

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 DIVISION, JOHANNESBURG**

CASE NUMBER: A3080/2020

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

6 February 2023

SIGNATURE

In the matter between:

LIEBENBERG JACOBUS FREDERIK

Appellant

And

LIEBENBERG TERSIA GERTRUIDA

Respondent

Coram: MUDAU J et DIPPENAAR J

Heard: 17 January 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 6 February 2023.

Summary: Family law – Marriage – Divorce – Maintenance-Maintenance order-Variation- Condonation application- trite principle applied.

The parties to this matter were divorced, and in terms of a consent paper which had been made an order of court, the respondent was to pay maintenance in respect of his former wife. The appellant sought an order for substitution or discharge of the spousal maintenance order (in terms of section 6(1)(b) of the Maintenance Act, 99 of 1998), but failed. On appeal, held- appellant failed to make out a proper case for condonation.

Held, as per the merits, appellant failed to establish inability to pay the respondent the maintenance he agreed to in terms of the settlement agreement.

Appeal dismissed.

JUDGMENT

THE COURT (MUDAU J et DIPPENAAR J concurring):

[1] The appellant appeals against the judgment and order granted in the Johannesburg West Magistrates Court, Roodepoort (“the court *a quo*”) on 19 October 2019. In terms of the order, the appellant’s application for the discharge of the order pertaining to the maintenance of his ex-wife, the respondent, was dismissed. No costs order was granted. The order pertaining to maintenance was contained in a written settlement agreement (the “settlement agreement”) concluded between the parties on

13 December 2014, which was made an order of the High Court in the divorce proceedings between the parties on 25 April 2014.

[2] In terms of the settlement agreement, the appellant agreed to pay maintenance for the respondent in an amount of R20 000 per month, which would increase annually in accordance with the appellant's net after tax percentage increase in salary, if any. The appellant would further retain the respondent as a dependant on his medical aid scheme on the comprehensive plan option and pay the monthly premiums in respect thereof, until the death, remarriage or gainful employment of the respondent, whichever occurs first. In the event that the respondent requires medical treatment not covered by the appellant's medical aid scheme and/or in the event that there are any excesses payable, the appellant would be liable for the reasonable expenses as provided for via the additional gap-cover policy.

[3] The appellant had applied for the discharge of the order for maintenance in respect of the respondent in terms of s 6(1)(b) of the Maintenance Act¹ during March 2019. In his application, the appellant contended that the cause for the discharge of the order was that he was retrenched effective from 31 October 2018 and the respondent's financial position has significantly improved as she now owns significant assets and investments, including cash deposits. The appellant believed that the respondent had received lump-sum payments and ongoing monthly income from work and other insurance settlements. He had been applying for local and international jobs via LinkedIn and other social media for the past 5 months without success and it was unclear when alternative employment would be secured especially within the context of South African Labour and BBBEE provisions.

[4] In her judgment, as repeated in the written reasons provided, the court *a quo* referred to *Havenga*² and *Jacobs*³ and concluded that the appellant had failed to prove

¹ 99 of 1998

² *Havenga v Havenga* 1988 (2) SA 438 (T)

³ *Jacobs v Jacobs* [1955] 4 All SA 210 (T)

an inability to pay the maintenance order agreed to by him in the settlement agreement. As a result, the application was dismissed.

[5] The first issue which must be considered is whether the appellant has made out a proper case for condonation.

[6] It was common cause that the appellant was obliged to prosecute his appeal within 60 days of noting it in terms of r 50(1) and that he had failed to do so. The appeal was noted on 3 December 2019. Despite the quotation for the transcript being approved by the appellant on 1 November 2019, the transcription only became available on 31 March 2020.

[7] A dispute arose about the amount charged in the invoice and payment was only effected by the appellant on 4 September 2020. The transcription was received by the appellant's attorneys on 10 September 2020.

[8] The appellant only launched a formal application for condonation for his failure to prosecute his appeal on 31 January 2022, months after the lapsing of the appeal. This was some 14 months after the record of appeal was uploaded on Caseline. The trite approach is that an application for a condonation relief especially in a case where the applicant is the *dominus litis*, must show good cause, which entails a full and reasonable explanation, covering the entire period of delay⁴. The Constitutional Court in *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*⁵ reminds us that "*the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be*

⁴ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A

⁵ 2008 (2) SA 472 (CC) at 477E–G

raised in the intended appeal and the prospects of success". No reasons were provided for the delay in the launching of the condonation application.

[9] The grounds advanced in the condonation application when it was eventually launched places blame on everyone except the appellant. It is contended that the dispute regarding payment with the transcribers delayed the provision of the record. Reliance was also placed on the Covid 19 pandemic allegedly constituting *vis maior* and circumstances beyond the appellant's control including the alleged closure of courts and difficulties with the CaseLines system in contending that it was almost impossible to effectively prosecute the appeal.

[10] It was contended that the appellant's financial means was meagre and he was subjected to a severe reduction in his financial capacity, although he conceded that he is not indigent. Lastly it was contended that there was no prejudice to the respondent as the appellant had continued to pay his maintenance obligations to her and she was not prejudiced in her interest to the finality of the litigation.

[11] The appellant argued that he at all times acted *bona fide*, that condonation would serve to dispose of the matter most effectively and that the matter is of extreme and significant importance to him as there is significant benefit at stake. As such, so it was argued, it is in the interests of justice to grant condonation. The application was opposed by the respondent, who claimed prejudice and her interest in the finality of the litigation.

[12] Those delays are however not the only ones which occurred at the instance of the appellant and are referred to hereunder. However, no condonation application was launched for any of the appellant's failures to comply with the relevant rules or directives.

[13] The hearing of the appeal was substantially delayed by the appellant's failure to lodge the appeal record correctly. Ultimately it had to be rectified on various occasions. After removal of the appeal from the roll of 6 June 2022 due to an error in the registrar's office, the appeal was to proceed on 8 September 2022. The appellant's heads of argument were not uploaded onto CaseLines in accordance with the relevant practice directives. There was further not an updated practice note filed for the hearing. The Court seized with the matter issued certain directives on 5 September 2022, including directing the appellant to properly upload his heads of argument. The matter was removed from the roll due to the defects.

[14] The appellant only uploaded his original heads of argument in compliance with the directives on 23 December 2022. In addition, supplementary heads of argument and an updated practice note and were filed.

[15] The latter in oblique terms addressed the issues raised in the court's directives of 5 September 2022. It was stated that the matter was to be heard on 8 September 2022 but did not proceed as the matter:

"was not correctly allocated to a full bench. In addition, the honourable Judges were unable to find the appellant's heads of argument. The honourable Judges further requested updated practice notes from the relevant parties".

[16] No explanation was tendered why it took more than three months for the court's directives to be complied with. In addition, the statement that the matter was "*not correctly allocated to a full bench*", was patently incorrect. Counsel advised those were her instructions at the time. Whilst it is accepted that Adv Coetsee was not involved at the time, the appellant's attorney must have known that this contention was not correct when providing her with instructions.

[17] It is trite that condonation must be sought as soon as a party becomes aware that it is required⁶. An applicant for condonation must furnish a proper explanation for

⁶ Minister of Agriculture v CJ Rance 2010 (4) SA 109 (SCA) para [39]

his default, which would be sufficiently comprehensive to enable a court to understand why it occurred and therefore to enable a court to make a proper assessment as to whether to exercise a discretion in applicant's favour⁷. As explained in by Heher JA in *Madinda*⁸, failure to do so may adversely affect condonation or it may merely be a reason to censure the applicant or his legal representatives without lessening the force of the application. In general terms the interests of justice play an important role in condonation applications

[18] The appellant must also illustrate prospects of success. The interests of the respondent, as successful party in the litigation must also be taken into account. It is also in the interests of justice and the public interest in bringing litigation to finality.⁹ Although the appellant argued that the respondent was not prejudiced, his argument disregards this principle.

[19] On the facts presented and applying the relevant principles, it cannot be concluded that the appellant has made out a proper case for condonation. The appellant did not provide full and reasonable reasons for the delays which are stated in broad and unconvincing terms.

[20] It is significant that the appellant did not even attempt to apply for condonation for the late filing of his heads of argument and practice note, his non-compliance with the relevant practice directives and the directives of the court of 5 September 2022 and the various errors in not complying with the relevant practice directives pertaining to the filing of the record. That omission is significant.

[21] However, even if a benevolent approach is adopted and condonation were to be granted, the appeal cannot succeed on its merits- and it cannot be concluded that the appellant has illustrated reasonable prospects of success on appeal.

⁷ Premier, Western Cape v Lakay 2012 (2) SA 1 (SCA) para [17]

⁸ Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA)

⁹ Zondi v MEC, Traditional and Local Government Affairs and Others 2006 (3) SA 1 (CC) at 12E-G

[22] The case presented before the court *a quo* was squarely predicated on a discharge of the order. In his heads of argument and in oral argument, it was argued in the alternative for a reduction based on the principle that it is open to this court to do so.

[23] In the absence of a real change in circumstances there would not be sufficient reason for the variation or rescission of a maintenance order. However, changed circumstances are not a statutory requirement and there may sometimes be sufficient reasons though circumstances have not changed¹⁰. It depends on the particular facts.

[24] In considering whether or not sufficient reasons exist for the variation of a maintenance order it should be borne in mind that the order is contained in a settlement agreement made an order of court. That agreement is a composite final agreement regulating all the rights and obligations of the parties. For the court to interfere by varying one component of the agreement while leaving the balance intact, as sought by the appellant, would fly in the face of time hallowed principle that court cannot make new contracts for parties and hold them to bargains deliberately entered into¹¹. This principle was again reiterated by the Constitutional Court in *Baedica*¹².

[25] The appellant argued that the court *a quo* misdirected itself by not finding that “retirement or related funds” contained in clause 6.4.1 of the settlement agreement, includes funds derived by the appellant from a retrenchment. He argued that upon a proper interpretation of the settlement agreement, the applicant’s retrenchment package should have been excluded from the enquiry, which the court *a quo* failed to do.

[26] Reliance was placed on the appellant’s undisputed evidence that the retrenchment money did not form part of the estate because he foresaw that he may not be able to be employed in the foreseeable future and his retrenchment was excluded and that he intended to exclude his retrenchment from the settlement agreement.

¹⁰ *Hancock v Hancock* 1957 2 All SA 282 (C)

¹¹ *Georghiades v Janse van Rensburg* 2007 3 SA 18 para [16]

¹² *Baedica* 231 CC and *Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC)

[27] In response, the respondent argued that the exclusion contended for could not be read into the agreement. She further emphasised that the clause provided the respondent would have no further claim, which did not relate to the maintenance the appellant agreed to pay in terms of the settlement agreement.

[28] Clause 6.4.1 of the settlement agreement provides:

"It is recorded that neither party shall have any further claim against the pension fund, provident fund, retirement annuities and/or endowment policies of the other party. Without limiting the generality of the foregoing, the Plaintiff shall have no claim against the Defendant's retirement or related investment funds for the purposes of claiming maintenance or any other purpose. Accordingly, the proceeds of such funds shall specifically be excluded from the income and/or capital of the Defendant when assessing his ability to pay maintenance".

[29] Upon a purposive, grammatical and contextual interpretation of the settlement agreement¹³, the appellant's interpretation does not pass muster. Clause 6.4.1 cannot be considered in isolation but must be considered in the context of the whole settlement agreement and specifically clause 5 which regulates the maintenance payable by the appellant to the respondent. The use of the words "any further claim" envisages a future claim, not the claims agreed upon between the parties in clause 5 of the settlement agreement. The unilateral expressed intention of the appellant does not tip the scales in his favour.

[30] The appellant's argument, relying on s 35(5)(b)(i) of the Basic Conditions of Employment Act in arguing that a gratuity is not considered remuneration and that the retrenchment package constituted a gratuity and should thus be included under "retirement or related investment funds" also does not bear scrutiny. The argument disregards that the retrenchment package included an amount in excess of R900 000 in respect of severance, notice and leave pay, which does constitute remuneration.

[31] In the application form completed by the appellant he listed his total expenses as R91 035.10 per month and his assets as comprising of a motor vehicle R72 800, Liberty

¹³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

pension R1 261 514, Forced retrenchment R2 880 150. He listed no income, despite his evidence establishing that he had been receiving a UIF payment of R5 500 per month. He further did not list his half share in the former matrimonial home worth some R7.2 million which the evidence established he is still occupying, despite the settlement agreement providing that the property should be sold as soon as possible.

[32] On a consideration of all the evidence, the appellant relied on a lack of income due to his last retrenchment rather than to deal with his entire financial circumstances, assets and ability to earn an income as an independent consultant or to secure new employment. The appellant further in his evidence relied only on his lack of obtaining formal employment in the intervening period after his retrenchment.

[33] It is trite that in general, in the absence of a real change in the circumstances, there would be no sufficient reason for the rescission or variation of a maintenance order¹⁴. It is not enough to provide the details of the income of the parties. An inability to pay must be illustrated¹⁵.

[34] The appellant further argued that his appellant's retrenchment constitutes a material change in circumstances justifying variation of the maintenance order as it constituted a total loss of recurring or regular income rendering his ability to pay spousal maintenance limited. Given that the retrenchment was already pending when he signed the settlement agreement, this contention does not avail the appellant.

[35] From the record it appears that the parties divorced after 26 years of marriage. At the time of the proceedings in the court *a quo*, the appellant was 54 years of age. He is well educated. He is an electric engineer by trade, and has a Bsc degree in computer science, an MBA from a UK University and a director leadership qualification from the University of Boston.

¹⁴ Havenga supra

¹⁵ Jacobs supra

[36] The respondent is a 52-year-old doctor of psychiatry. The respondent ceased working during the subsistence of the marriage. On her evidence she suffers from mixed connective tissue disease, a mixture of rheumatoid arthritis and lupus and vasculitis. No expert evidence was however led on her diagnosis. She received a disability payout due to her medical condition from Discovery and a payment from the Road Accident Fund pursuant to injuries sustained by her in an accident during the subsistence of the marriage.

[37] Although arguing that the court *a quo* failed to take into consideration the appellant's evidence on various occasions and attached weight to certain facts which it should have disregarded, that averment was made in bald terms in the appellant's heads of argument. No factual content was given to this averment in the heads of argument and the respondent did not have an opportunity to consider it.

[38] Heads of argument are important for the proper administration of justice and must engage fairly with the evidence and submit submissions in relation thereto¹⁶. As stated in *Feni*: "*Where this is not done and the work is left to the Judges, justice cannot be seen to be done*".

[39] The appellant further in argument sought to traverse various issues which were not dealt with in his heads of argument, nor in his notice of appeal. That is not permissible. In any event, we are not persuaded that there is merit in the appellant's contentions, considering the evidence as a whole led at the proceedings before the court *a quo*.

[40] None of the grounds raised by the appellant in the 19 paragraphs in the notice of appeal sustain a conclusion that the court *a quo* came to an incorrect conclusion and that the application should not have been dismissed.

¹⁶ *Feni v Gxothiwe* 2014 (1) SA 594 (ECG) at 596C-D

[41] Whilst there is merit in the contention that the court *a quo*'s reasoning in her judgment is not comprehensive, it cannot be concluded that the court *a quo* substantially misdirected itself in dismissing the appellant's application. An appeal is against the order, not the reasons for judgment.

[42] From the evidence as a whole, it cannot be concluded that the appellant established his inability to pay the respondent the maintenance he agreed to in terms of the settlement agreement. Whether the court *a quo* was incorrect to term this "an onus" is of no moment. The simple fact is that the appellant simply failed to establish an inability to pay, considering all the evidence presented at the hearing.

[43] Applying the relevant principles, the appellant thus failed to establish good cause for the discharge of the maintenance order in respect of the respondent. It follows that the appellant has failed to establish good cause for the discharge of the order.

[44] The appellant argued in the alternative that the maintenance order in favour of the respondent should be reduced. We are not persuaded that the appellant has made out a proper case for such relief.

[45] We would have been justified to dismiss the condonation application for failure to illustrate prospects of success. To achieve finality in the litigation we are however persuaded, in the interests of justice, to dispose of the appeal on the merits.

[46] The normal principle is that costs follow the result. There is no reason to deviate from this principle. The costs should include the costs of the condonation application.

[47] For these reasons, the following order is granted:

[1] The appeal is dismissed;

[2] The appellant is directed to pay the costs of the appeal, including the costs of the condonation application.

T MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree and it is so ordered



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 17 January 2023
DATE OF JUDGMENT	: 06 February 2023
APPELLANT'S COUNSEL	: Adv. AR Coetsee
APPELLANT'S ATTORNEYS	: Botha & Human Inc Ms C Botha

RESPONDENT'S COUNSEL

: Ms R Erasmus

RESPONDENT'S ATTORNEYS

: Riekie Erasmus Attorneys