**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 4/2021

In the matter between:

**SIMON ROY ARCUS** **APPELLANT**

and

**JILL HENREE ARCUS** **RESPONDENT**

**Neutral citation:** *Simon Roy Arcus v Jill Henree Arcus* (4/2021) [2022] ZASCA 9 (21 January 2022)

**Coram:** DAMBUZA, MOCUMIE and HUGHES JJA and KGOELE and SMITH AJJA

**Heard:** 18 November 2021

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 21 January 2022.

**Summary:** Interpretation of s 11*(a)*(ii) of the Prescription Act 68 of 1969 – whether a maintenance order is a judgment debt, subject to 30 years' prescription period, or any other debt, subject to three years' prescription period – held: maintenance orders are final, executable and appealable – a maintenance order is thus a judgment debt for the purposes of the Prescription Act, and subject to 30 years' prescription period.

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**ORDER**

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Francis AJ, sitting as court of first instance):

The appeal is dismissed with costs.

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**JUDGMENT**

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**Smith AJA (Dambuza and Hughes JJA concurring)**

[1] The circumscribed issue for determination in this appeal is whether an undertaking to pay maintenance in a divorce consent paper, which was made an order of court, gives rise to a 'judgment debt' as contemplated in section 11*(a)*(ii) of the Prescription Act 68 of 1969 (the Prescription Act or the Act), with a prescriptive period of 30 years, or any 'other debt', as contemplated in section 11*(d)* of the Act, with a prescriptive period of three years.

[2] The facts are common cause, but not really germane for the resolution of the posed legal question. I therefore summarise them briefly and only to provide context.

[3] When the appellant and the respondent divorced each other on 27 July 1993, they entered into a consent paper which, *inter alia*, provided that the appellant would pay maintenance for the respondent until her death or remarriage, and for

their two minor daughters until they became self-supporting. The consent paper was made an order of court.

[4] It is common cause that the appellant's obligations to pay maintenance in respect of the minor children terminated during 2002 and 2005, respectively, when they became self-supporting.

[5] Despite the fact that the appellant failed to pay the maintenance stipulated in the consent paper, the respondent did not take any steps to recover the arrear maintenance until December 2018, when she instructed her attorneys to send a letter of demand to the appellant. Notwithstanding demand, the appellant failed to pay the arrear maintenance, but commenced paying the monthly maintenance due to the respondent from January 2019.

[6] On 27 August 2019, the appellant lodged an application in the maintenance court for the retrospective discharge of his maintenance obligations in terms of the consent paper (the discharge application). That application is still pending.

[7] On 17 February 2020, the respondent caused a writ of execution to be issued in respect of the arrear maintenance of some R3.5 million. That writ was served on the appellant on 18 March 2020.

[8] Subsequently, on 19 June 2020, the appellant brought proceedings in the Western Cape Division of the High Court, Cape Town (the court a quo) for an order, *inter alia,* staying the writ of execution pending the determination of the discharge application. He also applied for a declaration that all maintenance obligations under the consent paper which accrued before 1 March 2017 (being the

due date for payment of maintenance three years prior to the date of service of the writ) have been extinguished by prescription.

[9] In the court a quo, as is the case before us, only the abovementioned issue fell for decision. The court a quo (Francis AJ) held that the maintenance obligations in the consent paper arose from a 'judgment debt' as contemplated in section 11*(a)*(ii) of the Prescription Act and are consequently subject to a 30-year prescription period. The appellant appeals that judgment with the leave of the court a quo.

[10] It is perhaps necessary to mention that although the learned acting judge was not convinced that there were reasonable prospects of success on appeal, he was of the view that 'the issue relating to the prescriptive period applicable to debts created by maintenance orders is compelling enough to warrant the scrutiny of a higher court' and granted leave for that reason.

[11] Sections 11*(a)*(ii) and 11*(d)* of the Prescription Act read as follows:

'The periods of prescription of debts shall be the following:

*(a)* thirty years in respect of –

. . .

(ii) any judgment debt;

. . .

*(d)* save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[12] Although the appellant accepts that a maintenance order has characteristics of a civil judgment, namely that it is executable without further proof and appealable, he contends that:

(a) Having regard to the objectives of the Act, a 'judgment debt' for the purposes of s 11*(a)*(ii), is one which is final in the sense of it being appealable, capable of execution and unalterable by the court which granted it.
(b) Because maintenance orders are variable by the court which granted them and are susceptible to ongoing disputes which may require evidence, they lack the certainty to qualify as a judgment debt for purposes of the Prescription Act.
(c) And since maintenance is intended for consumption and not accumulation, it is appropriate that the debts arising from maintenance orders should prescribe within three years, as they should be enforced promptly.

[13] In order to provide proper context to the appellant's contentions, it is necessary to state upfront that it matters not that the appellant's obligations to pay maintenance arose from an agreement, which was made an order of court, as opposed to a maintenance order granted by a maintenance court in terms of the Maintenance Act 99 of 1998 (the Maintenance Act). This is so because the definition of 'a maintenance order' in the Maintenance Act includes a maintenance order made by a court in terms of the Divorce Act 70 of 1979 (the Divorce Act).

[14] A resolution of this appeal will, to a great extent, depend on the determination of the question of whether maintenance orders possess the essential nature and characteristics of civil judgments. It would thus be instructive to survey authoritative pronouncements made by our courts in this regard.

[15] A good starting point would be Z*weni v Minister of Law and Order*,[1] where this Court held that '[a] "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not

[1] *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532I-533A.

susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'. And in *Kilroe-Daley v Barclays National Bank Ltd*,[2] this Court held that a 'judgment debt' for the purposes of section 11*(a)*(ii) of the Prescription Act 'refers, in the case of money, to the amount in respect of which execution can be levied by the judgment creditor; that in the case of any other debt steps can be taken by the judgment creditor to exact performance of the debt, ie delivery of the property, or performance of the obligation. A further feature of a judgment debt is that the judgment is appealable'.

In *Strime v Strime*,[3] it was held that '[a] claim for arrear maintenance under a Court's order is exigible without any averment or proof that the plaintiff had, in order to maintain herself, incurred debts during the period in question and notwithstanding the fact that she earned, or could have earned, an income from employment'. And in *Eke v Parsons*,[4] the Constitutional Court held that the effect of settlement agreements incorporated into court orders is that it changes 'the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order'. Lastly, in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*,[5] the Constitutional Court, in a pronouncement that, in my view, is emphatically dispositive of all the appellant's arguments, held that:

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[2] *Kilroe-Daley v Barclays National Bank Ltd* [1984] ZASCA 90; [1984] 2 All SA 551 (A); 1984 (4) SA 609 (A) at 624D-F.
[3] *Strime v Strime* [1983] 2 All SA 386 (C); 1983 (4) SA 850 (C) at 852C-E.
[4] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 31.
[5] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Other* [2016] ZACC 49; (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC); 2017 (4) BCLR 473 (CC); 2018 (1) SA 38 (CC) para 44.

'The three-year period is meant for claims or disputes which are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay.'

And that:

'. . . a debt contemplated in the Prescription Act cannot be reviewed or appealed against, except if it is a judgment debt.'[6]

[16] A maintenance order possesses another important attribute of a final civil judgment, namely that it is appealable. In terms of s 25 of the Maintenance Act, 'any person aggrieved by any order made by a maintenance court under this Act may, within such period and in such manner as may be prescribed, appeal against such order to the High Court having jurisdiction'. In addition, a person who is served with a demand to pay in terms of a maintenance order is compelled to comply with that order until he or she is able to demonstrate a change in circumstances justifying a variation of the order.

[17] It is thus manifest that maintenance orders are: (a) dispositive of the relief claimed and definitive of the rights of the parties, to the extent that they decide a just amount of maintenance payable based on the facts in existence at that time; (b) final and enforceable until varied or cancelled; (c) capable of execution without any further proof; and (d) appealable.

[18] The appellant contended that, despite these attributes, a maintenance order, nevertheless, cannot constitute a final judgment for the purposes of the Prescription Act, since it can be varied by the court which granted it, for sufficient reason or good cause. It is thus not unalterable by the court which made the original order, and in this sense resembles an interlocutory order or ruling which is open to reconsideration, variation or rescission by the court which granted it, on good

[6] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* (supra fn 5) para 55.

cause shown or altered circumstances. In addition, maintenance orders are susceptible to further disputes regarding the extent or existence of the liability. This means that the debt arising from a maintenance order is not certain and is contingent in nature, in as much as they can be varied or discharged with retrospective effect, so that arrears sought to be enforced by way of a writ of execution may be reduced or even extinguished through variation of the maintenance order. For these reasons debts which arise from maintenance orders cannot be regarded as 'judgment debts' for the purposes of the Prescription Act, or so the argument went.

[19] In my view, this argument is not sustainable. As mentioned, a maintenance order fixes the obligations between the parties until such time as it is discharged on application by either party. This can only happen if new circumstances arise upon which the original order can be reconsidered. That the maintenance order is subject to variation in this sense, does not detract from the fact that the court granting the maintenance order has done so on a consideration of the facts placed before it at the time. Its decision, either by way of a reasoned judgment or by agreement between the parties, disposed of the *lis* which was in existence between the parties at that point in time. An application for variation of that order thus introduces a new *lis*, the party applying for such an order contending that circumstances have changed to such an extent that they justify a reconsideration of the original decision. Thus, the matter is *res judicata* on the facts which were before the court that made the original maintenance order. Obligations arising out of maintenance orders are therefore not 'claims or disputes which are yet to be determined',[7] and are therefore not subject to a three-year prescription period.

[7] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* (supra fn 5).

[20] Section 8 of the Divorce Act 70 of 1979, which provides that a maintenance order 'may at any time be rescinded or varied', is thus an exception to the general rule that an order of court once pronounced is final and immutable.[8] In the event, the court that made the maintenance order is not at liberty to reconsider its original decision on the same facts. It can only vary or discharge the order if new facts are presented, which justify a reconsideration of the order. An aggrieved party who wishes to challenge the soundness of the original decision without establishing changed circumstances can only do so by way of an appeal.

[21] The appellant's argument had another string to its bow. He asserted, in addition, that his submissions in this regard find support in the fact that the Maintenance Act (in particular subsections 24(1) and (2)) draw a distinction between maintenance orders and orders for a once off payment of a specified sum of money, with only the latter being described as a civil judgment. Section 24(1) provides that 'any order or direction made by a maintenance court under this Act shall have the effect of an order or direction of the said court made in a civil action'. And in terms of subsection (2), 'any order made under sections 16(1)*(a)* (ii), 20 or 21(4) [which are for payment of once off specified sums of money] shall have the effect of a civil judgment of the maintenance court concerned and shall be executed as provided in Chapter 5' of the Maintenance Act.

[22] According to the appellant the distinction between the two categories is important, since a civil judgment is a final judgment, whereas a maintenance order is not, because it is variable following an enquiry in terms of Chapter 3 of the Maintenance Act. He contended that it is significant that no provision is made for the variation of orders for payment of a specified sum of money in terms of ss 16,

[8] *Reid v Reid* [1992] 3 All SA 354 (E); 1992 (1) SA 443 (E) at 447C.

20 and 21 of the Maintenance Act. And, furthermore, it is only upon conviction for an offence of failure to pay in accordance with a maintenance order under section 31, that the court can make an order for payment of the arrears in terms of section 40(1) that will have the effect of a civil judgment. On a proper construction of these sections, the Maintenance Act clearly distinguishes between a maintenance order and a civil judgment, which contemplates a final judgment for payment of a specified sum of money. The latter is not subject to variation following an inquiry in terms of section 16 of the Maintenance Act, or so the argument went.

[23] To my mind, this argument is also flawed. First, the attempt to draw a distinction between an 'order' and a 'judgment' is contrived and does not find any support in decided cases. In *Zweni*, this Court held that 'the distinction between "judgment" and "order" is formalistic and outdated; it performs no function and ought to be discarded'. The court emphasised that 'the distinction now is between "judgments or orders" (which are appealable with leave) and decisions which are not "judgments or orders".[9]

[24] Second, section 24(1) of the Maintenance Act provides that a maintenance order shall have the effect of an order or direction of the court made in a civil action. This means that a maintenance order has the same legal consequences which flow from an order made in a civil action. In my view, there can be no clearer declaration of the legislature's intention to visit upon a maintenance order the legal characteristics of a civil judgment. Paradoxically then, and properly construed, the sections relied upon by the appellant are destructive of his arguments.

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[9] *Zweni v Minister of Law and Order* (supra fn 1) at 532E-G.

[25] In the light of these findings, there is no room for the interpretation of s 11*(a)*(ii) to give effect to the policy considerations mentioned by the appellant. The appellant contended that the following policy considerations militate against a finding that maintenance orders are subject to a 30-year prescription period: (a) maintenance orders are intended to provide for immediate living expenses and sustenance and should therefore be promptly enforced; (b) permitting a maintenance creditor to wait up to 30 years to enforce a maintenance order could cause hardship to a maintenance debtor who, having been lulled into a false sense of security by the inaction of the maintenance creditor, has not provided for the liability, only to be surprised by a vast claim for arrear maintenance, plus accrued interest; (c) a 30-year prescriptive period allows the potential for abuse where a maintenance creditor seeks to exploit a subsequent windfall in the life of the maintenance debtor; and (d) it is difficult for maintenance debtors to defend against stale maintenance claims, and unreasonable to expect them to preserve documents for up to 30 years to deal with such claims.

[26] Apart from the fact that these are considerations that the legislature may contemplate if it desires to enact amendments to the maintenance laws, I am not convinced that these factors support the case for a shorter period of prescription. As was pointed out by the respondent's counsel, there can be little doubt that a longer period of prescription is in the best interests of those vulnerable individuals who are usually the beneficiaries of maintenance orders, namely divorced women and minor children. Moreover, in my view, the potential prejudice that a 30-year prescription period would have for the maintenance debtor, is also exaggerated. Apart from the fact that any such prejudice can be avoided by the debtor doing what all responsible citizens are supposed to do, namely to comply with court orders, it is inconceivable that any such prejudice can arise when, in appropriate

circumstances, the debtor would be able to apply for either prospective or retrospective variation of the order. In the event, the Constitutional Court's pronouncement in *Myathaza*, to the effect that the three-year prescription period is meant for claims which are still to be determined, is dispositive of this argument. As mentioned earlier, a maintenance order fixes the obligations of the judgment debtor until such time as it is discharged or varied upon the establishment of new facts.

[27] I am also of the view that the appellant's extensive references to maintenance dispensations in foreign jurisdictions are misplaced. The fact that other countries have elected to enact statutory provisions to provide for specific periods of prescription in respect of maintenance orders cannot assist in the interpretation of the Prescription Act as enacted and implemented in South Africa.

[28] The court a quo accordingly made the correct order and the appeal must fail. The appeal is accordingly dismissed with costs.

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J E SMITH

ACTING JUDGE OF APPEAL

**Mocumie JA and Kgoele AJA**

[29] We have read the main judgment by our colleague Smith AJA, with whom our other colleagues agree. We agree with most of what is said in it, including the order it proposes. We write separately, as our approach differs from the main judgment. Our approach endorses the approach adopted by the court of first instance (Francis AJ) and emphasises that the construction and interpretation as contended for by the appellant would perpetuate the hardships suffered by the most vulnerable groups in our society: women and children. This is so because, at the core, the issues in this appeal involve the proper interpretation and application of the Maintenance Act, which was mainly enacted to provide for a fair recovery of maintenance money, and to avoid the systemic failures to enforce maintenance orders and habitual evasion and defiance with relative impunity.[10]

[30] The words of the Constitutional Court in *Bannatyne v Bannatyne and Another (Bannatyne)*,[11] almost two decades now, still ring hollow for many women, because of maintenance debtors who take advantage of the weaknesses of the maintenance system to escape their responsibility by using every loophole in the law. This appeal highlights the disadvantages which the rightful court ordered-maintenance beneficiaries continue to suffer at the hands of maintenance defaulters. The appeal stems from the judgment of the Western Cape Division of the High Court, wherein Francis AJ (the high court) made a declaratory order that the maintenance obligations contained in the consent paper, which was made an order of the court, is subject to a 30-year prescription period in terms of s 11*(a)*

[10] *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) para 27; see also *S S v V V-S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC).
[11] *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) *(Bannatyne)*.

(ii) of the Prescription Act 68 of 1969 (the Prescription Act). The appeal is with leave of the high court.

[31] Mr Simon Roy Arcus (the appellant) and Mrs Jill Henree Arcus (the respondent), who was cited as the first respondent in the proceedings before the high court, were married some 19 years and two children were born out of their marriage. Although the children did not take part in this appeal, they were cited as the second and third respondents before the high court. The marriage was dissolved in terms of a consent agreement entered into between the parties, which was incorporated into the divorce order granted by the former Cape of Good Hope Provincial Division on 27 July 1993. The appellant failed to pay the cash maintenance portion agreed upon, namely the R2 000 per month in respect of the respondent and R750 per month in respect of each child from the date of the divorce (27 July 1993) until January 2019. The respondent did not demand payment of the arrear maintenance until December 2018. For that reason, the respondent caused a writ of execution to be issued against the appellant, dating back to July 1993, as the law allows her to, in the amount of R 3 223 190.70 (as amended). The writ of execution was stayed pending the outcome of the proceedings before the high court, which led to this appeal. The appellant also applied for retrospective discharge of his maintenance obligations under the divorce order, which application is pending before the magistrate court in terms of the Maintenance Act of 99 of 1989 (the Maintenance Act).

[32] The appellant's case before the high court is summarised aptly by Francis AJ in para 9 as follows:

‘The applicant contends that a court order for the payment of maintenance pursuant to a consent paper gives rise to an ordinary “debt”, which prescribes in 3 years, and not a “judgment debt”,

which only prescribes after 30 years. The applicant advanced the following arguments in support of this contention:

A judgment debt is final and conclusive in nature and cannot be altered by the court which pronounced it, i.e. one the effect whereof is res judicata. Because maintenance orders are capable of being varied, substituted, discharged on good cause, or even varied with retrospective effect, a maintenance order is not final and conclusive and lacks the attributes of a final judgment and is, therefore, not a judgment debt.

Various provisions of the Maintenance Act draw a distinction between maintenance orders for the payment of maintenance and orders for the payment of a once-off specified amount of money, with only the latter order giving rise to a civil judgment; and

The policy imperatives underlying the Prescription Act are not served by interpreting the words "any judgment debt" in section 11(a)(ii) as including a maintenance order, regardless of the fact that such an order may emanate from a judgment of the High Court: a creditor is responsible for enforcing his or her rights timeously and must suffer the consequences of failing in this regard and, conversely, a debtor must be protected against a stale claim which has existed for such a long time that it is difficult to defend against it.'

[33] For the respondent, it was contended that, whilst it is possible for a maintenance order to be varied as the circumstances change (in terms of s 8(1) of the Divorce Act 70 of 1979 (the Divorce Act)), this does not mean that when a consent paper is made an order of court, as in this case, the dispute between the parties is not definitively settled at that point in time. It was submitted on behalf of the appellant that although it is correct that once a court has made a consent order, it is *functus officio*, however, in relation to matrimonial disputes, that does not apply in all circumstances. The principle of *res judicata* only applies to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. In *PL v YL*,[12] it was held that:

[12] *PL v YL* [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) para 46; see also *Swadiff (Pty) Ltd v Dyke N O* 1978 (1) SA 928 (A) at 939E.

'A further exception to the general rule that an order of court, once pronounced, is final and immutable, is created by section 8(1) of the Divorce Act. As stated, in the absence of non-variation clause in the settlement agreement, it permits the court to rescind, vary or suspend a maintenance order granted earlier. Further, there exists in principle no reason why the parties may not subsequently seek an amendment thereof by mutual consent, or in circumstances where the order through error or oversight does not correctly reflect their agreement. Not only is the mandate of the court to exercise its discretion in terms of section 7(1) of the Divorce Act derived from the settlement agreement, but the consent order itself is based on the terms of that agreement. The legal nature of a consent order was considered by the appeal court in *Swadif (Pty) Ltd v Dyke NO*. It was held that where the purpose of the granting of the consent judgment is to enable the parties to the agreement to enforce the terms thereof through the process of the court, should the need therefor arise, the effect of the order is to replace the right of action on the agreement by a right to execute on the judgment: "[i]t seems realistic, and in accordance with the views of the Roman- Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it. The right of action, as Fannin J puts it, is replaced by the right to execute, but the enforceable right remains the same." The consent order accordingly does not have the effect of eliminating the contractual basis thereof. Rather, through operation of the *res judicata* principle, the judgment constitutes a bar to any action or proceedings on the underlying settlement agreement. The provisions of the agreement are instead to be enforced by the remedies available to a judgment creditor on a judgment. It is of course always open to the parties to abandon the judgment in whole or in part and to enter into a new agreement. Save for the aforegoing, the effect of the consent order is otherwise that it renders the issues between the parties in relation to their proprietary rights and the payment of maintenance to a former spouse, where the agreement includes a non-variation clause, *res judicata*, and thus effectively achieves a "clean break" as envisaged by the scheme of the Divorce Act.'

[34] Having considered the submissions of both parties and the applicable legal principles, the high court concluded on the basis of ss 24, 26 and 40 of the Maintenance Act that because the maintenance order which the court granted upon the divorce of the parties was a civil judgment, the failure by the appellant to

pay maintenance for all those years was a judgment debt which triggered the application of s 11*(a)*(ii) of the Prescription Act and therefore, the prescription period of 30 years.

[35] The high court subsequently granted an order that the maintenance obligations contained in the consent paper that was made an order of court on 27 July 1993 under case number 7177/1993, is subject to a 30-year period as prescribed in s 11*(a*)(ii) of the Prescription Act. It is this order that the appellant challenges with leave of the high court.

[36] The sole issue for determination before this Court, as was in the high court, is whether an undertaking to pay maintenance in a divorce consent paper which was made an order of court gave rise to a 'judgment debt' as contemplated in s 11*(a)*(ii) with a prescriptive period of 30 years, or 'any other debt' as contemplated in s 11*(d)* of the Prescription Act, with a prescription period of three years.

[37] This Court, must therefore consider whether the high court interpreted the word 'judgment debt' as contemplated in s 11*(a)*(ii) of the Prescription Act, with a prescriptive period of 30 years, and 'any other debt' as contemplated in s 11*(d)* of the Act, with a prescription period of three years, correctly. For this purpose, the proper approach to adopt in the interpretation of the statutes implicated, namely, the Prescription Act read with the Maintenance Act as well as the Divorce Act, is as was recently restated in *C:SARS v United Manganese of Kalahari (Pty) Ltd*[13] to take into consideration '. . . the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its

[13] *C: SARS v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA).

production . . . The inevitable point of departure [being] the language used in the provision under consideration'.

[38] The section at the heart of this appeal, s 11 of the Prescription Act provides:

**'The periods of prescription of debts**

The periods of prescription of debts shall be the following:

*(a)* thirty years in respect of–

(i) any debt secured by a mortgage bond;

(ii) any judgment debt;

(iii) any debt owed to the State. . . in respect of the right to mine minerals or other substances;

. . .

*(d)* Save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[39] As a starting point the law on consent papers incorporated into agreements including divorce orders, commonly known as settlement agreements or deeds of settlement, has been settled by the Constitutional Court in *Eke v Parsons (Eke)*[14] as follows:

'The effect of a settlement agreement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings to finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally "a matter judged"). It changes the terms of a settlement agreement to an enforceable order. . . .'

[14] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 31 citing with approval the judgment of the full court in *PL v YL* 2013 [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG).

[40] On the issue of the applicable period of prescription, in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*,[15] the Constitutional Court held that the three year prescription is meant for claims and disputes '. . . which are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay'. In *Reid v Reid*,[16] the court stated, '. . . [w]hen the consent paper is then made an order of Court, *res judicata* is established on the just amount payable as maintenance . . .'.

[41] Following the above precedents, it suffices to state the obvious, which was common cause between the parties, that the consent paper between the appellant and the respondent which was incorporated into their divorce order created a *lis* between them and the issue which was in dispute became *res judicata*. Such order became enforceable *inter partes* upon default or non-compliance by any of the parties. The parties only differed on whether it had all the attributes of a final order or not, and thus 'a judgment debt' or 'any other [ordinary] debt', which if breached became enforceable, and upon a warrant of execution to satisfy it being issued, it remained unsatisfied if it prescribed within three years or 30 years in terms of the Prescription Act.

[42] The word 'judgment debt' is not defined in the Prescription Act and so too the word 'any other judgment'. In its plain meaning 'a judgment debt' means an amount of money in a judgment awarded to the successful party which is owed to them by the unsuccessful one. Any other judgment in the context of maintenance means any order granted by a court, either the magistrates' court or the high court. The context in which the meaning of these words must be established is the

[15] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49; 2017 (4) BCLR 473 (CC); 2018 (1) SA 38 (CC) para 44.
[16] *Reid v Reid* [1992] 3 All SA 354 (E); 1992 (1) SA 443 (E) at 447B.

maintenance dispute which was finally settled between the parties by a consent paper. To interpret the Prescription Act and whether three years or 30 years is applicable to the arrears which the appellant owed over 19 years, this Court must look at the Prescription Act in the context of the Maintenance Act with specific reference to three sections, namely, ss 24, 26 and 40.

[43] Under the Maintenance Act, when a court orders a maintenance debtor to make payment of a sum of money in terms of s 24,[17] that order has the effect of a civil judgment and it shall be executed as provided. On the language used, 'a civil judgment'; this attracts a prescription period of 30 years. Section 26[18] read in conjunction with ss 7(1)[19] and 8(1)[20] of the Divorce Act provides that the same enforcement mechanisms may be applied for the *recovery of* any monies that may be owing pursuant to a maintenance order or an order for a specified sum of money made by a maintenance court upon an inquiry (at an initial stage) and thereafter,

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[17] Section 24 provides:

**'Effect of orders of maintenance court**

(1) Save as is otherwise provided in this Act, any order or direction made by a maintenance court under this Act shall have the effect of an order or direction of the said court made in a civil action.

(2) Any order made under section 16(1)*(a)*(ii), 20 or 21 (4) shall have the effect of a civil judgment of the maintenance court concerned and shall be executed as provided.'

[18] Section 26 provides:

'**Enforcement of maintenance or other orders**

(1) Whenever any person –

*(a)* against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or

*(b)* against whom any order for the payment of a specified sum of money has been made under section 16(1)*(a)*(ii), 20 or 21(4) has failed to make such a payment, such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon–

(i) by execution against property as contemplated in section 27;

(ii) by the attachment of emoluments as contemplated in section 28; or

(iii) by the attachment of any debt as contemplated in section 30.'

[19] Section 7(1) provides that:

'A court granting a decree 'of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.'

[20] Section 8(1) provides that:

'A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor . . . .'

any time for a rescission, variation or suspension if the court finds that there are sufficient reason therefor and even be substituted or discharged on good cause shown by a maintenance court. This section makes reference to the recovery of monies pursuant to a maintenance order. This means that it is a civil judgment debt.

[44] Over and above, s 40[21] of the Maintenance Act provides that an order of a court that grants an order for the recovery of arrear maintenance shall have the effect of a civil judgment of the court. The section categorically states that that order is a civil judgment. As the high court correctly found, this section (s 40) buttresses the reasoning that a maintenance order has the effect of a civil judgment, because 'if an order for arrear maintenance payments is to be regarded as a civil judgment, why should the principal amount payable in terms of the original maintenance order be considered to be something other than a civil judgment?'.

[45] Furthermore, based on the acceptance of *Eke* that once a settlement agreement has been made an order of court, it is an order like any other order and changes the terms of the settlement agreement to an enforceable court order, a maintenance order is a civil judgment subject to s 11*(a)*(ii) of the Prescription Act. In our view and for the purposes of the conclusion we reach on the issue of the applicable period of prescription, whether the order is incorporated in a deed of settlement or not in this matter, makes no difference. This we say because, throughout all the relevant sections under Chapter 5, the Maintenance Act makes

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[21] Section 40(1) provides that:
'**Recovery of arrear maintenance**
A court with civil jurisdiction convicting any person of an offence under section 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 and shall subject to subsection (2), be executed in the prescribed manner.'

reference to ‘judgment’ and ‘order’. The terms cannot be interpreted other than with reference to a civil judgment and order. Some of the provisions, such as s 24(1) in particular, even make direct reference to ‘civil judgment’. The same applies to s 24(2). There is therefore, no justifiable distinction that can be drawn between ss 24(1) and (2) if one applies the trite approach on the interpretation of legislation, although differently couched.[22] The distinction sought to be made by the appellant between an order and a judgment that the legislature intended for 3 years’ prescription to apply to an order and 30 years to a judgment is superficial and does not exist in law.

[46] In conclusion, it is indisputable that the consent paper which contained the agreement concluded between the appellant and the respondent was incorporated into their divorce order and became a court order; that the maintenance question (dispute) was determined; and that from that moment (in 1993) it was beyond any doubt that the maintenance dispute between them was finally disposed of. Thus, it could hardly be revisited, except if it was to be varied on the basis of the original order and only when the circumstances which were applicable at the time of the original order have changed; which the appellant did not do. Besides, a claim of maintenance under a court order is exigible without any averment or proof that the respondent had, in order to maintain herself, incurred debts during the period in question.[23] That the respondent did not claim the arrears over such a long period is irrelevant for the purposes of the issue in dispute; that of which period of prescription is applicable. The high court was thus correct to hold that ‘the maintenance obligations contained in the consent paper that was made an order of this court on 27 July 1993 under case number 7177/93, [was a civil judgment] and

[22] See footnote 15 above.
[23] *Strime v Strime* [1983] 2 All SA 386 (C); 1983 (4) SA 850 (C) at 852D.

is subject to a 30-year period as prescribed in section 11(*a*)(ii) of the Prescription Act'.

[47] For the sake of completeness, the appellant's attempt to make a case based on public policy is simply unfounded. The submission was made that the policy imperatives underlying the Prescription Act are not served by interpreting the words 'any judgment debt' in s 11(1)*(a)*(ii) of the Prescription Act as including a maintenance order, regardless of which court granted the order. Furthermore, that because a maintenance order is intended to provide for immediate living expenses and substance, it should, therefore, be promptly enforced. To enforce it much later would result in great financial hardship for a maintenance debtor who has been lulled into a false sense of security by the inaction of the maintenance creditor and who has not provided for the liability. It would also be unreasonable and burdensome to expect a maintenance debtor to keep records for up to 30 years to deal with possible maintenance claims, so the submission was concluded.

[48] What is extremely troubling is that the prejudice the appellant decries affects the maintenance creditors (who are predominantly, as this case demonstrates, women and children) far more than maintenance debtors (who are generally men). The submission was made by the appellant that to enforce the order and avoid prescription, a maintenance creditor had the option of approaching the court every three years. However, this will definitely cause hardship to the maintenance creditors, as they will be compelled to approach the courts every three years to enforce their claims to avoid prescription. In *Bannatyne*, the Constitutional Court recognised that the gendered nature of the maintenance system is undeniable. We can, therefore, not interpret the Prescription Act in a manner that will be at odds with the purpose of the Maintenance Act. To do so will be to the disadvantage of a

maintenance creditor and will fly in the face of what the Maintenance Act was enacted to do, namely, to avoid the systemic failures to enforce maintenance orders and habitual evasion and defiance with relative impunity.[24] It would also give protection to maintenance debtors more than was intended for. Consequently, the order of the high court ought to stand.

**Order**

[49] It is for these additional reasons that we support the order of the main judgment dismissing the appeal with costs.

B C MOCUMIE
JUDGE OF APPEAL

A M KGOELE
ACTING JUDGE OF APPEAL

[24] *Bannatyne* para 27.

APPEARANCES

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