[27.3] The Respondent is to pay to the Applicant interest at the prescribed rate of interest calculated from 2 January 2017 to date of

final payment in respect of the amount in paragraph 2 hereof.

[27.4] The Respondent is to pay the costs of this application on the scale of attorney and client.

[27.5] The Respondent is to pay the costs of the application for condonation for the late filing of the Respondent's Answering Affidavit on the party and party scale.

[27.6] The Respondent is to pay the costs occasioned by the postponement on 17 August 2021 on the scale of attorney and client.

That order, as I indicated at the commencement of the judgment, has already been typed and has been signed by me. It has been marked "X" for the purposes of identification, signed by me and dated today's date. It will be uploaded onto CaseLines by the clerk of this Court as soon as possible. I hand down that order.

.....

WANLESS AJ

ACTING JUDGE OF THE HIGH COURT

DATE: 15 MARCH 2023