

Short notes on

THE PRESCRIPTION OF CLAIMS IN A FAMILY LAW CONTEXT

Introduction

A recent judgement in *Arcus v Arcus* (1 of 2021) [2022] ZASCA 9 has become the talk of the town precisely because it involved a payment not enforced for over 25 years. Moreover, for arrear maintenance for children who have been long self-supporting.

The Supreme Court of Appeal has now clarified that an order of maintenance is a judgment. Therefore, it can be enforced for 30 years from the issue.

Thus, the legal issue for determination was whether an undertaking to pay maintenance in a divorce consent paper, which was made an order of the Court, gives rise to a 'judgment debt'. A "judgment debt" is contemplated in section 11(a)(ii) of the Prescription Act 68 of 1969, with a prescriptive period of 30 years. Or any 'other debt', as contemplated in section 11(d) of the Act, with a prescriptive period of three years.

This is likely to increase similar cases, which means that divorced couples should honour the obligations contained in these orders to avoid a similar fate.

Facts

In 1993 a maintenance consent paper was made an order of Court during the divorce proceedings for Mr Arcus and Mrs Arcus. Mr Arcus was, among other things, required to pay Ms Arcus and their two minor daughters maintenance until the daughters were self-supporting.

It is common cause that the appellant's obligations to pay maintenance regarding the minor children terminated during 2002 and 2005, respectively when they became self-supporting.

Even though Mr Arcus failed to pay the maintenance stipulated in the consent paper, Mrs Arcus did not take any steps to recover the arrear maintenance until December 2018. Then, she instructed her attorneys to send a letter of demand to Mr Arcus. However, notwithstanding demand, he failed to pay the arrear maintenance. Still, he commenced paying the monthly maintenance due to the respondent from January 2019.

On 27 August 2019, the appellant lodged an application in the maintenance court for the retrospective discharge of his maintenance obligations in the consent paper (the discharge application). That application is still pending.

On 17 February 2020, the respondent caused a writ of execution to be issued regarding the arrear maintenance of some R3.5 million. That writ was served on the appellant on 18 March 2020.

Subsequently, on 19 June 2020, the appellant brought proceedings in the Western Cape Division of the High Court to stay the writ of execution pending the determination of the discharge application. He also applied that all maintenance obligations under the consent paper, which accrued before 1 March 2017, have been extinguished by prescription.

What is a judgement? And why does it matter?

The word 'judgment debt' is not defined in the Prescription Act 68 of 1969 (the "Prescription Act"), and so too the word 'any other judgment'. In its plain meaning, 'a judgment debt' means an amount of money in a judgment awarded to the successful party owed to them by the unsuccessful one. Any other judgment in maintenance means any order granted by a court, either the magistrates' Court or the High Court. The context in which the meaning of these words must be established is the maintenance dispute finally settled between the parties by a consent paper.

In *Zweni v Minister of Law and Order*,¹ the Court held that '[a] "judgment or order" is a decision which, as a general principle, has three attributes:

- first, the decision must be final in effect and not susceptible of alteration by the Court of the first instance;
- second, it must be definitive of the rights of the parties; and
- third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

In *Kilroe-Daley v Barclays National Bank Ltd*,² the Court held that a 'judgment debt' under section 11(a)(ii) of the Prescription Act 'refers, in the case of money to: "the amount in respect of which execution can be levied by the judgment creditor; that in the case of any other debt steps can be

¹ [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532I-533.

² *Kilroe-Daley v Barclays National Bank Ltd* [1984] ZASCA 90; [1984] 2 All SA 551 (A); 1984 (4) SA 609 (A) at 624D-F.

taken by the judgment creditor to exact performance of the debt, i.e. delivery of the property, or performance of the obligation." A further feature of a judgment debt is that the judgment is appealable.

A maintenance order possesses another essential attribute of a final civil judgment, which is appealable. In terms of section 25 of the Maintenance Act 99 of 1998 as amended (the "Maintenance Act"), a person may appeal against an order. In addition, a person who is served with a demand to pay in terms of a maintenance order is compelled to comply with that order until they are able to demonstrate a change in circumstances justifying a variation of the order.

It is thus manifest that maintenance orders are:

- dispositive of the relief claimed and definitive of the rights of the parties, to the extent that they decide a just amount of maintenance payable based on the facts in existence at that time;
- final and enforceable until varied or cancelled;
- capable of execution without any further proof; and
- appealable.

Conclusion

The result was that the appeal was dismissed and the warrant no longer stayed. Mrs Arcus is therefore able to claim R3.5 million from Mr Arcus now, almost 30 years later. AS stated before, this is likely to increase similar cases, which means that divorced couples should honour the obligations contained in these orders to avoid a similar fate. Contact SchoemanLaw Inc for assistance in all your legal needs.