

Short notes on:

PRESCRIPTION OF A MAINTENANCE OBLIGATION CONTAINED IN THE CONSENT PAPER

Introduction

In terms of our law, when parties to a divorce proceeding enter into a Consent paper that is subsequently made an order of Court, there is an expectation that one of the parties shall be liable to pay reasonable maintenance towards the minor child(ren). A maintenance obligation merely involves paying a fixed amount towards the child(ren) to meet their basic needs.

Regardless of the severe criminal consequences concerned with the failure to make payment in terms of a maintenance order, that has not deterred some parents from willfully defaulting. Therefore, making the enforcement of a maintenance obligation a problematic area.

Case Discussion

In the case of *S A v J A and Others (7531/2020) [2020] ZAWCHC 155 (10 November 2020)*, the High Court was called to pronounce on the prescription period for a maintenance order embodied in a consent paper that is subsequently made an order of Court.

The Applicant and the First respondent's marriage was dissolved on 27 July 1993 in terms of a Court order that incorporated a consent paper's provisions. There were two minor children born of the marriage. In terms of the consent paper, the Applicant was ordered to pay R750 per month for each child and pay educational and medical expenses until the minor children became self-supporting. Furthermore, the Applicant agreed to the First Respondent maintenance of R2000 per month until her death or re-marriage, to bear all her medical expenses.

The Applicant defaulted on the cash maintenance as per the consent paper from the dissolution of the marriage until January 2019. The Legal question for determination is *whether an undertaking to pay maintenance in a divorce consent paper which is made an order of the High Court gives rise to a 'judgment debt' or 'any debt' contemplated in Sections 11(a)(ii) and 11(d) of the Prescription Act 68 of 1968 ("the Prescription Act")?*

Applicant's case

The Applicant argued that a maintenance order embodied in a consent paper that is subsequently made an order of court constitute an "*ordinary debt*" which prescribes in three (3) years, and not a judgement debt which prescribes after thirty (30) years.

It contended that due to the nature of the final court order being final, conclusive and cannot be altered by the court which pronounced it. A maintenance order on the other hand, by its very nature is not final and not conclusive, because it is capable of being altered or substituted by the court which pronounced it. Therefore, very distinguishable from a judgement debt.

High Court's pronouncement

The High Court found that the maintenance order constitutes a judgment debt and not an ordinary debt. The judgment clarifies that a creditor's right of recourse in terms of maintenance order embodied in the consent paper prescribes after thirty (30) years and not three (3) years. However, this does not mean that creditors must wait a long time to claim the debt with intentions that the maintenance claim would be much more than the monthly payments.

Conclusion

It is important to mention that it is the creditor's responsibility to enforce his/her rights to maintenance timeously. The failure to do so, will afford the debtor protection against stale claims that existed for such a long time making it difficult for the debtor to defend against it.

Should a debtor default in complying with the terms of the maintenance order, the creditor must seek legal advice in enforcing such terms. Considering the complicated nature of the creditor's right of recourse during maintenance matter, it is essential that you consult with us for purposes of understanding your rights in the maintenance dispute.

Contact SchoemanLaw Inc for your Family Law related issues.