

B v B AND ANOTHER 1997 (4) SA 1018 (SE)

Headnote : Kopnota

When applicant and first respondent were divorced in October 1994 their agreement as contained in a consent paper was made an order of Court. Clause 2 of the agreement provided that the applicant would pay first respondent R750 maintenance in respect of each of their two children 'until (they) become self-supporting'. When the elder son, J, turned 21 in March 1996 applicant discontinued his maintenance payments. First respondent reciprocated, inter alia, by taking out a writ of execution from the Registrar on the property of applicant. The second respondent, the Sheriff, on instructions of the first respondent, attached certain property of applicant. Applicant then brought the instant application on motion for the setting aside of the writ on the basis that his obligation to pay maintenance under the Court order in respect of J had ceased by automatic operation of law when J had turned 21.

Held, that as a general rule an order to pay maintenance in respect of a minor child to a custodian parent lost its effect when the minor achieved majority. Although there was a continuing reciprocal duty of support between parent and child that arose ex ratione pietatis as an invariable consequence of their relationship, the fact that a father's duty of support extended beyond the minority of the child did not extend the operation of a maintenance order beyond the date on which the child became a major. (At 1020E--H.)

Held, further, that there were sound reasons for limiting the effect of a maintenance order to the period of a child's minority: firstly, in the context of a consent paper, the maintenance is paid to the custodian mother as custodian, which meant that the obligation to make payments to her expired automatically when her status as custodian terminated upon the child reaching majority; and, secondly, when a minor attained majority, the relationship between him and his parents changed, with the result that it would as a rule be intolerable to leave the mother with the competency to decide how the maintenance received from the father should be applied for their child's benefit. (At 1020H--1021A/B.)

Held, further, that although it might be so that the parties could agree that the maintenance obligation shall extend beyond the age of 21, a clear indication of such an intention was required. In the instant case the parties' failure to expressly limit the payments to the period before the children turned 21 did not mean that they had intended the obligation to continue for an unlimited period after J became a major provided only he was not 'self-supporting'. Such an intention required plain expression, which clause 2 of the agreement (see above) did not do - the parties had simply made it clear that the obligation to pay maintenance would cease before the child turned 21 should he become self-supporting. (At 1021D/E--I, paraphrased.)

Held, accordingly, that on the wording of the consent paper applicant's obligation to pay maintenance under the order in respect of J had ceased when he turned 21. (At 1021I.)

Held, further, that even if the above conclusion were wrong and the maintenance order still stood in respect of J, the maintenance obligation was enforceable, if at all, only by J himself, and not by first respondent: an agreement between parties contemplating divorce that maintenance be payable beyond their child's minority was in essence a stipulatio alteri in favour of the child, and the fact that the agreement was contained in a consent paper which was made an order of Court did not change the nature of the agreement. Therefore, in the absence of indication to the contrary, only the child as the beneficiary of the stipulation had the competency to enforce the obligation. It followed that first respondent lacked locus standi to institute any legal proceedings on the Court order in respect of the maintenance due to J after he reached majority. (At 1021J--1022H, paraphrased.) Application granted and writ of execution set aside.