IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

HELEN MENTZ APPELLANT

and

REGINALD CEDRIC SIMPSON RESPONDENT

CORAM : BOTHA, HEFER et F H GROSSKOPF JJA.

HEARD : 12 SEPTEMBER 1989.

DELIVERED : 2 OCTOBER 1989.

J U D G M E N T

J J F HEFER JA.

HEFER JA :

The parties to this appeal were formerly husband and wife. When their marriage ended in divorce during 1974 custody of their minor daughters, Laura and Ruth, was awarded to the appellant and the respondent was ordered to pay maintenance at the rate of R50 per month for each child.

During 1986 the appellant filed a complaint in terms of sec 4(1) of the Maintenance Act 23 of 1963. Her aim was to have the maintenance increased to R750 per month for each of her daughters. The maintenance court enquired into the matter in terms of sec 5 of the Act and increased the maintenance to R225 per month in respect of Laura and R175 in respect of Ruth. This did not satisfy the appellant. She appealed to the Eastern Cape Division but her

appeal was dismissed. With leave granted by the court a quo she has now appealed to this court.

It is necessary to state at the outset that according to the decision of this court in Bordhin v Bordhin 1956(2) PH B32 the approach to an appeal of the present kind should be "along the lines adopted in compensation cases" (per BEYERS JA at p 9 of the original judgment). This approach, BEYERS JA said, is outlined in the following passage from the judgment of WATERMEYER JA in Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199-200 :

> "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case. For this reason a Court of Appeal does not readily interfere with an

> estimate made by the Court appealed from. Attempts have been made in several cases in which the assessment of damage was a matter of estimation rather than calculation to define the class of case in which a Court of Appeal should interfere .... These citations suggest that a Court of Appeal should not interfere unless there is some striking disparity between its estimate of the damages and that of the trial court, and further unless there is some unusual degree of certainty in its mind that the estimate of the trial Court is wrong."

This approach to an appeal against an award of compensation was adopted in several later cases which need not be listed. It is sufficient to refer to A A Mutual Insurance Association Ltd v Magula 1978(1) S A 805 (AD) at 809 B-C where JOUBERT JA said:

> " .... this Court will not, in the absence of any misdirection or irregularity, interfere with a trial Court's award of damages unless there is

a substantial variation or a striking disparity between the trial Court's award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court."

I accept that the present appeal has to be approached along similar lines but I must draw attention to a further passage in the judgment in Sandler's case (at 200) which was not quoted in the judgment in the Bordhin case. It reads as follows:

"But it does not follow that a Court of Appeal must renounce its functions as a Court of Appeal by deferring to the estimate of the trial Court in a case of doubt or difficulty ....Seeing that an appeal is a rehearing of all the questions involved in the action, including the quantum of damages, a Court of Appeal must necessarily decide upon the figure which it thinks should have been awarded. When it has done that, if the figure arrived at, considered from all aspects, differs substantially from

> the figure awarded, the Court of Appeal must give effect to it. If it does not do so, it is deferring to the judgment of the trial Judge and not carrying out its functions as a Court of Appeal by exercising its own judgment upon a matter which is before it on appeal."

In order to consider whether there are grounds for interfering with the award in the present case I shall briefly state the relevant facts and then deal, firstly, with the court a quo's judgment and, secondly, with the magistrate's reasons.

It emerged at the enquiry that, after her divorce from the respondent, the appellant married her present husband, Mr Mentz, who had been divorced from his wife. Respondent in turn married the former Mrs Mentz who had the custody of her and Mr Mentz's three minor

children. After the parties' remarriage the Simpson household thus consisted of the respondent and his newly acquired wife and stepchildren, and the Mentz household of Mr Mentz and the appellant, Laura and Ruth. Initially Mr Mentz paid maintenance to Mrs Simpson at the rate of R60 per month for each of his three children but at the time of the enquiry the eldest, Jonathan, had left school and was doing national service. Mr Mentz had stopped paying maintenance for him although he was not entirely self supporting. For the other two children he was still paying maintenance at the original rate whilst the respondent was still contributing towards Laura and Ruth's maintenance, also at the original rate. At that stage Laura was a nineteen year old student at Rhodes University and

Ruth a fifteen year old pupil at Victoria Girls High School in Grahamstown.

At the enquiry the parties were agreed that an increase of the respondent's contribution to the maintenance of his daughters was necessary. What was in issue was, firstly, the total amount reasonably required for maintaining them and, secondly, the amount which the respondent should contribute. According to the appellant the total amount was R1 053,94 per month in respect of Laura and R749,94 in respect of Ruth, and her contention was that the respondent should contribute R750 per month for each child. The respondent disputed the reasonableness of the appellant's total figures and maintained that he could in any event not afford to pay R750 per month

for each child.

The judgment of the court a quo (which was prepared by KROON J with MULLINS J concurring) proceeds on the basis of the well-known dictum in Herfst v Herfst 1964(4) S A 127 (W) at 130 C that

> "(the) general principles are that a child of divorced parents is entitled to be maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life. That obligation attaches to both parents jointly, but inter se, their respective shares of that obligation are apportioned according to the financial resources and circumstances of each of them."

Having rightly stressed that "the assessment of the reasonable requirements must be made in the light of, inter alia, the means of the parents and their standard of living" KROON

J proceeded to state the reasons why he regarded the appellant's claim as excessive. I do not propose dealing with every reason advanced in the judgment; the amounts which the appellant demanded were obviously excessive and there is substance in many of the learned judge's remarks. But there are others which, with respect, do not bear scrutiny. In relation eg to the appellant's decision to seek an increase in the maintenance the learned judge said:

> "On the face of it, it appears to be a sudden decision inconsistent with what had been the longstanding mutual arrangement between the parties relating to the maintenance of the children. Although, as already mentioned, it is not necessary for an applicant to establish a change in circumstances as a pre-requisite to a claim for increased maintenance, the apparent unilateral withdrawal from a longstanding mutual arrangement of this nature seems to me to demand something more from the appellant than the needs of

> the children and the ability of the respondent to pay. Apart from financial considerations, moral or equitable considerations also play a part when the alteration of a maintenance order is in issue (JACOBS V JACOBS 1955(1) S A 235 (W) at 237; SAWDEN V SAWDEN 1956 (4) S A 109 (W) at 111)."

The court a quo was apparently not aware of the decision in Watson v Watson 1979(2) S A 854 (AD) in which this court rejected an argument that a mother was not entitled to seek an increase in maintenance for her minor daughter only four months after she had signed a consent paper regulating the maintenance, by adopting (at 860 A-D) the following passage from the judgment appealed against:

> "The Court could and would (all other factors being favourable) not refuse the application for an increase if it were 'satisfied on the facts that the true interests of the minor require a change'. (Christian v Christian 1945

> T P D 434 at 437). Such conduct on the part of a wife might bar her from relief where she was claiming an increase in respect of her own maintenance but I do not see how her moral turpitude (if such it were held to be) could be a ground for depriving a child of maintenance to which it was otherwise entitled."

I respectfully agree. In any event, the appellant testified at the enquiry that she filed the complaint after the respondent had threatened to deprive the children of the benefits of his medical aid scheme and had refused to make a contribution to Laura's tuition fees at the university. It is difficult to see what better explanation she could have advanced or how there could be any suspicion about the morality or the equity of her conduct in filing the complaint.

Laura's tuition fees were dealt with in another context in the following passage from the court a quo's judgment:

> "It is established law - c.f. BOONZAIER V PROVINCIAL INSURANCE CO. LTD, Corbett and Buchanan, The Quantum of Damages, page 87 - that although a father may agree to fund his child's attendance at a university and such funding would constitute portion of his support and maintenance of the child, he is not obliged to pay for his child to attend university nor would the child be entitled in law to claim that his father do so. In the instant case the respondent joined issue with the appellant's attorney on the latter's contention that LAURA was entitled to attend university and require him to pay therefor. In law the respondent is entitled to resist the assertion that LAURA, who is presumably able to secure employment and support herself, is entitled as of right to claim that he pay for her attendance at university."

There are two reasons why this reasoning cannot

be supported; the first relates to the court's exposition of the law and the other to the facts. The statement that a parent is not legally obliged (unless he consents to do so) to pay for his child's university education is not in accordance with my conception of the law. It is trite that the duty of support includes the obligation to provide the child with a suitable education (Van Vuuren v Sam 1972 (2) S A 633 (AD) at 642 F; Boberg, The Law of Persons and the Family 259). In an appropriate case, depending on matters such as the child's intellectual capacity and the standing and financial resources of the family, this may extend to a university education (Voet 25.3.4, Richter v Richter 1947(3) S A 86 (W) at 92, Ex parte Pienaar 1964(1) 600 (T) at 607B, Smit v Smit 1980(3) S A 1010 (O) at 1018F - 1020D).

It is true that the question of a proper education for their children is usually left for both parents to decide but, where the parents are divorced, it is the custodian parent who takes this decision. The position in such a case is correctly described in Scott v Scott 1946 W L D 399 at 401 as follows:

> "Where then the custody has been awarded to the mother at the time of a divorce the decision whether a child should attend a university passes, in my opinion, to the mother. But of course her bare decision cannot burden the father with the obligation to provide maintenance for that purpose. Whether he should provide that maintenance is judged by considering whether such education should be regarded as part of the necessary maintenance of that child, having regard to the standard of living and income of the parents."

(See also Richter v Richter (supra)at 90).

In the present case the court a quo clearly laboured under the mistaken impression that the respondent's attitude was decisive and accordingly failed to consider the question of Laura's education properly. Moreover, although mention is made in the judgment of the fact that the respondent challenged his daughter's right to a university education, the nature of the challenge is not disclosed. In effect all that the respondent said when he was asked at the enquiry whether he disputed that Laura was entitled to a university education, was that she had no right to demand it. Upon being asked what should happen if a child has the ability and the parents can afford such an education, he replied: "If that is the situation then the parents should do what they can to send the child to university".

He did not suggest that Laura does not have the ability nor did he dispute appellant's evidence that she was in fact doing very well at Rhodes, or that he had refused to make a contribution towards her fees for no other reason than, as he said , that he could not afford it. All this, and the fact that the respondent is an engineering graduate himself, leaves one with the firm impression that the appellant's decision to send Laura to university was the correct one and that both parents should indeed do what they can to keep her there.

Respondent's assertion that he could not afford a contribution towards Laura's tuition fees (or, for that matter, towards her and Ruth's maintenance generally) was made largely in view of the expense involved in the up-

bringing of his three stepchildren. Appellant's contention at the enquiry and again in the court a quo was that the respondent was not obliged to maintain his stepchildren and that he should spend a larger portion of his income on the maintenance of his own daughters. She was plainly correct. That a stepfather is not legally obliged to maintain a stepchild, is trite (S v MacDonald 1963(2) S A 431 (C) at 432 F; In Re Estate Visser 1948 (3) S A 1129 (C) at 1133) and was accepted by the court a quo. Applying certain dicta in MacDonald's case at 433 the court ruled, however, that the respondent may, in the event of his present marriage being one in community of property, be liable for the maintenance of his stepchildren in his capacity as administrator of the joint

estate and that it operated against the appellant that it was not canvassed at the enquiry whether the marriage was in or out of community of property. And, since the respondent was in any event liable for the price of necessities supplied to the household of which the stepchildren are members (Clark & Co v Lynch 1963(1) S A 183 (N)), the expenses incurred in respect of the latter "is accordingly a commitment which has to be taken into account in considering the means available to the respondent with which to contribute to the support of his own children".

This part of the court's reasoning cannot be supported either. Respondent's liability to the suppliers of household necessities is quite irrelevant and the possibility that he might be married in community of property

was not raised either at the enquiry (where he was represented by an attorney) or in the court a quo (where he was represented by counsel). If his legal representatives did not see fit to raise the point, it may safely be assumed that they knew perfectly well that the respondent was in fact not married in community of property. Bearing in mind that the interests of minors were at stake it is regrettable that the court a quo relied on a matter that was never an issue and, moreover, actually made it count against them. But, even if the respondent had been married in community of property, the court a quo did not take into account that Mrs Simpson, the other partner in the joint estate, was not working at the time of the enquiry, was not earning any income and was receiving only R120 per

month by way of maintenance for the children from Mr Mentz. It is clear that the respondent bore the lion's share of their maintenance. His evidence was that an amount of R730 per month was required to maintain the two youngest children and a further amount of R165 per month in respect of Jonathan - a total of R895 per month of which Mr Mentz contributed only R120. If in these circumstances he found it difficult to make ends meet, his first duty obviously was to maintain his own children properly and to leave it to his wife to see to it that Mr Mentz did likewise in respect of his children. Judging by the standard of living which, according to the appellant's evidence, he maintained, the amount which Mr Mentz contributed was ludicrously low and plainly inadequate. The court a quo was, no doubt, conscious

of the fact that Mr Mentz was in turn the major contributor to Laura and Ruth's maintenance and that a demand by Mrs Simpson for an increase might affect his contribution. This is indeed so. But by, in effect, requiring both fathers to give preference to their stepchildren the court perpetuated a situation which should never have been allowed to develop.

Unfortunately the court a quo's approach to Laura's university education and to the respondent's commitment to his stepchildren brought about that the needs of his own children were not properly considered. Some of the component items of the appellant's claim were considered and found to be either unjustified or excessive but the judgment gives no indication of an effort on the

part of the court to assess the children's actual needs or the actual extent of the respondent's ability to contribute thereto. This was an unfortunate omission particularly since the magistrate's reasons, to which I now turn, are open to criticism in these very respects.

The reasons commence with the finding that the appellant was entitled to an increase. Relating to the amount of the increase the magistrate states that-

> " ... complainant failed to satisfy the court that the amounts claimed are the needs of the children. The court finds that the claims for most of the items are excessive. More particularly Laura can save on pocket money, clothes, deodorants and make-up, toothpaste soap, petrol, and Ruth on clothes, deodorants, make-up, toothpaste, soap and toiletries."

Without disclosing what the extent of these savings could be the magistrate states further:

> "If both parties contribute 50-50 towards the maintenance of the children it means that with a payment of R400 per month the children receive in total an amount of R800 per month which seems to this court a reasonable amount .... to provide for the children's needs, education and social standing in life."

How these amounts were arrived at is again not disclosed. One can only assume that they are not calculated amounts but mere estimates. But even if they are, one would expect them to be based on, and in accordance with, the evidence. An examination of the evidence reveals that they are not. This is vividly illustrated by the way in which the magistrate dealt with Laura's maintenance. The respondent's main objection was to the amounts which the

appellant claimed in respect of accommodation, clothing and toiletries for the children. The items which he did not dispute or against which he had no serious objection, total, in Laura's case, R519 per month. Of the R400 per month that the respondent was ordered to pay, R225 was allocated to Laura and this presupposes, on the magistrate's reasoning, that the total amount required for her maintenance was R450. This is considerably less than the R519 already mentioned and to which a further amount has to be added for Laura's accommodation, clothing and toiletries.

This and certain remarks elsewhere in the reasons create the impression that the magistrate set about his task by first estimating what the respondent could afford to contribute and by adapting the children's needs accordingly.

It need hardly be stated that this was not the correct way to arrive at a decision. And the error was compounded by the fact that, like the court a quo, the magistrate was clearly not impressed with the contention advanced on appellant's behalf that the respondent should cut down on the expenses incurred in connection with his stepchildren and thus to enhance his ability to maintain his own children.

It follows from what I have said that this is a case in which interference with the magistrate's award is justified. I proceed, therefore, to assess the amount that the respondent should have been ordered to pay to the best of my ability on the available evidence.

A convenient point of departure is the amount

of R475 that, according to the respondent, is required monthly for the maintenance of his stepdaughter,Gabrielle, who was thirteen at the time of the enquiry. Her requirements are comparable to those of the fifteen year old Ruth so that it would not be unreasonable to assess the requirements of these two girls on the same level and on the respondent's own figures. Included in the amount of R475 is an amount of R25 in respect of Gabrielle's school fees which are about the same as Ruth's. By deducting the school fees and adding Laura's university fees of R184 per month one arrives at a figure of R634 per month as a guide to assess the latter's requirements. I realize that Laura is older than the other two girls and that some of her requirements are not the same as theirs but there are certain

items which the respondent included in the R475 that are somewhat higher than the amounts claimed by the appellant for the corresponding items for Ruth. A fair amount can be arrived at by adjusting the apportionment between Laura and Ruth of the total amount which the respondent should be ordered to pay. On the respondent's own figures I accordingly assess their joint total requirements at about R475 + R634 = R1109 (say R1110) per month.

In order to apportion this amount between the parents I take into account the respondent's monthly nett income of about R2200 (the precise amount cannot be gleaned from the evidence) and the appellant's monthly income of R240. It would not be unreasonable in the circumstances of the case to require the appellant to devote her entire

income to the maintenance of the girls. I also take into account that the appellant provided accommodation for the girls in her house which, again using the respondent's own comparable figures, may be valued at about R110 per month for each child. I would apportion to the appellant a total amount of R500 per month, including the value of the accommodation, and to the respondent the balance of R610 per month.

The apportionment of this amount between Laura and Ruth must provide, of course, for the former's higher tuition fees and personal requirements. Having considered all the available information it appears to me that a reasonable award would have been R400 in respect of Laura and R210 in respect of Ruth.

It must be understood, of course, that the figures that were used and the situation that was contemplated in these calculations reflect the position three years ago when the enquiry was held. No account was taken of any changes which might have occurred, and probably did occur, in the meantime. The effect of this judgment will, moreover, be that quite a considerable amount will be due to the appellant on account of the long lapse of time between the enquiry and the hearing of the appeal. There is no way in which this court can prevent any possible hardship to the respondent arising from his liability in terms of our judgment. Bearing this in mind and that there is a distinct possibility of a demand by Mrs Simpson for an increase in

the maintenance that Mr Mentz is presumably still paying, I wish to express the sincere hope that the parties will act sensibly in the interest of their children in whatever future steps they might take.

The appeal is accordingly allowed with costs and the order of the court a quo set aside.

Substituted for it is the following order:

"The appeal is allowed with costs; the Maintenance Order issued by the magistrate on 11 November 1986 is amended by substituting the amounts of R610, R400 and R210 for the amounts of R400, R225 and R175 respectively in paragraph (a) of the order."

J J F HEFER JA.

BOTHA JA)
F H GROSSKOPF JA) CONCUR.