THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

The Supreme Court of Appeal (SCA) today dismissed, with costs, an appeal brought by Simon Roy Arcus (the appellant).

The appeal stemmed from the judgment of the Western Cape Division of the High Court, wherein Francis AJ (the court a quo) made a declaratory order to the effect that the maintenance obligations contained in the consent paper, pursuant to the divorce of the appellant and Jill Henree Arcus (the respondent), which was made an order of the court, was subject to a 30-year prescription period in terms of s 11*(a)*(ii) of the Prescription Act 68 of 1969 (the Prescription Act).

The circumscribed issue for determination in this appeal was 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 section 11*(a)*(ii) of the Prescription Act, with a prescriptive period of 30 years, or any 'other debt', as contemplated in section 11*(d)* of the Prescription Act, with a prescriptive period of three years.

Smith AJA (Dambuza and Hughes JJA concurring) (the majority judgment) found that a resolution of this appeal, to a great extent, depended on the determination of the question of whether maintenance orders possessed the essential nature and characteristics of civil judgments. Pursuant to a survey of authoritative pronouncements made by our courts in this regard, the majority judgment found that it was manifest that maintenance orders were: (a) dispositive of the relief claimed and definitive of the rights of the parties, to the extent that they decided 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. The majority judgment found that a maintenance order had the same legal consequences which flowed from an order made in a civil action. A maintenance order fixed the obligations of the judgment debtor until such time as it was discharged or varied upon the establishment of new facts, and was therefore not subject to a three-year prescription period.

Thus, the majority judgment held that the court a quo made the correct order and the appeal accordingly failed.

Mocumie JA and Kgoele AJA wrote a separate concurring judgment, as, although largely in agreement with the main judgment, the approach taken was different. The concurring judgment's approach endorsed the approach adopted by the court of first instance (Francis AJ) and emphasised 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 was so because, at the core, the issues in this appeal involved 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.

The concurring judgment found that 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 was superficial and did not exist in law. It found further that: it was 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 had changed, which the appellant did not do. Besides, a claim of maintenance under a court order was exigible without any averment or proof that the respondent had, in order to maintain herself, incurred debts during the period in question. That the respondent did not claim the arrears over such a long period was irrelevant for the purposes of the issue in dispute; that of which period of prescription is applicable. The high court was thus correct.

Furthermore, Mocumie JA and Kgoele AJA found that one could not interpret the Prescription Act in a manner that would be at odds with the purpose of the Maintenance Act. To do so would be to the disadvantage of a maintenance creditor and would 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. It would also give protection to maintenance debtors more than was intended for. Consequently, the order of the high court ought to stand.

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