REPORTABLE
CASE NO. 467/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

KENNETH JOHN DOUGLAS

APPELLANT

and

BLANCHE DAW DOUGLAS RESPONDENT

CORAM: HEFER, SMALBERGER, F H GROSSKOPF, OLIVIER JJA et VAN COLLER AJA

DATE OF HEARING: 7 NOVEMBER 1995

DATE OF JUDGMENT: 28 NOVEMBER 1995

JUDGMENT

OLIVIER JA:

This appeal arises from an enquiry initiated by the appellant before the Maintenance Court at Grahamstown on 18 June 1993 in terms of sec 4(1)(b) of the Maintenance Act, 23 of 1963 ("the Act"). In the complaint initiating the

enquiry the appellant claimed a reduction of the maintenance which he had been ordered by the Witwatersrand Local Division of the Supreme Court to pay to his two sons, born out of the marriage between the respondent and himself, when the marriage was dissolved by a decree of divorce on 26 October 1990. BACKGROUND:

The parties to this appeal were married to each other in January 1982. Twin boys were born on 17 October 1984. The marriage ended in divorce on 26 October 1990, a final decree being issued by the Witwatersrand Local Division on that day. Custody of the boys was awarded to the respondent. Clause 4 of a settlement agreement reached between the parties and incorporated in the decree of divorce provided for the payment of maintenance for the two boys as follows:

> "4.1 The defendant will pay R1250 a month maintenance in respect of each child, plus all their reasonable educational expenses (including school fees and levies, stationery, school uniforms and extramural activities) as well as all their necessary medical, dental and orthodontal expenses.
>
> 4.2 The defendant will increase the maintenance on 1 March each year

in the same ratio as the official weighted average consumer price index has increased, since the date of this agreement in the case of 1 March 1991 and since the previous 1 March after that."

No provision was made for the payment of maintenance to respondent personally, but in a further agreement, also incorporated in the decree of divorce, arrangements were made for the division of the not inconsiderable assets of the parties.

At the time of the divorce the parties were living in Johannesburg. The appellant was and is a partner of a large firm of attorneys. He holds a Ph.D. degree in banking law and is mostly involved in commercial legal work. The respondent held, at that time, five university degrees, viz. two bachelor's degrees in psychology, two honours degrees and a master's degree. She practised as a consultant psychologist from the matrimonial home.

After the divorce the respondent and the boys moved to Grahamstown. The respondent did so in order to enrol for a Ph.D. degree in psychotherapy which, according to her evidence, she could only obtain from Rhodes University. Such a degree would, according to her evidence, enhance her professional

potential. She moved into a flat in Grahamstown with the boys and took up such part-time employment as she could procure, i.a. as part-time lecturer at Rhodes University and part-time consultant at Fort England Hospital.

The correct application of the formula for the increase of the maintenance payable to the children, set out in paragraph 4.2 of the agreement mentioned above, would have resulted in an obligation on the appellant's part to pay R1695,00 per child per month i.e. a total of R3390,00 per month as of 1 June 1993. He approached respondent for a consensual reduction of the maintenance payable to the children. When such consent was refused, the appellant launched proceedings on 18 June 1993 for a reduction as from 1 June 1993 of the said maintenance in the Maintenance Court in Grahamstown by filing a complaint in terms of sec 4(l)(b) of the Act. In the complaint he requested that the existing court order be replaced by an order for payment of R500 per month per child and the cancellation of his obligation to pay any educational expenses (including school fees and levies, stationery, school uniforms and extramural activities) for the children.

The enquiry commenced on 10 August 1993. The appellant appeared in person, while the respondent was represented by an attorney. Both parties testified and were cross-examined. The main basis of the appellant's complaint was that he had been suffering for some months in 1993 from endogenous depression; that as a consequence his capacity to work, concentrate and carry out ordinary responsibilities was severely impaired; that he had had to reduce his work load in the firm; and as a result, and pursuant to the terms of the partnership agreement, his earnings had been drastically reduced. From the evidence it appeared that the appellant had suffered from endogenous depression since the age of 18 years; that this was a recurrent condition for which he was receiving excellent medical treatment; that by the time of the trial, the condition had already improved markedly; and that he might regain his full earning capacity at any stage. It also appeared that he had considerable capital assets, inter alia a trust fund in Canada amounting to R190 000 which could be used for the maintenance of the children; that since the divorce he had remarried and had moved into a more luxurious and expensive residence with

considerable additional mortgage bond and other liabilities.

The magistrate presiding dismissed the complaint in the following terms:

> "Taking the evidence of both parties, it was a war of figures. The court is not going to comment on that. The court has to see whether there is any change in the status of any of the parties. Now what Dr Douglas concerns, according to his evidence, he has depression for the last 12 years as I understand. So it's a matter of up and down with him. He says he is quite capable to work at this moment, maybe not at full capacity but that also happened in the past. He gave no indication that he is going to take his pension so maybe the period of depression is longer than normal but taken over a period there is no change to what happened in the past. The court must also take into consideration that provisions have to be made in a situation like this where it is a matter of up and down and therefore Dr Douglas has some capital assets that can be capitalised in order to support the children. He also was aware of this maintenance order the moment he remarried. The court is of the opinion that there is no change in his situation at the moment and the application is then dismissed."

The appellant appealed against this order to the Eastern Cape Division of the

Supreme Court in terms of sec 7(1) of the Act.

Kroon J (with whom Nepgen J concurred) held that certain of the items

of monthly expenditure claimed by the respondent to be necessary for the

maintenance of the boys could be reduced, decreasing the reasonable

maintenance payable to R2600 per month in respect of both children, i.e. R1300 in respect of each child. He held that the escalation clause contained in the existing order should continue to operate in order to make allowance for future increases in the needs of the children. The court upheld the appeal with costs and made the following order:-

> "With effect from 1 June 1993 the amount of maintenance payable in cash by the applicant in respect of the two minor children will be the sum of Rl 300,00 per child per month. The provisions of clause 4 of the Agreement marked 'XT incorporated into the order of the Supreme Court of South Africa (Witwatersrand Local Division) dated 26 October 1990 in case no. 15711/90 will otherwise remain in force."

Implicit in this order is the continuation of the appellant's obligation to pay all the reasonable educational expenses (including school fees and levies, stationery, school uniforms and extramural activities) as well as the necessary medical, dental and orthodontic expenses of the boys, as set out in paragraph 4.1 of the aforesaid court order.

Not content with the limited success achieved in his appeal to the Eastern Cape Division, the appellant gave notice of an application for leave to appeal to

this Court. In the application the appellant appeared in person. Kroon J (with whom Nepgen J agreed) held that, save in one respect, the grounds of appeal were in substance either a restatement of the arguments which were presented to the court at the hearing of the appeal, or an attack on the manner in which these arguments were dealt with in the judgment of the Court. The additional ground was that the appellant was entitled to an order that a considerable amount of money allegedly misappropriated by the respondent out of the maintenance paid by him in the past for the children's maintenance be set off against his future maintenance payments. Kroon J held that this argument was untenable and that any leave to appeal, if granted, could not embrace leave to advance the said claim, Leave was granted, however, on the basis that this Court might hold that an analysis of the respondent's cash flow might"... be a decisive pointer to the children's reasonable needs being in a sum cognizably less" than that fixed by the Eastern Cape Division.

The next step in the proceedings was the filing by the appellant of a Notice of Appeal which, together with "Grounds of Appeal" (for which the Rules

of this Court do not make provision), because of the argumentative manner in which it was clothed, covered no less than 103 pages. In its amended form the order sought by appellant from this Court reads as follows:

"A. The appellant is ordered:

A.1 to pay to the respondent R500 a month maintenance ('the cash maintenance'), with effect from the date set out in paragraph B of this order, in respect of each of the parties' children, Aidan Michael Douglas and Lance Alexander Douglas, ('the children') and to pay the children's necessary medical, dental and orthodontal expenses with effect from 1 June 1993;

A.2 to increase the cash maintenance on 1 March each year in the same ratio as the official weighted average consumer price has increased, since 1 September 1993 in the case of 1 March 1994 and since the previous 1 March after that.

B. The liability of the appellant to pay the cash maintenance shall commence when:

B.l the aggregate amount of the cash maintenance that would have been payable had such liability commenced on 1 June 1993, plus interest as set out below

equals

B.2 the aggregate amount misappropriated by the respondent to her own use out of the maintenance paid by the appellant in respect

of the children between 1 January 1991 and 31 July 1993 (namely R55 443), less any portion of the R55 443 repaid by the respondent to the appellant, plus interest as set out below

The interest referred to in B.l and B.2 above is interest as set out in paragraph D of this order on the accumulating/reducing balance from time to time of the amount under B.l or B.2, as the case may be, from 1 January 1991.

C. To the extent that the maintenance paid by the appellant in respect of the period from 1 June 1993 up to the date of this order (including medical and educational expenses) exceeds the maintenance payable under this order in respect of the same period (including medical expenses), such excess shall be reimbursed by the respondent to the appellant, together with interest as set out in paragraph D of this order on the accumulating and/or decreasing balance from time to time of the excess from 1 June 1993.

D. The interest referred to in paragraphs B and C of this order shall be calculated at the rate and in the manner payable by the respondent on the amount owing from time to time on her access bond account relating to Lot 614 Parktown North (or a comparable rate if there should cease to be any amount owing on such account or if interest should cease to be payable on that account or at the normal rate on such an account), alternatively at the rate under the Prescribed Rate of Interest Act.

E. This order replaces, with effect from 1 June 1993, the maintenance order made by the Supreme Court of South Africa, Witwatersrand Local Division, on 26 October 1990 in case 15711/90 pursuant to

clause 4 of the Settlement annexed as 'X1' to the divorce order.

F. Further or alternative relief.

G. Costs."

The date of 1 June 1993 refers to the date of the amended order sought in the application to the Maintenance Court.

Preliminary procedural matters.

Prayers B and C are based on the appellant's allegation that in the period since the divorce and up to the date of the complaint, the respondent had misappropriated for her own use R55 443 of the children's maintenance money.

When the appellant testified and cross-examined the respondent during the trial at the Maintenance Court, he never accused her of misappropriating the children's money. Only during argument did he produce a document, exhibit H, in which he purported to have done a "cash flow analysis" in respect of the respondent's income and expenditure during three selected periods, viz. 1 January 1991 to 31 December 1991,1 January 1992 to 31 July 1992 and 1 August

1992 to 31 July 1993. The appellant's case, as set out in his amended Notice of Appeal is that the cash flow analysis shows what funds the respondent received during these periods from all sources (eg earnings and investment income, maintenance paid by the appellant and borrowings), the capital expenditure and other non-living expenses the respondent paid out of these funds (eg the purchase of a share in a farm and a trip she took overseas), and the balance, being the amount spent by her on her and the children's living expenses. By then determining the ratio between the respondent's own living expenses and her expenses in respect of the children, and applying this ratio to the total amount spent, one arrives at the amount spent by the respondent on her own living expenses and her expenses in respect of the children. The appellant further calculated, allegedly on the respondent's evidence, alternatively on the calculations made by the court a quo , that the ratio between the respondent's own and the children's needs (or expenditure) was 73%: 27% (i.e. of all income received, respondent spent 73% on herself and only 27% on the children). Consequently, the appellant submitted that "... it had required only less than half

of the appellant's maintenance to enable the children to be maintained at substantially the same standard of living that had applied during the marriage ..." and that the respondent had misappropriated the aforesaid amount for her own use.

The appellant's insistence on raising the alleged misappropriation and his right of set-off or reimbursement in this Court, led to a procedural dilemma. It arose in this way: In the appeal to the court a quo, counsel for the appellant relied, for the first time, on the so-called misappropriation by the respondent. Counsel for the respondent objected to this argument with the submission that the respondent had not been taxed in the Maintenance Court with the inferences which the appellant now sought to draw, and that there simply was not sufficient evidence to sustain the said inferences, i.a. that it had not been proved that the respondent's income, on which she was cross-examined, was the only income she had received during the relevant period. In the absence of such proof, it was argued, the cash flow analysis was fatally flawed. Counsel for the appellant, apparently aware of this problem in his client's case, relied on an agreement,

presumably entered into between counsel prior to the appeal being heard by the court a quo, to the effect that the respondent had had no other sources of income than those appearing from the evidence led in the Maintenance Court,

In dismissing the appellant's approach based on the alleged misappropriation, the court a quo did not consider it necessary to express any view as regards the alleged agreement.

In his copious heads of argument in this Court, the appellant did not refer to or rely on the alleged agreement. But in her heads of argument, counsel for the respondent, apart from advancing several reasons why a set-off or suspension could, in law, not be maintained, also questioned the alleged agreement, She merely stated that the court a quo had made no finding that the alleged agreement had been endorsed by counsel for the respondent, and in any event, its terms as mentioned in passing in the court a quo were vague. For purposes of dealing with the alleged misappropriation, she stated that she would ignore the alleged agreement, the exact terms of which do not appear from the record.

These remarks by counsel for the respondent elicited a petition, running

into 28 pages, by the appellant. In the petition, the appellant seeks permission to "rectify" the record so as to include proof of the alleged agreement, alternatively to remit the matter to the Maintenance Court at Grahamstown to hear further evidence on the question of whether the respondent had any receipts other than those reflected in the said cash flow analysis. The respondent opposed the relief sought in the petition.

There is, however, also a further procedural problem arising from the appellant's Notice of Appeal. It relates to paragraphs B and C quoted above.

Paragraph B, which purports to request a "suspension" of the appellant's obligations to pay maintenance to the children, is nothing but an indirect way of raising set-off. The appellant was expressly denied leave to appeal to this Court on that basis. In fact, in the appellant's original Notice of Appeal he openly and directly relied on such set off, notwithstanding the aforesaid order.

It is trite law that, in both criminal and civil matters, leave to appeal may be limited so as to allow only particular grounds of appeal to be advanced (see Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v

Staatspresident en Andere: Jooste v Staatspresident en Andere. 1988(4) SA 224 (A) op 246 C - 247 C;S v Safatsa and Others 1988(1) SA 868 (A) at 877 A - G). But it is also true that"... this Court will not necessarily consider itself bound by the grounds upon which leave has been granted. If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground to be argued" (S v Safatsa, supra, at 877 B - D. See also R v Mpompotshe and Another 1958(4) SA 471 (A) at 472 H - 473 F).

Although leave to appeal on a ground refused by the court which granted leave to appeal to this Court should, generally speaking, be requested by way of petition, which would normally be considered by the court hearing the appeal, the required leave can also be sought by way of application when the appeal is heard. In such a case condonation for the delay in asking such leave should also be requested (see R v Mpompotshe and Another, supra, at 473 E - F).

The appellant did not present a petition requesting the required leave prior to the hearing of this appeal. He was patently not aware of the decisions

of this Court mentioned above. When these problems were mentioned to him he applied orally for leave to rely on set-off. As I understood him, his application also included leave to ask for paragraph C of the amended Notice of Appeal, i.e. for judgment against respondent for payment of the allegedly misappropriated amount.

There are, therefore, four preliminary applications before this Court dealing with procedural matters, viz.

(i) an application to rectify the record so as to include the terms of the agreement allegedly entered into between counsel for the parties prior to the hearing of the appeal by the court a quo relating to the respondent's sources of income;

(ii) alternatively, an order that the hearing of the appeal in this Court be postponed and that the matter be remitted to the Maintenance Court at Grahamstown for the re-opening of the enquiry and the hearing of evidence relating to the respondent's post-divorce income;

(iii) Leave to advance prayer B;

(iv) Leave to advance prayer C.

I deal with these applications seriatim, (i) The application to rectify the record.

This Court has the inherent power to regulate its own procedural matters (see also Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986(2) SA 734 (A) at 754 G; S v Malinde and Others 1990(1) SA 57 (A) at 67 A - E). But does this power encompass the rectification of the record of the proceedings in a court a quo? We were not referred to any authority on this point. But, even assuming for the moment that it does, rectification of a record of the proceedings before a court a quo will not be granted by this Court on appeal merely for the asking. If the matter relates to an agreement entered into between counsel for the parties as alleged in the present case, at least it would be required that the parties are, in this Court, ad idem as to the terms of the agreement and that it was intended that the agreement would be taken into

account by the court a quo.

In the present case the terms of the alleged agreement were disputed by the respondent in this Court and there is no consensus that such agreement was intended to bind the court a quo. This Court is not a trial court to solve factual disputes and to decide on questions relating to alleged and disputed omissions from the record.

If the refusal of the application now under discussion prejudices the appellant, he only has himself to blame. As stated previously, he never canvassed with the respondent in cross-examination the alleged cash flow analysis, the ratio of expenditure between herself and the children or the alleged misappropriation. Because he did not traverse these matters fully and openly, he found himself in difficulties at the appeal before the court a quo in that the possibility of the existence of other sources of income of the respondent, not canvassed with her, could not be excluded. As long as such possibility existed, he could not rely on the cash flow analysis as being correct, nor could he advance the argument of misappropriation.

In an ordinary civil matter, where the cases of the respective parties are set out in the pleadings, it is required of a litigant to put his case fairly and squarely to each opposing witness (see Small v Smith 1954(3) SA 434 (SWA) at 438 C - H). This salutary rule forms part of our legal ethical code. It enhances notions of fair play and equity and prevents civil proceedings from degenerating into trials by ambush. This approach applies a fortiori to an enquiry under the Act, where there are no pleadings and formal discovery of documents. The appellant, in failing to put his case fairly to the respondent when he was cross-examining her, prevented the issues from being fully and openly vented. That failure has now led to the appellant's predicament.

The application for rectification of the record so as to include the

contested agreement clearly must fail.

(ii) The application for postponement of the hearing of this appeal and remittal to the Maintenance Court for the re-opening of the enquiry and the hearing of evidence relating to the respondent's post-divorce income.

Sec 22 (a) of the Supreme Court Act, 59 of 1959, empowers this Court,

on the hearing of an appeal, to remit the matter to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing.

In a long line of cases, certain guiding principles for the exercise of this power have been developed. They are as follows:

(1) whether the evidence tendered or envisaged could with reasonable diligence have been tendered or elicited at the trial;

(2) whether the said evidence is "presumably to be believed" or "apparently credible";

(3) the effect it will have on the case;

(4) whether conditions since the trial have so changed that the fresh evidence will prejudice the opposite party.

(See Nathan Barnett and Brink 3rd ed. Uniform Rules of Court 606; Colman v Dunbar 1933 AD 141 at 161 - 2; Benjamin v Gurewitz 1973(1) SA 418 (A) at 427 E - 430 E; Deintje v Gratus and Gratus 1929 AD 1 at 6 - 7; Shein v Excess Insurance Co Ltd 1912 AD 382 at 389 - 393; 418 at 427 - 431.)

I am of the view that the present application for remittal and re-opening

of the enquiry fails to meet these requirements. For instance, as regards requirement (a), it is clear that the failure to place the full facts before the Maintenance Court was due to the appellant's failure, and his failure alone, to disclose his case to the respondent and to elicit the required information from her. In this Court he conceded that in the course of the trial she had made available all her financial books and statements to him and that he had already then decided that he was going to do a cash flow analysis to prove the misappropriation on the respondent's part and to disprove the children's needs as put forward by her. In the event, he can expect little sympathy from this Court. In Deintje v Gratus and Gratus. supra at 6, the following dictum from two venerable English cases was approved of:

> "It is an invariable rule in all the Courts, and one founded on the clearest principles of reason and justice that if evidence which either was in the possession of parties at the time of the trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial."

Furthermore, as regards requirement (c), the effect of remittal of the

matter and re-opening the enquiry will be that the appeals to the Eastern Cape Division and to this Court would have been in vain. If new evidence is heard by the Maintenance Court, the possibility of new appeals by either of the parties to the Eastern Cape Division and to this Court cannot be excluded. The envisaged process militates against the principle interest reipublicae ut sit finis litium (see Mkwanazi v Van der Merwe and Another. 1970(1) SA 609 (A) at 616 F).

Consequently, this application must also fail. (iii) Leave to advance prayer B i.e. the suspension of maintenance payments until the allegedly misappropriated funds have been utilised by the respondent for the children's maintenance.

It is clear that the suspension of maintenance payments is but an indirect form of set-off. Appellant had been refused leave to rely, in this Court, on setoff. As set out above, this Court may grant leave to advance a ground of appeal not allowed by the court a quo, if there is sufficient merit to warrant the consideration of it. I turn, therefore, to a consideration of the merits of prayer B.

I have considerable difficulties with the legal basis underlying prayer B.

Voet, who deals with this matter, was of the view that neither set-off nor suspension could be raised in respect of an obligation to pay maintenance (see Comm. ad Pand. 16.2.16 and 25.3.5).

Our courts appear to have followed Voet's point of view. It seems to be an accepted rule that if the husband who has been ordered to pay maintenance to a child, avers that he has paid more than his share, or that the wife has wrongfully spent the children's maintenance, the correct remedy is to institute action against the wife and not to claim set-off against the children, (see R v Glasser 1944 EDL 227 at 232, 233; Kanis v Kanis 1974(2) SA 606 (RAD) at 609 C - H; Phillips v Phillips 1961(2) SA 337 (D) at 341 B - D.)

It is, however, not necessary to formulate the correct legal principle and dispose of the instant case in accordance therewith, for there are insurmountable factual problems in granting leave to advance prayer B. As stated before, the claim for set-off rests on the alleged misappropriation by the respondent. As explained above, the factual substratum of this allegation has not been proved,

and it would be futile to consider prayer B.

Consequently, leave to advance prayer B must be refused.

(iv) Leave to advance prayer C, i.e. the reimbursement by the respondent of the alleged misappropriated maintenance monies.

The order encompassed in prayer C by the appellant in effect seeks judgment against the respondent for payment of R55 443 plus interest.

Neither the Maintenance Court nor the court a quo was asked for a similar order. By virtue of sec 5(4)(b) of the Act, the Maintenance Court had no jurisdiction to make such order. And although the court a quo and this Court on appeal to it, according to sec 7(2) of the Act"... may make such order in the matter as it may deem fit", this is clearly not a case where the order requested should be granted. As indicated above, the alleged misappropriation was never canvassed with the respondent at the trial and was never proved. It would be futile to grant the leave requested.

The application to advance prayer C is refused. The merits of the appeal: underlying principles.

This brings us to the proper scope and object of this appeal, viz. an evaluation of the correctness or otherwise of the judgment of the court a quo. In this regard, attention should once again be drawn to the decision of this Court in Bordihn v Bordihn 1956(2) PH B32 (A) at 91-2, reiterated in Mentz v Simpson 1990(4) SA 455 (A) at 456E - 457C, in which the respective approaches by a trial court and a court of appeal to cases such as the present one were formulated. In deciding what, in the circumstances of a particular case, a reasonable amount to award as maintenance for a child would be, the trial judge has to consider a variety of factors, inter alia, the needs of the child, the social status of the parties, the ability of the father, and if need be, the means of the mother to pay maintenance. The amount arrived at must necessarily be an estimate. In these circumstances the approach of an appeal court, when asked to interfere with the estimate of the trial judge, should be along the lines adopted in compensation cases. In Sandler v Wholesale Coal Supplies Ltd 1941 AD 194 at 199 - 200 Watermeyer JA stated:

"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."
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> Joubert JA in AA Mutual Insurance Association Ltd v Maqula 1978(1)

SA 805 (A) at 809 B - C succinctly formulated the principle as follows:

> "... (T)his 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."
>
> But, as was pointed out by Watermeyer JA in the Sandier-case (at 200),

this does not imply the abdication by a court of appeal of its essential function.

> "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."

I intend to apply the approach outlined above to the judgment of the court a quo.

An order made by the Supreme Court at the time of divorce of the parents relating to the maintenance of a child or children may be varied by the Maintenance Court by virtue of sec 4(l)(b) of the Act or by the Supreme Court by virtue of sec 8(1) of the Divorce Act, 10 of 1979.

As general point of departure it can be stated that in the absence of a material change in the circumstances since the making of the original court order, there can be no sufficient cause for amending such order. But proof of a material change in the relevant circumstances is not a statutory prerequisite Havenga v Havenga 1988(2) SA 438 (T) at 445 C - F).

The point of departure for proceedings for a variation of an existing order

must be the children's needs. Once that has been established, the ability of the party obliged to pay the maintenance (and also that of the other parent) should be established. The children's needs can then be adapted accordingly, if necessary (see Mentz v Simpson, supra, at 461 I - J). The needs of the children.

The court a quo has given extensive and careful consideration to the figures and arguments presented by both parties. The court reduced a number of items claimed by the respondent, and arrived at the figures referred to earlier in this judgment.

Nowhere in his copious heads of argument did the appellant analyse or criticise the court's calculation. He rather aimed attacks at the respondent from various, mostly irrelevant, angles, e.g. her misappropriation of the children's maintenance, his claim for interest on such monies, the alleged failure of the court a quo to take into account that the children spent some of their holidays with him, that he pays a small (indeed negligible) amount of pocket-money to the children directly, her decision to give up her practice in Johannesburg and

to move to Grahamstown in order to further her studies, which he described as self-indulgence, and her decision to retain two properties in Johannesburg which she lets at a loss. At the hearing of the appeal the appellant was invited to give attention to the calculations by the court a quo. It soon appeared that his criticism was not based on any evidence and is quite unfounded. Indeed, his suggested figures as compared to his allegations of what he spends on his own household, e.g for food, are clearly unfounded and unreasonable.

Under these circumstances there is no basis on which the calculation of the children's needs by the court a quo can be disturbed. The standard of living of the parties.

The next enquiry then is whether these expenses are commensurate with the standard of living of the parties.

The appellant was a partner in a very large firm of attorneys. At one

stage he was one of the top fee-earners in his firm. For the past few years his

earnings from fees, as certified by the firm's auditors, were as follows:

28 February 1989 R128 222

28 February 1990 R135 374

(5) February 1991 R254 066

(6) February 1992 R281 656 28 February 1993 R348 502.

He also earned R3250 per annum (i.e. R270 per month) lecturing in business law, and earned dividends in the sum of R90 - R125 per month.

After their marriage, the parties lived in a house in Melville, then went on study leave to New York for a year (at a cost, according to appellant, of more than R190 000) and returned to the Melville residence for two or three years. They then purchased a house in Parktown North, where they lived until they separated some time prior to the divorce, whereupon the appellant moved back to the Melville residence, which still belonged to him.

During the subsistence of the marriage the parties lived for some time in Parktown North, which the appellant described as one of the better areas of Johannesburg. The house was situated on half an acre of ground, with a swimming pool. The appellant described the house as "a very nice house" with

very expensive woollen carpets in the main bedroom and study. The kitchen was fitted with top quality fittings. After the appellant had bought the house, he spent approximately R45 000 on renovating it. The house was fitted with quarry tile patios, and underfloor heating in the master bedroom and study. He employed a gardener, a domestic servant and a half-day nanny. They had two motorcars, and dined out at very expensive restaurants, sometimes as often as once a week. Once they went to Europe on holiday; every year they would go on holiday, hiring a cottage and even motorcars, and again dining out at very expensive restaurants. During 1982/1983 he did not work in the legal firm; but took a year off to read for his doctorate in banking law at the University of the Witwatersrand. They bought a very expensive lounge suite in 1988; the diningroom suite was of expensive yellowwood; the lounge and family room were fitted with very expensive mohair curtains; they enjoyed the benefit of all the modem conveniences such as dishwashers etc.; the appellant maintained a selection of good wines and they drank two to three bottles of wine per week. The appellant and the respondent both pursued post-graduate studies and they

had a propensity towards intellectual activities.

After the divorce, until 1992, the appellant continued living in the house in Melville, which was fully paid for i.e. the appellant had no bond repayments in respect of the property. In September 1992 he purchased a house in Forest Town for R440 000, incurring a bond repayment obligation of ± R4200 per month. He also had to spend R40 000 on renovations on the property. The appellant says the Melville property was not an appropriate address for a senior partner in his firm and hoped to sell it. He also considered the price he paid to be a bargain. The purchase of the Forest Town residence brought about additional expenditure in the form of rates at R337,08 per month, maintenance at R250 per month and furniture purchases at R250 per month. He claimed R400 per month for clothing for himself, and testified that the amount was mainly spent on suits; he later reduced this claim to R200 per month. He also claimed R870 per month for motor repairs and R300 for sundry monthly expenses. He conceded that the new residence had a swimming pool, but said that it was non-functional. The property in Melville, which has not been sold

yet, is worth R140 000 but is let at a loss of R90,00 a month, the appellant having bonded it for R96 000. His shares are worth R17 800 and finally he is entitled to the capital of a trust fund in Canada, which stands at R190 000. There would be no problem, according to his evidence, in bringing that money to South Africa and spending it on the maintenance of his children. The evidence was that the fund was, in any event, established to provide for the tertiary education of the boys in Canada. Subsequent to the divorce he had spent approximately R25 000 on compact discs.

The appellant conceded that, should there be a remission in his depression (a matter to which I return later), he had the potential to be a top fee-earner in the firm, and that he would be able to charge very high fees.

As far as the respondent is concerned, at the time of the divorce she had obtained the five degrees hereinbefore described. She practised as a psychologist from the matrimonial home and earned between R2500 and R3000 per month. She stopped practising as a psychologist in December 1990 and was accepted by Rhodes University for a doctorate in psychotherapy. Such a degree would

enable her to generate more income. Her net income at the time of the enquiry was approximately R4567 per month after tax deductions, being a salary from Rhodes University as a part-time lecturer; a salary from Fort England Hospital for work performed there; monthly fees earned and rental income. At the end of 1993 her nett income would be reduced because the Rhodes appointment would come to an end. The appointment at Fort England was a temporary one. If, at the end of 1993, she had completed the Ph.D. degree, she would forfeit the right to occupy a university flat. She intended then purchasing a modest house in Grahamstown near Graeme College, which the boys would attend, at a price of R160 000 to R170 000. The bond repayment would amount to approximately R2030 to R2170 per month. The boys had skateboards and bicycles, footballs, marbles, and tennis balls, they kept fish and rabbits and they intended building a tree house. They were also taking tennis and gymnastics lessons. The respondent needed a car to get to her work and classes.

The court a quo described the house in Parktown North as a luxury abode and stated that the evidence disclosed that the family enjoyed a high standard

of living. In his Notice of Appeal the appellant criticized these findings by the court a quo and also described the alleged failure of the court a quo to mention that "some reduction in (the) standard of living for both spouses and their children is normally the result of the break up of a joint home" as an error.

The appellant's criticism of the findings of the court a quo is unfounded. The parties indeed, stante matrimonio, maintained a very high standard of living; after the divorce this standard did not drop. On the contrary, measured against the appellant's increased income and his move to a more luxurious and expensive residence etc, his standard of living has risen.

There is, accordingly, no reason why the children's needs should now be measured against a lower standard than that which prevailed at the time of the divorce.

The appellant's ability to pay the maintenance as ordered by the Supreme Court at the time of divorce.

I have already alluded to the fact that the appellant's annual income rose from R128 220,00 for the year ending 28 February 1989, to R135 374 in 1990,

R254 066 in 1991 to R281 656 in 1992 and R348 502 to 28 February 1993. According to the evidence his income for March 1993 was R25752,72, which was still consistent with the income earned in the tax year ending on 28 February 1993. But then, in April 1993 it decreased to R12363,00, in May 1993 to R225, June 1993 to Rl 125,00 and July 1993 to R675,00. At the enquiry he estimated his monthly income for the tax year ending 28 February 1994 as R176488, i.e. R14707 per month.

The decrease in income for the four months preceding the application to the Maintenance Court was the sole basis of the complaint, and was in turn laid at the door of the economic recession and the appellant's endogenous depression.

The reliance on an economic recession is not convincing at all, despite the claim that his firm's income was dropping steadily. The appellant's own income up to the end of February 1993 was increasing steadily. His income in March 1993 was not markedly less than that of his average income in the previous tax year.

As far as the reliance on endogenous depression is concerned, there is a total lack of convincing evidence as regards the duration of the condition complained of. Moreover, the appellant conceded that by the time of the hearing of the enquiry, which occurred in August 1993, his condition had shown a marked improvement over what it had been earlier that year. Moreover, the first letter by the appellant's firm recording the appellant's drop in income stated that "... his problems were already manifesting themselves in March ...". Apparently the condition complained of only influenced his income as from March 1993. By August 1993 there was a marked improvement. In my view the evidence of a decrease in income for five months does not constitute sufficient cause for a variation of the order made by the Witwatersrand Local Division. This is especially so where the appellant had a trust fund of R190 000 available from which he could supplement his temporary cash flow problem. His refusal to do so is, in my view, unreasonable and unjustifiable. The ultra vires argument.

Finally, reference should be made to the appellant's reliance on the

alleged nullity of that part of the judgment of the court a quo relating to educational expenses. As mentioned earlier, the court a quo expressly ordered that, apart from a reduction in the cash amount payable by the appellant he must obey all the other terms of the order made by the Supreme Court, i.a. the payment of all the reasonable educational expenses (including school fees and levies, stationery, school uniforms and extramural activities) of the two children.

The appellant now argues that such order was ultra vires the Act. His argument is set out in the heads of argument as follows:

> "Section 5(4)(b) of the Maintenance Act 23 of 1963 gives the maintenance court the power to order payment of a cash sum and medical expenses but makes no mention of educational expenses. A maintenance court's order is in substitution for the existing order and replaces it in its entirety Purnell v Purnell 1993(2) SA 662 (A) at 667 J to 668 A - so that the fact that the previous order granted by the divorce court by consent included educational expenses cannot serve as the basis for an order that the appellant pay educational expenses. It follows, it is respectfully submitted, that the appeal court's order that the appellant pay the children's educational expenses is ultra vires."

The appellant's argument is ill-conceived. As was clearly pointed out in Purnell v Purnell, supra, at 666 F - 667 H, an existing maintenance order only

ceases to be of force and effect if the Maintenance Court makes an order replacing or discharging it (see secs 4(1), 5(4) and 6(1) of the Act).

In the present case the Maintenance Court did not issue an order replacing or discharging the existing Supreme Court order. In fact, in dismissing the appellant's complaint, it left the existing order intact. The court a quo in turn only reduced the cash amount monthly payable to the children and confirmed the continuation of all the appellant's other maintenance obligations. The court a quo was entitled to make such an order by virtue of sec 7(2) of the Act.

The respondent gave notice of intention to ask this Court for a special order of costs, on the attorney and client scale, against the appellant. Having given the matter careful consideration, I am not convinced that such an order should be made in the present appeal.

The following orders are made:

1. The applications numbered (i) to (iv) hereinbefore are dismissed with costs.

2. The appeal is dismissed with costs.

HEFER, JA)

SMALBERGER, JA)

)CONCUR F

H GROSSKOPF, JA)

VAN COLLER, AJA)