

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



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2021/23816

(1) REPORTABLE:	
(2) OF INTEREST TO OTHER JUDGES:	
(3) REVISED:	
.....
SIGNATURE	DATE

In the matter between:

D[...], A[...]

Applicant

AND

D[...]: T[...] M[...]

Respondent

JUDGMENT

GREEN, AJ

1 The Applicant and Respondent were previously married to each other. The order of divorce incorporates an Agreement of Settlement which provides for, amongst other things, maintenance to be paid in respect of the child born of the marriage.

2 The papers reveal that the interactions between the Applicant and the Respondent in respect of the maintenance for the child have been fractious. Matters came to a head when the Respondent issued a writ of execution against the Applicant for maintenance which she alleged was due. The Applicant applies to set aside the writ on two grounds:

2.1 firstly, the Applicant says that he has complied with his obligations in terms of the Settlement Agreement; and

2.2 secondly, he says that the amount claimed in the writ is incorrect.

3 It is necessary to say something about the papers that have been filed in this matter. The issue ought to have been a simple one – was there a basis for the issuing of the writ and is the amount correct? However, the issues that are canvassed in the papers range far and wide dealing with all manner of disputes between the Applicant and the Respondent, some going back to whether an amount relating to the sale of the immovable property should be paid by the Applicant to the Respondent. There are also multiple issues raised in respect of various aspects relating to the maintenance of the child. These issues ought not to have been raised in this application, and those responsible for preparing the papers, who were not the counsel that appeared before me, should in future endeavour to deal only with the issues that are relevant to an application and not unnecessarily expand the matter.

4 A further issue that requires comment is the tone that is adopted in the papers and the correspondence that was exchanged. Whilst parties who were previously married to each other have lost their love and affection for each other, and may even harbour animosity to each other, that ought to be put to one side when the interests of a child born of the marriage are considered. Resort to allegations of ulterior motives, *mala fides* and the employment of emotive and adjectival language in correspondence and affidavits does little to progress issues and reach a sensible resolution.

5 I make the observations, which I have set out above, in the hope that they will provide guidance to both the parties and those responsible for preparing the papers in this matter in future.

6 I turn now to the merits of this application.

7 When the Respondent issued the writ, she, as is customary, deposed to an affidavit and attached a schedule setting out how the amount claimed in the writ was made up (“the Schedule”).

8 The Schedule commences with an opening balance. No explanation is provided as how that opening balance is made up, or what it represents. During argument, the Respondent’s counsel informed me that over time the Applicant and Respondent had exchanged a spreadsheet representing amounts due and amounts that had been paid, and that the opening balance follows from that spreadsheet. That may be so, but there is still no explanation on the papers of what the opening balance is.

9 By far the largest amount set out in the Schedule is said to be in respect of “Stabling”. The papers include a number of invoices issued by various horse stables and it seems that the description of “Stabling” in the Schedule is the shorthand that was used for that which is set out in the invoices issued by the stables. The invoices issued by the stables reveal that the amounts claimed are in respect of the stabling and feeding costs of a horse, the medical costs of a horse and dressage lessons either on a group basis or a private basis.

10 The latter part of the Schedule sets about adding and deducting various amounts to arrive at the total that is claimed in the writ. The Schedule provides no explanation for these amounts, they are not explained in the affidavit in support of the writ, and the papers filed in this application did not explain these amounts. During argument the Respondent’s counsel pointed out that if one has regard to some of the emails that the parties exchanged then it is possible to work out that one of the additional amounts claimed is in respect of what is alleged to be shortfall owed by the Applicant in respect of the costs of the divorce. That is seemingly correct. However, on my reading, it is not possible to work out what the other amounts are for.

11 A further issue which emerges from the papers is that after the writ had been issued the Applicant paid certain amounts in respect of maths lessons and school fees. Although the writ purports to be issued primarily for stabling costs, both parties sought to deduct the payments made for the maths lessons and the school fees from the amount claimed in the writ. I raised this with counsel during the argument and asked why, what are seemingly disparate amounts, are being set off? If stabling costs are owed, then those remain owing notwithstanding that payments are made for maths lessons and school fees.

12 An issue that looms large in this matter is whether the Applicant is liable for the stabling costs that are claimed in the writ. In the papers the Respondent has relied on the terms of the Settlement Agreement concluded between the parties as being the basis upon which she alleges the Applicant is liable for those costs. It is therefore necessary to consider the terms of the Settlement Agreement.

13 Any enquiry into the interpretation of a contract must adhere to the now settled approach to interpretation. This approach is well established by cases like *Endumeni*¹ and *Blair Athol*.²

14 In the recent Constitutional Court judgment in *University of Johannesburg*,³ the present position was captured as follows:

“This approach to interpretation requires that ‘from the outset one considers the context and the language together, with neither predominating over the other’. In *Chisuse*, although speaking in the context of statutory interpretation, this Court held that this ‘now settled’ approach to interpretation, is a ‘unitary’ exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.”

The approach in *Endumeni* ‘updated’ the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

² *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA).

³ *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC).

interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract."⁴

(emphasis added)

15 The general approach to interpreting contracts may be summarized as follows:

15.1 Interpretation is objective, not subjective.⁵ It does not involve a search for the intention of the contracting parties.

15.2 A document must be considered by always having regard to the text, context and purpose at the same time (a unitary interpretation exercise).⁶

15.3 Context and purpose are informed by "*material known to those responsible*" for the production of the contract.⁷

15.4 "*Context*" is not an open invitation for evidence that adds to, or modifies, words in a contract.⁸

15.5 Insensible and unbusinesslike results should be avoided, where the text allows.⁹

⁴ At paras 65 to 67.

⁵ *Endumeni* at para 18, fn 21; See also *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); para 18.

⁶ *University of Johannesburg* at para 65.

⁷ *Endumeni* at para 18, fn 21.

⁸ *University of Johannesburg supra*, *Capitec Bank Holdings Limited and another v Coral Lagoon Investments* 194 (Pty) Ltd and others 2022 (1) SA 100 (SCA).

⁹ *Endumeni* at para 18, fn 21

15.6 The way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term.¹⁰

16 The relevant clauses of the Settlement Agreement are to be found in clause 4 which in relevant part provides:

“ 4 Maintenance for the minor child

4.1 *The Defendant shall, in respect of the minor child, make payment of the following costs:*

4.1.1 *such costs in connection with a secondary education at schools agreed upon between the parties as set out herein:*

...

4.1.1.4 *66.6% (SIXTY SIX, SIX PERCENTUM) of all or any extra murals (sic) activities, hobbies and any associated costs relating to the minor child's extra mural activities or extra-curricular activities which the minor child might wish to undertake, provided that the Defendant has been consulted in connection therewith.*

...

4.2 *The parties agree that any tertiary educational costs of the minor child will be shared equally between the parties. The choice of tertiary education, location of the institution, choice of field of study and the accommodation during the*

¹⁰ Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited 2012 JDR 1734 (SCA) at para 15.

attendance at such institution shall be agreed to by all parties concerned before any costs are incurred.”

17 The Settlement Agreement goes on to provide that the Applicant will pay R12,500 per month towards the maintenance of the child and that:

“Such maintenance shall cease when the minor child reaches the age of 18 years or becomes self-supporting.”

18 The Respondent’s counsel urged me to find that the stabling costs are included under clause 4.1.1.4 of the Settlement Agreement. That clause is not the model of clarity. It starts off by saying that an amount has to be paid “*in respect of all or any extra murals (sic) activities, hobbies and any associated costs*”, but goes on to refer to the child’s “*extra mural activities or extra-curricular activities*”. So, in the first part, the clause relates to hobbies but does not do so in the second part, and in the second part it relates to extra-curricular activities but does not do so in the first part.

19 What is clear is that clause 4.1.1.4 operates in respect of costs in connection with the child’s education at secondary school, and that anchors the clause to school activities.

20 In my view, and applying the text context and purpose approach to the interpretation of the Settlement Agreement, stabling fees do not fall within the ambit of clause 4.1.1.4. I say this because in context that which is contemplated in clause 4.1.1.4 are extra mural or extra-curricular activities that are linked to the child’s school. Dressage from which the stabling fees arise does not, in my view, typically fall within the ambit of extra mural or extra-curricular activities that are

linked to the child's school, and the papers do not provide facts to suggest that this may be so. I am mindful that the reference to "*hobbies*" may be wider than extra mural or extra-curricular activities, but again the hobby is linked the child's school, and the papers do not provide facts to demonstrate that dressage is a school linked hobby.

21 On a textual approach to the Settlement Agreement the stabling costs do not fall within clause 4.1.1.4 of the Settlement Agreement.

22 A further point of relevance is that for some time the stabling fees were not claimed by the Applicant as part of the maintenance that was due in terms of the Settlement Agreement. If the stabling fees had consistently been claimed as being due in terms of the Settlement Agreement than they would presumably have been included in the spreadsheet that the parties kept recording amounts due and payments made, and the opening balance of the Schedule would have included the stabling fees. This is subsequent conduct of the parties that is relevant to the interpretation of the Settlement Agreement.

23 I therefore find that the stabling costs which are claimed in the writ do not fall within the ambit of the Settlement Agreement. It follows from this finding that the amount of the writ is wrong.

24 My finding that the stabling fees do not fall within the ambit of the Settlement Agreement is expressly not a finding that the Applicant is not liable for those expenses. Whether the Applicant is liable for the stabling fees is a separate question to whether they are included in the Settlement Agreement. Stated differently, the Settlement Agreement does not define, by limitation, the Applicant's maintenance obligations to the child. Whether the Applicant ought to

pay for the stabling fees will depend on an assessment of the lifestyle to which the child has become accustomed and the Applicant and Respondent's financial means. When this enquiry is undertaken the fact that the child has for several years participated in dressage will have to be taken into account when assessing what the child has become accustomed to. That is an enquiry which is beyond the scope of this application and the papers before me do not deal with it.

25 During argument the Respondent's counsel urged me not to set aside the writ but to instead suspend its operation. There was a debate with counsel for both the Applicant and the Respondent on what would become of the matter if I were to suspend the operation of the writ. Both counsel were asked to submit a note setting out what options would be available to the parties in the event of the writ being suspended as opposed to being set aside. The note was provided, and I am grateful to counsel for their assistance.

26 I have carefully considered whether I should accede to the Respondent's request that the writ should be suspended as opposed to being set aside. It seems to me that, given my finding that stabling fees do not fall within the scope of the Settlement Agreement, and that the amount of the writ is wrong, there is little point in suspending the writ instead of setting it aside. This is so because the writ ought not to have been issued and nothing that might occur following the suspension of the writ would cure that defect. I will therefore order that the writ should be set aside.

27 That leaves the question of costs. Both parties urged that costs should be granted in their favour. In my view, the issuing of the writ and the bringing of this application ought not to have been necessary. The parties ought to have

engaged each other to resolve the issue in the best interests of the child. On my assessment of the papers, both parties are at fault in allowing circumstances to develop that precipitated this application and both parties are at fault in preparing the papers in the manner they were presented. For that reason, and in the exercise of my discretion, I will make no order as to costs.

28 For the reasons set out above, I make the following order:

1. The writ of execution issued by this court on 20 September 2022 under Case No. 2021/23816 for payment of the amount of R101 082.22 by the Applicant is set aside.
2. There is no order as to costs.

I. GREEN

Acting Judge of the High Court

Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 26 April 2024 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 April 2024.

Date of hearing: 18 April 2024

Date of delivery of judgment: 26 April 2024

Appearances:

For the plaintiff: Adv T. Cartens

Instructed by: Boela Van Der Merwe Attorneys Inc

For the defendant: Adv B. Smith

Instructed by: Ross Munro Attorneys