REPUBLIC OF SOUTH AFRICA

74/97

Case No: 127/95

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

JANET NORA SPARKS Appellant

and

TREVOR DUDLEY SPARKS Respondent

Coram: Mahomed CJ, Smalberger, Howie, Zulman JJA, et Streicher AJA

Heard: 21 August 1997

Delivered: 19 September 1997

JUDGMENT

MAHOMED CJ:

The Respondent who is a chartered accountant was married to the Appellant who is a saleslady in a departmental store. There are two children born of this marriage. They are Jessica, a daughter, born on the 4th of December 1978 and David, a son, born on the 13th of June 1980.

The marriage between the parties was dissolved on the 4th of April 1984. By consent an order was made by the Court, directing the Respondent to pay maintenance at the rate of R200 per month, in respect of each of the said children and the Appellant. The total maintenance payable by the Respondent was therefore R600 per month.

In terms of the order, however, the obligation of the Respondent to pay maintenance at the rate of R200 per month to the Appellant personally, was to cease if the Appellant remarried or cohabited with any other man after the order of divorce became operative. Some years later the Appellant did in fact begin cohabitation with a boyfriend, and from sometime in 1989 the Respondent ceased paying any maintenance to the Appellant personally. The payments in respect of each of the minor children were increased by R50. The total monthly maintenance thereafter paid by the Respondent was R500, consisting of R250 in respect of each child. The Respondent therefore effectively reduced his obligation from R600 per month to R500 per month.

The costs of maintaining the two minor children continued to increase in the ensuing years, and the Appellant therefore made an application to a Magistrate in terms of the Maintenance Act No 23 of 1963 ("the Act"), for an order, to increase the amount which the Respondent was required to pay in respect of the maintenance of the children. She sought maintenance in the sum of R500 each for Jessica who was then fifteen years old and David who was thirteen.

The application was vigorously resisted by the Respondent in proceedings which went on for seven court days. The record consisted of some six hundred pages.

The Magistrate who presided at the hearing carefully and thoroughly assessed the evidence. She concluded that the reasonable costs of maintenance in respect of David and Jessica was R1032 and R950 per month respectively. She was satisfied that the Appellant's gross income was only

R950 per month. She ordered the Respondent to pay an amount of R1700 per month consisting of R800 in respect of maintenance for Jessica and R900 in respect of David.

The Respondent lodged an appeal against this order in the Cape of Good Hope Provincial Division of the then Supreme Court, on the 15th of July 1993. The fact that an appeal then became pending did not, however, operate to suspend the obligations of the Respondent to make maintenance payments in the amount of R1700 per month in the interim. This is because section 7(4) of the Act provides that an appeal against a maintenance order in terms of the Act shall not suspend the payment of maintenance in accordance with the relevant maintenance order ("unless the appeal is noted against a finding that the appellant is legally liable to maintain the person in whose favour such maintenance order was made").

Since the Respondent's appeal to the Cape Provincial Division was only against the quantum of the maintenance he was ordered to pay, he became obliged to and did in fact pay the amount of R1700 per month, ordered by the Magistrate, throughout the period of approximately nine months which elapsed before the appeal was heard.

The appeal was heard by Conradie J and Viljoen AJ on the 18th of March 1994. The judgment on appeal was given by Viljoen AJ. The learned Judge referred to an "arguable item" of R92,00 per month and he held that:

"Suffice it to say that but for this one arguable item, I agree with the presiding officer's finding that reasonable maintenance for the parties' son was at the time R1032,00 per month and for their daughter R950,00 per month"

The Court also accepted that the gross income of the Appellant was R950 per month, but it nevertheless substituted for the order made by the Magistrate an order which obliged the Respondent to pay only the sum of R500 in respect of the maintenance of each child because:

"... a Maintenance Court should in my opinion be slow to go beyond what the custodian parent claims."

The effect of this substitution, without any qualification, was to put the Respondent in a position to claim repayment of the excess of R700 per month which he had paid pursuant to the Magistrate's order in the interim period which had ensued from the date of that order and the date of its substitution on appeal.

The Respondent was quick to assert this advantage. Within a few days after the order made on appeal, he wrote a letter to the Appellant claiming repayment of the excess payments amounting to R6300. In the alternative he offered to recover the amount plus interest by reducing the maintenance installments payable in the future but subject to some outrageous conditions, including a condition which effectively amounted to a transfer of custody of Jessica to him and a cessation of his obligations to make monthly payments in respect of maintenance of Jessica ordered by the Court.

The Appellant reacted to this development through her legal representatives by making an application for leave to appeal against the order made by the Cape Provincial Division.

This application was again heard by Conradie J and Viljoen AJ. Mr Slabbert from the office of the Attorney-General in Cape Town who has at all times appeared as *amicus curiae* for the Appellant drew the attention of the Court to the effect of the order made by it and the claim for repayment asserted by the Respondent. He submitted that the unqualified form of the order had created legal consequences which the Court could never have intended and he asked that the order made on appeal be made effective only from the date of that order. He submitted that section 7(2) of the Act which entitled a Court on appeal to make any order "it may deem fit" permitted this course.

The Court held that having made the order which it did, it was *functus officio* and could therefore not alter that order. It granted the application for leave to appeal to this Court, but it ordered that pending the finalisation of the appeal the Respondent was to continue to pay the maintenance which he had been ordered to pay in terms of the order made by it on 18 March 1994.

It is clear from the judgments in the application for leave to appeal, that the Court had made its order on appeal, in the form which it did, without applying its mind to the discretion vesting in it in terms of section 7(2) of the Act, without knowing that the Respondent had been making payments of maintenance in the period which had elapsed since the appeal against the Magistrate had been lodged, without appreciating the consequences of that fact and without having accorded to Mr Slabbert the opportunity of being heard on these matters. Both Judges have stated that they

would have made the order contended for by Mr Slabbert if they had afforded him an opportunity of being heard on these matters and if they had in consequence of this been made aware of the facts brought to their attention during the hearing on the application for leave to appeal.

This is not a case in which we are asked to interfere with a discretion exercised by a Court whose judgment is attacked on appeal. The grounds on which it could do so are limited.

The Court, *in casu*, never applied its mind to the suitability or desirability of an order in terms of section 7(2) making the reduction of the maintenance payable by the Respondent effective only from the date of its order and not from the date of the order made by the Magistrate. We are therefore entitled to apply our minds to section 7(2) and to exercise our own discretion as to whether or not the maintenance order made by the Court *a quo*, should be made effective only from the date of its order.

The object of section 7(2) is clearly to enable a court hearing an appeal from a Maintenance Court, to make such orders as are necessary or suitable to ensure justice and fairness in the circumstances of each case. The section can therefore properly be invoked to make the substituted order of reduced maintenance by the Court *a quo*, effective only from the date of that order, if the unqualified effect of the order would otherwise be likely to cause undue hardship to the Appellant or to prejudice the legitimate needs of the minor children sought to be protected by the maintenance order.

According to Mr Slabbert, it was common cause between the parties during the application for leave to appeal in the Court *a quo* that the "excess" amounts in the sum of R700 per month paid by the Appellant during the nine month period which intervened between the noting of the appeal against the order of the Maintenance Court and the date of the order of the Cape Provincial Division on appeal, had all been spent by the Appellant on the maintenance of the minor children of the marriage and that she was in no position to repay any portion of these monies to the Respondent.

Although there is no direct evidence before us to show whether or not the Appellant used the "excess" payments made by the Respondent on the maintenance of the children or whether or not she is in a position to repay such monies, the circumstantial evidence disclosed by the objective facts, is perfectly consistent with the submission made by Mr Slabbert.

Both the Maintenance Court and the Court *a quo* on appeal found that the amount necessary for the reasonable maintenance of the children exceeded R1900. The Respondent herself earned a gross amount of only R950. The "excess" payments received from the Respondent would therefore clearly have been needed to cover the shortfall (which had been augmented by the boyfriend of the Appellant but who was under no lawful obligation to do so). This was a continuing and pressing need, which would have absorbed all the available resources of the Appellant. She was therefore compelled to use the services of an *amicus curiae* to conduct her case and had difficulty in finding security for the Respondent's costs on appeal. The letter from the Respondent offering to give terms on which the Appellant could make the repayments of the excess which the Respondent had paid during the period pending the appeal, would also suggest

that, to the knowledge of the Respondent, the Appellant had no resources to afford such repayments immediately.

It is therefore clear that unless the order made by the Court *a quo* on appeal is qualified in terms of section 7(2) of the Act, it would have the effect of actually reducing the monthly amounts of maintenance of the minor children which the Court had determined. This is a hardship which was never intended by the Court *a quo* when it made its order, and is plainly unjustified by the circumstances. It is, however, a result which can and should be avoided by making that order effective only from the date upon which it was given.

In the result I make the following order:

Order:

1. The Appeal is upheld.
2. The orders made by the High Court of the Cape Provincial Division are set aside and substituted by the following:

    "(a) The Respondent Trevor Sparks is ordered to pay to the Appellant Janet Sparks an amount of five hundred rand per month in respect of the maintenance of their son David and five hundred rand per month in respect of the maintenance of their daughter Jessica.

    (b) This order shall be effective only from the 18th of March 1994, and payment of the first installment in terms of the paragraph (a) shall commence on 1 April 1994.

    (c) It is declared that:

        (i) all payments in respect of the maintenance for the said minor children made by the Respondent Trevor Sparks to the Appellant

Janet Sparks during the period 30th June 1993 to 18th March 1994 pursuant to the order of the Magistrate made on the 30th June 1993 were payments to which the Appellant was lawfully entitled;

(ii) The Appellant shall be entitled to retain all the payments referred to in sub-paragraph (i) and made by the Respondent, during the said period, without any obligation to refund or repay any portion thereof to the Respondent, Trevor Sparks."

MAHOMED CJ

Concur:

Smalberger JA
Howie JA
Zulman JA
Streicher AJA