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CASE NO: A3114/2006

JOHANNESBURG

In the matter between:

FORSSMAN, S. Appellant

and

FORSSMAN, A.C.G. Respondent

JUDGMENT

SALDULKER, J and LEVENBERG, AJ

I. BACKGROUND FACTS

1] This is an appeal against a decision of the Randburg Magistrate's Court to increase the maintenance payable by the Appellant to

the Respondent in connection with their 8 year old son, B.

2] The Appellant and the Respondent were divorced during June 2004. Pursuant to an agreement of settlement concluded between the parties, the Appellant agreed to pay R2 200,00 per month in maintenance, increasing annually against CPI.

3] The minor child (who was born in 1999) was five years old at the time of the divorce. At the time when the application for increased maintenance was heard in 2006, B was seven years old.

4] The Appellant (the husband) was the plaintiff in the original divorce proceedings between the parties, and the Respondent was the defendant. The parties executed an agreement of settlement ("the settlement agreement") which was made an order of Court, which governed their proprietary rights after divorce.

5] Pursuant to clause 4.1 of the settlement agreement, the Appellant undertook to pay maintenance to the Respondent in an amount of R2 200,00 per month. In addition (pursuant to clause 4.3), the Appellant was to *"ensure that the child is at all times registered*

as a member of a fully comprehensive medical aid scheme and pay the monthly contributions due in respect of the child's said membership." In addition, any medical expenses borne by the Respondent were to be reimbursed within seven days of presentation of an invoice therefor. To the extent that any medical expenses were not covered by the relevant medical aid scheme, the expenses were to be borne equally between the parties.

6] The Respondent was awarded custody of the minor child. The Appellant was to have reasonable access, every alternate weekend and for two weeks vacation per annum.

7] The settlement agreement required the Respondent to pay the Appellant an amount of R170 969,00 in two equal instalments in consideration for the transfer to the Respondent of the Appellant's interest in the matrimonial home. The Respondent has apparently paid this amount to the Appellant and she is now the owner of the matrimonial home.

8] At the time when the application for an increase was brought, the Respondent occupied a senior position at the JSE in Sandown, where she was employed as Senior General Manager. Based on the evidence, it appears that the Respondent's annual income, inclusive of bonus, is an amount of R1 300 000,00.

9] The Appellant occupies a senior position with Deutsche Bank in Sandown. While it is our opinion that the Appellant made an inadequate showing of his actual earnings, he testified at the trial that his earnings were R765 000,00 per annum, including bonus. For purposes of this judgment, we assume in his favour that this is in fact his annual income.

10] At the time of the Magistrate's Court hearing, B was attending school at Marist Brothers St David's, which is very close to the place of work of both the Appellant and the Respondent. We are satisfied from the evidence that B was enrolled in that school with the consent of the Appellant. Indeed, the Appellant conceded, in the process of his cross-examination of the Respondent at the trial, that he considered this school to be *"a*

reasonable school" and *"cheaper than some of the other schools"*.

11] The Appellant has two children from a prior marriage. Neither of them live with him. The oldest is attending university at the University of the Witwatersrand The second child was in matric at the time of the hearing and it was anticipated that that child would go to university in Cape Town.

12] Neither of these two children live with the Appellant. The Appellant tendered no concrete evidence of the expenses that he incurred on a monthly basis with respect to these two children.

13] The Appellant currently lives with a female companion, whom he refers to as his *"girlfriend"*. She is the owner of the property in which the Appellant resides.

14] The Appellant testified that, by agreement with his companion, he contributed R7 000 to the running expenses of their household. He did not demonstrate how this amount was calculated.

15] The Respondent sought an increase in the maintenance in terms of section 6(1) of the Maintenance Act, 99 of 1998 ("the Act") in the following terms:

15.1] Payment of the sum of R4 000 per month to be increased by CPI on 1 January each year.

15.2] Payment of 50% of the school fees, uniforms, extramurals and extramural clothes of the minor child.

15.3] The Respondent would undertake all responsibility for the child's medical expenses.

16] During the course of argument, the Appellant contended that the amount of R5 000,00 per month awarded by the learned Magistrate was greater than the amount that had been claimed by the Respondent. This is not correct. If one takes into account the school fees, the amount claimed in fact exceeds R5 000,00.

17] In any event, even if the Magistrate had awarded a larger amount than was claimed by the Respondent, the court, as the Upper

Guardian of all minors, had every right to ensure that a proper maintenance award was made in the circumstances.

18] The grounds (or *"good cause")* proffered by the Respondent for seeking an increase in maintenance were:

> "Initial misrepresentation of income. Under-estimated child support costs and lack of compliance with court order (i.e. medical costs & visitation)."

19] During the course of testimony it emerged that the Respondent, as the custodial parent, was paying B's medical expenses on an ongoing basis as and when they were incurred. Thereafter she would seek reimbursement from the Appellant. The Appellant tended to delay in submitting claims to the medical aid and in reimbursing the Respondent.

20] The Appellant agreed that there should be an increase in maintenance up to an amount of R3 500,00 per annum. This amounts to a concession that there is *"good cause"* for an increase in maintenance within the meaning of section 6 of the Act.

21] The Appellant maintained that there should be no maintenance increase to cover medical aid and medical expenses and that the existing arrangement should continue.

22] The parties were unrepresented at the trial of the matter.

23] The Respondent asserted monthly expenditure in connection with the minor child of R26 149,00. The learned Magistrate, in her detailed reasons, carefully considered every single expense claimed by the Respondent and significantly pared her claim down. The Magistrate concluded that the total monthly expenses that should appropriately be allocated to the minor child amounted to R15 490,00.

24] We can find no fault with the manner in which the Magistrate calculated that the total monthly expenses associated with the minor child were in the amount of R15 490. Accordingly, it is not necessary to further analyse the manner in which she dealt with the individual amounts claimed.

25] We are satisfied that the learned Magistrate erred in so far as she

found that the Respondent's real annual income was nearly R1,8 million. The correct annual income of the Respondent inclusive of bonus, is R1,3 million.

26] Assuming that the Magistrate had recognised the correct income figure for the Respondent, the Appellant would have had to contribute 37% of the expenses associated with the minor child rather than merely 30%. This would have resulted, on the Magistrate's reasoning, in a maintenance award in favour of the Respondent of R5 738,00. Accordingly, the Magistrate's error is one that favours the Appellant.

27] The Appellant appealed against the maintenance award of the learned Magistrate.

II. DISCUSSION

28] The Appellant relied heavily on the decision of the Zimbabwe Supreme Court in *Acutt v Acutt* **1990 (4) SA 873 (Z)**. Based upon *Acutt*, the Appellant contended that:

> "The starting point in allocating expenses is to allocate those expenses that do not relate only to the child as to 1/3 for the child and 2/3 for the parent."

29] On this reasoning, the Appellant then argued that certain of the expenses allocated to B should have been further pared down by an amount totalling R1 430,00.

30] We have reviewed *Acutt* and we are satisfied that the Appellant has misinterpreted the judgment of the court in that matter.

31] In *Acutt* the Court held that **in the case of an application for maintenance *pendente lite***, the appropriate maintenance for a child should be calculated by adding *"the net monthly incomes of the parties [i.e. the parents] and then apportion[ing] the total as to one share per child and two shares per adult."*

32] Applied to the facts of the present case, such an approach would result in a significantly higher award of maintenance in favour of the child. In applying *Acutt* in this matter, the net **combined income** after tax of the Appellant and the Respondent would have to be divided by five (i.e. two portions for each of the

parents and one for the minor child) and the minor child would be entitled to receive a one-fifth portion. The obligation to fund that one-fifth portion would then have to be allocated between the parties *pro rata* according to their respective incomes. Such a calculation would have resulted in a much larger maintenance award against the Respondent.

33] It is important to note that the approach of the Court in *Acutt*, which is both robust and practical, is to focus on the **income** of the parties rather than their **expenses** The implicit assumption is that it can be anticipated that children of parties who earn a certain income are entitled to expect a certain living standard.

34] The approach in *Acutt*'s case is generally better suited to applications for maintenance *pendente lite* than to more permanent final divorce judgments or post-divorce awards which are usually made by agreement or after hearing full evidence on the parties' income and expenditure. However, it is an approach that has considerable practical appeal in resolving maintenance issues, even after the parties have been divorced.

35] In the present case, the Appellant relied heavily on *Acutt* As the "*pure Acutt"* approach ignores the expenses incurred by the parties, we find that the Appellant's reliance on *Acutt* (which was not withdrawn during the course of argument) is probably dispositive of the matter.

36] In fact, in adopting the *Acutt* approach in the present type of situation it is probably appropriate to tailor it based upon **concrete evidence** of unusual expenses that are not taken into account in the *Acutt* formulation. No such evidence was forthcoming.

37] Accordingly, the contention that the Appellant should pay less because he is also responsible for the maintenance of two other children from a previous marriage cannot be sustained because the Appellant failed to establish exactly how much maintenance he is paying with respect to the two older children. Even if he has two other children, the amount that he has been ordered to pay to the Respondent for the maintenance of their minor child is not excessive having regard to his income and station in life.

38] The Appellant maintains that his monthly household expenses amount to R7 000,00, because that is what he currently contributes to the upkeep of his companion's household, a home in which he currently lives rent free. The Appellant made no attempt to justify these expenses as being reasonable or necessary. The fact that the Appellant and his companion have arbitrarily fixed upon that number cannot at this stage prejudice his minor child.

39] The Appellant's contention that the Respondent is not entitled to claim the costs of a private school education for the minor child is also without foundation. The parties appear to be well educated. They earn a substantial income. A child from that background has every right to expect a quality education, as was apparently recognised by the Respondent at the time when the child was initially enrolled in the school with his support and consent. In any event, it was not demonstrated that there is any significant cost differential between the fees that would be incurred for sending the child to a Model C school and the fees charged by Marist Brothers St David's.

40] The increase in maintenance is also partly due to the fact that the learned Magistrate accepted that the Respondent should be allowed to pay the minor child's medical expenses in the future, with the Appellant now paying the Respondent an allowance to cover what was previously his portion of those medical expenses.

41] We find this decision of the learned Magistrate to be correct The Respondent testified that, as a practical matter, she has had to pay for the minor child's medical appointments at the time when the child attends those appointments and thereafter wait for reimbursement from the Appellant, even though the Appellant often delays in effecting the reimbursements. This is an undesirable situation. If the Respondent is *de facto* having to pay medical expenses as and when they occur, she should not have to be dependent upon the Appellant's goodwill in the future.

42] We find the learned Magistrate's decision concerning maintenance to be entirely appropriate. Her decision takes into account the best interests of the child and it fully recognises parental responsibilities as they have now been enshrined in The

Children's Act, 38 of 2005 ("the Children's Act"). We are fully cognisant of the fact that the Children's Act was not applicable at the time when the Magistrate rendered her decision. However, the parental responsibilities and rights as recorded in section 18 of the Children's Act appear in any event to be largely in accordance with the obligations of parents under the common law.

43] We note that, while the Appellant and the Respondent were married to each other, they enjoyed a very comfortable lifestyle. They are both educated people earning very large incomes. There is every reason why they should be obliged to provide their minor child with the educational opportunities which in today's world would allow their child to enter the same socio-economic group as the one in which the parents live and work.

44] During the course of argument it was contended for the Appellant that the Respondent has chosen too lavish a lifestyle for the minor child. This is an inappropriate submission. In fact, in the manner in which the expenses of the minor child have been

apportioned between the Appellant and the Respondent, the Respondent is in any event bearing the lion's share of responsibility for the child's maintenance. The Appellant should, as a parent, be pleased that the income of his ex-spouse is so high as to provide for his minor child a lifestyle which he himself would wish to enjoy if he were growing up in South Africa at this time.

45] We feel it necessary to comment on the Appellant's conduct in bringing the present appeal. The differential between the amount awarded by the learned Magistrate and the amount that the Appellant has conceded he should be paying is slightly in excess of R1 000. The Appellant has probably by bringing this appeal effectively squandered the maintenance differential between the parties for a period of several years. It would have been far more preferable for the Appellant to have given due consideration to the true interests of his minor child rather than dissipating this kind of money on unnecessary legal fees. This is a classic case in which the Appellant's anger with his ex-wife has unfortunately clouded his judgment. He has lost sight of his obligation to

properly maintain the child that he chose to bring into the world.

46] In this context the Appellant submitted that, if we dismiss the appeal, we should order that each party pay his/her own costs. The Appellant contended that it would cause a greater divide between the parties if the Appellant were to have to pay the Respondent's costs.

47] We do not agree with this reasoning. The Appellant is the one who chose to prosecute this appeal, not the Respondent. If costs are not awarded in favour of the Respondent, the effect of the maintenance increase would be eaten up by the costs that the Respondent has had to incur to defend the Magistrate's judgment.

48] The Appellant did not act in the interests of his minor child when he prosecuted this appeal. He must accept the consequences.

49] Accordingly, we make the following order:

1. The appeal is dismissed.

2 The Appellant is ordered to pay the Respondent's costs incurred in the appeal.

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SALDULKER, J
JUDGE OF THE HIGH COURT

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P.N. LEVENBERG, AJ
ACTING JUDGE OF THE HIGH COURT

Date of Judgment: 23 August 2007

APPELLANT ATTORNEY: THOMSON WILKS INCORPORATED

APPELLANT COUNSEL: ADVOCATE PYE

RESPONDENTS ATTORNEY: CARVALHO, HILL AND ASSOCIATES

RESPONDENTS COUNSEL: ADVOCATE A.R.G. MUNDELL