IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A 48 / 2021

In the matter between:

E[…] S[…] Appellant

and

J[…] J[…] S[…] Respondent

Coram: Wille, J et Lekhuleni, AJ

Heard: 23rd of April 2021

Delivered: 4th of May 2021

JUDGMENT

WILLE, J: (Lekhuleni, AJ concurring)

INTRODUCTION

[1] This is a civil appeal from a lower court in Stellenbosch. This appeal is about maintenance. The issue on appeal is very limited and is narrow, both in scope and nature.

[2] The parties were married to each other and were divorced about (21) years ago.[1] It is common cause that the appellant has complied with all his obligations as set out in the consent paper, the terms of which were incorporated into a decree of divorce. This, by agreement between the parties. In the lower court, the appellant sought a variation in the form of a discharge of an obligation[2], in terms of section 6 (1) (b) of the Maintenance Act.[3]

[3] The challenged obligation in terms of which the discharge is sought, is the following:

'Die eiser onderneem om vir die verweerderes lidmaatskap van 'n mediese fonds wat sootgelyke voordele en drempels bied as die wat die eiser se mediese fonds tans bied op sy koste uit te neem en maandeliks in stand te hou tot haar hertroue, afsterwe of todat sy 'n permanente lidmaatskap van 'n eie mediese fonds bekom, welke een ookal eerste plaasvind, ***en***[4] *alle redelike mediese, tandheelkundige en verwante uitgawes ten opsigte van die verweerderes, uitsluitende maar nie beperk tot hospitalisasie, medikasie (op doktersvoorskrif) en sielkundige behandeling, self te bekostig, onderworpe aan klousule 4.2.4 hieronder'*[5]

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[1] On the 21st February 2000
[2] Imposed upon him in terms of the agreed consent paper
[3] Act 99 of 1998
[4] My emphasis added
[5] Clause 4.2.1 – the 'subject' clause

THE APPELLANT'S CASE

[4] The appellant has recently retired.[6] Upon his retirement he received a pension payment of approximately R12 million. The respondent was paid her aliquot share of this pension in the amount of R4 116 040,00. This, strictly in terms of the consent paper.[7]

[5] It is the appellant's case that the respondent is no longer in financial need of any further assistance from the appellant. I pause to mention that the 'affordability issue' on the part of both parties, was not an issue before the lower court and this is also not an issue before us on appeal.

[6] In short, the appellant advanced a substantial change in his income profile due to his retirement. He argues that because of this change in his financial position, he is entitled to a discharge of his medical aid maintenance obligations towards the respondent. Put in another way, he requires a financial 'clean break' from the respondent. Besides, the appellant contends for the discharge because the respondent is permanently employed and is now eligible to join a medical aid of her own. All, this he says, amounts to 'good cause'.

THE RESPONDENT'S CASE

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[6] During January 2019
[7] Clause 6 thereof

[7] The respondent's case is this: that the subject clause directs that the appellant is obliged to continue paying for the respondent's medical aid, unless the respondent remarries, or until the respondent passes away or in the event that the respondent obtains her own permanent medical aid: that it is common cause that none of these (3) contemplated events have taken place: that the consent paper is a contractual arrangement and that our courts, as a general rule, respect and uphold the sanctity of contracts.

DISCUSSION

[8] The proposition by the appellant is that it was always contemplated by the parties that the respondent would at some stage obtain her own medical aid. In contrast, the respondent avers that the appellant aspires from the court to draw an inference from the facts in this connection. This, because the 'wording' in the subject clause, does not support the interpretation contended for, by the appellant. On the material before me, I am not persuaded that it was always contemplated that the respondent would obtain her own medical aid. I say this because the agreement in essence affords the respondent only an option to obtain her own medical aid. This much is clear from the wording of the agreement. What in essence, the applicant is contending for is a fictional fulfillment of a contractual term, this within the context of an agreed divorce settlement agreement.

[9] In terms of section 6 (1) (b) of the Act, an existing maintenance obligation may be discharged or substituted if 'good cause' exists. The appellant relies heavily, although

not exclusively, on the payment to the respondent from his pension payment as the main ground for his discharge from his obligations in terms of the agreed medical aid contributions, in the form of maintenance. The argument is that in the event that the matter was heard afresh, as a maintenance matter, a court would not order the appellant to continue with the payment of the agreed medical aid contributions, in the form of maintenance. This may be so, but this is not the test and, neither is it the function of this court on appeal.

[10] In this connection, I refer to the penchant remarks by Griesel, J in *Georghiades*[8], as follows:

'In considering whether or not sufficient reason exists for a variation of the present maintenance order has been shown, it is important to bear in mind that the order in question is contained in a consent paper, which was made an order of court at the time of the divorce…'

'As such it constitutes a composite final agreement entered into between the parties, purporting to regulate all their rights and obligations enter se upon divorce. For the court now to interfere in that arrangement by varying one component of the agreement, while leaving the balance of the agreement intact, would fly in the face of the time-hallowed principle that "the court cannot make new contracts for the parties; it must hold them to bargains into which they have deliberately entered". The principle of pacta sunt servanda is equally relevant in this context'

[8] *Georghiades v Janse Van Rensburg* 2007 (3) SA 18 para [16]

[11] It is trite that special circumstances need to be advanced so as to impale the fairness of a divorce order granted by agreement between the parties. More importantly, Rumpff J, eloquently observed the correct legal position, to be the following:

'*The fact that the respondent is now in a somewhat better position that she was at the time of the agreement was made and that the applicant is in a slightly worse financial position, does not, in my view, by itself constitute good cause for altering the agreement, made an order of court'*[9]

[12] In addition, the appellant's arguments are buttressed by reference to the 'clean break' principle which has purpose in matrimonial causes of action. I am unable to find any direct authority for the proposition that the 'clean break' argument finds application in connection with the variation or discharge of an agreed existing maintenance obligation in terms of a consent paper, sanctioned by a court.

[13] Even if I am wrong on this score, the decided authorities are against the appellant in his assertions that the payment of the aliquot share of his pension to the respondent, *per se*, constitutes 'good cause' for the discharge of his existing obligations in terms of the consent paper.[10]

[14] In my view, the change in the appellant's employment status to that of a retiree, read together with the respondent's now increased financial position[11], do not *per se* constitute 'good cause' for a variation or discharge of the appellant's existing

[9] *Jacobs v Jacobs* 1955 (4) SA 211 (T) at 212 D.
[10] *Copelowitz v Copelowitz and Anothers, N.O.* 1969 (4) SA 64 CPD.
[11] Or indeed her ability to obtain her own medical aid

maintenance obligations to the respondent in connection with her medical aid requirements, as previously agreed. On the papers before me, I am unpersuaded that the 'good cause' threshold has been discharged by the appellant. An analysis of this threshold determination is even made more complex due to the fact that this matter was determined 'on the papers' in the lower court and this appeal court falls to determine this matter on the record of proceedings before it. Nothing more and nothing less.

[15] Another aspect to consider is that it seems common cause on the facts, that the appellant having been fully informed, elected voluntarily to consent to the terms of the subject clause. This brings me to touch upon the issue of the '*pacta sunt servanda'* principle.

[16] For this enquiry, I need to, inter alia, consider the facts and circumstances surrounding the signing of the consent paper.[12] They are these: that the appellant was legally represented and so was the respondent: the consent paper consisted of some (19) pages, all witnessed and signed by both parties and moreover each of the parties recorded that they would have no further claims of whatsoever nature against each other.[13]

[17] It seems clear to me that this is a case where the parties all agreed and accepted expressly that they understood what they were agreeing to in the consent paper. The correct position in our law on this score has been recently very clearly re-stated in *Beadica*.[14] The enquiry includes a consideration of whether the parties negotiated with

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[12] Such as they may be 'gleaned' from the record of proceedings in the lower court
[13] Clause 10
[14] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC)

equal bargaining power and whether they understood what they were agreeing to. In this matter, it is clear that the parties were possessed of equal bargaining power and they must have understood what they were assenting to. The consent paper was after all, at their request.

[18] In essence, the issue before us is contractual in nature. That having been said, I do accept that there has been a legislative intervention granting to the court a discretion to deal with issues such as a discharge and variation of an existing maintenance order. This, by way of the Act. In this connection, I refer to the penchant remarks by Maya, JA (as she then was) in *Odgers*[15], as follows:

'There is no bar to agreeing on the duration and extent of the payment of maintenance which is to be made, irrespective of any change in the parties' circumstances, the agreement is valid and purely contractual in nature. It falls to be governed by the rules applicable in that sphere'

[19] I say this further because it is now settled law that contractual interpretation is an objective process of attributing meaning to the words used in a document recited in the context of the document as a whole and having regard to the apparent purpose of those words.[16] I mention this because on a plain reading of the subject clause, the appellant is obliged to continue to pay the respondent's medical aid contributions until she remarries, dies or obtains a permanent medical aid of her own, whichever event first occurs.

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[15] *Odgers v De Gersigny* 2007(2) SA 305 (SCA) para 8
[16] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18

[20] The question of affordability[17], in my view, has less to do with the first (3) conditions set out in the subject clause, but more to do with the other medical expenses anticipated in the last (6) lines of the subject clause. I say this also because the word ***and***[18] is generally used to introduce an additional comment or interjection. It is a conjunctive.

[21] Further, I am unable to find any misdirection by the judicial officer in the lower court which would allow this court to interfere on appeal. The judicial officer may very well have formulated the lower court judgment with reference to a 'substantial change' in the applicant's financial position. The reasoning in the judgment is neither factually, nor legally flawed.

[22] Moreover, as alluded to earlier, I hold the view that the appellant has not met the threshold requirement of 'good cause' for a variation or discharge of the terms of the subject clause in the consent paper, sanctioned by the lower court. I say this also because it must have been in the contemplation of the parties and, more so of the appellant, at the time when the consent paper was concluded, that he would retire and that the respondent would not necessarily by then, have obtained her own medical aid. Furthermore, the consent paper specifically catered for the potential windfall in connection with the increased values of the pension which were eventually paid out to the parties.[19] In terms of the consent paper the appellant specifically agreed that the respondent would be

[17] 'Self to bekostig' (if this is even a relevant consideration)
[18] 'en'
[19] Clause 6.4

eligible to participate in any gains or interest in connection with the appellant's pension interest as defined in the consent paper.

[23] In the result, I make the following order:

1. That the appeal is dismissed.

2. That the appellant is liable for the costs of and incidental to the appeal process, on the scale as between party and party, as taxed or agreed.

WILLE, J

I agree,

LEKHULENI, AJ