Case No 611/97

In the matter between :

GRAHAM JOHN BURSEY

Appellant

and

JANE NOELLE BURSEY First Respondent

THE SHERIFF OF THE HIGH COURT OF SOUTH AFRICA (SOUTH EASTERN CAPE LOCAL DIVISION) Second Respondent

Coram: Vivier, Nienaber, Howie, Olivier *et* Plewman JJ
A.

Heard: 19 March 1999

Delivered: 30 March 1999

Divorce - maintenance for child until self-supporting - effect of

order

J U D G M E N T

VIVIER JA

VIVIER JA:

The appellant and the first respondent were divorced on 17 October 1994. The divorce order incorporated an agreement between them which provided for custody of their two minor children, J. and K., to be awarded to the first respondent and for maintenance for the children to be paid by the appellant (the defendant) as follows (clause 2):

> "The defendant shall pay to the plaintiff, as and for maintenance for the said minor children, the sum of R750 per month per child, the first payment to be made on the last day of the month in which a final decree of divorce may be granted by the above Honourable Court and thereafter on the last day of each succeeding month. The said maintenance shall be paid until the said children become self-supporting."

At the time of the divorce the elder son, J., was 19 years and 7 months old, having been born on 6 March 1975. He was a first year student at Rhodes University, Grahamstown and had registered for a

three-year course which he would ordinarily have completed by the end of 1996. On 21 February 1996 the appellant, who practises as an advocate in Port Elizabeth, wrote to J. informing him that when he turned 21 years of age on 6 March 1996 he would no longer be obliged to pay maintenance for him through his mother as she would no longer be his custodian. He told him that from that day he would pay maintenance directly to him and requested details of his expenses, his part-time earnings and the amounts received from his mother in order to calculate the future maintenance. J.'s attorney subsequently furnished the appellant with a list of his expenses. On 29 April 1996 the appellant wrote to J. complaining that he had not been furnished with details of J.'s part time earnings nor the amounts he had received from his mother. The appellant went on to state that in view of J.'s attitude he had decided not to assist him any further and that the matter would have to be resolved in court. The appellant had in an earlier letter advised J. to approach the maintenance court for maintenance. No further maintenance for J. was thereafter paid by the appellant. This resulted in the first respondent, who had in the meantime moved to Cape Town, issuing a summons out of the small claims court at Cape Town on 21 June 1996 for arrear maintenance for J. in terms of the divorce order and J. causing the appellant to be summoned to appear before the maintenance court at Grahamstown on 29 July 1996. This hearing was postponed to 28 October 1996 when the matter was withdrawn. The action in the small claim's court was withdrawn on the day of the hearing i e on 24 October 1996. On 1 October 1996, and while the proceedings in the small claims and maintenance courts were still pending, the first respondent caused a writ of execution in terms of rule 45 (1) of the Uniform Rules of Court to be issued out of the Eastern Cape Division, pursuant to which certain of the appellant's law

reports were attached by the deputy sheriff, Port Elizabeth on 9 October 1996. After the first respondent had refused the appellant's request to withdraw the writ he applied in the Eastern Cape Division for an order setting aside the writ. The deputy sheriff, Port Elizabeth, was cited as the second respondent but he filed a notice abiding the court's decision and has taken no further part in the proceedings. The application was granted by **Erasmus J** whose judgment is reported as *B v B and Another* 1997 (4) SA 1018 (SECLD). The first respondent's appeal to the Full Court succeeded and with the necessary leave the appellant now appeals to this Court. The first respondent has filed a notice abiding our decision and was not represented at the hearing before us.

According to our common law both divorced parents have a duty to maintain a child of the dissolved marriage. The incidence of this duty in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time. The duty does not terminate when the child reaches a particular age but continues after majority. (In *re Estate Visser* 1948 (3) SA 1129 (C) at 1133-4; *Kemp v Kemp* 1958 (3) SA 736 (D & CLD) at 737 *in fine; Lamb v Sack* 1974(2) SA 670 (T); *Hoffmann v Van Herdan NO and Another* 1982 (2) SA 274 (T) at 275A.) That the duty to maintain extends beyond majority is recognized by sec 6 of the Divorce Act 70 of 1979. Sec 6 (1) (a) provides that a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. Sec 6 (3) provides that a court granting a decree of divorce may make any order which it deems fit in regard to the maintenance of a dependent child of the marriage. This provision must be contrasted with the provision in the sub-section relating to the custody or guardianship of, or

access to a minor child. A maintenance order does not replace or alter a divorced parent's common law duty to maintain a child. In *Kemp v Kemp*, *supra*, **Jansen J** stated at 738 A-B that as a matter of expediency the court, as the upper guardian of the child, usually regulates the incidence of this duty as between the parents when it grants the divorce and that its order for maintenance is ancillary to the common law duty to support.

In the present case the divorce order stipulates periodic payments of a fixed sum of money "until the said children become self-supporting". In neither of the courts below was it contended that both J. and K. had to be self-supporting before the duty to pay maintenance for J. ceased.

The contention on behalf of the appellant was that on a proper interpretation of the order J.'s maintenance ceased when he attained majority. Reliance for this submission was placed on cases such as *Richter v Richter* 1947 (3) SA 786 (W), *Kemp's* case and *Gold v Gold* 1975 (4) SA 237 (D & CLD).

Relying on the judgment of **Price J** in *Richter's* case (at 91) it was submitted that the words "the defendant shall pay to the plaintiff, as and for maintenance for the said minor children ..." in clause 2 qualified the duration of the order i e that the duty to maintain ceased upon majority. I cannot agree. Clause 1 of the agreement awards the custody of "the minor children, J.S.B. and K.G.B." to the first respondent. The words "the said minor children" in clause 2 merely identify the children by reference and cannot have been intended to qualify the duration of the order, particularly in view of the express term as to the duration of the duty to maintain which follow.

It was next submitted, also on the strength of *Richter's* case, that J.'s maintenance in terms of the order was payable to the first

respondent in her capacity as his custodian so that when this status terminated upon majority the appellant's obligation to pay her either ceased or was henceforth enforceable only by J. and not by the first respondent. The maintenance order is, as I have said, ancillary to the common law duty of support and merely regulates the incidence of this duty as between the parents. The effect of this order is simply that after J.'s majority the maintenance payable to him by his parents would continue to be paid to him by the first respondent who would recover under the Court's order the appellant's contribution to this common parental duty to support. This she was fully entitled to do in terms of the order. J.'s position was not affected as he could at any time during the operation of the order have enforced his common law right to an upward variation of the maintenance payable by his parents upon proof of the requisites for such a variation. I cannot, therefore, agree with the submission that the mere fact that J.'s maintenance was payable to the first respondent meant that the maintenance ceased upon his majority.

In the court of first instance **Erasmus J** said (at 1020 E-F of the report) that as a general rule an order to pay maintenance for a minor child to a custodian parent loses its effect when the child attains majority. As authority for this proposition the learned judge relied upon the decisions in the *Richter, Kemp* and *Gold* cases. None of these cases, however, affords authority for a statement of the law so wide in its terms. The Full Court correctly pointed this out. In the *Richter* and *Gold* cases the maintenance orders fixed no time when the payment of maintenance should cease but simply provided for monthly payments of certain sums and nothing more. In these cases it was said that there was an implication in the order that the payment of maintenance was to cease when the child reached the age of majority

or earlier if he or she became self-supporting (*Richter's* case at 91 and *Gold's* case at 239 D). In these cases it was necessary, so it was held, to imply a condition into the order so that proper effect could be given to it. It is not necessary for a decision of the present case to decide the correctness of the decisions in the *Richter* and *Gold* cases. The wording of the order in the present case is quite different and it is not necessary to imply a condition in order to interpret it (cf *Russell v Boughton* 1955 (2) SA 229 (SR)). In *Kemp's* case the maintenance order provided for the monthly payment of a fixed sum of money until the minor reached the age of 18 years. The non-custodian parent successfully applied for a variation of the order before the child reached the age of 18 years in view of the fact that she was earning a monthly income in excess of the amount of maintenance payable. The order was amended to add the proviso that in the event of the child earning more than the amount stated at any time before reaching the age of 18 years, maintenance for her would not be payable and should she earn less the maintenance would be reduced *pro tanto*. In his judgment (at 738 F-G) **Jansen J** referred to *Richter's* case and the implication which was said to arise in that case and stated that it would be undesirable to extend this approach to the case before him. **Jansen J** went on to hold (at 738 *in fine*) that if the order stipulates periodic payment of a fixed sum of money until the minor reaches a certain age there should be no room for an implication that the order will *ipso jure* cease to operate before that time if the minor becomes self-supporting. *Kemp's* case is therefore no authority for the general rule stated by **Erasmus J**.

In the present case the order is clear and unambiguous and there is no room for the implication found in the *Richter* and *Gold* cases. In my view the order means precisely what it says, namely, that the

appellant is obliged to pay maintenance for J. until he becomes self-supporting, even if that occurs after he has attained majority. As I have indicated above, there is no reason in law why a divorce order may not provide for maintenance beyond majority in proper circumstances. An example of such a case is *Raff v Cohen* 1956 (4) SA 426 (C). The consent paper which was incorporated in the court's order provided for the non-custodian parent to pay maintenance for the two minor children in a certain sum per month "until both children shall have married". The non-custodian parent subsequently applied for an order declaring that the order meant that the maintenance would be payable until both children reached majority. In dismissing the application **Newton Thompson J**, referring to the terms of the consent paper, said (at 428 E-G):

> "I can hardly imagine words which are clearer than that, and I see no reason whatever why I should insert a term that that payment of maintenance was to terminate when the unmarried girl became 21. It is just the sort of provision I can imagine parents making to safeguard their daughters. They might well consider that their obligation to the daughter went on to the time of her marriage even if that was after she turned 21."

Although not raised on appellant's behalf it is desirable to consider the question whether the order automatically ceases to operate when J. becomes self-supporting. As explained in *Kemp's* case at 738 E-G, depending on the terms of the order, a maintenance order exists separately from the fluctuations of the incidence of the common law

duty to maintain but may be brought into harmony with that duty by the court at any time. The order is thus not *ipso jure* varied by changed circumstances but remains fully effective until terminated or varied by the court. The order itself may, however, stipulate a period for its operation eg until the child reaches a certain age and it will cease to operate at that stage (*Kemp's* case at 738 E-G).

In my view the present order fixed a time for its duration i e until J. becomes self-supporting and it will cease to operate when that event occurs (or conceivably when J. becomes capable of supporting himself, a matter which I need not decide). Whether that event has indeed occurred may be the subject of dispute but it is an objective fact capable of being established with sufficient certainty.

Notwithstanding the continued existence of an order to pay maintenance it will of course always be open to the parent or other party liable to pay it to raise the defence on the facts that he is no longer so liable, either in whole or in part, e g because the child has become self-supporting. I should point out that such a defence was at no stage raised in these proceedings.

It was submitted that the agreement which was incorporated in the court's order constituted a *stipulatio alteri* in favour of J. with the result that only J. had the right to enforce the obligation to pay maintenance. I do not agree that the agreement was a *stipulatio alteri*. In concluding the agreement the appellant and the first respondent had no intention of conferring a right upon J. which, upon acceptance by or on his behalf, would be a contractual right, a right other than that flowing from their common law duty to maintain J. (*Kemp's* case at 741 F-G and *Total South Africa (Pty) Ltd v Bekker No* 1992 (1) SA 617 (A) at 625 D-H).

A submission in the heads of argument filed on behalf of the appellant that either the Court of first instance or the Full Court should in the exercise of a discretion contended for have granted an order staying or setting aside the writ of execution, was abandoned at the hearing before us. Nothing further need therefore be said about it.

For the reasons given the appeal is dismissed with costs.

W. VIVIER JA.

Nienaber JA)

Howie JA)

Olivier JA)

Plewman JA) Concurred.