THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ***Yes***

Date: ***12th August 2022*** Signature: _____

CASE NO: 19762/2007

DATE: 12th August 2022

In the matter between:

CRAWSHAW, RICHARD PETER Applicant

and

YOUNG, LISA GAYLE Respondent

Heard: 21 April 2022 – The 'virtual hearing' of this opposed application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 12 August 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 12 August 2022.

Summary: Civil procedure – arrear maintenance payable pursuant to divorce order and divorce settlement – warrant of execution against property – arising out of failure to pay maintenance in terms of agreement of settlement – variation of agreement of settlement unenforceable as result of non-variation clause – Application to set aside writ – application refused.

ORDER

(1) The respondent is granted leave to amend the warrant of execution against the property of the applicant by deleting the amount of 'R1 203 198.60' and by substituting it with the sum of 'R1 035 743.03'.

(2) The applicant's application is dismissed with costs.

JUDGMENT

Adams J:

[1]. On 22 April 2021 the respondent caused to be issued a warrant of execution against the property of the applicant on the basis of a divorce settlement entered into between them during March 2009, which settlement agreement was made an order of this court (per Tsoka J) on 31 July 2009. According to the said warrant of execution and the documents in support thereof, an amount of R1 203 198.68 is due and payable by the applicant to the respondent in terms of the divorce order, which incorporated the settlement agreement, in respect of arrear maintenance for the three children born of the marriage between the parties. The applicant denies that any amount is due by him to the respondent as claimed in the warrant of execution. And in this opposed application he applies to have the warrant of execution set aside.

[2]. In issue in this matter is the proper interpretation of the divorce settlement and whether the parties intended *inter alia* that the applicant would be liable to pay the private school fees in respect of the children or public school fees. These issues are to be decided against the factual backdrop as set out in the paragraphs which follows, which by and large is common cause.

[3]. The applicant and the respondent, who were previously married, are the parents of three children, namely Daniel, born on 17 August 2000, and twins David and Lauren, who were born on 25 September 2002. On 31 July 2009, this

Court dissolved the marriage between the parties, and the settlement agreement they had entered into on 18 March 2009, was made an order of court. The settlement agreement provided for primary residence of the children to vest with the respondent, subject to the applicant's rights of contact.

[4]. The applicant agreed, and was ordered to contribute towards the maintenance of the children by cash payments to the respondent of the amount of R2500 per month per child, to be escalated annually at the rate of 7% per annum. Furthermore, the agreement of settlement provided that the applicant 'shall pay 100% of the minor children's school fees, which shall include primary, secondary and tertiary education fees and shall make payment of 50% of the minor children's school uniforms and 50% of their stationary requirements'. And the applicant was to retain the children as dependants on a comprehensive medical aid scheme in addition to him paying the reasonable medical expenses and excesses not covered by the medical aid scheme until such time as the children would have become self-supporting.

[5]. The agreement of settlement contained standard so-called *Shifren* clauses, which provided that: -

'25. No addition to, alteration, variation or cancellation of this agreement shall be of any force or effect unless reduced to writing and signed by both parties.

26. No relaxation or indulgence which either party may grant to the other shall constitute a waiver of the rights of that party.'

[6]. And the 'Full and Final Settlement and Non-Variation' clauses provided as follows:

'27. This agreement is in full and final settlement of all and any claims which either party may have against the other when or howsoever arising, whether past, present or future.

28. No variation, alteration, amendment or cancellation of or to this agreement shall be of any force or effect unless same is reduced to writing and signed by both parties hereto.'

[7]. It is the case of the respondent that the applicant owes her an amount of R1 203 198.60 pursuant to and in terms of the divorce settlement, which total is constituted as follows: R993 583.58 in respect of arrear cash maintenance;

R7 421.38, in respect of the applicant's 50% liability in respect of stationery; R47 537 in respect of David's 2020 school fees at St Dunstan's College; R26 443.33 in respect of additional medical expenses incurred in respect of the children; R112 860 in respect of Daniel's tuition fees at Varsity College; and R15 353.20 in respect of the children's school uniforms.

[8]. In my view, there is not much dispute about these sums, and the total amount due, as representing the cash maintenance payments payable in terms of the divorce settlement, as well as expenses actually incurred by the respondent. In other words, the applicant appears, in my view, not to seriously challenge the fact that the respondent was entitled to receive payments of these amounts if it is accepted that the agreement of settlement signed during March 2002 was extant. He does however deny that the respondent is entitled to recover those amounts from him and he does so on the basis of what he contends to be an agreement reached between the parties during February 2011 to vary the terms of the settlement agreement ('the alleged variation agreement'). In his founding affidavit, the applicant alleges that in terms of the alleged variation agreement he would pay 50% of the private school fees of the children *in lieu* of the cash maintenance component, for the duration of the time that the children were schooled privately. Furthermore, so it was averred by the applicant, the respondent would provide him with a list of expenses and supporting documents in respect of school stationery, extra murals, uniforms and other related activities to allow him to reimburse these costs, as he and the respondent would each be liable for 50% of these costs.

[9]. It is the applicant's case that the terms of the variation agreement were contained in an email he addressed to the respondent on 7 February 2011, which simply read in part as follows:

'That you [the respondent] agree to grant me [the applicant] permission to deduct your share of the amount payable to CB or to St Dominics School, if applicable, from the monthly maintenance payable to you as per the divorce decree.'

[10]. The email was ended off by the applicant with a request for the respondent to 'reply in writing via email as to avoid any unnecessary misunderstanding and to comply with the legalities of our divorce decree.'

[11]. The respondent denies the existence of a valid agreement at variance with the terms of the settlement agreement. Her explanation of the circumstances giving rise to the applicant's email of 7 February 2011 is that the applicant had threatened her that, unless she paid 50% of the children's fees at CBC and St Dominic's College, he would remove the children from their schools. She chose the path of least resistance, and simply let him be, but she did not agree to the applicant's terms. Moreover, it is the case of the respondent that prior to, at the time of and subsequent to the granting of the decree of divorce, all three the children attended private schools, by agreement between the parties. She therefore contended, contrary to what was alleged by the applicant in his founding papers, that the intention of the parties as expressed in the divorce settlement, was that the children would attend private schools and that the applicant would be liable for such private school fees.

[12]. In the final analysis, if the applicant's version relating to the alleged variation agreement is not accepted, then there is no alternative but to accept the respondent's calculations and the fact that the applicant is liable under the divorce order for the amounts referred to in the warrant of execution and the supporting affidavit, subject to the following proviso. It has been admitted on behalf of the respondent that the writ contains an error in that it includes a claim for cash maintenance subsequent to the children reaching majority. That error equates to R167 455.56. Accordingly, the writ stands to be amended by a reduction of the amount thereof to the sum of R1 035 743.04.

[13]. The so called *Shifren* principle finds application generally in the context of maintenance orders, contained in settlement agreements incorporated into court orders, and therefore *in casu*. In *SH v GF*[1], the Supreme Court of Appeal specifically rejected the notion that it would offend public policy to enforce a non-variation clause in circumstances where an oral agreement of variation of a maintenance order exists. It is precisely because of considerations of public policy that non-variation clauses are regarded as valid. This is what the SCA had to say on the point:

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[1] *SH v GF* 2013 (6) SA 621 (SCA) at para 16.

'[16] In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution. See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A – C and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363) paras 7, 8, 90 and 91. Despite the disavowal by the learned judge, the policy considerations that he relied upon are precisely those that were weighed up in *Shifren*. In *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd and Others as Amici Curiae)* 2011 (5) SA 329 (SCA) para 35 Brand JA said:

> "As explained in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo."'

[14]. As rightly contended by Ms Liebenberg, Counsel for the respondent, the applicant cannot and does not deny that the settlement agreement contains a non-variation clause. Accordingly, for any variation of the maintenance order contained in the settlement agreement to be valid, it must be reduced to writing and signed by both parties. That was not done *in casu*. And therefore that spells the end of the applicant's case based on the alleged variation of the divorce settlement. In light of the wide wording of the non-variation clause in the settlement agreement, not only variations to the settlement agreement, but also additions, alternations and cancellation of the agreement must comply with the formalities prescribed.

[15]. Moreover, on a proper interpretation of the divorce settlement, it must be accepted that the agreement contemplated that the applicant would be liable for the private school fees in respect of the children. As was said by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2]:

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The Inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[16]. The Supreme Court of Appeal has repeatedly stated that a restrictive consideration of words, without regard to context, should be avoided. However, any interpretation exercise starts with the language of the document in question, and the written text should not be relegated. The parol evidence rule remains part of South African law, which includes that extrinsic evidence is only rarely admitted. Specifically, evidence of pre-contractual negotiations and the intention of the parties of their prior negotiations are inadmissible for the purpose of interpretation. See *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*[3]; *Tshwane City v Blair Athol Homeowners Association*[4].

[17]. Applying these principles to the present case, I conclude that the settlement agreement provided that the applicant would be liable for payment of the fees of private school tuition as against public school fees, as contended for

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[3] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para [35];

[4] *Tshwane City v Blair Athol Homeowners Association* 2019 (3) SA 398 (SCA) at paras [64] - [66].

by the applicant. The point is simply that all three children were in private schools prior to and at the time of the divorce order, and the applicant paid the private school fees. It therefore follows, as submitted by the respondent, that it is improbable that the respondent would have begged for the children to be enrolled in private schools prior to February 2011 when the alleged variation agreement was reached.

[18]. Moreover, the terms of the alleged variation agreement are manifestly at variance with the settlement agreement. The mere existence of the non-variation clause discounts the validity of the applicant's reliance on the parties' alleged conduct as constituting a variation of the settlement agreement. No oral or implied or tacit agreement which purports to be a variation of the terms of the settlement agreement can be valid in the face of the non-variation agreement which requires the signature of both the applicant and the respondent. Additionally, the applicant's case on the exact terms of the alleged variation agreement does not bear scrutiny. Absent the respondent's signature, the alleged variation agreement is invalid for want of compliance with the prescribed formalities.

[19]. I therefore conclude that the applicant’s version relating to his liability to pay maintenance under and in terms of the divorce settlement cannot be accepted. The respondent’s version and her calculations can and should be accepted. Therefore, the warrant of execution was validly issued and should stand.

[20]. There is another reason why the applicant’s version should be rejected and that of the respondent accepted. And that is the trite principle that in the case of factual disputes in motion proceedings the version of the respondent must be accepted for purposes of determination thereof, irrespective of where the onus lies, unless that version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. See *National Director of Public Prosecutions v Zuma*[5].

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[5] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); 2009 (1) SACR 361; 2009 (4) BCLR 393; [2008] 1 All SA 197) para 26.

[21]. Applying the aforegoing trite principle, it cannot possibly be suggested that the respondent's detailed and clear calculations, supported in all material respects by documentary proof, should be rejected on the papers. If anything, that is the version that should be accepted without further ado.

[22]. In that regard, it is now settled that a writ may be validly issued based on an 'expenses clause' contained in a maintenance order on condition that the amount was easily ascertainable, and is in fact ascertained in an affidavit filed on behalf of the judgment creditor. (*Butchart v Butchart*[6]). The respondent has clearly complied with the requirements for the issue of a valid writ.

[23]. For all these reasons, I am of the view that the writ was properly issued. It was in accordance with the maintenance orders incorporated into the settlement agreement. The amounts claimed were certain and corroborated by supporting documents. Accordingly, the applicant has not, in my view, made out a case for the setting aside of the writ of execution.

[24]. In the final analysis, the applicant does not deny the terms of the settlement agreement or that the respondent incurred expenses for which he was liable, either in full or in part. He admits that he did not make payment of the maintenance due in terms of the settlement agreement. The application therefore stands to be dismissed.

[25]. The costs should follow the suit.

Order

[26]. Accordingly, I make the following order: -

(1) The respondent is granted leave to amend the warrant of execution against the property of the applicant by deleting the amount of 'R1 203 198.60' and by substituting it with the sum of 'R1 035 743.03.'

(2) The applicant's application is dismissed with costs.

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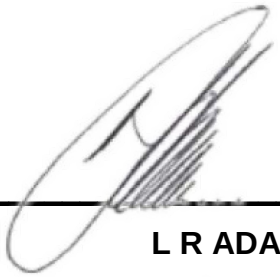
[6] *Butchart v Butchart* 1997 (4) SA 108 (W).



L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON:	21st April 2022 as a videoconference on *Microsoft Teams*
JUDGMENT DATE:	12th August 2022
FOR THE APPLICANT:	Advocate Shirley Nathan SC
INSTRUCTED BY:	Nowitz Attorneys, Hyde Park, Johannesburg
FOR THE RESPONDENT:	Advocate Sarita Liebenberg
INSTRUCTED BY:	Yammin & Hammond Attorneys, Bedfordview
