THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1324/2019

In the matter between:

CASPER HENDRIK BAILEY **FIRST APPELLANT**

SAREL LOUIS AUGUSTYN **SECOND APPELLANT**

and

HAZEL JOHANNA CICELIA BAILEY **RESPONDENT**

Neutral citation: *Bailey and Another v Bailey* (Case no 1324/2019) [2020] ZASCA 178 (18 December 2020)

Coram: VAN DER MERWE, MOCUMIE and MAKGOKA JJA and LEDWABA and EKSTEEN AJJA

Heard: 4 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 09h45 on 18 December 2020.

Summary: Family law – interpretation of word 'remarriage' in deed of settlement made order of court – means marriage recognised by law – religious Christian ceremony performed not remarriage.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Neukircher J) sitting as court of first instance:

(a) The appeal is upheld.

(b) The order of the court a quo is set aside and replaced with the following:

'1. Paragraph 5.1 of the settlement agreement between the parties made an order of court on 28 August 2017 is amended/varied to read as follows and with effect from date of this order "The Defendant shall pay an all-inclusive amount of R10 000 (Ten Thousand Rand) maintenance to the Plaintiff per month until her death or remarriage and/or cohabitation with another man in a common law marriage whichever occurs first."

2. It is declared that the ceremony that had been performed in respect of the applicant and Mr Riaan Visagie on 9 December 2017 did not constitute a remarriage within the meaning of the said deed of settlement between the parties.

3 The respondent is directed to pay the costs of the application.'

(c) There is no order as to the costs of the first appellant and the respondent on appeal.

(d) The respondent is directed to pay the costs of appeal of the second appellant.

JUDGMENT

Mocumie JA (Van der Merwe JA and Ledwaba and Eksteen AJJA concurring):

[1] The marriage of the first appellant, Mr Casper Hendrik Bailey, and the respondent, Mrs Hazel Johanna Cicelia Bailey, was dissolved by a court order incorporating a settlement agreement which they had concluded. The second appellant, Mr Sarel Louis Augustyn, acted at all relevant times as the attorney of the first appellant. The main issue for determination in this appeal is the interpretation of the word 'remarriage' in the settlement agreement entered into between the first appellant and the respondent in the divorce proceedings. The further issues are

whether the first appellant was in contempt of court and whether the costs orders of the court a quo, particularly that the second appellant, be mulcted with costs *de bonis propriis*, were justified. The appeal is with leave of this Court.

[2] The relevant background facts appear from what follows. On 28 February 1987, the first appellant and the respondent were married in community of property. They separated in June 2016 with the common intention to divorce. The respondent then initiated divorce proceedings against the first appellant. Pending the finalisation of the divorce proceedings, they entered into negotiations assisted by their respective attorneys. In June 2017, they signed a settlement agreement. Clause 5.1 of the settlement agreement, which is in dispute, reads:

'The Defendant shall pay an all-inclusive amount of R10 000.00 (Ten Thousand Rand) maintenance to the Defendant per month until her death or remarriage whichever occurs first.'

In the court a quo and this Court, the first appellant accepted that the second reference to 'Defendant' was simply an error and should read 'Plaintiff'.

[3] On 28 August 2017, a decree of divorce, incorporating the signed settlement agreement, was made an order of the court. After the divorce, the respondent cohabited with Mr Visagie. On 9 December 2017, Reverend van Huyssteen, a minister of the Dutch Reformed Church, conducted a ceremony during which he blessed and sanctioned their cohabitation so that they would not 'live in sin.' Both the respondent and Mr Visagie invited friends and relatives to the ceremony, the photos of which were posted on Facebook by the respondent with the caption that Mr Visagie was her husband. By 5 March 2019, the date of the hearing in the high court, the respondent, and Mr Visagie had already separated.

[4] At the end of February 2018, the ceremony between the respondent and Mr Visagie came to the attention of the first appellant. Upon the advice of the second appellant, the first appellant stopped paying maintenance to the respondent on the basis that the respondent had remarried, thus ending his duty to maintain her. He stopped payment at the end of March 2018, which prompted the respondent to lay a criminal charge against the first appellant for failure to pay maintenance. On 23 April 2018, the first appellant appeared in the magistrate court where he raised the following defence in respect of the charge proffered against him:

'On advice of Counsel and informing him of the so-called marriage on 9 December 2018, the Court was informed on the date of appearance of 23 April 2018 that the Court Order of the High Court could not be enforced in the Criminal Court without an attempt to amend/vary it in terms of legal process which would in any event be opposed as being moot in the light of the fact that maintenance orders lapse automatically in the event of a re-marriage by the recipient of maintenance.'

[5] The magistrate apparently accepted what the first appellant had stated and struck the matter from the roll. The respondent thereafter approached the high court where she sought to amend clause 5.1 of the settlement agreement by replacing the second word 'Defendant' with 'Plaintiff', as it ought to have read in the first place. She also sought to hold the first appellant in contempt of a court order for his failure to pay maintenance since April 2018.

[6] The first appellant filed a conditional counter-application in which he sought a declaratory order that on 9 December 2017 in the Dutch Reformed Church Montana; the respondent and Mr Riaan Visagie concluded an unregistered common law or Christian relationship of cohabitation as husband and wife, and, as a result of which his duty to pay maintenance had lapsed. He also sought orders that:

'1.1 The word "remarriage" in paragraph 5.1 of the settlement agreement between the parties made an order of the court on 28 August 2012, be interpreted and extended to include an unregistered common law alternatively Christian marriage relationship as husband and wife.

. . .

Alternatively,

. . .

2.1 Paragraph 5.1 of the settlement agreement between the parties made an order of Court on 28 August 2017 is amended/varied by adding after the word "remarriage" the following words

"alternatively, Plaintiff entering into an unregistered common law alternatively Christian marriage relationship of cohabitation as husband and wife"

. . .

Alternatively

. . .

3.1 Paragraph 5.1 of the settlement agreement made an order of the court on 28 August 2017 is amended/varied by adding after the word "remarriage" the following words

"alternatively, Plaintiff entering into a relationship of cohabitation as husband and wife with another man."'

[7] The high court (Neukircher J) found in favour of the respondent. It found that the insertion of the second word 'Defendant' instead of 'Plaintiff' in clause 5.1 was a patent error that was not apparent to the parties, their legal representatives or the court. The high court also held that the ceremony conducted in respect of the respondent and Mr Riaan Visagie did not constitute remarriage. It furthermore held that the meaning of the word did not include cohabitation, as the first appellant had contended. The first appellant and the respondent, however, reached agreement, contained in a draft order, as to the amendment of clause 5.1 for future purposes. The court a quo thus varied the settlement agreement to read:

'1. Paragraph 5.1 of the settlement agreement between the parties made an order of the court on 28 August 2017 is amended/varied to read as follows and with effect from the date of order: The defendant shall pay an all-inclusive amount of R10 000 (Ten Thousand Rand) maintenance to the plaintiff per month until her death or remarriage and/or cohabitation with another man in a common-law marriage, whichever occurs first.'

[8] The high court also held the first appellant in contempt of court for failing to pay the respondent maintenance in terms of the settlement agreement; and it mulcted the second appellant with costs *de bonis propriis.* In addition, it ordered the first appellant to pay costs on the scale of attorney and client.

[9] On the question whether the ceremony between the respondent and Mr Visagie was a 'remarriage' as contemplated by the parties when they concluded the settlement agreement, the high court found, with reference to several cases including *Ochberg v Ochberg's Estate*[1]*,* that on the evidence presented, what occurred on 9 December 2017 was no valid and binding legal marriage ceremony. Thus, the respondent's legal obligation to pay maintenance had not lapsed. Addressing the first appellant's provisional counter-application based on rectification, at para 40 of the judgment, the high court found that:

'[a]t the time that the settlement was entered into, the respondent had the opportunity to add into the settlement agreement that any cohabitation by the applicant would result in a

[1] *Ochberg v Ochberg's Estate* 1941 CPD 15.

nullification of the maintenance payable by him to her. He failed to do so. He was represented by an attorney at the time and despite this, no such clause was added to the settlement agreement'.

[10] As I have said, counsel for the first appellant handed up a draft order in which the respondent consented to a variation of the settlement agreement and which included the variation that the respondent had sought from the outset. The court, however, held at para 51 that 'had it not been for this concession, the [conditional] counter-application would have been dismissed with costs.'

[11] In respect of the contempt of court relied upon by the respondent, the high court found at para 48 of the judgment that:

'[i]n so far as the contempt of court regarding the failure to pay maintenance because of the argument that the applicant has remarried is concerned, I am of the view that the wilfulness and *mala fides* cannot be established. It is clear that the respondent was advised by his legal representatives that this argument was a valid one and given that he is a lay person, in my view he would know no better.'

It nevertheless found the first appellant guilty of contempt of court consisting of deductions from maintenance made before April 2018 and sentenced him to three months' imprisonment which was suspended conditionally.

[12] As the appeal revolves around the interpretation of the word 'remarriage' in the divorce settlement agreement and flowing from that what constitutes a marriage, the Marriage Act 25 of 1961 (the Marriage Act) must be the starting point. The relevant provisions are the following:

'**11. Unauthorised solemnization of marriage ceremonies forbidden**

(1) A marriage may be solemnized by a marriage officer only.

(2) . . . .

(3) Nothing in subsection (2) contained shall apply to any marriage ceremony solemnized in accordance with the rites or formularies of any religion if such a ceremony does not purport to effect a valid marriage.

29A. Registration of marriages

(1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.

(2) The marriage officer shall forthwith transmit the marriage register and records

concerned, as the case may be, to a regional or district representative designated as such under section 21 (1) of the Identification Act, 1986 (Act No. 72 of 1986).'

[13] The purpose of interpretation, is to establish the intention of the parties from the words used in the context of the document as a whole, the factual matrix surrounding the conclusion of the agreement and its purpose or (where relevant) the mischief it was intended to address.[2] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[3], with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4], this Court affirmed that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to 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 production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to and guard against, the temptation to substitute what they regard as reasonable, sensible, or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[14] The ordinary meaning of remarriage is to enter into a further marriage recognised by South African law (legal marriage). The context provides several indications that this was the meaning of the word remarriage in clause 5.1 of the deed of settlement. First, the parties used the word in the agreement that regulated the

---

[2] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; [2009] 2 All SA 523 (SCA); 2009 (4) SA 399 (SCA) para 39; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; [2015] 4 All SA 417 (SCA); 2016 (1) SA 518 (SCA) paras 27, 28, 30 and 35.

[3] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA).

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

consequences of the dissolution of their legal marriage. In the absence of an indication to the contrary, the parties must be taken to have intended a remarriage of the same status, ie a legal marriage. Second, clause 5.1 echoed the phrase 'until death or remarriage' in s 7(2) of the Divorce Act 70 of 1979.[5] There the phrase undoubtedly refers to a legal remarriage. Again, in the absence of an indication to the contrary, the phrase must have been intended to have the same meaning as in s 7(2). Third, the very wording of the agreed amendment shows that it introduced into the clause what was not there before.

[15] Thus, the parties agreed that the first appellant's duty to maintain the respondent would lapse when another person becomes legally obliged to maintain her. But should the respondent cohabitate with a person who *de facto* contributes to her maintenance (which on the uncontroverted evidence, Mr Visagie did not), the first appellant would have the remedy of approaching the maintenance court for a variation or discharge of the maintenance order under s 6(1) read with s 16(1)(*b*) of the Maintenance Act 99 of 1998.The agreement must now be applied to the facts.

[16] Reverend Van Huysteen's uncontradicted evidence was that he is an ordained minister and marriage officer in terms of the Marriage Act (s 29A*(a)*). That on 9 December 2017, he conducted the ceremony between the applicant and Mr Visagie. However, that ceremony had no legal consequences, as he did not solemnise it in terms of the Marriage Act. No one signed the marriage register as prescribed in the Marriage Act (s 29A*(b)*). He did not pronounce the applicant and Mr Visagie to be husband and wife to those in attendance of the ceremony. On the contrary, he expressly informed the audience that no legal marriage was concluded. Nor did he after the ceremony transmit the marriage register and other relevant documents to a regional or district representative at the Department of Home Affairs (s 29A*(c)*).

---

[5] Section 7(2) provides:
'In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period *until the death or remarriage* of the party in whose favour the order is given, whichever event may first occur.' (Emphasis added.)

[17] In terms of s 29A of the Marriages Act the requirements for the registration of a valid marriage are that:

(a) the solemnization of the marriage is done by a marriage officer designated in terms of the Marriage Act;

(b) the (i) parties to the marriage together with the (ii) marriage officer and (iii) two witnesses are required to sign the marriage register immediately after such solemnization;

(c) the marriage officer is thereafter charged to forthwith transmit the marriage register and other relevant documents to a regional or district representative designated as such under s 21(1) of the Identification Act 72 0f 1986, at Home Affairs. None of these requirements were fulfilled during the ceremony. Thus, the finding of the high court that there was no 'remarriage' cannot be faulted.

[18] Counsel for the respondent fairly, and correctly, conceded that the high court erred in holding the first appellant in contempt of court. In the respondent's founding affidavit, it was expressly stated that the alleged contempt of court consisted of non-payment of maintenance since April 2018. That was the case that the first appellant had been called upon to answer. As I have said, the high court in fact held that the first appellant did not commit contempt of court in this regard. In the circumstances it erred in holding that the first appellant was in contempt of court in respect of deductions that he had made from the monthly amount prior to April 2018. On the evidence, the bulk of these deductions were in any event in respect of the respondent's medical fund contributions and were made with her consent.

[19] As I have said, this Court granted leave to the second appellant to appeal against the *de bonis propriis* costs order. Before us, counsel for the respondent rightly conceded that the order was vitiated by procedural unfairness. In this regard the high court referred to two matters. First, it said, 'the application was served on Mr Augustyn during October 2018'. Second, it stated:

'[o]n Monday, the 4th of March 2018 when the matter was called, I insisted that Mr Augustyn be present in court to explain why a *de bonis propriis* costs order should not be granted against him. He thus had an opportunity until Tuesday, 5 March 2019 when this matter was argued to provide such an affidavit. None was forthcoming. In my view, Mr Augustyn has had ample

opportunity to provide an explanation to this court, as to why he should not pay costs *de bonis propriis* and he failed to do so.'

[20] But the second appellant was not a party to the application in the high court. His firm merely accepted service of the respondent's application on behalf of the first appellant. The mere fact that the second appellant had in these terms been informed to attend the hearing the following day, did not give expression to the entrenched *audi alteram partem* principle. The second appellant was not informed of the purported grounds for a *de bonis propriis* costs order and was not provided a fair and proper opportunity to explain himself.

[21] There was also no substantive ground for the order. It is settled law that generally a court would only grant a costs order *de bonis propriis* against an attorney in cases that involve gross incompetence or gross disregard of professional responsibilities, dishonesty, wilfulness, or negligence of a serious degree.[6] The high court based the *de bonis propriis* costs order (and the attorney and client costs order against the first appellant) on the propositions that in both the maintenance court and in the papers before it, the first appellant, upon the advice of the second appellant, had relied on the obvious error in the deed of settlement as a substantive defence to the claim for payment of maintenance. It was wrong on both scores. The first appellant did not appear in the maintenance court. He appeared on a criminal charge in the criminal court. In facing a criminal charge, it was perfectly reasonable to put forward what I have quoted in para 5 above. The first appellant did not rely on the error as a defence in the high court. He expressly accepted that it was a patent error and defended the matter, as I have said, on the basis that his admitted liability to pay maintenance had lapsed. For the same reasons, attorney and client costs against the first appellant were not justified.

[22] Paragraph 1 of the order of the court a quo was granted by agreement, was not appealed against and must stand. For the reasons stated, the rest of the order of the court a quo does not withstand scrutiny. The first appellant and the respondent, sensibly, agreed that a declarator would be to the benefit of the parties in order to

---

[6] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) para 51 and 54. See also *Stainbank v South African Apartheid Museum at Freedom Park and Another* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) paras 52-54.

arrange their affairs accordingly. It is fair and just that the first appellant and the respondent pay their own costs of appeal. The respondent did not abandon the costs order against the second appellant but attempted to defend it in the heads of argument filed in this Court. In the result the respondent should pay the second appellant's costs of appeal.

[23] In the result, the following order is granted:

(a) The appeal is upheld.

(b) The order of the court a quo is set aside and replaced with the following:

'1. Paragraph 5.1 of the settlement agreement between the parties made an order of court on 28 August 2017 is amended/varied to read as follows and with effect from date of this order "The Defendant shall pay an all-inclusive amount of R10 000 (Ten Thousand Rand) maintenance to the Plaintiff per month until her death or remarriage and/or cohabitation with another man in a common law marriage whichever occurs first."

2. It is declared that the ceremony that had been performed in respect of the applicant and Mr Riaan Visagie on 9 December 2017, did not constitute a remarriage within the meaning of the said deed of settlement between the parties.

3. The respondent is directed to pay the costs of the application.'

(c) There is no order as to the costs of the first appellant and the respondent on appeal.

(d) The respondent is directed to pay the costs of appeal of the second appellant.

_____

B C MOCUMIE

JUDGE OF APPEAL

Makgoka JA (dissenting)

[24] I have had the benefit of reading the main judgment by my colleague, Mocumie JA. I agree with it, save for the reasoning and conclusion on the interpretation of the 're-marriage clause' in the settlement agreement, as well as the costs order as between the first appellant and the respondent. The main judgment declares that 'the ceremony … performed in respect of the applicant and Mr Riaan Visagie on 9 December 2017, did not constitute a remarriage within the meaning of the …deed of settlement between the parties.' I conclude, in the specific context of clause 5.1 of the parties' settlement agreement, that the respondent and Mr Visagie indeed entered into a 're-marriage'.

[25] The relevant facts are common cause. The first appellant and the respondent were previously married. They divorced on 28 August 2017. Their decree of divorce incorporated a settlement agreement which was made an order of court. Paragraph 5.1 thereof obliged the first appellant to pay R10 000 maintenance monthly to the respondent 'until her death or remarriage, whichever occurs first…'. A month and half later, on 13 October 2017, the respondent announced to the world via the social medium of Facebook,[7] that she and Mr Visagie, with whom she had been cohabiting, were getting married on 9 December 2017 in a church ceremony in Montana, Pretoria.

[26] After that date, the respondent's Facebook page depicted, among others things, photos of the ceremony, which in all respects, resembled a marriage consummation: the respondent was dressed in a wedding dress; she was escorted into the church by a male person; the respondent and Mr Visagie stood in front of a priest, and later knelt while being blessed by the priest, and the couple exchanged wedding rings. The ceremony was witnessed by the couple's families and friends. Mr Visagie also updated his Facebook status to 'Married Hazel Bailey', in reference to the respondent. Later, on Mr Visagie's birthday, the respondent posted a birthday message for the latter on Facebook, referring to him as 'the best husband ever.'

[7] Facebook is an American online social media and social networking service.

[27] Unsurprisingly, the above developments caught the first appellant's interest, as the respondent's marriage would have a direct bearing on his maintenance obligation towards the respondent. As stated already, that obligation would lapse upon the respondent's re-marriage. Shortly after becoming aware of the ceremony, the first appellant sought confirmation from the respondent that she was indeed married to Mr Visagie, which the respondent denied. His further investigation revealed that, at the request of the respondent and Mr Visagie, the priest who presided over the ceremony neither completed the marriage register nor registered the marriage, as the respondent sought to avoid the lapsing of the first appellant's maintenance obligation. On advice from his attorney, the first appellant stopped paying maintenance to the respondent.

[28] As a result, the respondent laid a complaint against the first appellant in the magistrate's court for failure to pay maintenance for the period September 2017 to February 2018. The maintenance court dismissed the complaint based on an artificial ambiguity due to a patent error in the settlement agreement where in respect of the maintenance obligation, 'defendant' was used instead of 'plaintiff'. The respondent appealed to the court a quo, before which the first appellant contended that his maintenance obligation towards the respondent had lapsed because the latter Mr Visagie were married. The court concluded that because the registration formalities prescribed in s 29A of the Marriages Act had not been observed, there was no 'valid marriage' and thus the first appellant's maintenance obligation to the respondent had remained extant.

[29] As a prelude to my consideration of the 're-marriage clause' in the settlement agreement, I make a general observation that the concept of 'marriage' has taken an elastic nature over the past decade or two. For example, African customary, Muslim, Hindu and Jewish, and same-sex unions have become accepted as 'marriages'. Although none of the ceremonies performed in terms of these unions comply fully with the strict prescripts of s 29(A), they give rise to legal consequences of a marriage.

[30] The fatal flaw in the court a quo's judgment is that it did not consider the context of clause 5.1 of the settlement agreement. As Lord Steyn famously remarked, 'In law,

context is everything.'[8] By narrowly focusing on whether the ceremony conducted on 9 December 2017 constituted a marriage, the court a quo asked a wrong question, and consequently, it was led astray in its analysis of the 're-marriage clause.' The correct enquiry, to my mind, should have been whether the relationship between the respondent and Mr Visagie constituted a 're-marriage' as envisioned in the settlement agreement. Viewed in this light, instead of it being the sole and focal point of the enquiry, the ceremony was but one of the factors to be taken into account in answering the contextual question.

[31] It is common cause that the respondent and Mr Visagie cohabited, and for all intents and purposes, lived as husband and wife. According to the respondent, she and Mr Visagie are Christians, and in terms of their faith, any sexual relationship outside the confines of a marriage is sinful. The ceremony on 9 December 2017, she explained, was to 'legalise our relationship before God and not to live in sin'. It is not clear how an avowedly 'sinful' relationship can be 'legalised' before God. Be that as it may, the respondent's assertion confirms the depth of the relationship as being akin to that of a husband and wife.

[32] This, in my view, is the context within which the word 're-marriage' in the settlement agreement should be construed. The word was used in the context of providing maintenance for the respondent. The agreement was premised on an archaic and sexist notion that the respondent needed a man to financially maintain her. Whether the man she 're-married' in fact supported her financially or was able to do so, was irrelevant to the first appellant's maintenance obligation to the respondent. As soon as she 're-married', that obligation would lapse. Seen in this light, and given the nature of the relationship between the respondent and Mr Visagie, the latter fulfilled the purpose for which the clause was inserted in the settlement agreement. The ceremony on 9 December 2017 was but a confirmation of a *de facto* state of affairs between the respondent and Mr Visagie.

[8] In *R v Secretary for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at 447. This was approved in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1.

[33] Regarding the ceremony itself, but for the non-completion of the marriage register, it was a complete marriage ceremony. It should be borne in mind that the non-completion of the marriage register was not an oversight or a mistake. It was a conscious decision aimed singularly at preventing the 're-marriage' clause in the settlement agreement from kicking in. It was a manipulation of the law, concocted by the respondent and aided by a priest, to frustrate the eventuality which the parties had clearly in mind when concluding the settlement agreement. And to the extent it was assumed that the new man in the respondent's life would automatically support her, it follows that Mr Visagie should be assumed to have done so. It is irrelevant that he says he did not. The result was, at least notionally, that the respondent enjoyed maintenance from the first appellant and Mr Visagie. This, in my view, is a contrived and disingenuous scheme which a court should frown upon, instead of giving it its imprimatur.

[34] What is more, when interpreting documents, courts are enjoined to avoid a construction that leads to absurd results. In the present case, it is clear that the parties envisaged that once the respondent cohabited with another man in a relationship akin to that of husband and wife, the first appellant's maintenance obligation to the respondent would lapse. The mischief intended to be addressed by the 're-marriage clause' was the respondent being maintained simultaneously by the first appellant and a man she cohabitated with. By construing the clause within the strict prescripts of s 29A, the result is that the respondent received maintenance from two men: exactly what the parties had intended to avoid. In the court a quo, the respondent agreed to an amendment of the settlement agreement to the effect that, for future purposes 're-marriage' would include her cohabitating with another man in a common law marriage. To my mind, far from signalling a different intention, it confirms the parties' true, original intention when the settlement agreement was concluded.

[35] For these brief reasons, I am unable to agree with para 2 of the order of the majority judgment, as well as the costs order as between the first appellant and the respondent. Given the view I take of the matter, I would order the respondent, in addition to the second respondent's costs, to pay the first appellant's costs. Her reprehensible conduct deserves that much.

[36] Other than that, I am in full agreement with the rest of the order of the majority judgment and the reasoning underpinning it.

_____

T M MAKGOKA
JUDGE OF APPEAL

Appearances:

For appellants:	E Prinsloo
Instructed by:	Wilsenach Van Wyk Goosen & Bekker Inc., Pretoria
	Bezuidenhout Inc., Bloemfontein.
For respondent:	J J Strijdom SC
Instructed by:	Rianie Strijdom Attorneys, Pretoria
	Symington De Kok Attorneys, Bloemfontein.