Short Notes on:

MAINTENANCE IN SETTLEMENT AGREEMENTS – IS THERE ROOM FOR VARIATION AFTER THE FACT? – THE CASE OF *ES v JJS 2021 (A48) ZAWCHC* (unreported case no A48/2021, 4-5-2021) (Wille J, Lekhuleni AJ concurring)

Introduction

Settlement agreements (also referred to as consent papers) are often entered into between parties in divorce proceedings as a means to ensure the parties part ways amicably and to avoid any long and drawn-out court proceedings. On 4 May 2021, Wille J delivered the judgment in the case of ***ES v JJS,*** which dealt with the variation of spousal maintenance.

Overview: the ES v JJS case

On 21 February 2000, a divorce decree was granted after the parties had concluded a consent paper (settlement agreement). The Appellant had sought an application for variation of the divorce order in the lower Court in Stellenbosch. The application was brought on the basis that the Appellant contended that he had discharged his obligation regarding the consent paper. The obligation to provide spousal maintenance is contained in Sections 7(1) and 7(2) of the Divorce Act 70 of 1979. The Appellant's application was brought under Section 6(1)(b) of the Maintenance Act 99 of 1998, which provides for the discharge of an agreement with good cause shown.

During the divorce proceedings, the Appellant and Respondent had been legally represented and voluntarily consented to the settlement agreement terms. Although the parties had divorced some 21 years ago, the Appellant recently retired. Per the settlement agreement, he paid the Respondent an amount of R4 116 040.00 regarding the pension he received. The Appellant sought to discharge his obligation in respect of the monthly medical aid payments on the basis that the Respondent was no longer in need of further financial assistance from the Appellant. This was because she had received a hefty sum from the pension and was also permanently employed. The Appellant believed that the Respondent was no longer in financial need of the Appellant and requested a discharge of a specific obligation, being the Respondent's medical aid that Appellant has been paying.

The issue before the Court was whether the Appellant had discharged the threshold for 'good cause' as referred to in Section 6(1)(b). Additionally, the Court had to determine whether the interpretation

of the settlement agreement was such that affordability would be a consideration in the discharge of the obligations and whether the parties were aware of what they had consented to in the agreement. The issue before the Court was, therefore, of a contractual nature.

Wille J first considered the threshold for good cause and whether the obligation had been discharged. The Court dismissed the contention by the Appellant that had the maintenance order been reviewed by the maintenance court today, that the Respondent would pass the affordability test and the medical aid contributions by the Appellant would not be required. Nor did the Court accept the Appellant's stance that having paid the Respondent her share of his pension, the sudden increase in her financial position would discharge his obligations. In doing so, the Court had referred to previous case law that outlined the rationale that it would be unfair for the Court to interfere with an order granted in terms of a settlement agreement by varying one part of the agreement whilst leaving the remainder of the agreement intact.[1] The Court in *Georghiades* had further relied on the case of *Jacobs v Jacobs* 1955 (4) SA 211 in that a change in a financial position did not necessarily provide sufficient grounds for 'good cause'.

Dealing with the aspect of the contractual nature of the settlement agreement, the Court considered that both parties entered into a consent paper upon agreement, regulating their rights and obligations. Furthermore, both parties had legal representation, thus having had equal bargaining powers and clearly understood the terms of the agreement. In looking at the wording of the agreement, the Court pointed out that the discharge of the maintenance obligation in respect of the medical aid contributions when the Respondent had her own medical aid as the agreement is read to interpret it only as an option that the Respondent may at some point have her own medical aid and was not an affordability issue. The Court further looked at the principle of *pacta sunt servanda* that is a cornerstone of South African contractual law. It states that the obligations created in an agreement must be honoured as it reflects the parties' intention at the time of the conclusion of the agreement.

Wille J concluded his judgment by stating that he believed that the threshold for 'good cause' had indeed not been met. However, Wille added that the parties' contemplation when the agreement was concluded was apparent in the agreement's wording and dismissed the appeal.

Conclusion

[1] Georghiades v Janse Van Rensburg 2007 (3) SA 18.

The clauses drafted and agreed to in settlement agreements should not be taken lightly when agreeing. It is of the utmost importance that both parties clearly understand the conditions to which they consent and that the wording of the clauses is clear and concise. In applying for variation orders, a party must carefully consider the grounds upon which it is basing its application and consider alternative recourses available. For any of your family law or litigation needs, contact an expert at SchoemanLaw today.

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