

Legal update 4 of 2022: Maintenance

Introduction

This update deals with cases relating to maintenance issues, in particular if a warrant of execution can be issued to attach a pension benefit, if a member is entitled to be notified before a warrant is executed against his pension benefit, when a maintenance order becomes prescribed, and when a parent's maintenance obligations end.

Summary

Case 1: GB vs Discovery Life Investments Services LTD:
Gauteng High Court, Johannesburg (Case no: 28609/2020) Unreported (26 November 2021)

Can a warrant of execution issued by the High Court be used to attach pension fund assets arising from maintenance legal proceedings between spouses?

- **The finding:** Yes, a High Court can enforce its maintenance orders by way of a warrant of execution. While the Pensions Funds Act prohibits attachments of pension benefits, it makes exceptions by allowing orders made in terms of the Maintenance Act and the Divorce Act. Also, courts have increasingly favoured the High Courts as being capable of executing and finalising maintenance matters before them and not needing the authority of maintenance courts to execute orders relating to attaching pension benefits.

This was based on the court's interpretation of section 26(4) of the Maintenance Act that *any order issued in order to satisfy a maintenance order* qualifies as a valid order to attach pension benefits.

- **Practical application:** The Maintenance Act allows for a maintenance court to grant an order to deduct maintenance from a member's retirement fund benefits. However, applicants may also approach a High Court that granted them a maintenance order and apply for a warrant of execution to attach pension benefits

concerning the maintenance dispute.

Case 2: VDB vs VDB: High Court of South Africa, Johannesburg [VDB vs VDB and Others (22/11181) ZAGPJHC 271 (20 April 2022)]

Is a member entitled to be notified before a court order for arrear maintenance is executed against that member's pension benefit?

- **The finding:** No, although the withdrawal may cause irreparable harm to the member's investment, there is nothing in either the Pension Funds Act or the Maintenance Act that requires notification to the member before issuing a warrant of execution.
- **Practical application:** The funds will deduct arrear maintenance, in terms of a court order, from the member's benefit and pay it as a lump sum to the person entitled to the maintenance.

Even though the Pension Funds Act and the Maintenance Act do not require notice to be provided to the member, we will advise the member when we receive such a warrant. We will, however, still proceed with the execution of the warrant even if the member requests otherwise.

Case 3: Simon Roy Arcus vs Jill Henree Arcus: Supreme Court of Appeal, Bloemfontein (Case no: 28609/2020) Reported (21 January 2022)

When does a maintenance order prescribe?

- **The finding:** A maintenance order will only prescribe if valid steps are not taken to enforce the court order for 30 years after a court issued it.
- **Practical application:** A prescription is a specified time which a person is given to enforce their legal claim against another person. This usually lasts for three years.

Beneficiaries of maintenance orders must take measures to ensure that they enforce their legal claims shortly after a court issued them. However, a maintenance order will only prescribe 30 years after a court issued it.

Cases 4 and 5: *CL vs CJL*: Western Cape High Court, Cape Town (Case no: 3437/2022) Reported (17 June 2022), and *JAL vs JL & Another*: Western Cape High Court, Cape Town (Case no: 19441/2020) Reported (10 June 2022)

When does the legal obligation to maintain a child end?

- **The finding:** Parents have a duty to support their children until they reach the age of majority *or* until the children are self-sustaining.
- **Practical application:** The Children's Act states that parents have the responsibility to contribute to the maintenance of their children. According to section 17 of this Act, children become adults when they reach the age of majority (18 years old). However, a parent's responsibility to maintain their child does not cease when they reach majority.

If either or both parents were supporting the child as a minor, a court may order them to continue to do so until the child is self-sustaining.

More detail on Case 1

Case 1: GB vs Discovery Life Investments Services LTD: Gauteng High Court, Johannesburg (Case no: 28609/2020) Unreported (26 November 2021)

The mother of a minor child succeeded in obtaining an interim maintenance order against her then husband from the High Court. In terms of the order, he was to pay maintenance of R25 000 per month for the minor child. He was also supposed to pay for all costs relating to the family home, monthly instalments of the vehicle driven by his then spouse and was required to make a once-off contribution towards her legal bill. He did not fully comply with this order.

As a result, his former spouse applied for a warrant of execution from the High Court to attach his pension benefits from the Discovery Preservation Fund ('Discovery').

Discovery initially complied with the order and paid out a part of the member's pension benefits. However, due to opposition from the member, Discovery reversed this decision.

Discovery objected to the application on the basis that:

- The Pension Funds Act states that no benefit according to the rules of the fund shall be capable of being reduced, transferred or be liable to be attached or

subjected to any form of execution under a judgment or order of a court of law.

- While Discovery admitted that their position regarding this issue was not consistent, they argued that the former spouse's warrant of execution is not valid and should it approve the deduction of the pension benefits, the member may not only hold them liable, but it may also cause him to suffer negative tax consequences as happened when they partially paid out after the first warrant of execution was granted.

The High Court ('the Court') rejected Discovery's claim that they were unable to make a deduction against the member's pension benefits for the following reasons:

- The Court highlighted that while it is not allowed by law to attach pension benefits, the Pensions Funds Act makes two exceptions by allowing deductions for orders made in terms of the Divorce Act and the Maintenance Act.
- The Court found that the words 'notwithstanding anything to the contrary' in section 26(4) of the Maintenance Act empower other courts to use the authority given by the Maintenance Act to enforce orders against pension benefits of any person involved in a maintenance dispute.

- The Court further raised a legal question on whether or not the Maintenance Act precludes the High Court from issuing orders to attach pension benefits and assist in the enforcement of maintenance disputes simply because it is not a maintenance court.
- The Court held that recent case law indicates a trend which is in favour of the High Court being capable of settling maintenance disputes and not necessarily needing the approval of maintenance courts for its orders to be valid when attaching pension benefits.
- The Court further held that section 26 of the Maintenance Act can be interpreted in two possible ways. The first meaning is restrictive and only allows for attachment of pension benefits if a maintenance

court orders it. In terms of the second, the interpretation is broad and allows any court that can grant a maintenance order the authority to issue a warrant of execution for the attachment of pension benefits.

- The Court held that preference must be given to the second interpretation as processes found in the High Courts are capable of handling warrants of execution of the orders that they had granted. The Court also found that warrants of execution issued by the High Court can be used to attach pension fund assets arising from maintenance legal proceedings in terms of the Maintenance Act.

More detail on Case 2

Case 2: VDB vs VDB: High Court of South Africa, Johannesburg [VDB vs VDB and Others (22/11181) ZAGPJHC 271 (20 April 2022)]

- Mr VDB, a member of a retirement annuity fund, claimed to have lost about 30% of his income due to COVID-19, which resulted in him paying less maintenance than what he was supposed to for his three children.
- When his former spouse Ms VDB refused his request for a reduction of his maintenance obligation, he approached the High Court and the Maintenance Court with the view to reduce the maintenance payments. Ms VDB opposed these applications.
- Before the applications were dealt with, Ms VDB applied for a warrant of execution against his pension benefit for the arrear maintenance without any prior notification to Mr VDB. A writ or warrant of execution is a document issued by a court authorising an official to attach a debtor's assets so that they can be used to settle the debt.
- Mr VDB brought an urgent application to the High Court claiming that:
 - he should have been given notice of an intended application for a warrant of execution for alleged arrear maintenance;
 - he had a right to challenge such application, and

- a premature withdrawal against his retirement benefit was highly prejudicial to him as it substantially decreased his fund benefit and triggered tax and an early exit penalty.

The High Court dismissed Mr VDB's application.

- The Court agreed that Mr VDB would suffer irreparable harm as he would not be able to be returned to the position he was in, before withdrawal, especially after incurring exit fees and SARS tax fees.
- The Court further emphasised that although there were remedies for a writ of execution that was incorrectly or improperly issued, this was a writ of execution issued by the Maintenance Court. The Maintenance Act thus regulated rights of the parties and it was the provisions of this Act that would apply in this case. Section 27(3) of the Maintenance Act provided the only remedy available to Mr VDB, being that the Maintenance Court might only set aside a writ of execution once it was satisfied that the maintenance or other order had been complied with.
- The Maintenance Act did not provide for a notice to be granted before the issuing of the writ of execution and subsequent execution of a maintenance order. Therefore, Mr VDB did not have the right to receive notice before a withdrawal was made from his pension benefits.

More detail on case 3

Case 3: Simon Roy Arcus vs Jill Henree Arcus: Supreme Court of Appeal, Bloemfontein (Case no: 28609/2020) Reported (21 January 2022)

- 27 July 1993: Mr and Mrs Arcus entered into a settlement agreement which formed part of their final order of divorce. The agreement provided that Mr Arcus pay maintenance for Mrs Arcus until she dies or remarries. The other condition was for him to pay maintenance for their minor child until she became self-sustaining.
- December 2018: Mrs Arcus tried for the first time to recover the arrear maintenance from Mr Arcus since their divorce.
- January 2019: Mr Arcus began paying the monthly maintenance after receiving a letter of demand from Mrs Arcus's attorneys in December 2018.
- 17 February 2020: A writ of execution was issued in favour of Mrs Arcus regarding the arrear maintenance in the sum of R3.5 million.
- 19 June 2020: Mr Arcus brought an application in the Western Cape High Court for an order to suspend the writ of execution pending the application lodged by him on 27 August 2019.
- Mr Arcus objected to the writ of execution to recover the maintenance arrears on the basis that the Maintenance Act defines a maintenance order as an order made by the court in terms of the Divorce Act. According to Mr Arcus, the maintenance order could not be enforced as it arose from the party's settlement agreement and was not an order determined by the courts as required by law.
- He alleged that maintenance orders do not qualify as final orders issued for the purposes of the Prescription Act because they lack certainty and are subject to change due to the allowance the aggrieved party had, with good reason, to request the courts to change the original order.
- He contends that maintenance orders should prescribe within three years as they must be enforced without delay and timeously used for their intended purpose. He also states that the payment of maintenance is intended for immediate living

expenses and not to be saved and used in the future.

The High Court ('the Court') rejected Mr Arcus' arguments that the maintenance order had prescribed.

- The court highlighted the fact that, unlike an ordinary legal claim which has a three-year prescription period in terms of the Prescription Act, a maintenance order is an order of the court.
- The Court went on to clarify that a maintenance order has the effect of a final civil judgment which has a prescription period of 30 years.
- The High Court dismissed Mr Arcus's application and ordered him to pay his maintenance arrears. Mr Arcus appealed to the Supreme Court of Appeal (SCA).

The SCA dismissed the application and held the following:

- The definition of a maintenance order in the Maintenance Act includes a settlement agreement if it was made an order of the court. Therefore, it is not relevant whether the obligation to pay maintenance arises out of a settlement agreement as the High Court incorporated it into the maintenance order.
- Section 40 of the Maintenance Act provides that an order of a court that grants an order for the recovery of arrear maintenance shall have the same effect as a civil judgment.
- Even though maintenance orders are subject to change, a person that is ordered or served with a demand to pay in terms of a maintenance order is compelled to comply with that order. Therefore, obligations arising out of original orders are final and not mere claims or legal disputes. As a result, maintenance orders are excluded from being subjected to a three-year prescription period.
- Allowing a 30-year prescription period for maintenance orders would be more beneficial for the vulnerable than unfair to the aggrieved debtors. As part of its reasoning, it highlighted that a 30-year prescription period is in the best interest to provide for a fair recovery of maintenance arrears and helps to avoid defiant parties from evading payment by taking advantage of systematic failures.

More detail on case 4

Case 4: *CL vs CL*: Western Cape High Court, Cape Town (Case No: 3437/2022) Reported (17 June 2022)

- The parties in this matter were amidst a divorce. They have one adult-dependent daughter. The applicant, the mother of the child, contended that the father still had the duty of support towards their daughter as she was not yet self-sustaining.
- She made various requests in the application, including equestrian lessons, tertiary education and accommodation fees as well as a new vehicle to the value of R420 000, for the adult-dependant daughter.
- The respondent argued that the mother of the child had no *locus standi* to bring this application as their daughter was a major and should apply in her personal capacity. He further added that their daughter showed no positive sign of wanting to pursue tertiary education and he therefore disputed the maintenance he had to pay towards this. He added that the child already had access to a vehicle and did not need an additional one.
- The Court held that a parent's right to apply for maintenance for their child usually terminates when the child reaches the age of majority. However, the responsibility to maintain their children does not. If

either or both the parents were supporting their child as a minor, the court may order the parents to continue to support the child until the child is self-sustaining.

- The Court further stated that section 6(1) of the Divorce Act provides that a decree of divorce shall not be granted until the Court is satisfied that provisions made in respect of minor or dependent children are acceptable under the relevant circumstances. Section 6(3) further makes provision that a court, when granting a decree of divorce, may make any order that it deems fit in respect of dependent children.
- The Court went on to define 'self-supporting' as *conceivably capable of supporting himself/herself* and concluded that a parent or both parents needed to support an adult-dependent child until he/she becomes independent or self-supporting.
- The final consideration of the Court was that a parent does have the *locus standi* to bring a maintenance application *pendente lite* as it is in line with Rule 43(1) of the Uniform Rules of Court and common law.
- The High Court dismissed the application with costs.

More detail on case 5

Case 5: *JAL v JL & Another*: Western Cape High Court, Cape Town (Case no: 19441/2020) Reported (10 June 2022)

- The parties were divorced on 21 June 2019, with a deed of settlement. They have two children, a major daughter and a son, who was a minor at the time. The father of the children brought this application to have a warrant of execution of arrear maintenance set aside pending the determination of this matter.
- A warrant of execution was issued by the High Court ('the Court') upon application by the mother of the children. It entailed an amount of R200 390.20 for the following:

- R50 832 for arrear maintenance for the son of R4 000 per month together with interest, from 16 October 2020 to 1 October 2021;
- R5 525.90 for reimbursement of the cost of prescribed medication, an optometrist account and the fees of a counselling social worker for the son;
- R83 410.02 pertaining to the balance of the major daughter's tertiary education and accommodation costs (at a university residence and private dwelling) from 21 January 2019 to October 2021, and
- R18 691.92 for shortfalls/arrears in the daughter's pocket money of R2 000 per month from 1 February 2020 to 1 October 2021.

- The father of the children stated that the children had reached the age of majority and he was not liable for the maintenance of his daughter and the son from 13 January 2021 (his 18th birthday). He disputed additional medical expenses as well as the arrear cash contributions for the son's reasonable schooling expenses.
- He further argued that the daughter did not show the necessary aptitude or applied herself in her tertiary studies and disputed the education and accommodation fees and pocket money for this purpose, adding that the applicant has no *locus standi* to bring this aspect of the maintenance before the Court as their daughter was a major.

The Court dismissed his application with costs.

- The Court emphasised that section 6(1) of the Divorce Act provides that a court may not grant a decree of divorce unless it is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage, are satisfactory or are the best that can be affected in the circumstances. In turn, section 6(3) stipulates *inter alia* that a court may 'in regard to the maintenance of a dependent child of the marriage... make any order it deems fit'.
- The Divorce Act itself thus recognises that there are instances where a child born to divorcing parties may, even though he or she has attained majority, nonetheless still be financially dependent on his or her

parents for some time to come.

- Additionally, the major daughter suffered from bipolar mood disorder leading to her struggling with her tertiary studies. The Court held that there was no difference between her situation and one where a dependent major child suffered a serious physical injury, or succumbed to some other type of illness, which rendered her unable to complete her tertiary studies for a particular year. To view the position otherwise would be to ignore the very real and debilitating effects of a psychiatric illness and to inappropriately regard such an illness as having lesser importance, and consequences, than a physical injury or other debilitating condition.
- The Court further added that there was no provision in the deed of settlement that stated that payment was no longer to be made to the mother of the children but to the children themselves upon reaching majority, which could have easily been added in the deed of settlement. The mother of the children, therefore, did have *locus standi* to bring an application for the maintenance of her major children.

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