Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 6566/06

Before: The Hon Mr Justice Binns-Ward

In the matter between:

PETER JOHN TURTON **Applicant**

and

LORRAINE JANET TURTON **1st Respondent**
SHERIFF OF THE HIGH COURT, STRAND **2nd Respondent**

JUDGMENT DELIVERED: 2 FEBRUARY 2012

BINNS-WARD, J:

1] The marriage between the applicant and the first respondent was dissolved in terms of an order made by this court on 20 August 2008. The order incorporated the provisions of a 'consent paper' entered into between the parties. In terms of clause 3 of the consent paper the applicant was bound to pay R12 000 per month to the respondent in respect of personal maintenance from 1 September 2008. The consent paper provided for the annual

escalation of this maintenance obligation to accommodate the eroding effect of monetary inflation. It also provided that in the event of the first respondent being paid the sum of at least R3,5 million out of the proceeds of a fixed property registered in the name of the applicant, which was to be put into the market, the applicant's aforementioned maintenance obligation would thereupon fall away. These provisions constituted a '*maintenance order*', as defined in s 1 of the Maintenance Act 99 of 1998.[1]

2] The applicant fell into arrears with the payment of the maintenance. He then applied to the maintenance court for a reduction in the amount of his monthly maintenance obligation. The proceedings in the maintenance court culminated in an order being taken by agreement between the parties on 23 April 2010. According to its tenor, that order directed the applicant to pay personal maintenance to the first respondent with effect from 1 May 2010 in the amount of R8 000 per month, with an additional amount of R2000 per month to be paid in respect of the months of May and June 2010.

3] The arrears which had built up in respect of the applicant's obligation in terms of the high court order remained unpaid. The first respondent obtained the issuance by the registrar of the court of a writ of execution in respect of the unpaid arrears. The execution of the writ resulted in the attachment of some debentures owned by the applicant. The effect of the writ was subsequently suspended pending the determination of the current application.

---

1 Section 1(1) provides: '*In this Act, unless the context indicates otherwise - **'maintenance order'** means any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person;*'.

4] The order made by the maintenance court was made in terms of s 16(1)(b) of the Maintenance Act, which provides:

> (b) After consideration of the evidence adduced at the enquiry, the maintenance court may –
>
> in the case where a maintenance order is in force –
>
> i) make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order; or
>
> ii) discharge such maintenance order; or
>
> c) ….

Section 16(1)(b) falls to be read with s 22 of the Act, which provides:

> Whenever a maintenance court –
>
> a) makes an order under section 16(1)(b) in substitution of a maintenance order; or
>
> b) discharges a maintenance order under section 16(1)(b),
>
> the maintenance order shall cease to be of force and effect, and the maintenance officer shall forthwith give notice of the decision to the registrar or clerk of the court in the Republic where the maintenance order was issued or where the sentence concerned was imposed, as the case may be, who shall deal with the relevant records in the prescribed manner.[2]

5] In these proceedings the applicant seeks an order setting aside the writ of execution. The grounds upon which he contends for this relief are that the relevant provisions of the high court order ceased to be of force or effect upon the making of the substituting order of the maintenance court, and that the terms of the maintenance court order in any event reflected an agreement of

2 The registrar of this court became obliged, upon receipt of notice of the substituting order, to act in terms of regulation 13 of the Regulations Relating to Maintenance (GNR 1361, dated 15 November 1999, published in GG 20627). That entailed filing a copy of the substituting order with the original record applicable to the case in this court and recording the particulars of the new order on the order which is being substituted.

compromise reached between himself and the first respondent in respect of any unfulfilled maintenance obligations under the high court order.

[6] In support of the first of the aforementioned grounds the applicant relied on the effect of s 16(1)(b) read with s 22 of the Maintenance Act, as well as the interpretation by the Appellate Division, in *Purnell v Purnell* 1993 (2) SA 662 (A), of the essentially identical equivalent provisions of the 1963 Maintenance Act[3].

[7] In *Purnell*, a maintenance order had been made in the high court when the parties had been divorced. Sometime later, the maintenance regime instituted in terms of the high court order was substituted by an order made in the maintenance court. Thereafter one of the parties applied for a variation of the maintenance regime. That application was brought in the high court by way of an application for a variation of the originally made high court order. Conformably with the language of the Maintenance Act, the Appellate Division held that the high court order had ceased to exist,[4] having been substituted by the maintenance court order, and that therefore, being non-existent, it was not amenable to variation by the high court.

[8] The judgment in *Purnell* did not deal at all with the question that presents in the current case. The question in this case is whether an order made by the maintenance court in substitution for a pre-existing order *ipso facto* extinguishes the maintenance receiver's right to enforce payment of periodic

3 Sections 5(4)(b) and 6 of the Maintenance Act 23 of 1963. Act 23 of 1963 was repealed in terms of s 45 of the 1998 Maintenance Act.
4 As Kriegler AJA stated '*the order of Court at which…the notice of motion was directed…was a dead letter*'.

payments that have accrued under the pre-existing order prior to its substitution by a new order made in terms of s 16(1)(b) of the Maintenance Act.

[9] By stating that when a maintenance court makes an order in substitution for an existing order the latter '*shall cease to be of force and effect*', s 22 of the Maintenance Act does not denote that the existing order shall be deemed never to have existed. On the contrary, the language bears the plain meaning that the existing order shall cease to be of force or effect from the moment it is substituted, in other words *ex nunc*. The substitution effected by the maintenance court order occurs when the order is made, and according to its tenor. Thus, unless, and only to the extent that the substituting order is expressed to have retrospective effect, it operates prospectively and does not derogate from the fact of the existence of the prior order, nor from any of the rights of the beneficiary of the pre-existing order which had already fully accrued. In my view, the position where a substituting order is made without expressly retrospective effect is analogous to that which ordinarily obtains when an executory contract is cancelled: The contract ceases to be of force or effect from the moment of its termination, but rights which had accrued to the contracting parties and were due and enforceable by them before the contract was ended are not extinguished with the contract. The accrued rights may still be enforced despite the fact that the contract has subsequently become a dead letter – see *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) at 870G - H.

[10] The firmly entrenched approach of our courts is to presume that if the

legislature intended by any statutory provision to encroach on vested or existing rights it would do so '*plainly, if not in express words, at least by clear implication and beyond reasonable doubt*'.[5] I find no language in the Maintenance Act which would justify its construction so as to clearly imply an intention that a substitution order made in terms of s 16 of the Act would *ipso facto*, and irrespective of its terms, expunge a maintenance beneficiary's rights in respect of the enforcement of payment of arrear maintenance under the preceding order if such rights had vested and been enforceable before the making of the substitution order. (As discussed later in this judgment, the Act contains other provisions directed at ameliorating the position of a maintenance debtor upon whom the enforcement of a maintenance order might bear too harshly.)

[11] The Maintenance Act expressly deals with the recovery of arrear maintenance by civil execution; see chap. 5 of the Act. The measures provided in this regard include obtaining a writ of execution, a garnishee order, or an emoluments attachment order from the maintenance court. The relevant provisions also allow for an application by the maintenance debtor to the maintenance court for ameliorating relief should the enforcement remedy chosen by the maintenance creditor be alleged to bear too heavily in the circumstances. The maintenance court may grant such relief after an enquiry into various matters, including the existing and prospective means of the maintenance debtor and the needs and obligations of the maintenance creditor. Broadly similar provisions existed under the 1963 Maintenance Act,

5 *Mhlongo v MacDonald* 1940 AD 299 at 310. See also e.g. *Millman NO v Twiggs* 1995 (3) SA 674 (A) at 679B and *Land- en Landboubank van SA v Cogmanskloof* Besproeiingsraad 1992 (1) SA 217 (A) at 230E-F and 236B-C.

although, significantly, those were limited in that statute to proceedings ancillary to criminal proceedings against the maintenance debtor in the manner now provided in terms of chap 7 of the 1998 Act. While it was apparently more common under the 1963 Act for maintenance creditors to enforce payment of unpaid arrears under high court maintenance orders using the criminal enforcement mechanisms under the statute,[6] there was nothing exceptionable about the enforcement of such orders by civil writ of execution.[7]

12] In *Thomson v Thomson* 2010 (3) SA 211 (W) a full bench of the Witwatersrand Local Division held that the 1998 Maintenance Act did not preclude a party from issuing a writ of execution out of the high court to enforce payment of arrear maintenance.[8] The authority for that proposition cited by the court was the full bench judgment in *Butchart*.[9] But *Butchart* concerned a matter disposed of in terms of the 1963 Act. Furthermore, the judgment in *Thomson* was handed down in July 2003, before the amendment of s 26(1)(a) of the Maintenance Act in the manner described below. It therefore has to be considered whether s 26(1) in its current form has changed matters.

13] Section 26(1) of the Maintenance Act, 1998, provides:

(1) Whenever any person-

(a) against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or

6 HR Hahlo *The South African Law of Husband and Wife* 5ed (Juta, 1985) at 369-370.
7 See *Du Preez v Du Preez* 1977 (2) SA 400 (C) and *Butchart v Butchart* 1996 (2) SA 581 (W) at 583D and on appeal to a full bench, at 1997 (4) SA 108 (W).
8 At para 20.
9 See fn. 7.

[Para. (a) substituted by s. 18(a) of Act 55 of 2003.]

(b) against whom any order for the payment of a specified sum of money has been made under section 16(1)(a)(ii), 20 or 21(4) has failed to make such a payment,

such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon-

(i) by execution against property as contemplated in section 27;

(ii) by the attachment of emoluments as contemplated in section 28; or

(iii) by the attachment of any debt as contemplated in section 30.

The term '*maintenance order*' is specially defined in s 1(1) of the Act.[10] It is clear that it includes an order for the payment of maintenance '*issued by any court in the Republic*'; and thus plainly includes a maintenance order (within the ambit of the term as defined) made by a high court.[11] Prior to its amendment, in terms of s 18(a) of the Judicial Matters Second Amendment Act 55 of 2003, s 26(1) had read in relevant part '*against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order*' (emphasis supplied). The amendment was effective from 31 March 2005. The evident intention of the amendment was to bring maintenance orders made by the high courts within the embrace of s 26; as prior to its amendment, the provision had pertained only to maintenance orders made by the maintenance courts.[12]

[14] Section 26(2), read with s 27, of the Maintenance Act provides that any person in whose favour a maintenance order is operative may apply to the

10 See fn 1.
11 In terms of s 1(1) of the Act '*court in the Republic*' is expressly defined to include '*a High Court*'.
12 This is borne out in the memorandum accompanying the Bill (Bill B41-2003) in terms of which the amendment to s 26(1) of the Maintenance Act was proposed. It stated in the relevant part (para 2.10) '*Section 26 of the Maintenance Act, 1998, provides, among other things, for circumstances where a person against whom a maintenance order has been granted fails to make a particular payment in accordance with that maintenance order, that such order would be enforceable in respect of the arrear amount by execution. The amendments are necessary to ensure that these provisions are also applicable in respect of maintenance orders made by the High Courts and the Divorce Courts*'.

maintenance court for the issue of a writ of execution if the maintenance payable under the order is in arrears by more than ten days. The provision affords any person against whom a writ of execution is issued the right to apply for the holding of an enquiry. Pursuant to such an enquiry, the maintenance court may suspend the writ and make an attachment of emoluments order in terms of s 28 of the Act, or a debt attachment order in terms of s 30. An attachment of emoluments or debt order may also be rescinded, suspended or amended by the maintenance court, on application.

[15] In *Thomson* supra loc cit, the court remarked that in proceedings instituted in the high court for a suspension of a writ of execution on a maintenance order because of an alleged inability by the judgment debtor to pay the maintenance it would be appropriate to transfer the proceedings to the maintenance court to be dealt with there under the relevant provisions of chap 5 of the Maintenance Act. However, absent consent thereto by the parties, I do not know, and the judgment does not inform, how such a transfer could competently be effected.[13] In any event, at the time judgment in

13 In supplementary written argument submitted at my request after the hearing, the applicant's counsel submitted that the court in *Thomson* in referring a maintenance issue before it to the maintenance court was acting within its 'inherent jurisdiction. No authority was cited in support of this proposition. I am unaware of the existence of an inherent jurisdiction in the high courts to transfer proceedings competently instituted before them to other jurisdictions. It seems to me that the courts' jurisdiction in this respect is limited to that provided in terms of s 9 of the Supreme Court Act 59 of 1959, s 3 of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001 and rule 39(22) of the Uniform Rules of Court. Cf. *Road Accident Fund v Rampukar; Road Accident Fund v Gumede* 2008 (2) SA 534 (SCA). (The inherent power of a high court to transfer a case from the principal seat of the court to a circuit session of the court, or *vice versa*, is distinguishable, being essentially a regulation by the court of its own processes and procedures.) I am, with respect, unpersuaded by the reasoning to the contrary in *Veto v Ibhayi City Council* 1990 (4) SA 93 (SECLD). In this regard it is perhaps of significance that when Heher JA recently made reference to a high court's power, in the exercise of its discretion, to refer a matter brought before it to another court for hearing because the matter might more conveniently or appropriately be heard elsewhere, the learned judge of appeal supported his observation with a reference to Act 41 of 2001, as distinct from any inherent jurisdiction (see *Els v Weideman* 2011 (2) SA 126 (SCA) at para 34). The magistrates' courts are creatures of statute, and proceedings in those courts fall to be instituted and prosecuted in accordance with the relevant statutory provisions. The same considerations apply to proceedings in the maintenance courts. A high court has no jurisdiction, outside the applicable statutory frameworks, in proceedings

Thomson was handed down, the provisions of chap 5 of the Maintenance Act were applicable only respect of orders made by the maintenance court. They were of no effect in respect of maintenance orders made in a high court. The remark thus seems to have been uttered *per incuriam*.

[16] Prior to the amendment of the provision, at a time when chap 5 related only to the civil enforcement of orders made by the maintenance court, s 26(1) of the Act provided the only purely civil means of enforcing payment of a maintenance obligation arising from a maintenance order made by a maintenance court. Under the preceding 1963 Maintenance Act execution of an order for maintenance made by the maintenance court could be obtained only under an order made ancillary to the criminal conviction of the person responsible for the non-payment under s 11 of that Act. Thus situations could arise in which a defaulter escaped conviction through lack of proof beyond reasonable doubt by the state of criminal intent (*mens rea*) and, despite remaining in arrears in respect of periodic payment obligations imposed in terms of a maintenance court order, was, by reason of the acquittal, not susceptible to having a writ issued for the attachment and sale of his or her property in execution of the unfulfilled obligations under the order. The unsatisfactory nature of this state of affairs was highlighted by the South African Law Commission (as it was then called) in an issue paper on the review of the maintenance system.[14] The provisions of chap 5 of the 1998 Maintenance Act reflect the remedial measures suggested in the issue

instituted before it to cause those proceedings to continue in another court. Subject to the applicable statutory provisions, it is for a claimant to determine in which court of competent jurisdiction to institute and prosecute proceedings.

14 South African Law Commission Issue Paper No. 5 'Review of the Maintenance System' (1997).

paper.[15]

[17] When it was originally enacted, s 26(1) of the Maintenance Act was an enabling provision. It enabled the civil enforcement of a maintenance order made in the maintenance court. The remedies and procedures provided for civil enforcement in terms of chap 5 of the Act were the only remedies available. The question that arises is what was the legislature's intention when it amended s 26(1) to make high court maintenance orders susceptible to chap 5? High court maintenance orders had always been civilly enforceable by writ of execution, and thus the necessity for them to be brought within the embrace of chap 5 of the Act did not exist.

[18] The carrying out of any of the civil remedies under the Act is subject to the protections afforded to the maintenance debtor under s 27(3)-(6), s 28(2) and s 30(2) of the Act. These matters do not coincide exactly with the remedies and procedures that would be applicable in terms of the processes of the high court. There is no 10 day moratorium in favour of the maintenance debtor in terms of the high court enforcement procedures. Another difference is that while a high court has the power to suspend the execution of its orders, and whereas the Uniform Rules make provision for garnishee attachments, it is generally believed that the court does not have the jurisdiction to make order for the attachment of future salary or wages (an emoluments attachment order).[16] Furthermore, the nature of the enquiry provided in terms of s 27(3)

15 The investigation by the South African Law Commission (Project 100) is referred to in the preamble of the 1998 Maintenance Act.

16 See e.g. *Van der Merwe v Uys* 1957 (4) SA 574 (T); *Gouws v Theologo and Another* 1980 (2) SA 304 (W) and *Pienaar v Pienaar en Andere* 2000 (1) SA 231 (O). Uniform Rule 45(12)(j) and (k) used to provide for the attachment of future emoluments, but those provisions were repealed (possibly because of a realisation that it was beyond the powers of the Rules Board to purport to amend the

and (4) of the Maintenance Act is *sui generis* and certainly would not be available to a debtor in the position of the applicant in the current case under the high courts' processes. It essentially creates an opportunity to have the question of not only the means of the debtor to pay investigated, but also to have his or her liability to do so revisited.

[19] It is unlikely to have been the legislature's intention that there should be two different systems of civil enforcement of high court maintenance orders in existence parallel to each other; the one with a 10-day moratorium on enforcement, the other having no such moratorium; the one providing for a statutory procedure to convert the enforcement process into an enquiry; the other attended by no statutory restraints. An ability by a maintenance creditor to choose between such alternative enforcement processes, if the choice were available, would introduce an arbitrariness in respect of the consequences for the debtor that would be difficult to reconcile with rationality and equality before the law. Moreover, having regard to the expressed intention of the Act, being the creation of a fair and equitable maintenance system under the framework of the statute,[17] the achievement of that objective would not be assisted if s 26(1) were read as merely permissive or enabling in nature, and as allowing for disparate but parallel means of enforcement of high court maintenance orders – the one under the Act, and the other outside it.

[20] Counsel for both the applicant and the first respondent argued the case

law).

17 See the preamble and s 2 of the Maintenance Act.

assuming the competence of enforcing a high court maintenance order by writ of execution issued by the registrar. The effect of the provisions of the Maintenance Act just discussed, and more particularly the amendment effected to s 26(1), received no attention in their arguments. It was only during my preparation of judgment in the matter that I became astute to the consideration and invited counsel to address me on it. It seemed to me that as the enforceability of a writ of execution issued by the registrar of this court to enforce a maintenance order is the question at the heart of the matter I was duty bound to determine it with reference to the applicable law irrespective of the fact that the legal point that presented itself to me had not been identified as an issue by counsel or the parties; cf. *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para. 68 and some of the authority cited in fn. 40 to the judgment of Ngcobo J (as he then was). By agreement between the parties the additional argument was limited to written supplementary submissions.

21] Both counsel contended that the amendment to s 26(1) of the Maintenance Act did not affect the competence of enforcing a maintenance order made in the high court in the traditional way, by means of obtaining the attachment and sale of the maintenance debtor's property consequent upon the issuance by the registrar of the high court of a writ of execution. In this connection the first respondent's counsel, supported on this point by the applicant's counsel, approached the question on the basis that a construction of s 26(1) to mean that the provision comprehensively and exclusively regulated the civil enforcement of maintenance orders would amount to an ouster of the high

courts' jurisdiction. Relying on *Lenz Township Company (Pty) Ltd vs Lorentz N.O. En Andere* 1961 (2) SA 450 (A) at 455B; and *Minister of Law and Order and Others vs Hurley and Another* 1986 (3) SA 568 (A) at 584A – B, counsel submitted that there was a presumption, in the absence of an express provision or a necessary implication to the contrary in the instrument in issue, against a legislative intent to oust or curtail a court's powers. Both those cases, however, are quite distinguishable. They both involved questions in which it was contended that the statutory provisions in issue precluded the court from determining a substantive question. The arguments advanced and rejected in both cases were to the effect that the statutory provisions in question rendered the issues entirely non-justiciable. As counsel themselves recognised, in the modern constitutional era any such contention would, quite apart from the principles applied by the Appellate Division in a number of matters including those relied on by counsel in this case, have to overcome the hurdle of inconsistency with s 34 of the Constitution to hold muster.

22]Section 26(1) of the Maintenance Act does not render any question of maintenance non-justiciable. On the contrary, it proceeds on the assumption that maintenance orders can be made by the high courts, the divorce courts and the maintenance courts. It does not derogate from the existing authority of any court to make a maintenance order. It merely provides for a unified system of civil enforcement of such orders. In that sense the provision can be seen to be legislation of the character contemplated by s 165(4) and s 171 of the Constitution; that is legislation assisting the accessibility and effectiveness of the courts and providing for their functions and procedures. The fact that

the system provided involves a different administrative process from that which would ordinarily apply in respect of the enforcement of high court orders does not appear to me to entail a derogation from, or ouster, of the high court's jurisdiction. And the fact that the system provided permits the possible suspension or variation of a high court order, if appropriate, by a maintenance court seems to me to be indistinguishable in principle and substance to the long entrenched powers in that regard provided to the maintenance courts in terms of s 16 of the Act and the preceding like provisions in the 1963 statute. The authority relied upon by counsel for this part of their argument in any event does not detract from the fundamental premise that, subject only to constitutional compatibility, effect must be given to the evident intention of the legislature as derived from the language employed by it.

23]The other argument was that to construe s 26(1) of the Maintenance Act as providing that high court maintenance orders are to be enforced exclusively under the provisions of chap 5 would lead to '*impractical, undesirable and chaotic consequences*'. The only example offered by counsel of such unwholesome consequences pertained to the enforcement of orders made by a high court under rule 43 of the Uniform Rules of Court. Rule 43 is a procedural provision. It regulates the procedure to be followed in applications of an interim nature in matrimonial matters.[18] Relief obtained under the procedure is not final in nature and is directed at a regulation of the relevant issues, including maintenance, only pending the determination of the principal matrimonial case. Section 20(7) of the Supreme Court Act 59 of 1959 precludes any appeal from an order of the high court given in terms of

18 See Farlam et al *Erasmus, Superior Court Practice* at B1-312 [Service 37, 2011].

rule 43. In *De Witt v De Witt* 1995 (3) SA 700 (T), it was held that a maintenance order made in terms of rule 43 was amenable to replacement, upliftment or suspension by the maintenance court in terms of the provisions of the 1963 Maintenance Act, despite the anomalous consequences of such a reading of the statute in the face of the provisions of s 20(7) of the Supreme Court Act. The basis for the court's conclusion appears to have been that there was no warrant for reading in the word '*final*' before the word 'order' in the definition of '*maintenance order*'. A two-judge bench of the Transvaal Provincial Division subsequently held that this conclusion could not be faulted: see *Thompson v Thompson* 1998 (4) SA 463 (T). It is not necessary for me to determine whether these judgments were correct. Without so deciding, it nonetheless seems to me, with respect, however, that it might be that the judgments failed to give sufficient weight to the qualification to the statutory definition requiring regard to the context. In this regard context could arguably include not only the four corners of the Act, but also its evident purpose and position in the applicable broader statutory framework. Approached in that manner it does not appear to me to be at all certain that the legislature intended to bring orders made for maintenance *pendente lite* in terms of rule 43 within the embrace of '*maintenance order*' as defined in s 1 of the Maintenance Act. If this is so the unhappy consequences conjured in counsel's argument do not arise. If, however, the judgments in *De Witt* and *Thompson* are correct, they illustrate that the consequences about which counsel have expressed concern just have to be tolerated if they follow on the clearly articulated legislative scheme.

24] To sum up, I have been impelled to the conclusion that chap 5 of the Maintenance Act is intended to comprehensively regulate the civil enforcement of maintenance orders (as defined) made by any court in the Republic.[19] In the result the writ of execution obtained from the registrar of the high court must be set aside. Subject to a determination in her favour on the alleged compromise agreement, the first respondent is obliged to follow the procedures set out in chap 5 of the Maintenance Act to obtain civil execution against the applicant.

25] Turning then to the question of the alleged compromise agreement: The applicant's allegation that the maintenance order was agreed to by parties with the object not only of regulating his maintenance obligations with effect from 1 May 2010, as set out in the terms of the order, but also of compromising any dispute concerning his liability to pay any amount of arrear maintenance under the then subsisting High Court maintenance order is denied by the respondent. The wording of the order made by the maintenance court does not support the applicant's contention. Any factual dispute as to whether or not the order was preceded by the conclusion of a compromise agreement as alleged by the applicant falls to be resolved in favour of the respondent applying the *Plascon-Evans* principle. To the extent that it might have been permissible to consider the probabilities as they may be assessed on the papers, they do not support the applicant. It is common cause that the first respondent had turned down an offer by the applicant to pay her R20 000 in settlement of the arrears not long before the maintenance

19 Chapter 5 does not appear, however, to affect the competence of contempt of court proceedings against a maintenance debtor who fails to pay maintenance in breach of a maintenance order.

court's order was made. The applicant offers no explanation of why the respondent should then have settled shortly thereafter on the basis that she would receive nothing in respect of the arrears.

26] The maintenance court order provided that the applicant would pay the respondent R10 000 per month for the months of May and June 2010 and R8 000 per month thereafter. The contention by the applicant that the increased payments for May and June were intended to address the arrears finds no support in the language of the order. By contrast, a logical basis for the provision is, as pointed out by the respondent, to be found in the surviving provisions of the high court order, which afforded the applicant until the end of June 2010 to sell the abovementioned fixed property. If the property had not been sold by the end of June, the first respondent enjoyed the right under the provisions of the maintenance clause of the High Court order which had been expressly preserved by the substituting maintenance court order to require the property to be sold by auction. The period after June 2010 thus corresponded to that during which the respondent was at liberty to put in train measures directed at expediting the contemplated receipt by her of a share of the proceeds of the sale of the property so as to bring to an end the applicant's interim obligation to pay her an amount of monthly maintenance.

27] I have therefore concluded that the applicant has failed to establish that the first respondent compromised or waived her right to exact payment of the arrear maintenance.

28] It remains to consider the question of costs. Although the writ of execution

issued by the registrar of this court will be set aside, this will not occur because of the case advanced by the applicant on the papers. The applicant's case to that end was substantively advanced on the grounds that his obligation to pay the arrear maintenance had been extinguished. He has been unsuccessful on that score. Moreover, although the first respondent cannot obtain execution against the applicant's property on the writ issued out of the high court, it has been confirmed that she may do so on a writ obtained in terms of chap 5 of the Maintenance Act. In the circumstances I consider that it would be just and equitable that no order be made as to costs, with the result that each party must bear his or her own costs.

Order:

1. The warrant of execution, dated 15 September 2010, issued by the Registrar on 22 January 2011, in case no. 6566/2006 is set aside.

2. It is declared that the first respondent may, if so advised, apply to the maintenance court in terms of section 26(2) of the Maintenance Act, 1998, for the authorisation of a writ of execution referred to in section 27(1) of the said Act in respect of the arrears owed in terms of the High Court maintenance order in case no. 6566/2006 as at 23 April 2010.

3. There shall be no order as to costs, including in respect of the costs incurred in the proceedings instituted under the notice of motion dated 25 May 2011.

A.G. BINNS-WARD
Judge of the High Court

On behalf of Applicant	:	Adv. F.J. Gordon-Turner
Instructed by	:	Malherbe Attorneys
On behalf of the Respondents	:	Adv. S. Van Embden
Instructed by	:	Fairbridges
Date of Hearing	:	15NOVEMBER 2011
Date of Judgment	:	2 FEBRUARY 2012