IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: A479/2017
DATE: 15/06/2018

IN THE MATTER BETWEEN:

THE AFRICAN DEVELOPMENT BANK **Appellant**

and

THOURAYA (AOUADHI) EP NSEERA **Respondent**

In re:

THOURAYA(AOUADHI)EP NSEERA **Applicant**

and

EDIRISA NSEERA **Respondent**

Judgment

KOLLAPEN J:

Introduction

1. This is an appeal against the judgment and order delivered by Acting Magistrate C L Ungerer in the Magistrate's Court for the District of Tshwane, held at Pretoria on the 26th of June 2017. In those proceedings the appellant brought an unsuccessful application in terms of Section 28(2) of the Maintenance Act No 99 of 1998 ('the Act') in which it sought to rescind and have set aside a Court order of the 26th of January 2017 which ordered it, as an employer, to attach and deduct monthly emoluments in respect of one Edirisa Nseera who is in its employ, and pay the same over to the Respondent, Thouraya (Aouadhi) EP Nseera.

Background facts

2. The following is the background to the rescission application that served before Magistrate Ungerer: On the 12th of October 2016 this Court made an order in the following terms against Edirisa Nseera who was cited as the first Respondent in those proceedings:

"The Court hereby orders that:

1. *That the First Respondent (is) found to be in contempt of Court Order granted by the above Honourable Court on 15 June number 41999;*
2. *That the First respondent be arrested and detained for a period of 30 (thirty) days which will be postponed for a period of 1 (one) year, on the condition that the respondent adhered to the court order, within 10 (ten) days of service of this order upon his appointed attorneys of record.*

…

5. *The First Respondent pay maintenance to the Applicant for herself and the minor children at the rate of R 20 000.00 per month, the first payment in respect of October to be paid on or before 25 October 2016, thereafter at the 1st of every subsequent month. The amount shall be paid into the Applicants attorneys of record trust account details as*

follows..."

3. It is clear from the order that it was granted pending the finalisation of the divorce action between the Respondent and her husband Mr Edirisa Nseera. On the 22nd of January 2017 and on the advice of the Clerk of the Maintenance Court, the Respondent deposed to an affidavit in which she records the order made by this Court on the 12th of October 2016 and complains that her husband has not complied with the order in that the payments he makes are less than the specified amount and are made on different days each month. In addition she states under oath that he does not pay the school fees as required and when the Respondent complains, his response is that he does not have money as he has not been paid by his employer. Finally, the affidavit has the figure of R 20500.00 inscribed on it without any indication as to what this amount represents.

4. The Respondent then presented the affidavit to the Clerk of the Maintenance Court and on the 26th of January 2017 an order for the attachment of emoluments was made in the following terms:

" The Paymaster, Salary Office: The African Development Bank, 339 Witch-Hazel Avenue, Centurion

In terms of the provisions 16 read with section 26, 27, 28 and 30 of Maintenance Act 99 of 1998 it is ordered that:

monthly emoluments be attached to the value of R20 000.0 in terms of section 28 plus arrear maintenance of R20 50 .00 payable at R2000.00 per month from 28/02/2017 and upon al settlement of all arrears only the monthly maintenance of R20 000.00 shall be deducted and paid over until further no ice on or before the 7th of each succeeding month.

5. While the Court Order was signed by the Magistrate on the 26th of January 2017, the letter accompanying the order and directed to the Appellant as w ell as

the formal notice in terms of Section 29 of the Act bringing the Court order of the 26th of January to the attention of the Appellant, is dated the 25th of January 2017.

6. The Appellant takes issue with this on the basis that the letter and notice could not have conceivably pre-dated the order while the explanation offered by the Respondent is that she made the application for the emoluments order on the 25th of January 2017, and that the covering letter and notice to the employer was prepared and stamped on the 25th of January 2017 in anticipation of the order being granted on the 25th of January 2017. The Respondent was only able to see the Magistrate on the 26th of January as there were some typing errors made by the Clerk and the Magistrate had left by the time the errors had been rectified. The Respondent was accordingly only able to see the Magistrate on the 26th of January which is the date the order was signed

7. The order was served on the Appellant who then brought the application terms of Section 28 of the Act to have it rescinded and set aside. That application was opposed by the Respondent came before Acting Magistrate Ungerer and resulted in the judgment and order which is the subject of his Appeal.

8. In advancing the Section 28 application, the Appellant premised its case on three grounds:

a) That there are discrepancies in the dates of the order as compared with the letter and notice accompanying the older, rendering the process irregular;

b) That it was prejudiced in not being given notice of the application that the Respondent had made before the Maintenance Court and which resulted in the Emoluments Order of the 26th of January 2017;

c) That the prejudice it faced was that it was not afforded the

opportunity to oppose the Emoluments Order and if it had the opportunity, it would have raised the immunity it alleges it enjoys. This, it states, would have prevented the Court from making the order it did on the 26th of January 2017. It also accuses the Respondent of failing to place material facts before the Court, namely the matter of the immunity.

9. The Appellant also raised a number of new matters in its Replying Affidavit and they are:

a) That while the order of the 12th of October 2016 refers to maintenance *pendente lite,* the Respondent refers in her affidavit of the 22nd of January to her "ex-husband" which suggests that the interim order of the 12th of October 2016 would have ceased to exist at some time as the term "ex-husband" denotes the finality of the divorce proceedings, precluding her from relying on the interim order;

b) That the affidavit on which the Respondent relied to obtain the Emoluments Order did not set out the arrears which were the subject of the order of the 25th of January 2017.

The legal framework and analysis of the issues

10. Section 26 of the Act provides for the enforcement of maintenance orders and subsection (1)(ii) authorises the attachment of emoluments. Section 28 (1) of the Act provides as follows:

"28. Attachment of emoluments-(1) A maintenance court may-

a) on the application of a person referred to in section 26 (2) (a)

b) when such court suspends the warrant of execution under section 27 (4) (b);

c) when such court suspends the order for the attachment of debt under section 30 (1); and

d) where applicable, after hearing the evidence, either in writing or orally, of the employer of the person in question, make an order for the attachment of any emoluments at present in future owing or accruing to the person against whom the maintenance or other order in question was made..."

11. Section 28(2) reads as follows:

"(2) (a) An order under this section may at any time, on good cause shown, be suspended, amended or rescinded by the maintenance court.

(b) Any person who wishes to make an application for the suspension, amendment or rescission of an order under this section shall give notice in the prescribed manner of
-his or her intention to make the application to the person in whose favour that order was made, which notice shall *be served at least 14 days before the day on which the application is to be heard.*

(c) The maintenance court may call upon-

- *the person who has made the application to adduce s evidence, either in writing or orally, in support of hi her application as the maintenance court may cons necessary;*
- *the person in whose favour an order under this section was made to adduce such evidence, either in writing or orally, in rebuttal of the application as the maintenance court may consider necessary."*

The challenge to the order being granted *ex parte*

12. The section read as a whole is strongly indicative that an emoluments attachment order such as the one which is the subject of this appeal may be granted *ex parte.* The learned Magistrate in the Court *a quo* took this approach when describing the procedure as follows:

"The procedure in the Maintenance Act contained in Section 26 together with Section 28 of the Maintenance Act for applying for an emoluments attachment order is an ex parte application. It is for this reason that Section 28 makes provision for such an order granted upon such an ex parte application brought to be rescinded once any person against whom such order has been granted receives knowledge of the said order."

13. It must be evident that in the light of what can be described as a remedy to an aggrieved employer to seek the rescission, suspension or variation of the emoluments order that the *ex parte* practice which appears to exist is no in itself objectionable. Section 28 not only provides the remedy of rescission but also provides the detail of how that remedy is to be invoked. This must all point in the direction that the Section does not render it peremptory to give the employer notice in advance. If that were the case or the reasonable interpretation to be afforded to the Section, then it hardly makes sense that the legislature would have devoted so much attention in creating both the remedy and the procedure for an aggrieved employer to invoke if the intention was to give notice to the employer before the making of the order.

14. The requirements of *audi alteram* can be satisfied in different ways depending on the context and the particular factual matrix. What is of relevance here is that the employer is not a party to the dispute between the original parties who have a direct interest in the maintenance order. They are described in the Emoluments Attachment order as the creditor and the debtor. The employer is required at best to enforce the order of maintenance and can **be** thus seen a party from that limited perspective. Of course that does not preclude the employer from a voice with regard to the order made but that it is structured as a post-order intervention in the form of a rescission, suspension or variation in my view gives substance to the rights of the employer.

15. On the other hand this Court in both ***S v RASEEMELA* 2000 (2) SACR 98 (T) and *S v NKGOELE* 2002 (2) SACR 420 (T)** expressed the view that a Magistrate contemplating the in making of a maintenance order in term of Section

28(1) of the Act should afford the employer the opportunity of commenting upon the feasibility of the proposed order. These comments however were made in the context of criminal proceedings where appellants were convicted in terms of Section 31(1) of the Act of failing to pay maintenance.

16. In ***NKGOELE*** the order in question which related to emolument attachment was made in terms of Section 16(2)(a)(iii) of the Act after the conviction of the appellant in terms of Section 31(1) while in ***RASEEMELA*** the condition relating to the attachment of emoluments was part of the conditions of a suspended sentence imposed following a conviction in terms of Section 3 (1) of the Act.

17. Thus while the Court in ***RASEEMELA*** made reference to Section 28(1) and expressed the view that the views of the employer be sought, it is not cle on what basis the court made reference to the provisions of Section 28(1). Sec ion 28(1) does not apply in criminal proceedings and it is clear from the Section that an order in terms of Section 28(1) can only be made:

a. on the application of a person referred to in section 26 (2) (a);

b. when such court suspends the warrant of execution under section 27 (4) (b);

c. when such court suspends the order for the attachment of debt under section 30 (1); and

d. where applicable, after hearing the evidence, either in writing or orally, of the employer of the person in question

18. The relevant and operative sections under which the trial court in ***NKGOELE*** and ***RASEEMELA*** could impose as part of the sentence, an order attaching emoluments, is Section 16 (2)(a)(iii) which entitles a Court upon the conviction of a person of an offence in terms of Section 31(1), which is what occurred in both ***NKGOELE*** and ***RASEEMELA,*** to make what can be described as an emoluments attachment order.

19. Section 16 provides further that such an order can be made ,

" 16. Maintenance and ancillary orders.- ...

(2))(i)(dd) where applicable, after hearing evidence, either in writing or orally, of any person who is obliged under any contract to pay any sums of money periodical basis to the person against whom the maintenance order in question has been or is made,

that is not impracticable in the circumstances of the case: Provided that nothing precludes the court from making order in terms of this subsection if it is of the opinion that any further postponement of the enquiry in order to obtain in the evidence of the person referred to in subparagraph (dd) *will give rise to an unreasonable delay in the finalisation of the enquiry, to the detriment of the person or persons to be maintained."*

20. Thus Section 16 does not create an obligation to hear the employer before an order is made but both ***NKGOELE*** and ***RAMEESELA*** expressed the view that it should be done. I associate myself with this stance in the context of an order that is contemplated in terms of Section 16(2)(a)(iii). The remarks of the Court in both those matters with regard to the interpretation of section 28(1) would in my view be *obiter* remarks as the Court was in effect dealing with interpreting and giving effect to section 16 of the Act, not to section 28(1) of the Act. I

21. Of course the difference in the process for attachment under Section 16 and Section 28 is that in the latter instance there is an automatic right afforded to the employer to seek the rescission, variation or suspension of the order made, while this is not so in terms of Section 16. Accordingly the view that an employer be heard before an order is made is perfectly understandable and consistent given the final nature of the order that Section 16(2)(a)(ii) contemplates, while the

position is considerably different under an order made in terms of Section 28(1) where the right to seek rescission, suspension or variation is insulated in the structure of the Section.

22. In conclusion my view is that the views expressed in ***NKGOELE*** and ***RAMEESELA*** are clearly distinguishable and that in any event upon a proper construction and interpretation of the facts and circumstances of those matters, the Court was dealing with Section 16 and not Section 28.

23. Accordingly on this issue I conclude that the Section as it is structured certainly supports the granting of an order *ex parte* which does not offend the right to be heard which is expressly provided for in Section 28(2) and which would largely be confined to questions around the practicality of the order or as in this instance, a legal ground advanced as to why the order is not competent.

24. Under the broad challenge relating to the shortcomings in the *ex parte* process, the Appellant raised two additional matters in its Replying Affidavit. They emerge in reply for the first time and traverse issues that could have been been raised in the Founding Affidavit. In any event for the reasons that follow there li no merit in the challenges raised as I will demonstrate.

The reference to Mr Edirisa Nseera as the Respondent's ex-husband

25. In her affidavit in support of the emoluments attachment order, the Respondent refers to Mr Nseera as her "ex-husband". The Appellant states that thi is indicative of the divorce being finalised and the Respondent was there ore precluded from relying on the order of this Court of the Ii111 of October 2 16 which provides for maintenance *pendente lite* while the reference to her ' ex-husband" must suggest a final order

The arrears not dealt with in the affidavit in support of the order of the 26th of January 2017

26. The Appellant's complaint is that this affidavit does not set out how the arrears which are the subject of the order of the 25th of January 2017 are arrived at or even what the amount of the arrears is.

27. On both these issues I have some serious reservations, firstly as to whether the Appellant has the right to raise them. They go to the dispute between the Respondent and Mr Nseera and the rescission application which is grounder in Section 28(2) cannot become an avenue through which an employer then seeks to litigate on behalf of a party who is not before the Court. If Mr Nseera has an issue with the computation of the arrears or is of the view that there is a final order in place which replaces the interim order, then surely it is open to him to raise those issues in the appropriate forum. It hardly behoves the Appellant to raise them and beyond there being no merit in them, it is doubtful if the Appellant even has the necessary *locus standi* to raise them.

28. Certainly the authorities, including ***RASEEMELA*** **and** ***NGKOELE*** suggest that the interests of the employer really relate to the practicability d enforceability of the emoluments attachment order. It would be undesirable for an employer to purport to enter the principal dispute between the parties as e Appellant seeks to do.

29. That said, there is absolutely no merit in the points raised in any event. The reference to her "ex-husband' cannot mean that she is divorced, especially considering that she relies in the same affidavit on the order which provided for interim maintenance. The taking of this point on the papers, and thereafter persisting with it in argument, was in my view opportunistic and in a large measure lends credence to the Respondent's concerns that the Appellant attempting to litigate this matter on behalf of Mr Nseera.

30. The issue regarding the arrears is also not an issue in which the Appellant has an interest. In any event there is an inscription in the affidavit of the amount of R20 500.00 which corresponds to the arrear amount set out in the order of the 25th of January 2017. This point as well was unsustainable from the

outset.

The difference in the dates of the Order and those that appear on the letter and Notice in terms of Section 29

31. The explanation offered by the Respondent that it was contemplated that the Order would be granted on the 25th of January 2017 is a reasonable explanation on as to why the letter and notice was signed and stamped on the 25th of January 2017. Clearly if the order was granted on the 25th of January there would have been no problem.

32. The Respondent explains that some typing errors crept into the preparation of the order and by the time that was rectified, the Magistrate had left and she, the Respondent, was only able to see the Magistrate on the 26th of January which is the date the order was made.

33. Ideally the date on the letter and the Section 29 notice should have been changed but the failure to do so hardly has any consequence. The operative document is the Order and there can be no ambiguity about it or the date when it was signed as the date stamp bears out. That it says "Signed at Pretoria on 25th day of January 2017" is not material. It supports the Respondent's version that the papers, including the order, were prepared on the 25th of January 2017 and any party receiving such an order cannot be heard to say that there is uncertainty about the order or what is required to be done in terms of it.

34. One must in this regard be careful not to elevate formalism and allow t to become an obstruction of the course of justice and of the attempts by a Court to establish and determine the real dispute between the parties.

35. In ***EKE v PARSONS*** **2016 (3) SA 37 (CC),** the Constitutional Court expressed itself as follows on the role and place of rules in the quest for justice (at 5 A- D):

"...*Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. T. at, however does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core June ion of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rule. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said "[it] is trite that the rules exist for the courts, and not the courts for the rules.*

Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and...further the administration of justice ". *I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules and generally ensuring the efficient administration of the courts' judicial functions".*

36. While those remarks relate to the application of the Rules of Court, they should apply with equal force to the manner in which a Court approaches what may be described as matters of a purely technical nature that arise in the adjudication process.

Also, in ***TAKE AND SAVE TRADING CC v THE STANDARD BANK SA LTD*** **2004 (4) SA 1 (SCA),** the Court stated that a Court's role is more than that of a mere umpire of technical rules; the Court is "an administrator of justice... [it] has not only to direct and control the proceedings according recognized rules of procedure but to see that justice is done".

37. There is no merit in this leg of the challenge either.

<u>The claim to immunity</u>

38. The Applicant's case for immunity is the following: The African

Development Bank was established in terms of an Agreement signed on the 4th of August 1963 in Khartoum, Sudan by the representatives of various, can governments. That agreement (the main agreement) affords the Appellant immunity which the Appellant contends effectively precludes the Court from making the order it made in terms of Section 28(1).

39. It is not in dispute that:

a. In terms of the President of the Republic of South Africa's Minute No 652 dated 11 June 2009, an agreement between the Government of the Republic of South Africa and the Appellant was approved and the Ministers of Finance and International Relations and Cooperation were authorised to sign such agreement, which was indeed duly signed by them on that date (regional office agreement).

b. The regional office agreement pertained to the establishment of regional office of the Appellant on the Territory of the Republic of South Africa.

40. In order to properly assess and consider the claim to immunity it is necessary to have regard to the relevant provisions of the main Agreement, the agreement that establishes the regional office of the Appellant (the regional agreement).

The main agreement

41. The main agreement provides as follows:

i. Article 1 states that 'The purpose of the Bank shall be to contribute it the

sustainable economic development and social progress of its regional members individually and jointly;

ii . Article 52 states that "The Bank shall enjoy immunity from

every form of legal process except in cases arising out of the exercise of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of a member in which the Bank has its principal office, or in the territory of a member or non-member State where it has appointed an agent for the purpose of accepting service or notice of a process or has issue or guaranteed securities. No actions shall, however, be brought by member or persons acting or deriving claims from members"

and

"The property and assets of the Bank shall, wherever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

iii. Article 5 states that "Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action"

and

"The archives of the Bank and, in general all documents belonging to it or held by it, shall be inviolable, wherever located."

iv. Article 56(1) states that "All governors, directors, alternates, officers and employees of the Bank and experts and consultants performing missions for the Bank shall be immune from legal process with respect to acts performed by them in their official capacity."

v. Article 59 states that "The immunities, exemptions and privileges provided in this chapter are granted in the interests of the Bank. The Board of Directors may waive, to such extent and upon such conditions as it may determine, the immunities and exemptions provided in articles 52, 54, 56, and 57

of this Agreement in cases where its action would in its opinion further the interests of the Bank. The President shall have the right and the duty to waive the immunity of any official in cases where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Bank."

The regional agreement

42. The regional agreement provides as follows:

i. Article 4 states that "The Bank shall be immune from every form of legal process, and may be sued only in accordance with paragraph 1 of Article 52 of the Bank Agreement and paragraph 1 of Article 43 of the Fund Agreement."

and

"The property and assets of the Regional Office, wherever located and by whosoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case immunity shall have expressly been waived by the Bank. It is however, understood that no waiver of immunity shall extend to any measure of execution."

ii. Article 12(4) states that "The privileges, immunities, exemptions and facilities accorded in this Agreement are granted in the interests of the Bank and not for the personal benefit of the individuals themselves. President of the Bank shall have the right and the duty to waive immunity of any official of the Regional Office in cases where, in his or her opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Bank.

iii. Article 12(5) states that "The Bank shall use its best effort to ensure that the privileges, immunities, exemptions and facilities conferred by this Agreement are not abused and for this purpose shall establish such rules and regulations as it may deem necessary and expedient. Should the Government consider that an abuse has occurred; consultations shall be held between the

Government and the Bank to determine whether any such abuse has occurred and, if so, to take any necessary action to ensure that no repetition occurs."

43. If regard is had to the agreements read in context and mindful that the purpose of establishing the Bank was to advance the sustainable economic development and social progress of its regional members, then clearly the maintenance dispute between the Respondent and Ms Nseera is hardly a matter that falls within the general business of the bank or the scope of its operations addition, how that dispute finally gets resolved is of no concern to the Bank and does not impact on its operations, efficacy or its ability to discharge its mandate. Thus it is abundantly clear from the agreements and in particular Article 56 of the main agreement and Article 12.4 of the Regional Agreement that the immunities that may attach to the employees of the Bank are intended to operate for the personal benefit of such employees.

Do the provisions of Article 52 of the main agreement which provide that "the Bank shall enjoy immunity from every form of legal process…" preclude the making of an order against it in terms of Section 28(1)?

44. The case for immunity must at the end of the day be about protecting the Bank its operations and its assets from legal process except in the circumstances defined in Article 52. The order made in terms of Section 28(1) and which creates an obligation on the part of the Appellant to give effect to it, does not in my view fall within the scope of the protection that the agreement contemplates in creating the immunity it does.

45. Giving effect to the order cannot in any way compromise the assets of the Bank. What the Bank is required to attach and pay over is not its own assets but the emoluments that become due to Mr Nseera. Those emoluments then cease to be the assets and property of the Bank, and requiring them to be paid over can hardly violate the letter or the spirit of the respective agreements that create immunity. It is precisely a matter that relates exclusively to the private benefit of Mr Nseera, and allowing the bank to invoke immunity will clearly have the effect

that the immunity is then invoked for what will ultimately be the private benefit of Mr Nseera, clearly something the regional agreement expressly forbids in Article 12.4 thereof.

46. In addition Article 6.5 enjoins the bank and its officials to respect the Law of the Republic of South Africa. The phrase " immunity from every from of legal process" must in my view be interpreted in context and not simply be afforded its literal meaning.

47. ***NATAL JOINT MUNICIPAL FUND*** *v* ***ENDUMENI MUNICIPALITY*** **2012 (4) SA 593 (SCA)** the Court stated the following:

"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add. unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) td v General Hendrik Schoeman Primary School. The present s ate 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 w le 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 rule 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."

48. In addition and significantly so, one is dealing here with the interpretation of an agreement in the context of a dispute involving the rights of minor children to maintenance. I am accordingly satisfied that if regard is had to the agreement and in particular its purpose as well as its location within the South African legal system, then the claim for immunity is simply not sustainable.

49. In addition however and of concern is that the Appellant does not in any manner whatsoever deal with the provisions of Article 59 of the agreement and in this regard against the following factual backdrop:

a) Counsel for the Appellant placed on record that the issue of payment of maintenance is an important one and that the Appellant abhors conduct that evidences an attitude o an unwillingness to pay.

b) The Courts in South Africa have consistently and power expressed themselves on the importance of maintenance obligations being diligently discharged.

50. In ***BANNATYNE v BANNATYNE*** **2003 (2) SA 363 (CC),** the Constitutional Court dealt with the significance of maintenance obligations and the du of courts to ensure compliance therewith in the following terms:

"Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually

evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law."

51. In ***S S v V V-S*** **[2018] ZACC 5** (case CCT247/16 decided on 1 March 2 18) the Constitutional Court again amplified the duty of the Courts to ensure compliance and enforcement of maintenance orders:

"All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all. Those interests include the protection of the right of children and the collective ability of our nation to "free the potential of each person" including its children, which ring quite powerfully true in this context.

Thus, when courts act as the upper guardian of each child do so not only to comply with the form that the Constitution enjoins us to be loyal to, but with the very spirit encapsulated in the provisions of section 28(2) of Constitution that "a child' s best interests are of paramount importance in every matter concerning the child".

This is precisely such a matter. The Order was about ensuring the best means of protecting and enhancing the interests of the minor child, and the scope and the breadth of the provision of the settlement agreement appear to compellingly underscore that objective. The High Court, when it granted the decree of divorce, must then have been satisfied that the interests of the minor child were well catered for.

When those interests are imperilled or when the obligation undertaken by either parent to the child is not diligently complied with, then courts are enjoined to interfere in a manner that best protects those interests."

52. The obligation to pay maintenance and to do so diligently and timeously is at the heart of the social order we seek to create in our country, one characterised by care, compassion and the recognition of the vulnerability of children commitment to secure for them the entitlements that are due to them. The Maintenance Act and its provisions for enforcement seek to do precisely that. It is in the light of those considerations that one would have hoped that the Appellant, even if it held the view that it was in law entitled to invoke immunity, would have considered the duty placed on it by Article 59 of the main agreement to waive the immunity it contended for. Neither the course of justice nor the interests of the Bank are best served by invoking immunity. On the contrary the invoking of immunity that would have the ultimate effect of preventing the effective enforcement of a court order for the payment of maintenance, may well redound to the prejudice of the Bank and be inconsistent with its own interests as an African institution that should be deeply concerned about the well-being and the plight of the African child.

53. Finally it was argued that if the Appellant failed to implement the order made in terms of Section 28(1) it would risk being in contempt of Court and any order of contempt would then in turn violate the immunity granted. On this basis it was contended that the immunity must therefore apply in respect of the Section 28(1) order as well. I am not sure if the Act contemplates contempt proceedings but rather a right to enforce directly against the employer, the amounts not paid.

54. Section 29(4) provides as follows:

"(4) *If an employer on whom a notice has been served for the purposes of satisfying a maintenance order has failed to make any particular payment in accordance with that notice, that maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay, and the provisions of this Chapter shall, with the necessary changes, apply in respect of that employer, subject to that employer's right or the right of the person against whom t at maintenance order was made to dispute the validity of the*

order for the attachment of emoluments referred to in section 28 (1).

55. Whatever the case may be, subsequent action that the Appellant may expose itself to cannot be dispositive of the question of immunity. If Section 52 does not sustain a claim for immunity, then the Appellant must in the ordinary course carry the risk of not complying with an order properly and competently made, including the risk to its assets that Section 29(4) contemplates. Of course there is nothing that prevents the Appellant from at that stage, raising the matter of immunity again as the circumstances arise and the risk that it will then face may well be different.

A prima facie case

56. The Appellant contended that all it was required to do at this stage was to establish a *prima facie* defence and that it did enough by invoking the immunity agreements. Its stance was that a Court in the fullness of time would have to properly interpret those agreements. In this regard it relied on the following *dicta* in ***HASSIM HARDWARE v FAB TANKS*** **(1129/2016) [I 7) ZASCA 145 (13 October 2017):**

"It is trite law that an applicant in an application for rescission of judgment need only make out a prima facie defence in the sense of setting out averments. which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour. That is the business of the trial court. The object of rescinding a judgment is to restore the opportunity for a real dispute to be ventilated

57. The Court in ***HASSIM*** however also dealt with the requirements for rescission and indicated that even where such requirements were met the met the Court retained a discretion, which had to be judicially exercised, not to grant the application

"Rule 31(2)(b) of the Uniform Rules of Court provides that a party against whom default judgment has been granted may, within 20 days after he or she has knowledge of that default judgment, apply to court to set it aside. The court may, on good cause shown, set that judgment aside. It is established law that the courts generally require an applicant for rescission of judgment to show good cause by (a) giving a reasonable explanation for the default; (b) showing that his/her its application for rescission is made bona fide and not made merely with the intention to delay the plaintiff's claim; (c) showing that he/she/it has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success. Regarding the last mentioned requirement, it is trite law that an applicant or rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial.

Equally trite is the principle that even when all the requirements set out above have been met, it is still within the discretion of the court whether or not to rescind the judgment. That discretion must be exercised judicially in light of all the facts and circumstances of the case.

58. When I have regard to the defences advanced then they do, for the re given, raise serious questions about the *bona fides* of the Appellant and the interests it seeks to protect. Beyond invoking immunity, it has purported to raise defences that go to the heart of the merits of the dispute between the Appellant and Mr Nseera and to which it is neither a party nor can be said to have any interest in. It has been overly technical and formalistic in the stance it has taken to attack and cast doubt on the *bona fides* of the Respondent in a manner that is wholly unjustified. Finally it has expressed no appreciation and understanding for its duty set out in the main agreement with regard to the waiving of immunity to advance the course of justice and has paid no heed to the essence of the relief sought by the Respondent, the underlying objective the relief seeks to achieve, and the effect that immunity, even if it could be successfully invoked, would have on the legitimate interest of the Respondent in seeking to enforce the entitlement she and her minor children derive from a Court order issued out of this Court.

59. I have dealt with the three legs of the defences raised and am not satisfied that any of them, in the manner in which they are advanced, can be said *prima facie* to have any prospects of success. In any event and if am wrong on that score, then given the discretion vested in me I would not have granted the application. I would have declined to do so for the reasons I have advanced that relate to the conduct of the Bank and the manner in which it has litigated this matter, and its inability and failure to have dealt with its duty under Section 59 of the m in agreement.

60. It is finally important to record that the Appellant has not advanced any re son why the implementation of the order of the 26th of January will not logistically and practically be possible and I must assume that the order then is capable of being given effect to. To that end nothing stands in the way of the order being implemented save for the Appellant's reliance on immunity which I have already dealt with as being without foundation.

61. For those reasons I will propose that the appeal be dismissed with costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE,

H DEVOS
JUDGE OF THE HIGH COURT

IT IS SO ORDERED

A479/2017

HEARD ON: 15 May 2018

FOR THE APPELLANT: Advocate M D Silver
INSTRUCTED BY: Stein Scop Attorneys Inc. (ref.: D de Gouveia/Mr B Scop) correspondent attorneys - VDT Attorneys Inc.)

FOR THE RESPONDENT: Advocate M Steenkamp INSTRUCTED BY: Legal Aid South Africa (Pretoria) (ref.: MKS)