



moment OF TRUTH

Legal update 2 of 2021: Marriage and maintenance after the dissolution of the marriage

Introduction

This update deals with two recent cases decided by the Supreme Court of Appeal relating to –

- (a) whether a valid marriage exists between two people where they had a marriage ceremony solemnized in church but without signing a marriage register to have the marriage registered; and
- (b) whether there is a constitutional obligation on the State to enact legislation to recognize Muslim marriages.

Below is a summary of the case and insight into how we deal with these issues on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We also included more detail on the case.

Summary

Case 1: CB & Another vs HB (Case no. 1324/2019) [2020] ZASCA 178 (18 December 2020)

Can a person who was ordered by a court to pay maintenance to their ex-spouse until the date of the ex-spouse's remarriage or death, whichever comes first, stop paying maintenance if their ex-spouse enters a union similar to a marriage but not recognised as a legal marriage?

- **The finding:** If the divorce order states that the obligation to pay maintenance shall stop upon the remarriage of the party entitled to maintenance, the party who was ordered by a court to pay maintenance cannot have their liability to pay maintenance cease on account of their ex-spouse having entered a union akin to a marriage if that union is not a valid marriage in terms of South African law.
- **How we deal with this:** When it is brought to our attention that a member of our Fund has a maintenance obligation to another person, who may or may not be their ex-spouse, we only make a deduction from the

member's benefit upon receipt of a valid maintenance order that complies with all the requirements for a lawful deduction to be made. The order must comply with, amongst other things, the provisions of the Pension Funds Act and the Maintenance Act, and it must identify the Fund and direct the Fund to make a deduction of a specific or determinable amount from the member's benefit to satisfy the maintenance obligation. The Fund cannot refuse to give effect to a valid order of court solely on the request of the member. If the member believes that their obligation to pay maintenance has ceased for whatever reason including the remarriage of the ex-spouse, the member must apply to court for a rescission of judgment, discharge or variation of the court order, as the case may be. Without a subsequent court order that discharges the member from the liability to pay maintenance, the Fund cannot ignore the maintenance order, even if the member alleges that one of the conditions in the initial order, such as remarriage of the ex-spouse, has been fulfilled.

Case 2: President of the RSA & Another vs Women's Legal Centre Trust & Others; Minister of Justice & Constitutional Development vs Faro & Others; and Minister of Justice & Constitutional Development vs Esau & Others (Case no. 612/19) [2020] ZASCA 177 (18 December 2020)

Is there a constitutional obligation on the State to enact legislation recognising Muslim marriages?

- **The finding:** The Marriage Act and the Divorce Act are inconsistent with sections 9, 10, 28 and 34 of the Constitution of the Republic of South Africa in that they fail to recognise and regulate Muslim marriages. The declaration of constitutional invalidity is referred to the Constitutional Court for confirmation by that court. The common law definition of marriage is also declared

More detail of the case

Case 1: CB & Another vs HB (Case no. 1324/2019) [2020] ZASCA 178 (18 December 2020)

Can a person who was ordered by a court to pay maintenance to their ex-spouse until the date of the ex-spouse's remarriage or death, whichever comes first, stop paying maintenance if their ex-spouse enters a union similar to a marriage but not recognised as a legal marriage?

This matter was heard in the Supreme Court of Appeal (SCA) from the Gauteng High Court, Pretoria. The First Appellant ("ex-husband") and the Respondent ("ex-wife") were married in community of property in 1987. The ex-husband and ex-wife separated in June 2016 with the intention to divorce. In June 2017, they signed a settlement agreement for the dissolution of their marriage and a divorce order incorporating their settlement agreement was granted by a court in August 2017. Clause 5.1 of their settlement agreement provided that: "*The Defendant shall pay an all-inclusive amount of R10 000 (Ten Thousand Rand) maintenance to the Defendant per month until her death or remarriage whichever occurs first*". In the Gauteng High Court and in the SCA, the ex-husband accepted that the second reference to 'Defendant' was simply an error and should have read 'Plaintiff'. After the parties' divorce, the ex-wife cohabited with one Mr V. On 9 December 2017, a reverend who is a minister in the Dutch Reformed Church conducted a ceremony during which he blessed and sanctioned their cohabitation so that they should not 'live in sin'. Both the ex-wife and Mr V invited their family and friends to the ceremony, the photos of which were posted on Facebook

inconsistent with the Constitution. The declarations of invalidity referred to above are suspended for a period of 24 months to allow the President of the Republic of South Africa (President), Cabinet and Parliament to amend existing legislation or enact new legislation to recognise Muslim marriages as valid marriages in South Africa and to regulate the consequences of the marriage.

- **How we deal with this:** Where we receive a divorce order with a claim for pension interest against the member to a marriage that was concluded and terminated in terms of the tenets of Islamic law (Muslim marriage), we abide by the court order and pay the claim for divorce benefits if the order satisfies all the requirements for an enforceable divorce order.

by the ex-wife with the caption that Mr V was her husband. At the end of February 2018, the ex-husband became aware of the ceremony between his ex-wife and Mr V. After receiving legal advice, the ex-husband stopped paying maintenance to his ex-wife on the grounds that she had remarried and his obligation to pay maintenance had ceased. He stopped payment at the end of March 2018 and that prompted his ex-wife to lay a criminal charge against him for his failure to pay maintenance.

The Magistrates Court

The ex-husband appeared in the Magistrates Court (Criminal Court Section) on 23 April 2018. His defence in that court was that the court could not enforce the order of the High Court, i.e. the provisions of the divorce order in terms of which he had to pay his ex-wife maintenance, without an attempt to vary or amend the divorce order which would be opposed on the grounds that the obligation to pay maintenance had lapsed by reason of the remarriage of his ex-wife. The Magistrates Court accepted the ex-husband's defence and the matter was struck from the court's roll.

The Gauteng High Court

The ex-wife approached the High Court for variation of the divorce order seeking to replace the second 'Defendant' in clause 5.1 of the settlement agreement with 'Plaintiff' and also to hold the ex-husband in contempt of court for failing to pay maintenance since April 2018. By the hearing of the matter in the High Court, the ex-wife and Mr V had separated and no longer cohabited. The ex-husband asked

the court for an order declaring that his ex-wife and Mr V had concluded an unregistered common law or Christian relationship of cohabitation as husband and wife, and as a result of that, his duty to pay maintenance had lapsed. He also asked the court for an order that the word 'remarriage' in clause 5.1 of the settlement agreement be interpreted and extended to mean an unregistered common law, alternatively, Christian marriage relationship as husband and wife. The parties agreed to amend clause 5.1 of the settlement agreement for future purposes to read "*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*". The High Court made the order for variation of the divorce order accordingly. However, it also held that:

- the ceremony held between the ex-wife and Mr V did not constitute remarriage;
- the meaning of the word 'remarriage' did not include cohabitation, and
- therefore, the ex-husband's duty to maintain his ex-wife did not lapse and he was in contempt of court for failing to pay maintenance to his ex-wife.

The SCA

The ex-husband applied to the SCA to appeal the decision of the Gauteng High Court. The SCA found that:

- As the appeal revolved around what constitutes a marriage and the interpretation of the word 'remarriage' in the settlement agreement, the starting point should be the provisions of the Marriage Act. Section 11 provides that a marriage may only be solemnized by a marriage officer and section 29A provides that the marriage officer, the parties to the marriage, and two competent witnesses must sign the marriage register after solemnisation of the marriage.
- The ordinary meaning of remarriage is to enter into another marriage recognised by South African law. The parties used the word in the agreement that regulated the 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, i.e. a legal marriage. The parties agreed, during proceedings in the Gauteng High Court, to amend the settlement agreement to allow for the duty of the ex-husband to maintain his ex-wife to lapse when another person becomes legally liable to maintain her. This extends to cohabiting with

a person who contributes towards her maintenance (which Mr V did not).

- The reverend who conducted the ceremony between the ex-wife and Mr V is an ordained minister and a registered marriage officer. He did not conduct the ceremony in terms of the Marriage Act and did not pronounce the couple to be husband and wife, the marriage register was not signed, and he expressly announced to those in attendance that no legal marriage was concluded. The Gauteng High Court correctly held that there was no valid legal marriage between the ex-wife and Mr V as the requirements for registration of a valid marriage in terms of section 29A of the Marriage Act had not been met.

In conclusion, the appeal was successful, and the ex-husband's contempt of court was set aside. The SCA also made an order that:

- Clause 5.1 of the settlement agreement between the parties be amended with effect from the date of the SCA's order to read: "*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*".
- The ceremony performed in respect of the ex-wife and Mr V on 9 December 2017 did not constitute remarriage within the meaning of the word in the settlement agreement between the parties.

Case 2: President of the RSA & Another vs Women's Legal Centre Trust & Others; Minister of Justice & Constitutional Development vs Faro & Others; and Minister of Justice & Constitutional Development vs Esau & Others (Case no. 612/19) [2020] ZASCA 177 (18 December 2020)

Is there a constitutional obligation on the State to enact legislation recognising Muslim marriages?

This concerns the following three matters that came before the Western Cape High Court where the court consolidated the matters due to their common legal issue which was the crux of the dispute:

- **The Women's Legal Centre Trust (WLC) application:** In November 2015, the WLC launched an application to the Western Cape High Court against the President and the Minister of Justice and Constitutional Development, amongst others, contending that the State had failed to recognise and

regulate Muslim marriages, which is in breach of the Constitution. It argued that section 7(2) of the Constitution obliged the State to enact legislation that will recognise Muslim marriages and asked the court to declare the Marriage Act and the Divorce Act inconsistent with the Constitution.

- **The Faro application:** The Applicant (Mrs Faro) was married to Mr Ely in March 2008 in terms of the tenets of Islamic law. The marriage was dissolved in terms of the tenets of Islamic law in August 2009 when Mr Ely issued a *Talaq* (Islamic divorce). The *Talaq* was revoked when the parties resumed intimate marital relations and Mr Ely died in March 2010. In April 2010, Mr Ely's major daughter from an earlier marriage obtained a certificate from the Muslim Judicial Council (MJC) declaring that the marriage between the parties had been annulled. The Master of the High Court initially appointed Mrs Faro as the executor of the estate. After an objection and an investigation by the Master, including a meeting with the MJC, the Master accepted that the marriage had been terminated and resolved to withdraw Mrs Faro's appointment which resulted in the appointment of Ms Bingham as the executor. In 2013 Mrs Faro launched an application to the Western Cape High Court for an order setting aside the failure by the Master to uphold the objection which would have resulted in Mrs Faro being recognised as a spouse for purposes of the Interstate Succession Act and the Maintenance of Surviving Spouses Act.
- **The Esau application:** Mrs Esau launched an urgent application to the Western Cape High Court for an interdict against Mr Esau and the Government Employees Pension Fund (GEPF) to stop the GEPF from paying Mr Esau 50% of his pension interest pending legal action to be instituted by her for payment of the pension interest to her. The court granted the interdict and referred the constitutional issues to be heard as part of the consolidated matter.

The Western Cape High Court

The High Court held that:

- The State is obliged by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution by enacting legislation to recognise and regulate the consequences of Muslim marriages without delay.

- The President, Cabinet and Parliament were ordered to rectify their failure to do the above within 24 months of the date of the order.
- In the event that the State failed to enact legislation to recognise and regulate Muslim marriages within a period of 24 months, the provisions of the Divorce Act would apply to the dissolution of Muslim marriages even if they had been dissolved in terms of Islamic law.

The Western Cape High Court granted the President and the Minister of Justice and Constitutional Development leave to appeal to the SCA.

The SCA

During argument in the SCA, counsel for the President and the Minister ("Appellants") conceded that the Marriage Act and the Divorce Act infringed the right to equality, dignity and access to justice for women in Muslim marriages in that the legislation failed to recognise their marriages as valid marriages for all purposes. The Appellants also conceded that the rights of children born in Muslim marriages were infringed. The SCA found that:

- The rights of children born in Muslim marriages are infringed in that upon divorce of their parents, they are not afforded the automatic court oversight in terms of section 6 of the Divorce Act in relation to their care and maintenance. In addition, they are not protected by a statutory minimum age for consent to marriage.
- The court refused to make an order that constitutional invalidity of provisions of the Marriage Act and the Divorce Act should apply retrospectively to April 1994 based on the view that such an order may have far-reaching consequences and it is the prerogative of the State when curing the defect to decide if there should be retrospective application of the amendments to legislation or to the new legislation, if that is the case.
- The court ordered the following, amongst other things:
 - The Marriage Act and the Divorce Act are declared inconsistent with sections 9, 10, 28 and 34 of the Constitution as they fail to recognise Muslim marriages as valid marriages for all purposes and to regulate the consequences thereof.
 - Section 6 of the Divorce Act is declared inconsistent with sections 9, 10, 28 and 34 of the Constitution insofar as it fails to provide

- the mechanisms to safeguard the welfare of children born in Muslim marriages upon the dissolution of the marriage in the same manner that it does for children born in other recognised marriages.
- o Section 7(3) of the Divorce Act is declared inconsistent with sections 9, 10 and 34 of the Constitution insofar as it fails to provide for the redistribution of assets on the dissolution of a Muslim marriage.
 - o Section 9(1) of the Divorce Act is declared inconsistent with sections 9, 10 and 34 of the Constitution insofar as it fails to provide for forfeiture of patrimonial benefits of a Muslim marriage upon dissolution of the marriage in the same manner that it does for other recognised marriages.
 - o The declarations of constitutional invalidity are referred to the Constitutional Court for confirmation.

- o The common law definition of marriage is inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.
- o The declarations of invalidity referred to above are suspended for a period of 24 months to allow the President, Cabinet and Parliament to remedy the defect by amending existing legislation or enacting new legislation to recognise Muslim marriages as valid for all purposes and to regulate the consequences of the marriage.

The Court concluded that it had crafted an effective and comprehensive order in an endeavour to cure the hardship suffered by parties in Muslim marriages, especially vulnerable women and children, that will operate until the appropriate legislation is in place.

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