IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

Reportable
Case No: 2237/2013

In the matter between:

ER Applicant

and

LB Respondent

JUDGMENT DELIVERED ON 11 SEPTEMBER 2013

BOQWANA AJ

Introduction

[1] This is an application for the repayment of maintenance in the amount of R40 976.00, on the basis of unjustified enrichment, which the applicant alleges he paid to the respondent for the period of April 2007 to November 2012.

[2] At the commencement of these proceedings, I enquired from the applicant's Counsel, Mr Shaw, why this matter was brought in the High Court when the quantum was clearly within the jurisdiction of the Magistrate's Court. Mr Shaw remarked that his clients had not received good service from the Magistrate's Court that this matter was complex and it had a constitutional element that could be better determined in the High Court.

[3] I find Mr Shaw's remarks about the Magistrate's Court's service very unfortunate and degrading of the lower courts and hardly a valid reason for a party's decision to bring a matter deserving of being heard in lower courts, to the High Court. In view of the costs already incurred by the litigants I proceeded to hear the matter.

[4] Before the hearing of this application, the issue concerning the late filing of the answering affidavit was raised. I granted condonation on the basis that the respondent had shown good cause for the late filing of the answering affidavit in her papers.

Facts

[5] On 09 July 2004 a decree of divorce incorporating the terms of the agreement of settlement between the parties, dated 03 March 2004, was granted by the Witwatersrand Local Division ('South Gauteng High Court').

[6] The agreement of settlement made provision for payment of maintenance for the parties' two minor children, by the applicant, at the rate of R500.00 per month, per child, commencing on 01 April 2004. In terms of clause 3.5 of the agreement of settlement parties agreed that payment of the aforesaid maintenance would increase yearly on the 1st day of April, in accordance with the CPI rate from time to time.

[7] On 10 September 2007, maintenance was increased to R 1500.00 per month per child, by means of the Consent and Maintenance Order granted by the Bellville Magistrate's Court. This Order was signed by the applicant and was effective from 01 October 2007. It substituted the Order made by the South

Gauteng High Court. The new Order was obtained with the written consent of the applicant as the party against whom the Order was made.

[8] This Order however did not provide for an escalation clause as did the previous one. Despite this, the applicant paid yearly increases from the period of April 2007 to November 2012 totalling an amount of R40 976.00 in respect of maintenance.

[9] The applicant alleges that he was pressurised by the respondent's attorneys in April 2008 to pay these further increases based on the rate of inflation, whereas they knew or should have known that the amounts were not due by him. He also alleges that the amounts were paid in error and under duress to the respondent and although he had employed a lawyer to write a letter, the lawyer was not fully involved in the matter.

[10] The overpayment, he alleges, only came to light during the course of preparing for his defence in a suit filed by the respondent in June 2011 against him, for a further increase in maintenance.

[11] The respondent contends that, although the new Maintenance Order is silent on the matter, the parties had agreed during their negotiations that maintenance would be R1500 per child per month and would escalate annually in accordance with inflation. She alleges that the agreement was in fact preceded by a debate on whether the increase should be 10% per annum or inflation linked. According to her, the parties agreed that inflation would be more reasonable in the circumstances. She alleges further that the maintenance officer conveyed the agreement to the parties and specifically mentioned that its escalation was linked to inflation. She only noticed recently, when it was raised by the applicant, that the Magistrate erroneously failed to record the escalation clause on the Order itself. The agreement was nevertheless not in doubt as evidenced by the payments made by the applicant. She further submits that the applicant's consent to the payments was implied or tacit.

[12] The respondent further contends that the two versions presented by the applicant, (i.e. the payments were made in error and that the payments were

made under duress), are mutually destructive. Either he made a bona fide mistake or he was made to pay under duress, it could not be both, the respondent contends. She further submits that payment was in respect of maintenance of the children and not her, accordingly it would be the children that were 'enriched' and not her.

Discussion

[13] Mr Shaw submits on behalf of the applicant that the application is based on the *conditio indebiti*, alternatively on the *conditio sine causa*, alternatively on the *conditio ob turpem vel iniustam causam*.

[14] The requirements for an enrichment claim are that the respondent must be enriched, the applicant must be impoverished, the enrichment must be at the expense of the applicant and the enrichment must be unjustified. See **MN v AJ 2013 (3) SA 26 (WCC) at paragraph 17**. The central requirement of *conditio indebiti* is that the payment or transfer must have been effected in the mistaken belief that the debt was due.

[15] The mistake giving rise to the payment must be excusable in the circumstances. See **Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd 1997 (2) SA 35 (A) at 44C and Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and another 1992 (4) SA 202 (A) 223H – 224H.**

Excusability

[16] The applicant must place sufficient facts before the Court to justify a finding that the error that gave rise to the payment was excusable. In the decision of **Affirmative Portfolios CC v Transnet Ltd t/a Metrorail [2009] 1 All SA 303 (SCA)** the Court referred to the decision of Hefer JA's in **Willis Faber** (at 224E–G) as guidance as to what factors might determine the excusability of a particular error. In the Willis' the following was said:

'It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of

instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no *debitum* and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.'

[17] In that matter the Court rejected the argument by the respondent that overpayments were induced by the fact that the appellant had submitted invoices claiming the increased rate of R17.25 per hour plus the 15 per cent as an administrative fee.

[18] Turning to the facts of this case. It is apparent from the papers that the applicant continued to pay increased maintenance over a sustained period of four years. The applicant avers in his replying affidavit that there were discussions regarding the matter of escalation but there was no final agreement to this regard and the Court Order is evidence to that. The problem with the applicant's version in that regard is that, his conduct in paying the increase accords with the respondent's version that the parties had indeed agreed during the negotiations the maintenance would escalate based on inflation. If the applicant knew already during the negotiations that there was no agreement, why was he of the mistaken belief that he was liable to pay an increased maintenance and in fact proceeded to pay such an increase. In any event, the applicant chose motion proceedings. In this regard, the respondent's version is to be accepted in accordance with the Plascon-Evans rule. See **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Lt*d* [1984] ZASCA 51*;* 1984 (3) SA 623 *(AD)* at 634 F.** Besides, the respondent's version is the more probable of the two when regard is had to all the facts before the Court.

[19] The applicant's argument that he made a reasonable error is not supported by other factors. First, he argues that he was pressurised by the respondent's attorney in April 2008 whilst in his own version he started making payments a

year earlier, (i.e. in April 2007). The alleged pressure from the respondent's attorneys could certainly not have been a trigger to his mistaken belief that he was liable to pay the increase. In addition, he argues that he discovered the error whilst preparing his defence after institution of legal proceeding by the applicant in July 2011 but he continued to make payments up to November 2012. That conduct is certainly not in keeping with a person who discovered that he had all along been making incorrect payments. He went along and continued to pay voluntarily for more than a year after discovering the error. That conduct is suggestive of the fact that even if no oral agreement existed as he alleges, he had tacitly and by his conduct agreed to the increase.

[20] Another important factor is that correspondence sent to his attorneys by the respondent's attorneys in 2008 specifically mentioned that the order of 10 September 2007 should be read with the original order of 2004. If the applicant had an issue with that (as he claims the parties had not agreed) he or his attorneys should have raised it. It makes no sense for the matter to be raised after four years, when the parties and attorneys were engaging on the maintenance increase issue long before November 2012. At best the applicant's conduct would be one of those described by Boruchowitz AJA in the **Affirmative Portfolios** decision, supra, at paragraph 31 of his judgment as being a 'Grossly negligent conduct or inexcusable slackness in the conduct of one's own affairs' which is generally, (but not necessarily) regarded as inexcusable conduct.

[21] The allegation of duress is also without merit. In ***BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 para [36],** the Court re-affirmed that the party wishing to rely on duress in order to set aside a contract, must allege and prove that there was a threat of considerable evil to the person concerned, or to his or her family, such as to induce a reasonable fear of an imminent or inevitable evil; that the threat or intimidation was unlawful or *contra bonos mores*; and the moral pressure used must have caused damage. (see also **Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 306A-B)**. None of that has been shown in this matter by the applicant.

<u>Enrichment</u>

[22] To succeed in a claim under *conditio indebiti*, the onus is on the applicant to show that the respondent's estate has been enriched to the extent that there has been an increase in her assets as a consequence of the payments. In the ***MN v AJ* matter *supra,*** where the money paid as maintenance had been spent on maintaining a child who was not the plaintiff's biological child with some of the money having been used for the payment of school fees, the Court held that the plaintiff did not establish a *prima facie* case of enrichment by simply proving payment of money to the defendant. The Court held the following at paragraph 74:

> 'Given the fact that the money that was paid (albeit grudgingly and somewhat irregularly, according to the plaintiff) was for the maintenance of a child (and there is no suggestion that the defendant did not use it for that purpose), it would not be fair to the defendant to now order her to restore either the entire amount or a part thereof to the plaintiff.'

[23] It is not enough for the applicant to show that the money was paid into the respondent's bank account as Mr Shaw submits. The money was paid to the applicant not for her own use but for the children's maintenance. There is no suggestion that the money was not used for maintenance. The applicant's allegation that the respondent lives in a house which is worth millions of rand is no proof that she used maintenance money for the house. That claim is farfetched and must be rejected.

[24] Furthermore the allegation that she is married to a millionaire husband is also irrelevant as the current husband owes no legal duty to maintain the parties' minor children. The issue before this Court is in any case not whether or not the applicant can afford to pay maintenance or the amount he is currently paying.

<u>Public policy</u>

[25] This takes me to the public policy considerations and rights of children. Mr Shaw argues that even if the oral agreement existed, it would be invalid because of the parole evidence rule in that the parties decided to reduce their

agreement in writing. It is well established that where parties decide to embody their final agreement in written form the execution of the document deprives all previous statements of their legal effect. See **Affirmative Portfolios** at paragraph 13. In that case the Court held that not all oral or collateral agreements are necessarily deprived of legal effect. It said the following at paragraph 14:

> 'The parole evidence rule applies only where the written agreement is or was intended to be the exclusive memorial of the agreement between the parties. Where the written agreement is intended merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the "partial integration" rule. See Johnston v Leal and the cited cases'

[26] In order to determine whether the parties intended a written contract to be an integration of their whole transaction or merely a partial transaction, the Court may look at surrounding circumstances, including the relevant negotiations of the parties. In this case, the Court has already found that the circumstances of this case are suggestive that the common intention between the parties was for the maintenance to escalate annually based on inflation. There is no evidence that the parties agreed that the escalation clause would not form part of the Consent Maintenance Order. To the contrary, evidence suggests that parties agreed to the increase and it must have been an oversight for it not to be included in the Order. In any event, the Consent Maintenance Order does not contain a non-variation clause.

[27] To take this point even further, in a decision of **GF v SH and Others 2011 (3) SA (GNP)** that dealt with variation by subsequent oral agreement between the parties of a maintenance regime set out in a settlement agreement, Kollapen AJ (as he then was) held that even though the Shifren principle (established in **Shifren and Others v SA Ko-op Graanmaatskappy Bpk 1964 (2) SA 343 (O)**) which holds that any attempt to agree informally to vary a contract containing a non-variation clause, except in writing, must fail is subject to public policy considerations which

may well permit and indeed justify departure from such a principle. I agree with the remarks made by Kollapen AJ when he stated:

> '[21 In conclusion, I find that while the principle remains a firmly entrenched and necessary part of the law, the departure may not only be constitutionally permissible, but perhaps even constitutionally mandated.
>
> [22] If indeed the *Shifren* principle were entrenched and did not apply in the context of family law, it may well have the effect of achieving all kinds of unintended consequences that may well militate against the development of a public policy consistent with the norms and values of our Constitution. In particular, a strict adherence to those principles may well mean that parents become saddled with a disproportionate share of their responsibility in respect of the maintenance and upbringing of a minor child. It may well have the effect of restricting the ability of parents to do that which the best interests of the child demand, as opposed to that which they are obliged to do in terms of an agreement of settlement, which terms and provisions may well not have kept in touch with the changing times and developments relevant to the context.'

[28] *In casu,* cost-of-living is not static. Maintenance orders generally include a cost-of-living provision to keep up with the inflation. To suggest that the applicant would pay a flat rate of R1500.00 for all the years with no adjustments is most unlikely and could not be in the best interests of the children. In particular the applicant's claim for repayment of the maintenance amount offends public policy and totally ignores the reciprocal obligations of both parents towards the minor children. The applicant's application simply focuses on the extra R333 to R 1144 amounts he paid per month per child that he alleges were not part of the Court Order and pays little regard to the fact that those payments were made towards the maintenance of his minor children.

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[29] Mr Shaw's 'constitutional' submission that the fathers would be unequally treated if they are not allowed to reclaim overpayment of maintenance is misplaced. He presupposes that only fathers have an obligation to pay maintenance and he assumes that they are currently barred from claiming

any overpayment on legitimate grounds. This is incorrect. Anyone who has a legitimate claim has recourse if they can prove unjustified enrichment as required by the law. The rights of the fathers or parents that Mr Shaw refers to must be considered in the context of public policy and the constitution. Those rights cannot in my view be paramount over the best interests of a child. I do not hold the view that parents should be required to maintain their minor children beyond their abilities nor am I unsympathetic towards those parents that disproportionately share beyond what they are responsible for. In this particular I cannot find that there has been an unjustified enrichment.

Conditio sine causa and *conditio ob turpem vel iniustam causam*

[30] The applicant's obligation to pay maintenance was both natural and legal in nature. If the oral agreement to pay the yearly increases had occurred as it has in this case, the applicant cannot claim enrichment. *Condicto sine causa* is therefore not applicable. The alternative of *condictio ob turpem vel iniustam causam* is not applicable either as the central requirement of the *condictio ob turpem vel iniustam causam,* is that the amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal, i.e. because it is prohibited by law (see *FNB v Perry NO* 2001 (3) SA 960 (SCA) at paragraph 22. The application, *in casu*, is not based on any illegal contract. The *condictio ob turpem vel iniustam causam* as an alternative is rejected.

Conclusion

[31] In conclusion, there is no basis for finding that the respondent was unjustifiedly enriched and there is no reason why I should deviate from ordering costs on a High Court scale. As I indicated this matter should have been determined in the Magistrate's Court but the applicant chose to bring it to the High Court.

[32] I therefore order as follows:

The application is dismissed with costs.

N P BOQWANA

Acting Judge of the High Court

APPEARANCES:

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FOR THE RESPONDENT: Advocate J P Steeenkamp

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