**IN THE HIGH COURT OF SOUTH AFRICA** **REPORTABLE**

**(CAPE OF GOODHOPE PROVINCIAL DIVISION)**

**CASE NO: 3236/02**

In the matter between

**ROSALEE HILDA BATES** **Applicant**

and

**CHARLES JAMES DRURY BATES** Respondent

# JUDGMENT DELIVERED ON 19 JANUARY 2004

**YEKISO J**

[1] The Applicant in these proceedings has instituted contempt of Court proceedings against the Respondent arising from the alleged failure by the Respondent to comply with his maintenance obligations in terms of the Divorce Order granted on 17 March 1980 under case no: I991/80

[2] In terms of the Consent Paper entered into between the Applicant and the Respondent which was incorporated in the Decree of Divorce, the Respondent, as Plaintiff in that action, undertook to make certain monthly payments in respect of the

maintenance of the Applicant and the minor children born of the marriage. Over and above the monetary obligations which the Respondent was obliged to fulfil, the Respondent further undertook to provide for the provision of accommodation and payment of rentals for the Applicant and the minor children, the provision of a motor vehicle for the Applicant and as well as replacement of Applicant's household furniture and effects as and when circumstances would justify replacement of such items.

[3] The maintenance of Applicant, the provision of a motor vehicle, accommodation and replacement of household furniture and effects was made subject to a *dum casta* clause save that the *dum casta* clause would be suspended in the event the Applicant established a common home with a member of the opposite sex and live with such a party as husband and wife.

[4] The relevant clauses of the Consent Paper, which I propose to reproduce in full, except for clauses 2(a), 2(c) and 2(d) which provide for the maintenance of the minor children all of whom have since attained the age of majority, read as follows:

"2. Plaintiff undertakes and agrees in order to make due provision for the maintenance of Defendant and the four minor children born of the marriage between the parties to effect payment of the undermentioned sums and to provide as hereinafter prescribed:

*2(b) To effect payment to Defendant monthly in advance on the first day of each and every month with effect from the 1st March 1980, free of exchange at such address at Cape Town as Defendant may from time to time appoint in writing, of R 150.00 per month as and for maintenance in respect of Defendant personally, which payments shall continue until her death or remarriage, whichever event shall first occur, save that should Defendant establish a common home with a member o the opposite sex and live with such party as wife and husband, then and in such event Plaintiff's obligation with respect to payment of any maintenance in respect of Defendant personally shall be suspended whilst such liaison continues."*

*2(e) For as long as Plaintiff is legally liable to maintain Defendant as hereinbefore set forth, Defendant shall be entitled to occupy, free of any payment*

*whatsoever in respect of rental and/or water and/or electricity, the immovable property constituting the former common home and situate and known as 7 Lakeview, Pekalmy, Cape, in respect whereof Plaintiff is the registered owner, or such alternative dwelling as the parties might mutually agree upon from time to time. It is however specially understood and agreed that Defendant's right of occupation as hereinbefore set forth shall cease in the event of Defendant establishing a liaison on the basis hereinbefore referred to consequent whereupon Plaintiff's obligation to effect payment of maintenance in respect of Defendant personally shall be suspended, and this provision shall mutates mutandis apply in respect of the provision by Plaintiff is the free use of a motor vehicle to which reference is hereinafter made.*

2(f) Plaintiff furthermore undertakes and agrees for as long as he is legally liable to maintain Defendant as hereinbefore prescribed, to provide her with the free use of a motor vehicle analogous to such motor vehicle as is present at being utilised by her.

2(g) Plaintiff acknowledges that his obligations with respect to maintenance in respect of Defendant personally as hereinbefore set forth, shall be binding on his estate."

*"3(a) Defendant shall be entitled to retain as her own free and unfettered property all household furniture and effects of whatsoever nature or description at present situate at the former common home.*

3(b) Plaintiff specially undertakes and agrees for as long as he is legally liable to maintain Defendant to replace from time to time the furniture and household effects hereinbefore referred to as and when same become unserviceable and/or reasonably require replacement, at his own proper cost and expense."

*[5] As can be seen in terms of clause (b) of the Consent Paper, the Respondent's obligations in terms of this clause constitutes an order ad pecuniam solvendam whereas the Respondent's obligation relating to the provision of accommodation, provision of a motor vehicle and replacement of household furniture and effects are orders ad factum praestandum.*

[6] During 1995 the Applicant made an application in the Maintenance Court, Bellville for an increase in the amount of maintenance payable in terms of the Divorce Order dated 17 March 1980 which, as at the time of the Application, provided maintenance in respect of the Applicant in an amount of R 150.00 and an amount of R 100.00 in respect of one minor child, T., who had not yet attained the age of majority and had not yet become self supporting. The Respondent consented to an increase in an amount of R 1 500.00 per month in respect of the Applicant and to a further amount of R 1 500.00 in respect of the minor child.

[7] No reference was made in that application to the Respondent's obligations relating to the provision of accommodation and payment of rentals, the provision of a motor vehicle and the replacement of household furniture and effects. The Order dated 28 December 1995 made by the Maintenance Court, Bellville merely reads as follows:

"The Maintenance Order dated 17/03/1980 made by the Supreme Court Cape Town is

substituted by the aforegoing Maintenance Order.

*Dated at Bellville this 28th day of December 1995."*

The Order was made in terms of section 5(7) of the Maintenance Act, 23 of 1963, which has since been repealed and substituted by the Maintenance Act, No 99 of 1998. The latter piece of legislation came into operation on 26 November 1999.

[8] During 1999 the Applicant launched yet a further application for an increase in maintenance payable to herself only as the youngest of the children, T., had by then also reached the age of majority. This application culminated in the Respondent consenting to maintenance payable to the Applicant in an amount of R 3000.00 per month with effect from 1 November 2000. This order, made on 3 October 2000, substituted the earlier order made on 28 December 1995 by the Maintenance Court, Bellville.

[9] On this occasion the parties recorded that there was a dispute as regards the non-pecuniary regime of the Order granted on 17 March 1980 and the record of this dispute was annexed as annexure "A" to the consent form signed by the Respondent. Annexure"A" annexed to this consent form reads as follows:

"It is recorded that there is a dispute between the parties whether the following claims of the Applicant in terms of the Consent Paper which were incorporated in a decree of Divorce on 17 March 1980 were subsequently compromised by Applicant and it is recorded that the maintenance of R 3000 (three thousand rand) does not cover the

expenses contemplated in the following clauses of the Consent Paper.

a) Clause 2(e) of the Consent Paper (the claim for accommodation including electricity costs and water costs);

b) Clause 2(f) of the Consent Paper (the claim in respect of a motor car);

c) Clause 3(b) of the Consent Paper (the claim for replacement of household furniture and effects);

The Applicant reserves her rights to approach the appropriate forum to pursue these claims."

What annexure "A" in effect records is that the maintenance of R 3 000.00 per month does not cover the expenses, and in effect, the Respondent's obligations contemplated in paragraphs 2(e), 2(f) and 3(b) of the Consent Paper.

[10] The Respondent is opposing this application on three principal grounds, namely:

[10.1] That he and the Application had reached an agreement during early December 1995 that the Respondent would pay the Applicant an amount of R 17 000.00 in full and final settlement of all or any claims which the Applicant may have against the Respondent arising from the Respondent's obligation to provide the Applicant with accommodation, a motor vehicle and the replacement of household furniture and effects. The Respondent further alleges in his papers that because of this agreement, the Applicant's cash component of the maintenance was considerably increased from an amount of R 1 500.00 per month to an amount of R 3 000.00 per month.

[10.2] The entire Maintenance Order granted by the High Court on 17 March 1980 was substituted by the order granted by the Maintenance Court, Bellville on 28 December 1995, and that the latter order was in turn substituted by the one granted on 3 October 2000.

[10.3] That these proceedings be stayed until the Applicant pays the Respondent's taxed bill of costs totalling an amount of R 22 135.65 together with interest thereon *a*

*tempore morae.*
*Ms Williams* appeared for the Applicant whilst *Mr Seale* appeared for the Respondent.

[11] As correctly pointed out by *Ms Williams* in her submissions and in argument before me the issues I am required to determine are:

[11.1] Whether the agreement referred to in paragraph 10.1 of this judgment was indeed concluded between the Applicant and the Respondent.

[11.2] Whether the order of the Maintenance Court, Bellville dated 28 December 1995 substitute the whole of the Respondent's obligation in terms of the Consent Paper or only the Respondent's obligations in terms of paragraph 2(b) of the Consent Paper.

[11.3] Whether these proceedings should be stayed pending payment of the Respondent's unpaid bill of costs. I shall now consider these issues in turn.

**THE ALLEGED COMPROMISE AGREEMENT**

[12] In her Replying Affidavit, the Applicant denies having concluded an agreement of compromise I have already referred to in paragraph 10 of this judgment. The Respondent in turn alleges that the agreement of compromise was concluded between him and the Applicant during early December 1995. The Respondent does not state in his Answering Affidavit precisely when and where the agreement of compromise was concluded; who represented each one of the parties when the agreement of compromise was concluded. Each one of the parties was legally represented in the maintenance proceedings which were pending at the time the alleged compromise agreement was concluded. No explanation is given why the alleged compromise agreement was concluded outside the framework of the parties' legal representatives. No explanation is given why such an agreement was not reduced to writing, which could well have been helpful to obviate any potential future dispute.

[13] On 15 December 1995 the Respondent gave Applicant a series of cheques, one of which is dated 15 December 1995 and the rest post-dated; the Respondent does not state in his papers whether he personally gave these cheques to the Applicant or whether somebody else handed the cheques to the Applicant on his behalf. It was contended on behalf of the Applicant in argument, and which contention was not disputed in argument, that the series of cheques were handed over to the Applicant by the Respondent's accountant at the time, one Karen Hillcock on 15 December 1995, it being the same date the Respondent signed a consent to increase the maintenance payable to the Applicant and the minor child to an amount of R 1 500.00 each per month. It is significant to note that the consent form signed by both the Applicant and the Respondent and witnessed by one M White and Karen Hillcock contains a statement "Each party will pay their legal costs". There is no reference in it to an agreement of compromise.

[14] It is apparent that the Respondent had given the consent form signed by the parties to his attorneys of record. This consent form in turn was forwarded to the Maintenance Officer, Bellville by the Respondent's Attorneys under cover of their letter dated 20 December 1995. The contents of this letter read:

> "The complainant and our client, Mr Bates, have concluded an Agreement and we accordingly enclose herewith a written consent in terms of section 5(7) of the Maintenance Act, 1963 (Act 23 of 1963). Would you kindly ensure that same is made an Order of Court and confirm to us in writing that our client need not attend the enquiry scheduled for the 7th February 1996."

Once again no reference is made in this correspondence to a compromise agreement allegedly concluded between the Applicant and the Respondent.

[15] In response to a yet further application by the Applicant to the Maintenance Court, Bellville for an increase in maintenance, the Respondent's attorneys, per their letter dated 18 April 2000, elicited such information from the Applicant pertaining to the rental paid by the Applicant in respect of accommodation since January 1996 to date of the attorneys' aforementioned letter; records relating to any motor vehicle in which the Applicant had a direct or indirect interest including lease agreements and instalment sales agreement since January 1996 to date of the attorneys' aforementioned letter and details relating to purchase by the Applicant of household furniture and effects since January 1996 to date of the Respondent's attorneys' aforementioned letter. This information, elicited as it was from the Applicant by the Respondent's attorneys, would be irrelevant if the agreement of compromise was

indeed concluded.

[16] On 8 December 2000 the Respondent, by way of a Chamber Book Application, sought to apply for the variation of the Consent Paper incorporated in the Divorce Order granted on 17 March 1980. Paragraph B of the Variation Agreement annexed to the Chamber Book Application reads as follows:

> "The personal maintenance payable by Plaintiff to Defendant in terms of clause 2(b) of the Consent Paper was increased by the Magistrate's Court, Bellville on 28 December 1995 to an amount of R 1 500.00 per month and subsequently on 3 October 2000 to an amount of R 3 000.00 per month."

In the same Chamber Book Application the Respondent sought the following paragraph to be added as paragraph 2(h) to the original Consent Paper, namely:

> "THE PARTIES ACCORDINGLY AGREE TO VARY THE CONSENT PAPER BY INSERTING THE FOLLOWING NEW CLAUSE 2(H):
>
> '2(h) The maintenance payable in terms of clause 2(b) above (including such substituted maintenance amount as varied by a maintenance court) shall increase
>
> annually on the 1st November of every year with effect from 1st November 2001 at
>
> a rate commensurate with the rate of increase in the Consumer Price Index as notified by the Director of Statistics for the Republic of South Africa, or his equivalent, for the middle income group in the Western Cape area for the preceding year." (My underlining)

Once again no reference is made to the agreement of compromise allegedly concluded by the parties during early December 1995. The Chamber Book Application merely sought to record that clause 2(b) of the Consent Paper was substituted by the order of the Maintenance Court dated 28 December 1995 in terms

whereof the amount payable by the Respondent in respect of maintenance was increased to an amount of R 1 500.00 and a further order by the Maintenance Court dated 3 October 2000 in terms of which maintenance payable by the Respondent was increased to R 3 000.00. It is also significant to note that the alleged agreement of compromise was neither communicated to the Clerk of the Maintenance Court, Bellville nor to the Registrar of this Court in order that same be recorded accordingly.

[17] The Applicant admits having received the cheques referred to in paragraph 12 of this judgment but denies having concluded the agreement of compromise as alleged by the Respondent. She states in her Replying Affidavit that when she accepted the cheque dated 15 December 1995 and the rest of the post dated cheques she was under the impression that these were advance payments made to her in view of the fact that the Respondent would shortly be leaving for the United Kingdom where the Respondent used to spend four (4) months of the year commencing from the Christmas period. This is not surprising if one has regard to the letter dated 15 July 1991, annexed as annexure "B" to the Applicant's founding affidavit under case no: 16468/92, High Court, Cape Town and addressed to the Applicant by the Respondent's attorneys of record wherein it appears that the Respondent had in the past advanced to the Applicant an amount of approximately R 20 000.00 over and above the maintenance amount then payable by the Respondent. The Applicant further denies that it was communicated to her that the cheques were given to her in full and final settlement of whatever claims she may have had against the Respondent arising from the arrear maintenance. The Respondent states in his Answering Affidavit that during 1996 the Applicant instituted criminal proceedings for contempt of court but that the Attorney-General declined to prosecute. The Applicant denies this averment in her Replying Affidavit. If this averment by of the Respondent were to be accepted as true, same would fly in the face of the alleged compromise agreement concluded during early December 1995, hardly a period of a year having elapsed from the time the alleged conclusion of the agreement of compromise was concluded and the time the alleged criminal contempt proceedings would have been instituted.

[18] There obviously is a dispute surrounding the alleged conclusion of the agreement of compromise. However, I am of the view the dispute of fact raised by the Respondent does not amount to a real or genuine dispute of fact as to render this issue incapable of determination without resort to oral evidence. More so, in my view, the probabilities outweigh any probable conclusion of the alleged compromise agreement due regard had to the absence of any reference to such an agreement in the Respondent's attorneys' correspondence to the Maintenance Court, Bellville

dated 20 December 1995; absence of reference to the alleged compromise agreement in the Chamber Book Application of 8 December 2000; the eliciting from the Applicant of information per a letter by the Respondent's attorneys of record dated 18 April 2000 which information would be irrelevant if the compromise agreement was indeed concluded and the institution of the criminal contempt proceedings hardly a period of a year having elapsed from the time the compromise agreement was allegedly concluded.
Accordingly I find it highly improbable that a compromise agreement was concluded as alleged by the Respondent or at all. More so, I am finding it highly improbable that the Applicant would agree to a waiver of benefits of a substantially high value in the form of provision of accommodation, payment of rentals, replacement of household furniture and effects and the provision of a motor vehicle for a mere payment of an amount of R 17 000.00 even if monthly payments in respect of maintenance would be increased to the amount the Respondent had consented to pay.

**THE SUBSTITUTION DEFENCE**

[19] I have already made the point that the Respondent's maintenance obligations in terms of the Consent Paper to which reference is made in paragraph 4 of this judgment are two fold, namely those obligations which require the Respondent to make payment of money such as is envisaged in terms of clauses 2(a) and (b) of the Consent Paper and those obligations which require the Respondent to perform an act such as those obligations envisaged in terms of clause 2(e), the provision of accommodation, clause 2(f) the provision of a motor vehicle and clause 3(b) which deals with the replacement of household furniture and effects. Except for the Respondent's obligations in terms of clauses 2(g) and 3(a) the rest of the clauses fall within the maintenance regime.

[20] In this application the Applicant relies upon the provision of clauses 2(b), 2(e) and 2(f) and to clause 3(b) of the Consent Paper. The Respondent, on the other hand, contends that the Applicant cannot, in her proposed relief, place reliance on any of the provisions of the Consent Paper as the Bellville Magistrate's order of 28 December 1995 replaced the entire maintenance order granted by the Supreme Court on 17 March 1980. It is further the Respondent's contention that the provisions of section 5(4)(b) of the then applicable Maintenance Act, No 23 of 1963

in terms whereof the Magistrate made the order dated 28 December 1995, contemplates the substitution of the entire maintenance provisions of the High Court Order dated 17 March 1980 and not mere variation of certain individual maintenance provisions of that order as the Applicant seeks to contend, relying heavily in this regard on *Purnell v Purnell 1993(2) SA 662(A)* at *667I-668A.* The Respondent contends further that, in as much as the parties had reached a compromise agreement, the provisions of the original Consent Paper relating to the maintenance payable by him were compromised and that the Applicant cannot rely thereon to advance her claim. I have already made a determination as regards the conclusion or otherwise of the compromise agreement in paragraph 18 of this judgment and my comments as regards whether or not the alleged compromise agreement was concluded will not be repeated here.

[21] In order to make a proper determination of the issue as to whether or not the Maintenance Order of 28 December 1995 issued by the Magistrate Bellville substituted the whole of the maintenance provisions of the High Court Order of 17 March 1980, the Respondent's obligations in terms of the Consent Paper incorporated in such Order require a close scrutiny.

[22] It is worth repeating that the Respondent's obligations for the maintenance of Applicant, excluding the maintenance of the minor children, all of whom have since attained the age of majority, are contained in clauses 2(b), 2(e), 2(f) and 3(b) of the Consent Paper. The Respondent's obligations in terms of clause 2(b) constitute an order *ad pecuniam solvendam* whereas the Respondent's maintenance obligations in terms of the rest of the Consent Paper, that is paragraphs 2(e) – provision of accommodation, 2(f) – provision of a motor vehicle, and 3(b) – replacement of household furniture and effects, constitute an order *ad factum praestandum*. There is *consensus* between the parties that the Maintenance Court is competent to enforce both the orders *ad pecuniam solvendam* and orders *ad factum praestandum*. It is the Respondent's contention that the Maintenance order of 28 December 1995 issued by the Magistrate Bellville substituted both the Respondent's obligations *ad pecuniam solvendam* and *ad factum praestandum*. The Applicant's contention, on the other hand, is that the Magistrate's order did not extend beyond the Respondent's obligations in terms of clauses 2(a) and (b) of the Consent Paper and thus does not reach the Respondent's obligations *ad factum praestandum*.

[23] As has already been pointed out elsewhere in this judgment, during 1995 the Applicant made an application to the Maintenance Court, Bellville for an increase in the amount of maintenance payable in respect of herself and the remaining minor child, T., who had not yet attained the age of majority at that stage. In that application the Respondent consented to an increase in maintenance in respect of the Applicant herself and the minor child in an amount of R 1 500.00 each per month with effect from 31 January 1996. This increase clearly related to the Respondent's obligation *ad pecuniam solvendam*. There is no specific reference at all to the Respondent's obligation *ad factum praestandum* contained in the Consent Paper other than a reference, in paragraph (d) of the Consent form signed by both the

Applicant and the Respondent that "the maintenance order dated 17 March 1980 made by the Supreme Court (CPD) – Case No: 1991/80 be substituted by the aforegoing order". It is on basis of this order by the Magistrate Bellville that the Respondent contends that not only his obligation in terms of paragraph 2(b) of the Consent Paper were substituted but that his entire obligations, including his obligations a*d factum praestandum* were substituted and that, in view thereof, the Applicant's claims are without foundation, relying on such decisions as Pu*rnell v Purnell* supra, amongst others.

[24] The decision in *Purnell* was considered by Comrie J in *Cohen v Cohen 2002(2) SA 571(C)* at *576H – 578A.* In *Purnell* the Consent Paper, amongst others, provided for maintenance payable to the wife for a defined period of two years, it having been within the parties' contemplation that the husband's maintenance obligation would cease after the expiration of a period of two years. The maintenance amount was subsequently varied by the Maintenance Court. A subsequent application by the wife to the Witwatersrand Local Division for a declaration that maintenance would be payable indefinitely was upheld on the basis that the subsequent order by the Maintenance Court replaced/substituted the entire order initially granted by the Witwatersrand Local Division and declared that maintenance payable to the wife was of indefinite duration. The order of the Witwatersrand Local Division was confirmed by the then Appellate Division in a subsequent appeal.

[25] On the strength of *Purnell* and other subsequent decisions, Comrie J held in *Cohen* supra that the subsequent variation by the Maintenance Court of the maintenance order of the High Court meant the variation of the whole of the relevant clause in which the Plaintiff's maintenance obligation to the Defendant had initially been defined. However, the Supreme Court of Appeal, in an appeal against the decision of Comrie J, held a different view, holding that the existing 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. The Appeal Court thus held that the order of the Maintenance Court varying the amount payable does not affect the other parts of the Consent Paper which do not deal with the amount of maintenance payable. (see *Cohen v Cohen 2003(3) SA 337 (SCA)* at *343H* para 17)

[26] In the matter in point the Applicant applied for the variation of an amount payable in respect of maintenance for herself and that of the minor child. The Respondent consented to an increase to the amount of R 1 500.00 per month in respect of the Applicant herself and to a further amount of R 1 500.00 in respect of the minor child. There is no reference at all in the consent form signed by the Respondent to those aspects of the Consent Paper dealing with the Respondent's maintenance obligations *ad factum praestandum*. The Respondent signed the consent to maintenance on 15 December 1995. The consent was made an order of Court by the Maintenance Court on 28 December 1995. This consent was forwarded to the Maintenance Court by the Respondent's attorneys under cover of their letter dated 20 December 1995. The consent was made an order of Court by

the Maintenance Court on 28 December 1995. Since neither of the parties were present when the order was made, it is safe to assume that such order was made by the Magistrate in Chambers. Paragraph (d) of the consent refers to the substitution of the maintenance order dated 17 March 1980 made by the High Court, CPD which was to be substituted by the Maintenance Court order of 28 December 1995. There is no reference in this order to the Respondent's obligation to perform an act. Based on the reasoning and the principle as applied by the Supreme Court of Appeal in *Cohen* supra, I cannot find that the order issued by the Maintenance Court, Bellville either expressly or by necessary implication, was intended to substitute the entire order granted by the Supreme Court on 17 March 1980.

**RELIEF FOR COMMITTAL FOR CONTEMPT**

[27] The Respondent resists the Applicant's claim for an order for contempt of court on the basis of the alleged agreement of compromise and, further, on the basis that the order of 28 December 1995 issued by the Maintenance Court, Bellville substituted the High Court order of 17 March 1980 in its entirety, and that the substitution was not limited to the Respondent's obligations *ad pecuniam solvendam* but that such substitution extended to the Respondent's obligations *ad factum praestandum*. I have already found against the Respondent in both these issues so that the question I have to determine is whether the finding against the Respondent on the issues of compromise and substitution *ipso facto* justifies the conclusion that the Respondent is guilty of contempt of court.

[28] As correctly pointed out by *Mr Seale* in his submissions and argument the *onus* of proof that the Respondent is in contempt rests with the Applicant. In order to discharge this *onus* the Applicant must show:

a) that an order was granted against the Respondent;

b) that the Respondent is aware of the existence of the order; and

c) that the Respondent has either disobeyed the order or neglected to comply with it. (See *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa (now the High Court and the Supreme Court of*

*Appeal) 4th Edition 825; Consolidated Fish Distributors (PTY) Ltd v Zive and Others 1968(2) SA 517(C)* at *522)*

As further correctly pointed by *Mr Seale,* even if the Applicant succeeds in discharging the *onus* resting on her the Respondent may, by way of evidence, rebut the inference that he has intentionally disobeyed the Court's order (See further *Herbstein and Van Winsen* supra at 826 and other authorities cited at footnote 106)

[29] As to requirements (a) and (b), there is no dispute that the High Court granted an Order on 17 March 1980 and that the Respondent has all along been aware of the terms thereof. There is further no dispute as regards the discharge by the Respondent of its obligations *ad pecuniam solvendam* the Applicant acknowledging in her papers that the Respondent consistently discharged his obligations in this regard. The only issue in dispute is whether, over and above his obligations *ad pecuniam solvendam*, the respondent also discharged his obligations *ad factum praestandum*. I shall deal with this issue in turn.

[30] On 7 December 1992 the Applicant instituted proceedings on notice of motion against the Respondent under case no: 16468/92 for an order for committal of the Respondent to prison/goal on the basis that the Respondent failed or refused to pay increased rentals in respect of the premises occupied by the Applicant; that the Respondent refused or failed to replace the Applicant's household furniture and effects and also to provide the Applicant with the replacement motor vehicle.

[31] The Respondent opposed the aforementioned proceedings on the basis that, amongst other things, the Applicant and the Respondent had concluded a revised agreement in terms of which the Respondent paid to the Applicant an overall figure in respect of maintenance and that, in turn, the Respondent would be released from his obligation as regards payment of rentals and the provision of furniture. In paragraph 25 of her founding affidavit in the aforementioned proceedings the Applicant refers to a number of items which then required to be replaced, including a

Mazda 323 motor vehicle which, at the time she deposed her affidavit, was 5 years old and had covered approximately 100,000 km. In his answering affidavit the Respondent did not respond to the allegation relating to replacement of the motor vehicle.

[32] The Respondent states as follows in paragraph 25(a) of his affidavit deposed to on 4 January 1993:

> "a) I acknowledge that if I am furnished with details of the furniture requiring replacement I will, to the extent that I am legally obliged to do so, replace same. I stress however that Applicant when agreeing to accept an overall figure in respect of maintenance in the sum at present being paid, released me from any further obligation in this regard." (The emphasis is mine)

Further, the Respondent states as follows in paragraph 14 of his affidavit in answer to a claim in respect of rentals:

> "To the best of my knowledge and belief I have not paid rental to Applicant's father as alleged in that, in terms of the revised agreement between the Applicant and myself there was no obligation on me to do so."

[33] However, the position adopted by the Applicant in these proceedings is a complete change of front. The Respondent does not now base his denial of his obligations to the revised agreement he alleges he had concluded with the Applicant but on a compromise agreement he alleges he had concluded with the Applicant during December 1995 and also on the basis of all his obligations in terms of the Consent Paper having been substituted by the maintenance order of the Magistrate, Bellville dated 28 December 1995. It is difficult to comprehend why it would have been necessary to conclude an agreement of compromise if there already was in existence a revised agreement in terms of which the Respondent was released from his obligations. In my view, the allegation of the conclusion of a compromise agreement is a clear manifestation of the continuation of a trend on the part of the Respondent to evade his maintenance obligation. I accordingly find that the Respondent failed to discharge his maintenance obligation by failing to provide the Applicant with accommodation, failing to adequately assist the Applicant with rental payments and to provide the Applicant with a motor vehicle.

[34] This finding justifies an inference that the Respondent was not *bona fide* in his dealings with the Applicant when it comes to discharge of his obligations to provide Applicant with accommodation, assistance in rental payments, the

replacement of household furniture and effects and the provision of a motor vehicle, that the Respondent disobeyed aspects of the High Court Order granted on 17 March 1980 and that such disobedience is due to wilfulness on the part of the Respondent. What now remains to be determined is whether there is merit in the Respondent's contention that these proceedings be stayed until such time the Applicant pays the Respondent's taxed legal bills totalling an amount of R 22,135.65. To this issue I now turn.

**STAY OF THE PROCEEDINGS**

[35] It may well be so that the Applicant is indebted to the Respondent in respect of the Respondent's taxed legal bills. However, the Respondent does not appear to be without a remedy short of depriving the Applicant of her right to have her dispute settled before a court of law. There are more than sufficient mechanisms available to the Respondent to enforce his claim against the Applicant. This could be by way of a Writ of Execution against the property of the Applicant or to initiate proceedings to have the Applicant's financial position enquired into without a view to a possible order for periodical payments to liquidate her indebtedness in favour of the Respondent in the event of the Applicant not being possessed of property on which to levy execution.

[36] To deprive the Applicant of her right of access to a court of law in the circumstances of this particular matter is not the best course to follow. This right is fundamental to a viable and dynamic legal system having as its principal feature justiciable human rights. (See *D E Devenish: A Commentary on the South African Human Rights Butterworths 486)*
I am accordingly exercising my discretion in regard to this issue in favour of the Applicant. An order for a stay of these proceedings will not be in the interest of justice.

[37] Having thus determined all the issues referred to in paragraph 11 of this judgment in favour of the Applicant, it follows therefore that the Applicant is entitled to the relief claimed in terms of the Notice of Motion.

[38] It is accordingly ordered as follows, namely:

[38.1] The Orders by the Maintenance Court, Bellville granted on 28 December 1995 and 3 October 2000 substituted the Respondent's obligations in terms of clauses 2(a) and 2(b) only of the Consent Paper incorporated in the Decree of Divorce granted by this Court on 17 March 1980 under case no: I991/1980

[38.2] The Respondent is in contempt of the Order of this Court granted on 17 March 1980 under case no: I991/1980 in so far as his obligations in terms of clauses 2(e), 2(f) and 3(b) of the Consent Paper incorporated in the aforementioned Order are concerned.

[38.3] Arising from such contempt the Respondent is committed to Goodwood Prison to serve imprisonment for a period of one hundred and eighty (180) days.

[38.4] The Order in terms of paragraph [38.3] hereof is suspended on the following conditions:

[38.4.1] Within fourteen (14) days of the granting of this Order the Respondent is ordered to provide Applicant with accommodation as is envisaged in clause 2(e) of the Consent Paper incorporated in the Court Order aforesaid.

[38.4.2] Within fourteen (14) days of the granting of this Order the Respondent is ordered to provide the Applicant with a motor vehicle as is envisaged in clause 2(f) of the Consent Paper incorporated in the Court Order aforesaid.

[38.4.3] Within fourteen (14) days of the granting of this Order the Respondent is ordered to replace all of Applicant's household furniture and effects as is currently unserviceable and/or reasonably require replacement at the Respondent's costs and expenses.

[38.5] The Respondent is ordered to pay the costs of these proceedings.

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**N J Yekiso, J**