

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



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

Reportable

Case no: 358/2023

In the matter between:

E[...] V[...] J[...]

APPELLANT

and

W[...] J[...] V[...] J[...]

FIRST RESPONDENT

CAPITEC BANK HOLDINGS LTD

SECOND RESPONDENT

Neutral citation: *V[...] J[...] v V[...] J[...] and Another* (258/2023) [2024] ZASCA
92 (11 June 2024)

Coram: MOCUMIE, MOKGOHLOA, WEINER and KGOELE JJA, and
TOLMAY AJA

Heard: 6 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of

Appeal website and released to SAFLII. The date and time for delivery are deemed to be at 11h00 on 11 June 2024.

Summary: Divorce – arbitration agreement in the Deed of Settlement made an order of court – interpretation of s 2(a) of the Arbitration Act 42 of 1965 – whether arrear maintenance is arbitrable – s 2(a) wide enough to preclude such a matter.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mpama AJ, Loubser J sitting as a court of appeal):

- 1 The appeal is upheld with costs, including costs of two counsel where so employed.
 - 2 The order of the high court is set aside and replaced with the following order: ‘The appeal is dismissed with costs’
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JUDGMENT

Kgoele JA (Mocumie, Mokgohloa and Weiner JJA and Tolmay AJA concurring)

[1] The appeal concerns the interpretation of s 2(a) of the Arbitration Act 42 of 1965 (the Arbitration Act). Central to the appeal is a dispute as to whether arrear maintenance falls within the purview of s 2(a). The magistrate court for the district of the Free State held at Bloemfontein (the maintenance court), ruled that the issue falls within the purview of s 2(a). This ruling was set aside on appeal to the Free State Division of the High Court, Bloemfontein (the high court). It held that the maintenance court had no jurisdiction to decide the issue, only an arbitrator could

do so. This appeal is against the decision of the high court with special leave of this Court.

[2] The dispute arose in the following circumstances. The appellant, Mrs E[...] V[...] J[...] and the first respondent, Mr W[...] J[...] V[...] J[], were married. Their marriage was dissolved on 4 June 2015. The decree of divorce granted incorporated a deed of settlement concluded by the parties. Two clauses thereof are relevant for the purposes of this appeal. The first one is clause 3.1 which provides the appellant with the entitlement to the payment of spousal maintenance. In terms of this clause, the spousal maintenance would cease if she remarries, cohabits with another man, or upon her death (the *dum casta* clause). The second is clause 11 which provides that any dispute between the parties regarding their rights, duties, or liabilities arising from the deed of settlement, was to be submitted to arbitration (the arbitration clause).

[3] Around 2018, several disputes arose between the parties arising from the deed of settlement. An arbitrator was eventually appointed to resolve those disputes. Meetings between the parties culminated in an arbitration agreement concluded in August 2020. At all times the parties were assisted by their respective legal representatives. Clause 3 of the arbitration agreement accorded the arbitrator the power to determine his or her own jurisdiction.

[4] The appellant, however, never filed a statement of claim in respect of those disputes as agreed in the arbitration agreement. Instead, on 20 August 2020, the appellant's attorney wrote a letter to the respondent's attorney, raising concerns about the costs of arbitration. He also urged the respondent's attorney that they, together with the parties, should try and resolve the disputes outlined in the letter

that was previously sent to them dated 9 September 2019. As a result, the arbitration proceedings did not materialise. I pause here to indicate that, the appellant's counsel submitted before this Court that at that stage, arrear maintenance was not included in these disputes. I will return to this contention later in the judgment.

[5] On 1 March 2021, the appellant approached the maintenance court with an application to enforce the maintenance order and to recover the arrear maintenance in terms of s 26 of the Maintenance Act, 99 of 1998 (the Maintenance Act). The maintenance court granted the requested order on an *ex-parte* basis. In addition, the maintenance court interdicted Capitec Bank Holdings Ltd, the second respondent, from effecting payment of any monies from the account of the first respondent.

[6] Aggrieved by this, the first respondent anticipated the return date. In his opposition, the first respondent also objected to the jurisdiction of the maintenance court. He contended that the parties contractually excluded its jurisdiction from hearing the maintenance dispute in terms of the arbitration clause.

[7] The maintenance court dismissed the objection. It ordered the maintenance enquiry to continue in that court. The respondent appealed the maintenance court's order, and as alluded to already, the high court upheld his appeal. The high court concluded that the question of whether the arrear maintenance is a matter falling within the purview of s 2 of the Arbitration Act or not cannot be decided by the maintenance court, but by the arbitrator, since the parties had agreed to refer their dispute to arbitration. The high court also concluded that the arbitrator must decide his own jurisdiction.

[8] The central question in this appeal is whether a dispute regarding arrear maintenance is arbitrable. Key to this dispute is s 2(a) of the Arbitration Act which prohibits the submission to arbitration of certain matters or subjects. It provides:

‘A reference to arbitration shall not be permissible in respect of –

- (a) any matrimonial cause or any matter incidental to any such cause.
- (b) . . .’

[9] It is trite that an agreement to have a dispute resolved by way of arbitration is not in itself inherently *contra bonos mores*.¹ In *Telecordia Technologies Inc v Telkom SA Ltd*² this Court stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for the adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decision and minimises the scope of intervention by the courts.

[10] In the same breath, it is well established that arbitration does not oust the jurisdiction of courts.³ Section 3 of the Maintenance Act also stipulates that each magistrates’ court functions as a maintenance court at the district level, possessing jurisdiction over all matters arising from the Maintenance Act. A maintenance order is defined in the Maintenance Act as ‘any order for the payment, including the periodical payment, of sums of money . . . issued by any court in the Republic. . .’ A ‘court’ in the Republic includes a high court.

[11] The appellant’s main submission is that the impugned arbitration clause is in conflict with s 2(a) of the Arbitration Act because the arrear maintenance dispute constitutes a matrimonial cause, or a matter incidental thereto. The appellant

¹ *Lufuno Mphaphili and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 219-223.

² *Telecordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA); (2007 (5) BCLR 503; [2007] 2 All SA 243 para 48.

³ *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Ideas Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZACC 24; 2021 (11) BCLR 1203 (CC); 2022 (1) SA 317 (CC) para 26.

therefore supports the order of the maintenance court that the dispute was not capable of being adjudicated upon by way of arbitration.

[12] Relying on *Eke v Parsons (Eke)*,⁴ and *Brookstein v Brookstein (Brookstein)*,⁵ the first respondent supports the order of the appeal court. He contends that the deed of settlement disposed of all the disputes between the parties; the *lis* between the parties became *res judicata*; the matrimonial cause between the parties ceased to exist when a decree of divorce was granted; nothing remained that was incidental to such cause. As far as the characterisation of the dispute between the parties is concerned, the first respondent submitted that the appellant's cause of action is based on the *dum casta* clause; and the parties expressly agreed that all issues arising from the settlement agreement were to be dealt with by way of arbitration; their arbitration agreement should be respected by the court.

[13] As a basis for the argument that the dispute does not fall within the purview of s 2(a) of the Arbitration Act, the first respondent relied on *Brookstein* wherein this Court dealt with the question of whether a delictual claim based on negligent misrepresentation of the appellant's accrual was a cause that formed part of the matrimonial cause and thereby not susceptible to arbitration in terms of the Arbitration Act. In this regard, the Court held as follows:

‘After the order was granted, there was no longer any matrimonial cause to speak of. Neither was there anything incidental to such cause, as all of the matrimonial issues were disposed of when the court granted the order incorporating the settlement agreement. Consequently, there cannot be any issue still outstanding relating to the marriage. The inevitable result is that the marriage and all its natural consequences came to an end, and anything relating thereto, such as proprietary consequences, became *res judicata*.’⁶

⁴ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC).

⁵ *Brookstein v Brookstein* [2016] ZASCA 40; 2016 (5) SA 210 (SCA).

⁶ *Ibid* fn 5 above para 12.

[14] In characterising the dispute between the parties, the first respondent argued that the dispute between the parties concerns in particular, a factual determination of whether the *dum casta* clause was triggered or not. If the answer is yes, the first respondent submitted, a question of whether the appellant is entitled to the payment of maintenance in terms of the deed of settlement arises. As such, s 2(a) of the Arbitration Act is not applicable and the dispute between the parties is arbitrable. To amplify this submission, the first respondent contends that the dispute dates back to 2018. It relates to the fact that the appellant was living with another man as husband and wife and therefore his obligation to pay maintenance was extinguished. According to the first respondent, the dispute was properly formulated and the appellant elected not to place any evidence of exceptional circumstances before the maintenance court that would entitle it to exercise its discretion not to stay the proceedings and refer the dispute to arbitration.

[15] As far as the arbitration clause is concerned, the first respondent argued that the facts of this case are telling in that the appellant is the one who requested that an arbitrator be appointed; an arbitration agreement was concluded between the parties; the appellant is the one who reneged from this agreement by failing to file a statement of claim in circumstances where the parties had agreed that the arbitrator should decide upon his own jurisdiction. The first respondent contends that the order of the high court cannot be faulted.

[16] The characterisation of the principal issue before this Court is a fundamental point of departure of the dispute between the parties. This is evident because whilst the appellant refers to it as arrear maintenance, the first respondent, on the other hand, relates the dispute to the *dum casta* clause, a duty to maintain. According to

him, this would include a question of whether the maintenance order has lapsed or been extinguished.

[17] The characterisation proffered by the first respondent is ill-conceived for two reasons. First, the maintenance dispute stems from a maintenance order that was made by the high court when the marriage between the parties was dissolved. It relates to enforcing an order of the court and not the underlying settlement agreement. The appellant sought an order for the attachment of a debt. The majority of the claims consist of the short payments that were made by the first respondent. For example, in July 2017, it reflected a short payment of R1 627.50. This is so because an amount of R32 550 instead of R34 177.50 was paid. The list goes on up until the year 2020. Some short payment relates to relatively small amounts of \pm R400. Only three of the 42 months' transactions relied on by the appellants relate to a total non-payment.

[18] The upshot of all of the above is that the first respondent did comply with the maintenance court order but not in full. The statement proffered by the first respondent that he denies that he is obliged to pay any maintenance to the applicant, cannot be true as well. He did make payments but not in accordance with the amount the maintenance order stipulated.

[19] Second, even though the first respondent's contention that the maintenance dispute dates back to 2018 may be correct, however, it is clear that it did not form part of the disputes for which an arbitrator was sought and appointed. The letter requesting an appointment of an arbitrator dated 9 September 2019 which was attached to the papers that served before the maintenance court, enumerated the disputes between the parties. And maintenance was not among them. Therefore,

the arbitration agreement the first respondent bemoans does not include arrear maintenance. The arbitration agreement is therefore irrelevant for the purposes of the issue before this Court. The submission that the appellant reneged from the arbitration agreement cannot be correct.

[20] It appears that the high court was not spared by how the first respondent misconstrued and conflated the issue that was before the maintenance court, hence its finding that the arbitrator must decide his jurisdictional issues. For that reason, the high court misdirected itself in this regard. This brings me to the main issue before this Court, whether arrear maintenance is a matrimonial cause or an incidental cause thereto.

[21] The high court did not make a finding that arrear maintenance is a matter falling within the purview of s 2(a) or not. It deferred the decision to the arbitrator. Whether it did so because of the arbitration clause or because parties signed an arbitration agreement does not come out clearly from the judgment. Either way, the decision of the high court cannot be supported.

[22] A proper analysis of the arbitration clause itself reveals that it was couched in a general manner. It did not specify the enforcement of maintenance as a dispute that should be referred to arbitration. What compounds the issue further is that nowhere in the arbitration clause or the deed of settlement did the parties refer to the fact that 'the arbitrator should decide its own issues of jurisdiction'. As indicated above, this phrase is only found in the arbitration agreement. I have already pronounced that the arbitration agreement is irrelevant to the issue in this appeal. It is therefore apparent that this phrase cannot be imported to assist in the interpretation of the arbitration clause. In my view, it cannot be said that the

arbitration clause gave express intention of the parties that enforceability of the maintenance order or arrear maintenance should be submitted to arbitration. Under the circumstances, and as already indicated above, the interpretation of s 2(a) of the Arbitration Act becomes necessary.

[23] Recently the Constitutional Court in *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*⁷ restated the trite approach to the interpretation of statutory provisions and held:

‘. . .one must start with the word, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context maybe determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.’

[24] Following the above unitary approach, the point of departure is the language used in the section, in ‘light of the ordinary rules of grammar and syntax.’⁸ To this end, the phrase ‘incidental to’ in its ordinary grammatical meaning, and when used as an adjective, denotes ‘something happening in connection with or as a natural result of something else.’⁹

[25] The language of s 3 of the Maintenance Act is also important as it gives the magistrates’ court jurisdiction over all matters arising from the Maintenance Act. The purpose of the Maintenance Act should also be taken into consideration.

⁷ *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

⁸ *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] 2 All SA 262, 2012 (4) SA 593 (SCA) and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2014] 1 All SA 517, 2014 (2) SA 494 [2013 ZASCA 176].

⁹ Oxford Advanced Learner’s Dictionary(7th Edition) Oxford University Press, 2005

Amongst others, its purpose is to provide for the easy, cost-effective, and speedy resolution of maintenance complaints including recovery of arrear maintenance, or enforcement of its orders. In addition, the Maintenance Act criminalises failure to pay any particular amount of maintenance in accordance with a maintenance order in terms of s 31(1). The Maintenance Act therefore, jealousy created specialised courts, to wit maintenance courts, to deal with complaints where any person legally liable to maintain any other fails to do so, and the enforcement of the said orders. This Court cannot therefore interpret s 2(a) of the Arbitration Act in a manner that will be at odds with the purpose of the Maintenance Act.

[26] In terms of s 8(1) of the Divorce Act 70 of 1979 (the Divorce Act), it is possible for a maintenance order to be varied, rescinded, or suspended. This section is equivalent to s 19 of the Maintenance Act. The arbitrator cannot be clothed with these powers imposed by the two Acts. The powers are bestowed upon the courts only. Assuming for a moment that the first respondent's contention to the effect that he was not obliged to pay maintenance as ordered by the high court is correct, it means, procedurally, he should have approached the maintenance court for an application to discharge, vary, or suspend it. The arbitrator could not discharge or vary such order.

[27] It is significant to mention that s 8(1) of the Divorce Act specifically provides for the maintenance order or an order regarding custody, access, or guardianship of a child as orders that can be varied, rescinded, or discharged. The section did not include the proprietary order granted by the courts. Apart from the fact that the *Brookstein* matter heavily relied upon by the first respondent dealt with a delictual claim, this exception created by s 8(1) of the Divorce Act serves as the main reason why reliance on this authority cannot advance his case.

Maintenance, like issues relating to custody, access including guardianship of children, is and remains a live issue or dispute depending on the differing circumstances of the parties. That is why access to the maintenance court is made available pre and post-divorce. As already indicated above and with the risk of repetition, this is so because any party can approach the court anytime after such an order has been made to request the discharge, variation or setting aside of the maintenance court order. The argument regarding *res judicata* is therefore misplaced.

[28] A case that is close to the facts in this appeal is *Ressell v Ressell*.¹⁰ In this matter, the court refused to enforce a settlement agreement that was made an order of court. The settlement agreement also stipulated that any disputes (post-divorce) between the parties had to be referred to arbitration. A dispute existed concerning access to a child after the divorce. The court held that the provision in s 2(a) of the Arbitration Act excluding ‘any matter incidental to such matrimonial cause’ is adequately wide enough to keep such matters out of the field of arbitration. The court further explained that this applies whether the dispute arose before or after the divorce.

[29] From the above analysis, it cannot be contended that the ensuing arrear maintenance including the enforcement of the order are not connected with the matrimonial cause or are matters incidental thereto. Section 2(a) of the Arbitration Act is wide enough to keep such matters out of the field of arbitration. The appeal court misdirected itself by deferring the issue to be dealt with by the arbitrator. The issue that was before the maintenance court was not a dispute on the underlying

¹⁰ *Ressell v Ressell* 1976 (1) SA 289 (W) at 291.

settlement agreement, but an enforcement of one of the provisions of the order of the court.

[30] Lastly, the common law prohibits the ousting of the jurisdiction of or access to, the courts.¹¹ The appellant, therefore, in the worst-case scenario, could not have been deprived of the choice of forums in which to pursue civil enforcement of the maintenance order and cannot lawfully have waived her right to approach the maintenance court in terms of the Maintenance Act. The legislation applies *ex-lege* and obtains force by reason of the will and decision of the Legislature, not because individuals elect to be subject thereto.¹² Consequently, the arbitration agreement cannot in the circumstances of this matter supersede the jurisdiction of the maintenance court.

[31] It would be remiss to conclude without dealing with the submission made by the first respondent that the issue of the appellant not being able to afford arbitration was not properly brought before the maintenance court and the maintenance court erred by taking it into account. The converse is true. A letter dated 20 August 2020 was annexed to the papers that were submitted by the first respondent to the maintenance court. The date of this letter predates the date when the appellant approached the maintenance court by a period of about six months. This letter shows that at the time when the parties were engaged in the aborted arbitration, a concern had already been raised by the appellant regarding the costs of arbitration. The maintenance court was within its powers to have regard thereto, as by its nature, the procedure takes the form of an inquiry.

¹¹ *Schierhout v Minister of Justice* 1925 AD 417 at 424 (and applied more recently by this Court in *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) para 21.

¹² *RMB Private Bank (A Division of Firststrand Bank Ltd) v Kaydeez Therapies CC (in liquidation)* 2013 (6) SA 308 (GSJ) at 311G.

[32] In the result,the following order is granted

- 1 The appeal is upheld with costs, including costs of two counsel where so employed.
- 2 The order of the high court is set aside and replaced with the following order:
'The appeal is dismissed with costs'

A M KGOELE
JUDGE OF APPEAL

Appearances

For the appellant: N Snellenburg SC with H J Van der Merwe
Instructed by: Symington De Kok Attorneys, Bloemfontein.

For the respondent: S Grobler SC with R Van der Merwe
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