THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 499/12
Reportable

In the matter between:

SANDRA LEE DE HAAS **APPELLANT**

and

GARRY JOHN FROMENTIN **FIRST RESPONDENT**
THE SHERIFF OF THE COURT: SANDTON **SECOND RESPONDENT**
TURQUOISE MOON TRADING 309 (PTY) LTD **THIRD RESPONDENT**

Neutral citation: *De Haas v Fromentin* (499/12) [2013] ZASCA 144 (30 September 2013)

Coram: Mthiyane AP, Theron and Petse JJA and Van der Merwe

and Zondi AJJA

Heard: **10 September 2013**

Delivered: **30 September 2013**

Summary: Contempt of court arising out of failure to pay maintenance in terms of agreement of settlement – oral variation of agreement of settlement not established and in any event unenforceable as result of non-variation clause – no reason to interfere with exercise of discretion of court below in respect of sanction.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Kollapen AJ sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

VAN DER MERWE AJA (MTHIYANE AP, THERON AND PETSE JJA AND ZONDI AJA CONCURRING):

[1] The issue in this appeal is whether this court should interfere with the sanction for contempt of court imposed in respect of the first respondent by Kollapen AJ in the North Gauteng High Court, Pretoria. The judgment of the court a quo is reported as *GF v SH & others* 2011 (3) SA 25 (GNP). It granted leave to appeal to this court.

[2] The second and third respondents have no interest in the appeal. The first respondent (the respondent) does, but did not participate in the hearing of the appeal. The appellant rightly did not persist in an attempt to place further evidence before this court.

[3] The issue arose in the following manner. The appellant and the first respondent (the parties) were married to each other on 21 March 1992. Two children were born of the marriage, namely a boy born on 26 February 1995 and a girl born on 27 September 1997. However, the marriage did not last. On 27 August 2002 the marriage between the parties was dissolved by order of the high court. An agreement of settlement between the parties was also made an order of court. In terms of the agreement of settlement custody of the minor children was awarded to the appellant, subject to the right of

reasonable access to the children of the respondent, who was the plaintiff in the action.

[4] Clauses 4 and 5 of the agreement of settlement (the maintenance order) provided for maintenance for the children as follows:

'4. **MAINTENANCE IN RESPECT OF THE CHILDREN**

4.1 The Plaintiff shall pay maintenance in respect of the minor children at the rate of R5 000,00 (Five Thousand Rand) per month, per child, with effect from the first day of the month preceding the granting of a Final Order of Divorce and thereafter on the first day of each and every succeeding month.

4.2 The maintenance referred to in 4.1 hereof shall escalate annually at the Consumer Price Index (CPIX) rate, effective 12 (twelve) months after the granting of a Final Order of Divorce and thereafter on each anniversary of the granting of the decree of divorce.

4.3 Notwithstanding the provision embodied in paragraph 4.2 hereof, same shall not be construed as a waiver by either of the parties from applying to Court for an increase or decrease of the maintenance referred to in paragraph 4.1 hereof.

5. **EDUCATION AND MEDICALS IN RESPECT OF THE CHILDREN**

The Plaintiff undertakes to make payment in respect of the children, either to the Defendant or to the creditors concerned, at the Defendant's option, against statements of account to be produced to him of:

5.1 all medical, dental, physiotherapeutic, orthodontic, hospital, nursing home, surgical, ophthalmic, and like expenses, medicines not covered by prescriptions and prescribed medication;

5.2 nursery, primary and secondary private school fees and extra lessons;

5.3 levies, school books, stationery, school uniforms and compulsory school outings within the Republic of South Africa;

5.4 extra-mural sporting, cultural and academic activities, together with the costs relating to tuition fees, sporting equipment and attire relating thereto, including the cost of general tournaments, subject to a maximum payment of R500,00 (Five Hundred Rand) per month, per child in respect of all of the aforesaid;

5.5 the fees, books and equipment relating to the children's tertiary education at any university, college, art, computer or secretarial school or other place of like learning in the Republic of South Africa, including residence fees, subject to each child applying himself/herself with due diligence and showing an aptitude therefor.'

[5] However, within a few years disputes arose between the parties in respect of the payment of maintenance for the children. Despite attempts at settlement, these disputes and the acrimony between the parties escalated and on 15 April 2010 the appellant obtained a writ of execution against the moveable goods of the respondent for the sum of R303 154.62, consisting of alleged arrear maintenance in terms of the maintenance order for the period May 2008 to April 2010.

[6] The respondent responded thereto by issuing an application for setting aside the writ of execution on the ground that he was not in breach of his obligations in terms of the maintenance order. The appellant in turn filed a counter-application in which she inter alia claimed an order declaring the respondent to be in contempt of court, in that he wilfully and mala fide breached the provisions of the maintenance order and an order committing the respondent to imprisonment or imposing an appropriate suspended sentence.

[7] The court a quo set aside the writ of execution. It also declared the respondent to be in contempt of court in relation to the provisions of the maintenance order and imposed the following sanction:

‘(3) The applicant is sentenced to six months’ imprisonment, wholly suspended for three years, on condition that [he pay] the amount of arrear maintenance in the sum of R73 140,85, as follows:

(3.1) R20 000 by 20 December 2010.

(3.2) R20 000 by 20 January 2011.

(3.3) R20 000 by 20 February 2011.

(3.4) R13 140,85 by 20 March 2011.’

In addition each party was ordered to pay their own costs in relation to the main application, the counter-application and the respondent’s applications for condonation and striking out. There is no cross-appeal against the order declaring the respondent to be in contempt of court. As a result of subsequent events the appellant does not claim relief on appeal in respect of the order setting aside the writ of execution.

[8] The appellant relies on two grounds for the submission that the sanction is inappropriate. These grounds are first, that the court a quo erred in not ordering that the sentence be suspended on condition that the respondent at least pay the amount of the writ of execution; and second, that the sanction should have included a further condition that subjected the suspension of the sentence to future compliance with the maintenance order.

[9] When the court a quo imposed the sanction, it did so in the exercise of a discretion in the strict sense. This court can therefore only interfere with the exercise thereof if the court a quo had been influenced by a wrong principle of law, or a misdirection of fact, or if it failed to exercise a discretion at all. See *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) para 18.

[10] I am prepared to accept that if the amount of arrear maintenance at the relevant date should have been determined by the court a quo as a substantially greater amount than the amount of R73 140.85, a material misdirection would be established. I therefore turn to this question.

[11] Clause 9 of the agreement of settlement (the non-variation clause) provides as follows:

'**VARIATIONS TO THIS AGREEMENT**

Save for the above the provisions of this agreement shall not be capable of being varied (save by a Court of competent jurisdiction), amended, added to, supplemented, novated or cancelled unless this is contained in writing and signed by both parties.'

[12] The respondent's case was in essence that in terms of an oral agreement the parties varied the maintenance order, that it would be contrary to public policy to enforce the non-variation clause and that as a result of the variation, the amount of the writ was incorrect and fell to be set aside. These propositions were accepted by the court below. The respondent also maintained that he was not in breach of his obligations under the maintenance order.

[13] The case of the appellant was that on the facts the maintenance order was not varied and that there was in any event no ground for not enforcing the non-variation clause. According to the appellant the respondent was substantially in arrears in respect of his obligations in terms of the maintenance order, in wilful and mala fide disregard thereof.

[14] The court a quo found that with the assistance of a mediator the parties orally agreed on 11 August 2008 to vary the maintenance order as set out in a letter directed by the mediator to the parties on 13 August 2008. The letter, inter alia, states that the respondent will no longer pay any maintenance directly to the appellant but that he undertakes to pay maintenance for the children in respect of school fees, extra-murals, horse riding, stabling costs, pocket money, clothing, toiletries, food, transport, cell phones, entertainment, an au pair and medical aid directly to the relevant third parties and the children. The letter however also contains the following:

'What was discussed but was left in the air is the scaling down of the payments that Garry [is] currently making to Sandy. It was not made clear when these would actually cease.

. . .

The above mentioned system of maintenance payment will operate on a trial basis until the end of November 2008 when it will be reviewed in the light of any problems which may arise.'

[15] Both parties were acutely aware of the non-variation clause and the requirement that a variation of the maintenance order must be in writing and signed by both parties or ordered by a competent court. This was specifically emphasised in an email sent by the appellant to the respondent on 10 August 2008, the day before the mediation. In context the parties in my judgement did not intend the arrangement of 11 August 2008 to constitute a variation of the maintenance order. What was envisaged was clearly that if the trial period should prove to be successful, a formal variation would be brought about and until that takes place, there is no variation of the maintenance order. If the respondent complied with the arrangement during the trial period, he would of course not be in mala fide disregard of the maintenance order. I find therefore

that the court a quo erred in concluding that the maintenance order was in fact varied.

[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 & andere* 1964 (4) SA 760 (A) at 767A-C and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 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 & others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd & 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.'

[17] The respondent's answering affidavit in the counter-application (which also served as his replying affidavit in the main application) was deposed to on 28 October 2010. For purposes of determining the liability of the respondent in terms of the maintenance order the line should therefore be drawn at the end of October 2010. The court a quo correctly found that on his own version the respondent failed to comply with paragraph 4 of the maintenance order for the period February to October 2010. Even though I have found that the maintenance order was not varied, the question remains whether it could be determined on the papers whether the respondent was in arrears in respect of paragraph 4 of the maintenance order as at the end of January 2010 and/or in respect of paragraph 5 thereof as at the end of October 2010 and if so, in what amount.

[18] In this regard the papers reveal material disputes of fact. The present respondent was the respondent in the counter-application. It is trite that in 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* 2009 (2) SA 277 (SCA) para 26.

[19] The appellant's case is that at the end of January 2010 the respondent was in arrears in respect of paragraph 4 of the maintenance order in the sum of R265 776.89 and that at the end of October 2010 he was in arrears in respect of paragraph 5 of the maintenance order in the sum of R111 190.51. The respondent's evidence is that during the period from May 2008 to March 2010 he made payments in the total amount of R260 752 that were not taken into account in the calculations of the appellant. The respondent states that these payments were made directly to third parties and to the children in compliance with his obligations to maintain the children, apart from payment by him of the costs of their schooling and medical care. He also denies that he was in arrears in terms of paragraph 5 of the maintenance order. It is common cause that on 3 March 2008 the parties arranged that the children would stay with and be cared for by the respondent every other week and that this arrangement was given effect to during the period from March 2008 to June 2009. Although I have found that the maintenance order was not varied, it is clear that on 11 August 2008 the appellant consented to such direct payment, albeit for the trial period. In argument counsel for the appellant conceded that if it must be accepted that these payments were made by the respondent, they should be taken into account in the calculation of the arrear maintenance, if any. Counsel submitted that the respondent's evidence should be rejected on the papers and in this respect she stressed that the respondent produced virtually no documentary proof of payment despite his promise to do so.

[20] There is some force in the argument, but I am not persuaded that the evidence of the respondent can be rejected out of hand. The respondent detailed specific amounts allegedly paid during each month for the period from May 2008 to March 2010, totalling the sum of R260 752. It appears unlikely that this is a fabrication. In my view it cannot be said that the respondent will not be able to establish these payments at a trial. It suffices to say that it is not possible to resolve the many detailed disputes on the papers in respect of payments in terms of paragraph 5 of the maintenance order. It follows that it must presently be accepted that the amount of R260 752 was paid. As those payments were made in respect of both paragraphs 4 and 5 of the maintenance order, it is not possible to find on the papers to what extent the respondent was in arrears in respect of paragraph 4 of the maintenance order as at 31 January 2010 or in respect of paragraph 5 thereof as at 31 October 2010.

[21] An error crept into the calculation of the court a quo in respect of the unpaid maintenance in terms of paragraph 4 of the maintenance order for the period from February 2010 to October 2010. The unpaid amount as at 31 October 2010 was in fact R86 036.53. The error of calculation does not warrant interference with the sanction imposed. We were informed from the bar that the amount of R73 140.85 was paid by the respondent in compliance with the order of the court a quo. The respondent is of course not relieved of liability for the balance of R12 895.68.

[22] In terms of s 28(2) of the Constitution the best interests of the children are of paramount importance in this matter. It is unfortunate therefore that it cannot presently be determined which amount remains owing in respect of the maintenance of the children for the period up to October 2010. The appellant and the children are however not without remedy in this regard. The State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28 of the Constitution and to uphold the dignity and equality of women. See *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) paras 24 and 30. The Maintenance Act 99 of 1998 provides for

measures in this respect, dealt with fully below. These measures are available on the basis of the finding of this court that the maintenance order was not varied.

[23] The submission of the appellant in respect of the second ground is that the inclusion of a condition of suspension aimed at future compliance with the maintenance order would constitute a more effective sanction. It was suggested that a condition of suspension that the respondent is not convicted of failure to comply with the maintenance order or any maintenance order against him during the period of suspension, should have been added. This may be so, but as I have said, that is not the test to be applied. It is clear that the court below intended by the sanction in question to enforce arrear maintenance only. I am not persuaded that that constituted an improper exercise of its discretion. Two factors weigh heavily with me in this regard. The first relates to the manner in which the relief was framed in the counter-application. Paragraph 2 thereof reads as follows:

'Committing the applicant (in convention) to imprisonment for a period of six months, or such other period as the above Honourable Court may deem fit, *further alternatively* imposing a suspended sentence on the applicant (in convention) on such terms as the Court may deem fit . . . .'

[24] The second and more important factor is that the sanction did not leave the appellant and the children without remedy, in respect of the respondent's obligations in terms of the maintenance order that arose or will arise after the period dealt with in the judgment. The Maintenance Act defines a maintenance order as any order for the payment of sums of money towards the maintenance of any person issued by any court in the Republic, including a high court. The maintenance order can thus be enforced in terms of the Maintenance Act. It provides (in s 26 to s 28) for enforcement of maintenance orders by way of warrant of execution, attachment of emoluments or attachment of debts. Section 31(1) provides that any person who fails to make any payment in accordance with a maintenance order shall be guilty of an offence. Section 31(2) provides that if the defence is raised in a prosecution for an offence under this section that the failure to pay maintenance in

accordance with a maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of such defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.

[25] Section 40(1) provides that the court convicting any person of an offence under s 31(1) may on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court. In terms of s 40(2) a court granting an order against a convicted person may in a summary manner enquire into the circumstances mentioned in subsec 3 and if it so decides, authorise the issue of a warrant of execution against the moveable or immoveable property of the convicted person in order to satisfy such order. The circumstances mentioned in subsec 3 include the existing and prospective means of the convicted person; the financial needs and obligations of the person maintained by the convicted person; and the conduct of the convicted person insofar as it may be relevant concerning his or her failure to pay in accordance with the maintenance order. Section 40(4) provides that notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or similar benefit shall be liable to be attached or subjected to execution under an order granted under this section.

[26] It follows that the appeal against the sanction cannot succeed. I did not understand counsel for the appellant to argue that in this event there is any ground for interference with the exercise of the discretion of the court a quo in respect of costs and in my judgment there is none. Given that there was no appearance by the respondent there should be no order as to costs of the appeal.

[27] Accordingly the appeal is dismissed.

_____

C H G VAN DER MERWE

ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	Ms J M A Cane SC
	Instructed by:
	Eversheds, Sandton
	Symington & De Kok, Bloemfontein
For Respondent:	No appearance