IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 598/2011

In the matter between**:**

MARTIN DEON STRYDOM APPELLANT

and

KIM ETHNE STRYDOM RESPONDENT

APPEAL JUDGMENT Delivered on 03 April 2012

SWAIN J

[1] Before us for decision, are an appeal and cross-appeal, in which the parties are equally dissatisfied with an order made by the Magistrate in a maintenance enquiry, in respect of the maintenance payable by the appellant for two minor children, born of the prior marriage between the parties.

[2] The order made by this Court at the time of the parties' divorce on 07 April 2008 in respect of the maintenance of the two minor children, E, a boy born on 03 July 2003 and N, a boy born on 31 August 2006, reads as follows:

"3. That the defendant is directed to pay the following in respect of the minor children:-

a) maintenance at the rate of R2,500.00 per month per child;

b) all reasonable medical, dental and ophthalmic expenses incurred, with effect from the date of the transfer of the immovable property as provided in the settlement agreement dated 7 April 2008;

c) two thirds of all reasonable educational costs reasonably incurred including pre-primary fees, crèche fees, school fees, school clothes, tertiary education, extra mural expenses, sports clothes, sports equipment and all reasonable allied educational expenses."

[3] The appellant applied at the hearing on 05 September 2011 for this order to be discharged and to be replaced with an order, in terms of which the maintenance payable by the appellant, would be reduced to an amount of R1,000.00 per month per child, and his liability to pay for the defined medical and educational expenses, would be reduced to fifty percent of such expenses. The appellant also applied for such reduction to be retrospectively applicable from 01 March 2011. The respondent opposed any such reduction in the maintenance liability of the applicant. The Magistrate acceded to the applicant's request to reduce the amount of maintenance payable, but not to the extent sought by the applicant, reducing it to R1,500.00 per month per child, but to have retrospective effect from

01 March 2011. The Magistrate however did not accede to the applicant's request, to reduce his percentage liability for the payment of the defined medical and educational expenses.

[4] At the outset of the appeal Mr. Shapiro, who appeared for the respondent, applied for condonation for the late noting of the respondent's counter appeal, which was not opposed by Mr. Podbielski, who appeared for the appellant. We accordingly granted an order of condonation in this regard.

[5] The reason advanced by the appellant as to why a reduction in the maintenance payable by him for his minor children was justified, was solely because his salary had unexpectedly dropped at the beginning of 2011. He said that it had also dropped the year before in 2010, but he did not apply for a reduction in the maintenance payable at that time. However, because his salary had dropped again, he had reached the point where he had to apply for a decrease in the amount of maintenance payable. He added "if my salary didn't drop I would be in a position to pay that maintenance. I cannot right now."

[6] The appellant stated that his annual salary was determined at the beginning of each year, by reference to the amount of sales he had achieved in the previous year. Mr. Cocking, the National Branch Manager of the company which employs the appellant, confirmed this was the manner in which the appellant's annual

salary was calculated.

[7] It is therefore clear, that the crux of the matter was whether the appellant was financially able, to pay the maintenance demanded of him in terms of the order of this Court, and not whether the needs of the minor children, justified the payment of such maintenance.

[8] The main thrust of Mr. Shapiro's argument, was that the appellant was obliged to show a change in the conditions that existed from when the original order was made in 2008, but that the appellant had not given any evidence to prove what those conditions were. Consequently, he submitted the Magistrate erred in reducing the maintenance payable.

[9] It is so that in the case of

Roos v Roos 1945 TPD 84 at 88

which concerned the variation of a maintenance order, in respect of a divorced spouse and whether "good cause" had been shown for such a variation, within the meaning of that term, contained in the Matrimonial Affairs Act 37 of 1953, Schreiner J (as he then was) had the following to say:

> "Variation will be ordered not only in cases of breach by either party but because there has been such a change in the

conditions that existed when the order was made, that it would now be unfair that the order should stand in its original form".

[10] Likewise in

Havenga v Havenga 1988 (2) SA 438 (T) at 445 C - F

Harms J (as he then was) held that in regard to an application by a divorced spouse, to vary the maintenance payable to the former spouse, that as a general proposition, in the absence of a real change in circumstances, there would not be sufficient reason for a change. However, he added there could be circumstances where reasonable grounds existed for the variation of a maintenance order, even where there was no real change in circumstances.

[11] However in

Hossack v Hossack 1956 (3) SA 159 (T) at 163 F – H

Ludorf J drew a distinction between the "good cause" to be shown when an applicant seeks to vary maintenance payable to a divorced spouse, and when a variation is sought in respect of the maintenance payable to minor children. In the latter event he had the following to say:

"An applicant need usually only show an ability on the part of the respondent to pay more and a need that more should be paid".

The most important factor is the needs and welfare of the children. The payment of maintenance for minor children, is a priority, in the demands upon the resources of the individual liable for the payment of such maintenance.

[12] In the light of the fact that the needs of the minor children for the original maintenance payable was not challenged, and the appellant maintained that the only reason he was applying for a reduction in the maintenance, was because of a reduction over two successive years in his salary, the issue was whether the appellant had demonstrated an inability to pay the maintenance required.

[13] It was accordingly incumbent upon the appellant, not merely to show a reduction in his salary, but also an inability on his part to pay such maintenance. In this context, I do not agree that it was an absolute necessity for the appellant to show a change in his circumstances, from those which prevailed in 2008, before a reduction in the maintenance payable by him could be considered. A change in such circumstances, whether for the better, or for the worse, is however a factor to be considered.

[14] As regards the ability of the appellant to pay the required maintenance, there are certain aspects of his evidence, as high-lighted in cross-examination, which require closer examination.

[14.1] An expense claim by the appellant was an amount of R1,391.00 per month, in respect of retirement annuity payments. The appellant agreed that he could stop these payments, but he did not think it was a wise thing to do. The Magistrate agreed, finding that it is a basic prudent provision for the future that any working person could "hardly afford to do without". This is obviously so, but what is required of the appellant, is not a permanent cessation of such contributions, but a temporary suspension of their payment, until the appellant is again in a financial position to pay them. The priority must be the support of his minor children.

[14.2] An amount of R663.63 per month, was claimed by the appellant, in respect of a loan he received from his father, to enable him to pay some of his bills. His father had obtained a loan from ABSA, to lend him the money. The appellant agreed that he had no legal obligation to pay this money to his father. On the appellant's evidence it is apparent that his parents have been assisting him in various ways, to look after and support the children, when they were staying with the appellant. The Magistrate's views in this regard were simply that it was put to the appellant that it was a moral obligation and not a legal obligation, but "it has not been suggested how the applicant can get out of this obligation". It was never suggested that the appellant should avoid repaying the loan altogether. In my view, it would not be unreasonable to expect of the appellant, to temporarily suspend the repayment of the loan to his father, in order to properly support his minor children. The appellant did not state that his father was financially dependant upon the appellant,

repaying the loan at the rate of R663.63 per month, at present. There was no evidence to support the Magistrate's statement that suspending payment of the loan would "upset his relations with his parents". I would expect that knowing the reason was to properly support their grandchildren, they would be understanding of the appellant's predicament.

[14.3] The appellant claimed an amount of R380.00 per month for clothes and shoes, and stated that over the past few months he had bought a few items. He agreed that he did not buy items every month. Again, I do not regard this claim as one that should take precedence over the appellant's obligation to support his children. Again the Magistrate's view that the appellant may "end up not buying any clothing at all. Even after divorce, a person is still entitled to some dignity and decency" is not supported by any evidence. There is no evidence to show that the state of the appellant's clothing, is such that if he does not buy new clothes he will be reduced to a state where his dignity will be impaired. Again the interests of his minor children are paramount.

[14.4] A further expense claim by the appellant was an amount of R400.00 in respect of entertainment expenses. When it was put to him in cross-examination, that this was an additional expense, which could be saved, his reply was "so you're saying that basically now that I am divorced I cannot have entertainment for a whole year". In my view, if the alternative is that the appellant's minor children are not properly supported, this is precisely what it means. Other than finding that the expenses incurred by the appellant, in eating out

were not extravagant, in finding that these took place before March 2011 and therefore had nothing to do with the present application, the Magistrate did not deal with the appellant's claim in this regard.

[15] I am therefore satisfied that the Magistrate erred, in disregarding these reasonable savings in the appellant's expenses, which total an amount of R2,834.00 per month. When the amount tendered as maintenance by the appellant of R2,000.00 per month is added to this saving, a financial ability on the part of the appellant to afford payment of an amount of R4,834.00 as maintenance, is demonstrated. This is sufficiently close in proximity to the previous maintenance payable of R5,000.00 per month, to justify a finding, that the Magistrate erred in reducing the amount of maintenance, to an amount of R3,000.00 payable per month, in respect of both children.

[16] In the light of the conclusion I have reached it becomes unnecessary to consider the argument advanced by Mr. Shapiro, that the appellant had failed to prove a change in his circumstances, since the grant of the original order in 2008, to justify a reduction in the maintenance payable.

[17] Before dealing with the degree to which the appellant remains liable to pay for the medical and educational expenses, which was challenged by the appellant on appeal, it is necessary to consider

an application which was brought by the respondent, in terms of Section 22 (a) of the Supreme Court Act No. 59 of 1959, that certain evidence be received by this Court on appeal. In the alternative, the respondent sought an order remitting the matter to the Court *a quo,* which was "directed to take the further evidence of the parties regarding the payments made to the appellant and the quantum of his current salary".

[18] The appellant opposed the relief claimed and did not in the alternative, concede that the matter should be remitted to the Court *a quo*. In addition, no conditional counter-application was brought by the appellant, seeking leave to place evidence before this Court, in the event that this Court was disposed to grant the order prayed by the respondent. The appellant simply alleged that he would be severely prejudiced should the evidence be admitted on appeal. He alleged that he should not be forced at short notice, to deal with and explain in his affidavit, various deposits into his bank account, how they had been utilised and his current financial position, as this would re-open the entire enquiry.

[19] It is clear that an applicant for leave to place evidence before a court on appeal, must satisfy the following requirements:

[19.1] There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead, was not led at the trial.

[19.2] There should be a *prima facie* likelihood of the truth of

the evidence.

[19.3] The evidence should be materially relevant to the outcome of the trial.

State v de Jager 1965 (2) SA 612 (AD) at 613

[20] The respondent alleged that the appellant's bank, had continued to send email messages to her of payments made into the appellant's cheque account at First National Bank, Account No. 53771095157. She then annexed to her affidavit, printouts of the e-mail messages sent to her on certain dates. The appellant's reply was that the respondent operated his bank account with his permission, up until the parties were divorced in 2008, and he was unaware that the respondent continued to receive emails from his bank, detailing movements on his cheque account. He added that he found it "disturbing" that the respondent had not told his bank, or himself, that this was happening.

[21] The contents of these emails were as follows:

[21.1] On 21 November 2011, an amount of R26,975.25 was paid into the Appellant's account ("095157") which, according to the respondent, appears to be a refund from the South African Revenue Services;

[21.2] On 22 December 2011, an amount of R34,982.00 was

paid into the Appellant's cheque account ("095157"), with a reference indicating that it was his salary, according to the respondent;

[21.3] On 01 March 2012, an amount of R25,219.80 was paid into the Appellant's cheque account ("095157"), with a reference indicating that it was his monthly salary, according to the respondent.

[22] The appellant's reply to these allegations was simply to state that they were noted, without either admitting or denying them. In the context of the other averments made by the appellant in this regard, I am satisfied that there is a *prima facie* likelihood of the truth of the evidence set out above.

[23] It is in respect of the other two requirements for the admission of this evidence, that I have cause for concern. This is because these requisites are predicated upon the objective existence of the evidence at the time of the trial. The evidence could only have been of material relevance to the outcome of the trial, if it was in existence at that time. Although the reason for the evidence not being led at the trial, was because it was not in existence, this is quite obviously not the situation that the learned Judges of Appeal had in mind in de Jagers case. However, Holmes J A added the following at page 613 E – F (after setting out the quoted requirements).

"Non fulfilment of any one of these requirements would ordinarily be fatal to the

application, but every case must be decided on its particular merits, and there may be rare instances where, for some special reason, the Court will be more disposed to grant the relief".

In addition, in the case of

S v E B 2010 (2) SACR 524 (SCA) at paragraph 5

evidence of facts and circumstances which arose after sentence, was allowed to be adduced on appeal, where there were exceptional or peculiar circumstances present.

[24] It is clear that in terms of Section 28 (2) of the Constitution, a child's best interests are of paramount importance, in every matter concerning the child. This is echoed in Section 9 of the Children's Act No. 38 of 2005 (the Act) which provides as follows:

"In all matters concerning the care, protection and well being of a child the standard that the child's best interest is of paramount importance, must be applied".

In terms of Section 18 (2) (d) of the Act the parental responsibility, includes the obligation to contribute to the maintenance of the child.

[25] As stated by van Zyl J in

Girdwood v Girdwood 1995 (4) SA 698 (c) at 708 J

"As upper Guardian of all dependent and minor children, this Court has an

inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded".

[26] The danger of a party, having seen where the weakness lies in his/her case and shaping evidence to meet the difficulty (de Jager at 613 B – C) does not arise in the present case. That it is not in the interests of the administration of justice, that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified, is clear.

De Jager at 613 A – B

[27] I regard the present case however as a "rare instance" where for a "special reason" on its "particular merits" the request by the respondent to place such evidence before this Court should be permitted. The case is one where "exceptional circumstances" are present by virtue of the following factors:

[27.1] That an amount of R26,975.25 was paid to the appellant, as a refund from SARS on 21 November 2011, is directly relevant to the ability of the appellant, to pay the arrear maintenance claimed by respondent of R20,000.00, together with outstanding medical and educational expenses, totalling R25,569.37. It should be noted that as from March 2011, the appellant unilaterally reduced the maintenance payable for the minor children, despite the terms of this Court's order.

[27.2] That an amount of R34,982.00 was paid to the appellant as his salary on 22 December 2011, is directly relevant not only to the ability of the appellant to pay the balance of the said arrears, as well as his ability to pay maintenance at the original figure. Whether this amount possibly includes a bonus is impossible to say, because the appellant has chosen not to take this Court into his confidence.

[27.3] That an amount of R25,219.80 was paid to the appellant, as his salary on 01 March 2012, in the context of the evidence that his salary for 2012, would be calculated in February 2012, it seems to me safe to assume, in the absence of any evidence from the appellant to the contrary, that this is the salary of the appellant for 2012. This salary constitutes an increase of R2,254.75 over the appellant's salary for 2011. When regard is had to the fact that the Magistrate (incorrectly in my view) reduced the maintenance payable by the appellant, by an amount of R2,000.00 on the basis of the appellant's reduced salary, it is clear (even on the Magistrate's reasoning) that the appellant is able to afford the original maintenance payable.

[28] In a case such as the present, this Court as the upper Guardian of minor children, is obliged to allow the admission of this evidence, as it is relevant to ensure that the minor children are properly maintained. To ignore this evidence, in my view, would be tantamount to a failure by this Court, to ensure that the interests of the minor children were properly safeguarded.

[29] To remit the matter to the Magistrate to hear this further evidence, would delay matters. The determination of an adequate amount of maintenance for the minor children, is a matter of urgency, particularly when regard is had to the large amount of maintenance that is in arrears and has not been paid, to the prejudice of the minor children. If the appellant's expenses have increased since the end of September 2011 (when the Magistrate granted the order) to such an extent, that the appellant maintains that he is nevertheless unable to pay the maintenance, he would obviously be entitled to apply for a variation in the order. Be that as it may, the appellant in the light of the additional evidence, is well able to afford the original maintenance payable.

[30] As regards the costs of the appeal, the respondent has achieved substantial success, without regard being had to the additional evidence placed before this Court. On this basis alone the respondent would be entitled to the costs of the appeal. Although I have found that the appellant is able to afford the arrear maintenance and outstanding amounts payable, which apart from an amount of R3,000.00 (which the respondent conceded the appellant had paid) the appellant did not contest the accuracy of, the respondent in the Court *a quo* did not ask for an order that the appellant be ordered to pay the arrears. On appeal the respondent likewise did not seek such an order. It would accordingly be inappropriate for this Court to make such an order at this stage.

The order I make is the following:

(a) The evidence contained in Annexures “FA1”, “FA2” and ’FA3”, to the respondent’s founding affidavit, in support of the respondent’s application for leave to place further evidence before this Court, is received as evidence in the appeal.

(b) The appeal is dismissed with costs.

d) The cross-appeal is upheld, with costs.

e) The order of the Court *a quo* is set aside and replaced with the following order:

“The applicant’s application for a variation of the order granted by the High Court of South Africa, Durban & Coast Local Division, under Case No. 11068/2007 on 07 April 2008 is dismissed”.

I agree

K. SWAIN J **J. MNGUNI J**

Appearances /

Appearances:

Counsel for the Appellant	**:**	L. M. Podbielski
Instructed by		Louis M. Podbielski Attorneys Durban C/o Austen Smith Pietermaritzburg
Counsel for the Respondent:		Mr. W. Shapiro
Instructed by	**:**	McLung Mustard Pinetown C/o Geyser du Toit Louws & Kitching Pietermaritzburg
Date of Hearing of Appeal	**:**	19 March 2012
Date of Judgment	**:**	03 April 2012