

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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V[...] J[...] v V[...] J[...] and Another (258/2023) [2024] ZASCA 92 (11 June 2024)

Today the Supreme Court of Appeal (SCA) handed down a judgment wherein it upheld an appeal with costs, including costs of two counsel where so employed, against the decision of the Free State Division of the High Court, Bloemfontein (the high court), sitting as a court of appeal.

The case involves a divorce order stemming from the marriage between the appellant and the first respondent which was dissolved by the court in 2015. The decree of divorce granted by the court incorporated a deed of settlement which the parties concluded. The deed of settlement provided, *inter alia*, an entitlement to the payment of spousal maintenance and an arbitration clause, which provided for the resolution of disputes between the parties. In 2018, a dispute arose when the appellant sought to enforce a maintenance order and recover arrear maintenance from the first respondent. It was sparked by the application which was made *ex parte* by the appellant in terms of s 26 of the Maintenance Act 99 of 1998 (the Maintenance Act).

On 1 March 2021, the maintenance court granted the requested order. In addition, the maintenance court interdicted Capitec Bank, the second respondent, from effecting payment of any monies from the account of the first respondent. Aggrieved by this order, the first respondent anticipated the order and objected to the jurisdiction of the maintenance court. He contended that the parties contractually excluded its jurisdiction from hearing the maintenance dispute in terms of the arbitration clause.

The maintenance court dismissed the objection. The first respondent appealed the decision to the high court. The high court set aside the decision of the maintenance court. It held that the dispute should be decided by the arbitrator. The appellant successfully obtained special leave from this Court.

The issue before the SCA concerned the interpretation of s 2(a) of the Arbitration Act 42 of 1965 (the Arbitration Act). The SCA was called upon to decide whether arrear maintenance is arbitrable. The appellant argued that a maintenance dispute is not arbitrable because it is related to a matrimonial cause or a matter incidental to such a cause, as prohibited by s 2(a) of the Arbitration Act. The first respondent on the other hand maintained that the maintenance court had no jurisdiction to decide the matter, and the order of the high court should be upheld.

The SCA held that s 2(a) of the Arbitration Act is wide enough to keep arrear maintenance out of arbitration. In coming to this conclusion, the SCA considered the grammatical meaning of the word 'incidental'; the purpose of the maintenance Act including s 8(1) of the Divorce Act which provides for the variation of maintenance orders. It concluded that the issue of *res judicata* raised by the first respondent does not feature in the circumstances of this matter because of the provisions of s 8(1) of the Divorce Act. Lastly, that the maintenance court had jurisdiction to decide the matter.

As a result, the SCA upheld the appeal. The order of the high court was set aside and substituted with an order that: 'the appeal is dismissed with costs.'

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