



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Sandile Edwin Schalk v Vuyelwa Vumendlini-Schalk**

**CCT 247/16**

**Date of hearing: 29 August 2017**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On 29 August 2017 at 10h00, the Constitutional Court will hear an application for leave to appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria. The High Court granted an order authorising the issuance of a warrant of execution to attach and sell Mr Schalk's immovable property. The sale in execution is to satisfy a debt that Mr Schalk owes Ms Vumendlini-Schalk in respect of maintenance for their only child. The exact amount owing is disputed.

Mr Schalk and Ms Vumendlini-Schalk had been married, but were granted an order of divorce by the High Court on 29 October 2010. The divorce order incorporated the terms of a settlement agreement between the two parties. That agreement governed the amount Mr Schalk would pay monthly in basic maintenance for their child. It also contained separate provisions relating to Mr Schalk's contributions toward school fees, medical expenses, costs for text books and other special costs.

Soon after signing the settlement agreement, Ms Vumendlini-Schalk relocated to the United States of America, where she remained for approximately four years. During this time, Ms Vumendlini-Schalk claims to have paid various amounts in respect of school fees, medical bills, and extra-mural activities for the child. Mr Schalk paid maintenance for the child from October 2010 to close to the end of 2012. However, he failed to increase the payments annually as required by the settlement agreement. Around the end of 2012, Mr Schalk stopped paying maintenance. According to Mr Schalk, he was experiencing financial challenges at the time.

According to Ms Vumendlini-Schalk, the amount that Mr Schalk owed in maintenance, as well as his contribution to the medical bills, school fees, and costs of the child's extramural activities was R 306 550.18. She applied for the issue of a warrant of execution in that sum. She also filed a supporting affidavit for the warrant of execution. She listed the sums that she allegedly had paid without attaching invoices or receipts to verify. A warrant of execution was issued against Mr Schalk.

The Sheriff visited Mr Schalk's home to attach movable property pursuant to the warrant of execution and found that Mr Schalk had insufficient movable assets to satisfy the debt. Mr Schalk denies this. Ms Vumendlini-Schalk then applied to the High Court in terms of rule 46(1)(a)(ii) of the Uniform Rules of Court to have Mr Schalk's home declared specially executable. Mr Schalk opposed the application and offered to pay an amount of R100 000 towards the settlement of the R306 550.18 and to accelerate his monthly payments to satisfy the outstanding debt.

Mr Schalk contended that a warrant of execution should only have been issued pursuant to an "expenses" clause in an order of court if the amounts were easily ascertainable in the affidavit. Mr Schalk took the position that invoices or proof of payment should have been provided together with the affidavit. He made an application to the High Court to have the warrant of execution set aside or, alternatively, to have the amount reduced to R 50 130.04, the amount he conceded he owed for maintenance. That application was dismissed.

Whilst the divorce order contains a settlement agreement, it does not specifically order Mr Schalk to pay R 306 550.18. Rather, it specifies that Mr Schalk must pay R 2500 per month (which was to increase annually) as well as half of the child's school fees and medical expenses. Mr Schalk argued that there is no readily ascertainable amount in respect of the school fees and medical expenses. The Supreme Court of Appeal denied Mr. Schalk leave to appeal. Mr Schalk now applies to this Court against the order of the High Court that authorised the attachment of his home.

Two issues are of note. First, whether the amount of R 306 550.18 constituted a judgment debt such that the parties had a judgment debtor-judgment creditor relationship in respect of that amount. Second, whether the High Court used the rule 46(1)(a)(ii) execution process as a measure of last resort.

Mr Schalk submits that the amount claimed is not a judgment debt because the amount was not particularized by a court in a judgment. Further, the expenses in relation to the school fees, medical care, and extramural activities were amounts determined solely by Ms Vumendlini-Schalk and she failed to provide verification.

Ms Vumendlini-Schalk submits that in divorce proceedings, a liability arising from a divorce settlement agreement made an order of court is no different than a debt in a court order. Further, a court's incorporation of a settlement agreement into its order vests the agreement with the authority, force, and effect of a judgment. By agreeing to the order, both parties commit to compliance with the terms thereof and to be subjected to sanction

should they fail to comply. Ms Vumendlini-Schalk submits that there was a debtor and creditor relationship between herself and Mr Schalk and that Mr Schalk's liability to her on behalf of their child constitutes a debt.

Mr Schalk also submits that the High Court failed to consider the potential for alternative remedies, such as his partial settlement offer or emoluments of his earnings, in assessing whether execution was used as a measure of last resort. In Mr. Schalk's view, the High Court found his right to housing could not take precedence over the interests of his child.

Ms Vumendlini-Schalk submits that the High Court gave due consideration to the measure of last resort test. She argued the High Court rightly considered numerous factors in assessing the measure of last resort standard including that: Mr. Schalk informed the Sheriff that he had no movable property to satisfy the debt; Mr. Schalk owned two immovable properties; and that payment of the debt was in keeping with the child's rights and best interests (which should be accorded paramountcy over Mr. Schalk's right to housing).