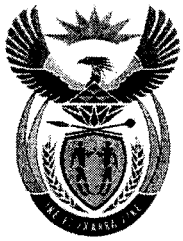

Republic of South Africa

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

Case No: A388/11
(Maintenance ref no. 30608MAI001021)

Before: The Hon. Mr Justice Yekiso
and
The Hon. Mr Justice Binns-Ward

In the matter between:

ANDRÉ ABRAHAM SEPTEMBER **Appellant**

and

JACQUELINE LETITIA SEPTEMBER **Respondent**

JUDGMENT DELIVERED: 15 FEBRUARY 2012

BINNS-WARD, J:

[1] This matter came before us on appeal against a decision by the maintenance court refusing an application by the appellant in terms of s 27(3) of the Maintenance Act 99 of 1998 ('the Act') for the setting of aside of a writ of execution. The writ was issued at the instance of the respondent to enforce payment of arrear personal

maintenance. The appeal was brought in terms of s 25 of the Act, read with the applicable regulations.[1]

[2] The marriage which had formerly subsisted between the parties was dissolved in terms of an order of the High Court made on 12 May 2006. The divorce order incorporated the provisions of a deed of settlement entered into by the parties. Clause 2.10 of the deed provided:

> The Plaintiff [i.e. the appellant before us] shall pay the Defendant [the respondent] an amount of R3000.00 per month from the month in which the Honourable Court grants the party's (sic) Decree of Divorce.

Clause 2.10 of the deed was the provision upon which the respondent relied as the maintenance order in respect of which she had obtained a writ of execution in terms s 26 read with s 27 of the Act. The term 'maintenance order' is defined in s 1(1) of the Act as follows: '*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;*'.

[3] Section 27(3) of the Act is intended to provide a remedy to a maintenance debtor who is served with a writ of execution and who contends that s/he has complied with the maintenance order in question. It provides:

> A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section, set aside the warrant of execution

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[1] See reg. 15 of the Regulations relating to Maintenance, published in GN R1361 in GG 20627 of 15 November 1999, and amended by GN R1099 in GG 29347 of 3 November 2006. The regulations were made in terms of s 44 of the Act.

> if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question.

The appellant's complaint about the writ of execution did not really fall within the ambit of s 27(3). He did not contend that he had complied with clause 2.10 read as a maintenance order. His application was founded on two quite different grounds. Firstly, he contended that the provisions of clause 2.10 did not constitute a maintenance order. Secondly, and in any event, he submitted that the writ should be set aside or suspended because the maintenance order – if clause 2.10 were to be accepted to be such - was the subject of a pending maintenance enquiry. The enquiry in question had ostensibly been set in train upon the conversion of criminal proceedings instituted against him for non-compliance with the order into a maintenance enquiry.[2] The conversion of proceedings as aforementioned is provided for in terms of s 41 of the Act.[3]

[4] The court below held against the appellant on both grounds of his application.

[5] Notwithstanding that the application did not fit within the apparent ambit of s 27(3), no objection to it was taken on that basis by the respondent either here, or in the court below. For present purposes we shall therefore assume in favour of the appellant, without so holding, that the application was properly before the maintenance court in terms of either s 27(3) or s 27(4) of the Act.[4]

[6] The first of the appellant's aforementioned grounds of application required the maintenance court to construe the deed of settlement. The manner in which the deed fell to be construed was not affected by its incorporation in a court order; see

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[2] A 'maintenance enquiry' is an enquiry in terms of s 10 of the Act. In a matter in which there is already a maintenance order in place, proceedings at such an enquiry may result in the substitution or discharge of the maintenance order; see s 16(1) of the Act.

[3] The text of s 41 is set out in para. [14], below.

[4] It would appear that an application in terms of s 27(4) falls to be brought using Part B of Form M, as prescribed in reg. 19(2) of the regulations. The appellant used Part A of Form M, which is prescribed for applications in terms of s 27(3); see reg. 19(1).

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A), at 304E-H.[5] Approving the aforementioned passage in *Firestone,* Nicholas AJA stated in *Administrator, Cape, and another v Ntshwaqela and others* 1990 (1) SA 705 (A) at 715G-H:

> As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it.

[7] In considering this issue the presiding officer in the court below concluded that although the wording of the deed was loose and inaccurate in certain respects, it was nevertheless clear that clause 2.10 of the document set out the terms of a maintenance obligation by the appellant in favour of the respondent. In my view this conclusion cannot be faulted.

[8] The proper approach to the construction of jural documents is set out in *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) ([1995] 2 All SA 635) at 767 I -768E, as follows:

> The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself. See *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C (per Rumpff CJ):
>
> > *'Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.'*

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[5] See also *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 489 (A), at 494F-H; and *Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal* 2001 (3) SA 9 (SCA), at para. 10.

> The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:
>
> (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ supra;
>
> (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G-H; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) at 305C-E; *Swart's* case supra at 200E-201A & 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180I-J;
>
> (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. *Delmas Milling* case at 455A-C, *Van Rensburg's* case at 303A-C, *Swart's* case at 201B, *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624G, *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) at 10C-D.

It is useful to read the aforegoing passage from *Coopers & Lybrand*, which has become something of a *locus classicus*, with the following observations by Harms DP in *KPMG Chartered Accountants SA v Securefin Limited and another* 2009 (4) SA 399 (SCA) at para. 39:

> First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corp* [1985] ZASCA 132 (at saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual

> matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2008 (6) SA 654 (SCA) para 7.)

[9] The preamble to the deed of settlement records that:

> WHEREAS the Plaintiff has instituted action in the above Honourable Court against the Defendant for, inter alia, a decree of Divorce
> AND WHEREAS....
> AND WHEREAS the parties have reached an agreement in respect of Custody of their minor children, maintenance, proprietary matters and further matters ancillary to this action;
> NOW THEREFORE the parties agree as follows and humbly request that the Honourable Court make this agreement an Order of Court.

This highlights, insofar as might have been necessary, the intended purpose of the document. It confirms that the objects of the deed were consistent with those ordinarily or commonly regulated as ancillary arrangements upon the dissolution of a marriage. It is significant that the issue of maintenance is mentioned generally, and not as 'maintenance of the minor children'. Thus if the parties had intended that the maintenance obligations to be imposed on the appellant were to be limited to the children one would have expected the relevant clause in the preamble to have recorded 'custody and maintenance of the minor children'. I mention this characteristic not to suggest that it would, by itself, be determinative, but merely as one of the salient features of the agreement that is pertinent to an assessment of the appellant's contentions as to its proper construction. The common intention expressed in the preamble to have the terms of the deed incorporated a court order

furthermore confirms that the document must have been intended to fully integrate the terms of their divorce settlement. This intention is reiterated in clause 12.2 of the deed. This is of significance for the application of the parol evidence rule.

[10] The deed is divided into two sections, labelled 'Section A' and 'Section B'. Section A consists of clauses 1 and 2 of the deed and bears the main heading 'PROVISIONS IN RESPECT OF THE MINOR CHILDREN AND DEFENDANT'. (my underlining) Clause 1 has the subheading '*Custody and Control of the Party's* (sic) *Minor Children*'. Its provisions provide that the respondent will have custody of the children and afford the appellant a reasonable right of access, including detailed arrangements for weekend access. Clause 2 of the deed has the subheading '*Maintenance in respect of the Party's* (sic) *Minor Children*'. It sets out in clause 2.1 that the appellant will pay the respondent maintenance in the amount of R1000 per month per child. Clause 2.2 stipulates that the aforementioned maintenance will increase annually in line with inflation, and clause 2.3 provides that the maintenance falls to be paid on or before the third day of every month after the date of the divorce. Clause 2.4 provides that the appellant will be responsible for paying the children's school fees and that the parties would be 'jointly liable' according to their means for the costs of additional tuition and extra-curricular activities. In terms of clause 2.5 the appellant was burdened with responsibility for the costs of the children's tertiary education. Clause 2.6 provided that the aforementioned maintenance obligations would apply until the respective children reached the age of majority or became self-supporting. Clauses 2.7 and 2.8 determined the appellant's responsibility in respect of the children's medical expenses. Clause 2.9 provides that the maintenance obligations defined in the preceding clauses would not be affected by the periods

during which the children spent with the appellant in terms of the access arrangements. Clause 2.10, which has been set out in full above,[6] is the last of the component sub-clauses in clause 2 of the deed.

[11] It is plain from the description of the content of clause 2 given in the preceding paragraph that the purpose of clause 2.10 is quite obviously different from that of the nine preceding sub-clauses. The latter are directed at establishing and regulating the content and manner of discharge of the appellant's maintenance obligations to the minor children of the marriage. Clause 2.10 imposes an obligation upon the appellant to pay an amount of R3000 to the respondent monthly from the date of the divorce. It is the only provision in section A of the deed that might properly be described as a provision '*in respect of the defendant*', in the sense adumbrated in the heading to the section.

[12] There is no express characterisation of the obligation imposed on the appellant by clause 2.10 as a maintenance payment, but why else should the parties have seen fit to include the provision in a clause which otherwise deals exclusively and expressly with questions of maintenance if the intention were that it was not to give rise to a maintenance order? Having regard to the objects of the deed stated in the preamble and its placement in a clause otherwise expressly dealing with maintenance issues, the objective indications all point to the provision indeed having been intended to provide for the maintenance by the appellant of the respondent. Nothing in the content of the deed read as a whole detracts from this indication. Certainly the subheading to clause 2, quoted earlier,[7] cannot be read to exclude clause 2.10 as providing for the maintenance of the respondent. On the contrary, for

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[6] At para. [2].
[7] In para. [10].

the reason already identified, despite its incongruence with a provision in favour of the respondent - as opposed to the children, the subheading does highlight the entire clause as being one intended by the parties to deal with issues of maintenance. No other part of the deed deals in any manner with that question. (Section B of the agreement deals with the use and division of the parties' movable and immovable property.)

[13] The evidence of the appellant on affidavit in support of his application for the setting aside of the writ was to the effect that the provision in clause 2.10 was intended to be contingent on the respondent's possible short-term inability to fully provide for herself. He explained the position thus at para. 25 of his supporting affidavit: '*In daardie stadium* [i.e. November 2005, when the deed was entered into] *was die* [respondent] *se vorige werkgewer ....te Stellenbosch,* (sic) *onder likwidasie en was sy slegs op 'n tydelike basis by haar nuwe werkgewer .... aangestel. Omrede* [the respondent] *bekommerd was dat sy nie 'n permanente aanstelling sou ontvang nie, het ek aangebied om voorsiening vir die betaal van R3000 per maand aan die [respondent] te maak sou sy werkloos word en vir 'n maand of twee nie 'n inkomste ontvang nie*' (my underlining). The short answer to this is that the evidence contradicts the express and unqualified terms of the sub-clause, and thus regard to it is excluded by the parol evidence rule. If, by common mistake, the deed does not reflect the parties' actual intention, the indicated remedy would be an application to the High Court for an amendment of its order. Despite the intervention of nearly three years since the issue was apparently raised in the criminal proceedings instituted against him for non-compliance with the alleged maintenance

order, there is nothing before us to suggest that the appellant has pursued the appropriate remedy.

[14] Turning to the second ground of the appellant's application. Section 41 of the Act provides as follows:

> If during the course of any proceedings in a magistrate's court in respect of –
>
> (a) an offence referred to in section 31(1); or
>
> (b) the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person,
>
> it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court shall convert the proceedings into such enquiry.

[15] The circumstances in which the criminal proceedings against the appellant were converted into an enquiry are not clear on the record. If, as he has it, the contemplated purpose of the enquiry was to determine whether or not clause 2.10 constituted a maintenance order, then the conversion was misdirected. It behoved the court seized with the criminal case itself to determine the meaning of the clause. There was no warrant to defer the question. If the clause were held not to be a maintenance order, the offence created in terms of s 31(1) of the Act could not have been committed and the appellant would thus have been entitled to an acquittal. Only if it were determined that the provision was indeed a maintenance order might there be grounds for a conversion of the criminal trial into a maintenance enquiry.

[16] But even more pertinently, in the context of the proceedings in the court below, it is apparent that the purported conversion of the criminal trial into a maintenance enquiry had been ineffectual. Section 41 of the Act contemplates the continuation of the proceedings before the criminal court, albeit in converted form. For that purpose the magistrate presiding would from the moment of the conversion

sit in the capacity of a presiding officer in the maintenance court and the prosecutor would act in his or her capacity as a maintenance officer, or if s/he was not delegated with that power by the Director of Public Prosecutions in the manner contemplated by s 4(1) of the Act, be replaced by one of his or her colleagues who had been so delegated. Conformably with its wording, s 41 of the Act contemplates a *conversion* of the criminal proceedings; not their *interruption* and recommencement later before a differently composed court. A relatively seamless transition from the one form of proceeding into the other is the evident legislative intention. It would not serve the objects of the Act for the criminal proceedings to be interrupted and for an indeterminate delay to be interposed between the ending of the criminal process and the commencement of the enquiry. In this connection the need for the maintenance system to be implemented in a manner that efficiently promotes compliance with maintenance obligations, emphasised by the Constitutional Court in *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111 (CC); 2003 (2) SA 363, at para.s 26-32, bears reference.

[17] The proceedings in the court below took place in November 2009, some six months after the purported conversion of the appellant's criminal trial into a maintenance enquiry. It is apparent, however, that notwithstanding the conversion no progress whatsoever had been made in hearing or determining the maintenance enquiry; hence my description of it as ineffectual.

[18] Mr *Grobbelaar*, who appeared on behalf of the appellant, submitted that it was implied in the Act that the presiding officer was possessed of a discretion to suspend the writ pending the determination of the maintenance enquiry directed in the criminal proceedings. It is not clear to me that this is so in the context of an

application properly instituted in terms of s 27(3). The position is possibly different in applications in terms of s 27(4). However, once again assuming in favour of the appellant, without deciding, that the magistrate was indeed possessed of a discretion to suspend the writ pending the determination of the enquiry instituted in terms of s 41, no misdirection has been shown in her decision not to do so. On the contrary, the apparent failure of all concerned to make any progress in the maintenance enquiry provided good reason for the presiding officer to decline to exercise a discretion in the appellant's favour. This would be particularly so in the context of the presiding officer's apprehension of the appellant's position that clause 2.10 did not constitute a maintenance order, and that the reported purpose of the enquiry directed in the criminal case was to determine this question.

[19] Mr *Grobbelaar* submitted that even if we were disposed to dismiss the appeal against the refusal of the appellant's application to have the writ set aside, this court should nonetheless suspend the writ pending the determination of proceedings by the appellant to rectify the deed of settlement and amend the court order. Apart from the consideration that it would be inappropriate to afford such relief without a proper investigation into the facts, which would include affording the respondent the opportunity to adduce evidence, the intervening delay described earlier - with no indication of any exertion by the appellant during it to achieve such a remedy – weighs heavily against the grant of any such indulgence. The appellant can adequately protect his interests by paying the arrear maintenance under protest and contingent upon his right to recover the expenditure from the respondent subsequent to obtaining a rectification of the deed of settlement and a consequential amendment of the court order.

[20] The appeal is dismissed with costs.

A.G BINNS-WARD
Judge of the High Court

YEKISO, J:

I concur.

N.J YEKISO
Judge of the High Court