

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: A5075/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO

02/11/2023

DATE

SIGNATURE

In the matter between:

C[...], R[...]

Appellant

and

Y[...], L[...]
(born K[...], formerly C[...])

Respondent

ORDER

The appeal is dismissed with costs.

JUDGMENT

Fisher J: (Yacoob and Mdalana-Mayisela JJ concurring)

Introduction

- [1] This is an appeal against the whole of the judgment and order handed down by Adams J on 12 August 2022 in terms of which the appellant's application to set aside a warrant of execution in respect of arrear maintenance was dismissed with costs.
- [2] Centrally, the appeal is against the conclusion that a settlement agreement, which was incorporated into the divorce order granted by this court on 31 July 2009, had not been varied by agreement.
- [3] The dispute is thus factual and involves contractual principles.
- [4] If the variation of the settlement agreement is established the alleged indebtedness for arrear maintenance does not exist and the appeal must succeed; if the variation is not established the judgment *a quo* must stand.

Material facts

- [5] The parties signed an agreement of settlement on 18 March 2009 ("the agreement") and this was made an order of court on their divorce.
- [6] The parties have three children, D[...] born in 2000 and twins D[...] and L[...] born in 2002 as at the date of divorce. All were enrolled in private schools at the date of the conclusion of the agreement and the divorce.
- [7] In terms of the agreement all decisions regarding the children's schooling, religion, extramural activities and major elective medical procedures would be jointly made by the parties.
- [8] The appellant agreed and was ordered to pay an amount of cash maintenance in the amount of R 2 500 per month per child which amount would increase annually by seven percent on the anniversary of the divorce such payments to be made into the respondent's bank account.

- [9] The appellant also agreed to and was ordered to pay one hundred percent of the children's school fees which would include primary, secondary and tertiary education fees and fifty percent of the cost of school uniforms and stationary requirements.
- [10] The agreement does not define the type of school or place any limitation on the amount payable for the fees.
- [11] The agreement contained the usual clauses stating that no variation of the agreement would be of any force unless reduced to writing and signed by both parties and that no relaxation or indulgence granted by either party to the other would constitute a waiver of rights.
- [12] The appellant fell into arrears in respect of the cash component of the maintenance shortly after the divorce. The arrears continued to grow over the years.
- [13] It is not in dispute that if the version of the respondent is upheld the amount owing to the respondent is a little over R1 million. This amount was confirmed by the court *a quo* under the amended warrant. For the most part, this amount is made up of the cash maintenance amounts which were not paid.
- [14] The appellant contends that the agreement, properly construed, means that he was liable for state school fees only. The respondent, on the other hand, contends that the appellant agreed to be liable to pay the fees of the schools of the type being attended by the children at time of the agreement.
- [15] It emerges from correspondence between the parties' attorneys during the course of settlement negotiations leading to the conclusion of the agreement that the appellant instructed his attorney that among the changes that he wished to be applied to a circulating draft was the deletion of word "private" in relation to the appellant's obligations to pay the children's school fees. This deletion was apparently acceded to, and the final draft referred only to "school fees".

- [16] The appellant initially paid the private school fees and most of the cash maintenance provided for under the agreement. But, in due course, he became restive as to his obligations. He felt that he was overpaying.
- [17] He informed the respondent that he was only liable under the agreement to pay State school fees and said that he would no longer pay the school fees at the children's schools. This would have meant that the children could not continue with their private schooling.
- [18] The respondent says that she resisted this interpretation of the agreement. To her mind the appellant was liable for the private school fees and the other agreed educational costs as well as the cash maintenance.
- [19] During 2011 the appellant stopped paying the monthly maintenance cash payment due under the settlement agreement.
- [20] The respondent says that this was the appellant's unilateral decision based on his own (incorrect) construction and that he was delinquent in respect of his obligations.
- [21] The version of the appellant is somewhat nuanced as to the source of his obligations. He contends both that the agreement described his obligation and that the agreement was varied to describe those obligations. I will deal with this anomalous position later.
- [22] The appellant alleges that the respondent pleaded with him to agree that the minor children attend private schools. For this reason, he says, they agreed to vary the settlement agreement on the basis that he would pay fifty percent of the school fees in lieu of the cash maintenance. He says that it was understood that this would mean that he paid more maintenance than was due under the agreement. He thus counterclaimed for an amount which he contends he overpaid.
- [23] The variation agreement contended for by the appellant comprises the writing as set out in an email sent to the respondent by the appellant on 07 February

2011 (“the 2011 email”) and the alleged acquiescence in this by the respondent.

[24] The appellant initially contended for an oral acquiescence alternatively one by conduct.

[25] When faced with the fact that the agreement contains a *Shifren* clause,¹ the appellant sought, in reply, to argue that the writing required under the agreement exists in the schedule sent by the respondent to the appellant which reflects calculations which accord with the variation agreed to and the signature required exists in the electronic “signature” which comprises the email itself.

[26] The 2011 email reads as follows:

“Subject: School fees and monthly maintenance 2011and future

Hi L[...],

I wish to place on record the following agreement concluded between us.

That you agree to pay half the annual fee due in respect of L[...]'s school fees to [...] School ie R 15 602.50 being your share for 2011

That you agree to pay half the monthly school fees due in respect of D[...]'s and D[...]'s school fees to [...] School ie R 10 3140.00 being your share for 2011

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

That this arrangement to continue for the duration of time that our children are schooled privately, thereby preventing a new agreement being necessary for the future

That you provide me with a list of expenses and supporting documentation in respect of school stationery, extra murals, uniforms, and other related activities to allow me to reimburse these costs timeously

¹ After SA *Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).

Please reply back in writing via email as to avoid any unnecessary misunderstanding and to comply with the legalities of our divorce decree

Regards" (Emphasis added)

[27] The respondent admits that she received the 2011 email. She says that she deliberately did not respond to it as she did not agree to its terms. She says that she made her disagreement clear to the appellant but he was unrelenting. She did not want to subject the family to yet further litigation. She says she just "let him be".

[28] And so began years of the appellant not abiding by the terms of the settlement agreement.

[29] The respondent pointedly denies that her silence was an indication of assent. She says that she made her position clear to the appellant over the years, i.e., that he was in arrears with his maintenance payments.

[30] This version of the respondent is borne out by written communications between the parties over the years.

[31] Examples of these communications are personal email and WhatsApp exchanges between the parties relating to the payment of maintenance which are attached to the founding affidavit. Some of these communications are set out below. The emphasis in each instance is mine and the messages are grammatically as they appear.

- On 21 October 2014 the respondent wrote the following email to the appellant:

Subject: Maintenance figures

Hi R[...],

Please could you send me a breakdown of the maintenance figures. *I never know what you're paying for from one month to the next.* I see only R818.00 has gone in this month. I would just like to see every month how you get to these different amounts so I

know what's going on. I paid R1200.00 for L[...]s camp for Jan/Feb 2015, and R400.00 repairs to D[...]s tablet So if you could trfr R800.00 for this.

Thanks

- The following WhatsApp text exchanges took place on the dates referred to:

02 Sep 2019

Respondent: Hi R[...]. Did you manage to pay [...] for L[...]s books? Thanks.

Appellant: not yet

Respondent: Ok. Can you try and organize it today please. It was supposed to be done by Friday. They stipulated that late payments may impact on pupils not getting books on time due to no supplies
You know what this country is like

03 Sep 2019

Respondent: R[...], did you manage to pay for L[...]s books?

Appellant: Not yet, will sort it out soon.

Respondent: Thank you

10 May 2019:

Respondent: Hi R[...]. Not sure if L[...] mentioned that she's having her wisdom teeth out on Friday 18 may. So please could you trfr R3500.00 for the hospital. Same as for D[...]. Plus Meds from the pharmacy pre-op. Thanks. I really appreciate it.

13 May 2019:

Appellant: Hi L[...], so typical of your lack of ability to understand the bigger picture. It's about me just paying while you enjoy the children. But it suits you so why would you want to try and change the way things are?

- Around that time but with date not indicated the following exchange took place:

Respondent: You have always tried to get out of your contract to pay but you will take care of your girlfriends bonds etc. I have never asked for anything for me. Anyway, the children are free to come to you whenever they wish.

Appellant: What exactly have I avoided paying?

Respondent: MAINTENANCE

Appellant: Really?

Respondent: [an emoji representing exasperation and disbelief.]

- A further undated exchange:

Respondent: You don't f***ing LISTEN!!!!!!! We've wasted days on going round in circles!!!!!!!

Appellant: "We can go to court. No problem."

Respondent: Awesome. *You're in breach of a court order. You haven't paid me maintenance in 7 years* bring it on I've been waiting for this moment for years.

Appellant: With pleasure I done more than my share.

[32] It is relevant that during 2020 the appellant, on his own version, unilaterally decided that he would no longer contribute to the private tuition fees of the children due on his version of the agreement. The indications are that he believes himself to be entitled to breach the agreement even on the terms contended for by him.

The dispute

[33] The case of the respondent is clear: The settlement agreement has not been varied and the respondent has been consistently delinquent in relation to his obligations.

[34] The case of the appellant is more complex: It seems that, in the first instance he claims that he has complied with the terms of the settlement agreement

(which he says dictates that he only has to pay for state school fees) and that the fees over and above the cost of the state fees which were expended on the private fees are in lieu of the maintenance payment due and, in fact, exceed the amounts due. He also seeks to take into account as part of his contribution under the agreement, gifts and holidays that he has bestowed on the children.

[35] In the second instance and seemingly in the alternative, he argues that, if he were liable for private fees, this position was amended by the variation agreement.

[36] There is an obvious factual tension in these alternative versions. However, as correctly found by the court a quo, the starting point of each is the interpretation of the settlement agreement.

[37] It is helpful to examine the facts with reference to the legal prescripts applicable in each instance and I will do so in due course. However, a central factual determination provides a lynchpin in the entire case. This is the following: The appellant avers that it was understood by the parties that he would only be liable for State school fees. He alleges that the respondent "begged" him to allow the children to attend private school. This wish on the part of the respondent precipitated the variation agreement he says.

[38] Aside from the legal position relating to the resolution of disputes of fact in applications, being that the dispute is determined on the version of the respondent, there are, in my view, factors which militate against the acceptance of the version of the appellant.

[39] It seems not to be seriously in dispute that all three children were attending private schooling at the time of the conclusion of the agreement.

[40] This raises the following questions as to the probabilities of appellants version: Why would the respondent have begged for the children to attend private schools if they were already enrolled in private schools? Why was the type of school fees payable not expressly dealt with in the agreement if they were to be of a different type to those payable at the time of the agreement? It was agreed that the schooling of the children could not be changed other than by

agreement; what then would the position be if the respondent refused to agree to move the children to a state school?

[41] Counsel for the respondent pointed out that there are various levels of subsidies at state schools which makes for a vast range of fees. The fact that specifics as to the type of State school fees which the appellant would be obliged to pay are absent from the agreement suggests that the intention was that the fees of the schools then attended would be payable. Furthermore, the appellant is enjoined in terms of the agreement to pay the school fees and not to make a contribution thereto in a particular amount.

[42] Thus, on this factual dispute alone the appellant must fail. The court *a quo* was correct in its finding that the version of the respondent as to the obligation to pay the school fees was to be preferred and accepted.

[43] Once it is accepted that the fees payable were private school fees, the whole version of the appellant collapses: if he were always obliged to pay private fees there would have been no basis for the variation agreement contended for.

[44] However, even accepting the version of the appellant, the application of legal principles thereto is also problematic for his case. I move now to deal with these principles.

Legal principles

[45] Under the expansive approach to interpretation laid down in *Endumeni*,² extrinsic evidence is admissible to understand the meaning of the words used in a written contract.³ On the other hand, the parol evidence or integration rule is an important principle that remains part of our law. This was affirmed by this court in *KPMG Chartered Accountants (SA) v Securefin Limited*,⁴ and *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*.⁵ Interpretation must be located in the text of what the parties, in fact, agreed.

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

³ *Capitec Bank Holdings Limited v Coral Lagoon Investments (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) at para 38.

⁴ *KPMG Chartered Accountants (SA) v Securefin Limited* [2009] ZASCA 7; 2009 (4) SA 399 (SCA)

⁵ *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; 2019 (3) SA 398 (SCA).

[46] With his usual clarity, Unterhalter AJA put it thus in *Capitec Bank Holdings Limited v Coral Lagoon Investments (Pty) Ltd*:⁶

“*University of Johannesburg* recognises that there are limits to the evidence that may be admitted as relevant to context and purpose. While the factual background known to the parties before the contract was concluded may be of assistance in the interpretation of the meaning of a contract, the courts’ aversion to receiving evidence of the parties’ prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract. *Blair Atholl* rightly warned of the laxity with which some courts have permitted evidence that traverses what a witness considers a contract to mean. That is strictly a matter for the court.” (Footnotes omitted)

[47] As I have said, the appellant sought to introduce evidence of negotiations leading to the agreement.

[48] I agree with the learned judge *a quo* that the evidence of the negotiations is inadmissible on the proper application of integration law principles in that the evidence seeks to alter the clear terms of the agreement.

[49] However, even if such evidence were to be admitted, the weight of the contextual evidence is such that, to my mind, the agreement is that private fees are payable.

[50] The alternative case of the appellant is that even if he were liable for private school fees, there was a variation of the agreement.

[51] I have referred above to the obvious tension in this version. This notwithstanding and for the sake of completeness I will deal with principles which inform the version of the appellant to the effect that there was a variation.

[52] On the appellant’s version of the variation agreement the respondent tacitly agreed to vary the agreement on the basis that she forwent the cash maintenance component of the settlement.

⁶ See fn 3 above.

[53] It is necessary for a party contending for a tacit term to show unequivocal conduct that establishes that the parties intended to, and did in fact, tacitly contract on the terms alleged. The conduct of both parties must be objectively considered as must the circumstances of the case generally.⁷ The question is whether the conduct of the respondent justifies a reasonable inference that the parties intended to and did contract on the terms alleged.⁸

[54] I move to consider the conduct of the parties in light of these principles. The contract contained a *Shifren clause*.⁹ The 2011 email purportedly outlining the variation agreement made it clear that this was understood by the appellant. He knew that any variation would have to be in writing. That is why he asked that the respondent “*Please reply back in writing via email as to avoid any unnecessary misunderstanding and to comply with the legalities of our divorce decree.*”

[55] The respondent did not accede to his request to agree in writing. It is clear from the exchanges mentioned above that the respondent, through the years harboured the understanding that the agreement was not varied, and she was clear that she was not being paid the maintenance due to her.

[56] The appellants attempt to characterise the schedule sent to the appellant by the respondent as the “writing” required under the agreement and the attempt to rely on the Electronic Communications and Transactions Act,¹⁰ to conjure the signature required is a desperate and cynical contrivance.

[57] As was correctly found by the court *a quo*, the fact that this is sought to be achieved in reply, which is impermissible, is but one more insuperable hurdle facing the appellant.

Costs

[58] There is no reason why the costs should not follow the result.

Order

⁷ *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A); *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* [2001] ZASCA 107; 2002 (1) SA 396 (SCA).

⁸ *Gordon Lloyd Page & Associates v Rivera* [2000] ZASCA 33; 2001 (1) SA 88 (SCA); *Starways Trading 21 CC v Pearl Island Trading 714 (Pty) Ltd* [2018] ZASCA 177; 2019 (2) SA 650 (SCA) at para 61.

⁹ See fn 1 above.

¹⁰ 25 of 2002.

[59] I thus order as follows:

[1] The appeal is dismissed with costs.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG
I concur

S YACOOB
JUDGE OF THE HIGH COURT
JOHANNESBURG
I concur

M MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 02 November 2023

Heard: 30 August 2023

Delivered: 02 November 2023

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