Bursey v Bursey and another
[1997] 4 All SA 580 (E)

Division:	Eastern Cape Division
Date:	2 October 1997
Case No:	CA 226/97
Before:	Nepgen J, Lang and Van Rooyen AJJ
Sourced by:	SJ Redpath and TJM Paterson
Summarised by:	S Moodliar

• Editor's Summary • Cases Referred to • Judgment •

Contract – stipulatio alteri – Test for – Must be positive intention to empower third party to adopt a right and to become a party to the contract if he or she wishes – Court finding on facts that agreement between parents that one parent is obliged to pay maintenance in respect of minor child does not constitute stipulatio alteri.

Maintenance – Major child – Whether parties to consent paper intended obligation to pay maintenance to continue once child attained majority – Whether such obligation is enforceable by the custodian parent even after the child attains majority.

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Parent and child – Maintenance – Major child – Whether parties to consent paper intended obligation to pay maintenance to continue once child attained majority – Whether such obligation is enforceable by the custodian parent even after the child attains majority.

Editor's Summary

The marriage between the Appellant and the First Respondent had been dissolved in 1994. A consent paper concluded between the parties, which had been made an order of court at the time of the divorce, provided *inter alia* that the First Respondent would pay maintenance to the Appellant (who was the custodian parent) in respect of the minor children until they became self-supporting.

When the older child ("John") attained majority, the First Respondent wrote to him advising that he would pay maintenance directly to him (and not through the Appellant). John consulted the attorney who had represented the Appellant in the divorce proceedings and instructed him in this regard. The attorney sent a schedule of John's expenses to the First Respondent. The fact that John had chosen to consult an attorney instead of responding directly to him, the First Respondent decided to withdraw his offer of further financial assistance.

The Appellant caused a letter of demand to be sent to the First Respondent via the Small Claims Court for arrear maintenance in respect of John. The First Respondent was summoned to appear before that court on 24 October 1996. Prior to the hearing, the Appellant obtained a warrant of execution ("the writ") dated 1 October 1996. On 9 October 1996, the deputy sheriff, acting in terms of the writ, attached certain books belonging to the First Respondent.

On 14 October 1996, the First Respondent applied to court for the setting aside of the writ. The writ was set aside on the following grounds: (i) that the First Respondent's obligation to pay maintenance to John in terms of the consent paper ceased upon John attaining majority; (ii) that, in any event, if the obligation continued after John attained majority, such obligation would be enforceable at the instance of John and not of the Appellant; and (iii) that an agreement between parties contemplating divorce that maintenance must be payable beyond the child's minority was a *stipulatio alteri* in favour of the child and only the child as beneficiary of the stipulation would be competent to enforce the obligation.

In view of the finding of the court *a quo* that the Appellant had not acted other than *bona fide*, in the best interests of the child, and upon legal advice, an order was made that each party pay its own costs.

On appeal to the full bench, the Appellant argued that the First Respondent's application ought to have been dismissed with costs.

Held – The Court held that the correct interpretation of the relevant clause in the consent paper was that the First Respondent had undertaken to pay maintenance for John until he was self-supporting even if that date was reached after majority. The Court examined the case law in detail and concluded that there was no reason why that obligation should not continue to be enforceable by the Appellant after John's majority.

With regard to the creation of a *stipulatio alteri*, the Court held that there had to be a positive intention to empower the third party to adopt the right in question and to become a party to the contract if he wished. The Court found on the facts that the relevant clause was not a *stipulatio alteri* and that the conclusion of the court *a quo* that only John was competent to enforce the obligation was incorrect.

The appeal was accordingly upheld with costs.

Notes

For Parent and child, see *LAWSA* Re-issue (Vol 2, paragraphs 175-340)

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed.)

B v B and another [1997] 1 All SA 598 (E) – **R**

De Crespigny v De Crespigny 1959 (1) SA 149 (N)

Gardner v Richardt 1974 (3) SA 768 (C)

Gold v Gold 1975 (4) SA 237 (D)

Kemp v Kemp 1958 (3) SA 736 (D)

Les Marquis (Pty) Ltd v Marchand and others 1989 (2) SA 651 (T)

Phillips v Phillips 1961 (2) SA 337 (D)

Raff v Cohen 1956 (4) SA 426 (C)

Raichman's Estate v Rubin 1952 (1) SA 127 (C)

Rheeder v Rheeder 1950 (4) SA 30 (C)

Richter v Richter 1947 (3) SA 86 (W)

Russell v Boughton 1955 (2) SA 229 (SR)

S v Richter 1964 (1) SA 841 (O)

Smit v Smit 1980 (3) SA 1010 (O)

Van Dyk v Du Toit 1993 (2) SA 781 (O)

Judgment

LANG AJ

On 17 October 1994 this Court ordered, firstly, the dissolution of the marriage between appellant and first respondent, and secondly, that the Consent Paper concluded by appellant and first respondent and marked "B", become an order of this Court. When referring to appellant and first respondent together I shall hereinafter refer to them as "the parties". There are two sons, John Stuart and Kevin George, born of the marriage between the parties. The elder son, John, was born on 6 March 1975. At the date of the divorce, he was a first-year student at Rhodes University. Clause 2 of the Consent Paper (referred to hereinafter as "clause 2") reads as follows:

"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 an undisclosed date after the divorce, but prior to the institution of the proceedings giving rise to this appeal, appellant moved from Grahamstown to Cape Town.

By virtue of certain submissions made to us by Mr *Mullins*, who appears for first respondent, it is necessary to recite portions of certain letters of which first respondent, John, and appellant's attorney, were the authors, and to refer to legal proceedings in courts other than this Court.

On 21 February 1996 first respondent wrote to John. This is a long letter containing various averments of a personal nature, but the urgent purpose of it emerges from the following extract from p 1 thereof.

"As you will remember, I spoke to you in January this year and again on 20 February with a view to discussing your reasonable requirements for maintenance while you are studying at University. I am not obliged to pay any maintenance on your behalf through your mother once you turn 21 years old. She is no longer your custodian or guardian and neither am I as of 6 March 1996. I am only prepared to deal with you direct and to pay you direct as of 1 April 1996. It is no use getting angry with me because I won't continue to work through your mother. In any event, she is in Cape Town and I am here in the Eastern Cape, as are you also. Please would you let me know in writing as a matter of urgency what your expenses are; ... this is in order for me to assess what your reasonable needs are."

John's reaction was to call on the Grahamstown attorney who had represented appellant in the divorce action and to furnish him with a schedule of his expenses. Appellant's attorney sent these details on to first respondent under cover of the following terse words.

"Your son, John, has called to see me in regard to maintenance and I am given to understand that you require details of his monthly expenses. I am enclosing a copy of a schedule prepared by him and should be pleased to hear from you URGENTLY regarding payment of maintenance. My understanding is that he has not received any maintenance for this month."

This response was not to first respondent's satisfaction. He addressed John by letter dated 19 March 1996, the relevant passage of which reads as follows:

"John, I wrote you a letter dated 21 February 1996. The only response that I've had in response to it was a letter from your attorney, Mr Borman. I cannot understand why you have not had the courtesy to write to me and why it was necessary to go to Mr Borman. Should you decide that you require legal assistance against me regarding maintenance I suggest that you approach the Maintenance Officer at the Magistrate's Court in Grahamstown. His services are free to you and you will not land up having to pay attorneys' accounts. I shall continue to correspond with you directly and not through Mr Borman."

On 25 April 1996 appellant's attorney wrote to first respondent in the following terms:

"Essentially you have been furnished with information concerning (John's) monthly expenses and, in this regard, I refer to the detailed statement furnished to you under cover of my last letter to you. In your correspondence you indicated to John that you are unwilling to communicate direct with attorneys but will limit your correspondence to him only. I further understand that you had arranged for a stop order in order to effect payment of R750 to John, the first payment to have been made on 15th instant but this instruction to the bank was cancelled on 11th instant. Matters must now be brought to finality. John cannot subsist without financial assistance. You required details of his income and called for tax vouchers. Succinctly put, tax vouchers are not furnished to casual employees. John is employed at Gino's on a casual basis and his average income is R90 per week. His income is subject to the vicissitudes of trade and the whims of customers. He receives no basic salary whatsoever. Given the above, I believe that the above matter will now have to be brought to finality. I have endeavoured to obviate an application to the Maintenance Court but circumstances now dictate that precipitate action must now be taken by John. In all the circumstances, and given the fact that you have now been furnished with details

of John's minimal income, unless payment of R750 is made to him care of my offices within five (5) days and unless your assurance is given that you will continue to effect payment of the maintenance with effect from 1 May 1996, the matter will be referred to the Maintenance Court without further ado."

The last letter in this depressing correspondence to which it is necessary to refer was addressed by first respondent to John on 29 April 1996. Portion of the con-cluding paragraph reads as follows:

"I had hoped that my letters would cause you to rethink your attitude to me. I would have tried to assist you financially, but to a lesser extent than before – but your attitude has made me reluctantly decide not to assist you any further. We will have to sort this matter out in court, as you threatened to do through Mr Borman. When and if your attitude improves towards me, then we can discuss future financial assistance."

First respondent was subsequently summoned to appear before the Maintenance Court, Grahamstown, on 29 July 1996 to answer the complaint of John. This matter was postponed to 28-29 October 1996 and was withdrawn on 28 October 1996. On 21 June 1996, appellant, advised by one De Jongh, who conducts "a maintenance clinic" in Cape Town, caused a letter of demand to be addressed to first respondent by the Small Claims Court, Cape Town, claiming "R2 250 being arrears in respect of John Bursey for April, May, and June 1996 (R750 per month) due in terms of Divorce Consent Paper dated 17 October 1994, clause 2." First respondent was summoned to appear before that court on 24 October 1996. Appellant, having visited Grahamstown on 25 September 1996 and having been advised so to do by her Grahamstown attorney, caused a writ of execution, ("the writ") to be issued out of this Court dated 1 October 1996. Acting pursuant thereto the deputy sheriff, Port Elizabeth, on 9 October 1996 attached certain books belonging to first respondent.

On 14 October 1996 first respondent applied to this Court for an order setting aside the writ and for an order of costs against appellant on the scale as between attorney and client. The application was argued before Erasmus J on 6 February 1997 and his judgment, reported as *B v B and another* [1997] 1 All SA 598 (E), was handed down on 13 February 1997.

The learned Judge in the court *a quo* set the writ aside and ordered that the parties were to be responsible for their own costs. He summarised the issues between the parties before him as follows:

"It is applicant's case that the writ stands to be set aside for the reason, *inter alia*, that when J became a major the obligation to pay maintenance to him under the court order ceased by automatic operation of law. First respondent contends that applicant's obligations continue despite the fact that J has become a major."

The learned Judge's reasoning which led him to the decision appears to have proceeded as follows:

(*a*)

The fact that upon divorce a non-custodian father's common law duty to support his child extends beyond majority, does not extend the operation of a maintenance order made at divorce in favour of the custodian mother beyond the date of the minor child's majority. The authority for that proposition was to be found in the judgments in *Kemp v Kemp* 1958 (3) SA 736 (D), *Richter v Richter* 1947 (3) SA 86 (W) and *Gold v Gold* 1975 (4) SA 237 (D).

(*b*)

Apart from the said case decisions cited as authority for that proposition, there are sound considerations both of principle and practical considerations which limit the effect of a maintenance order to the period of a child's minority. The first of these is that the obligation to pay maintenance to the custodian mother is to pay her *qua* custodian. Accordingly, as her status as custodian terminates upon majority so does the obligation on the non-custodian father to pay her. "It will be quite unnecessary and unpractical in such circumstances to expect non-custodian parents to approach the courts for declaratory orders relieving them of their burdens under the divorce order." The second such consideration was found to be the intolerable situation that would otherwise arise that the custodian mother would have "the competency to decide how the maintenance received from the father should be applied for their child's benefit".

(*c*)

While conceding that the parties to a given consent paper might agree that the maintenance obligation of the non-custodian parent should extend beyond their minor child attaining majority, to effect that result "clear indication of such intention is required" which, the Judge *a quo* held, was not to be found in clause 2. All that the parties made clear in the terms of clause 2 was that first respondent's maintenance obligation for John would cease before he turned 21 years of age if he became self-supporting. Were this not so, "the obligation would continue for an unlimited period after J became a major provided only that he was not self-supporting."

(*d*)

Accordingly, so the judgment runs, the *causa* for the writ fell away on 6 March 1996.

(*e*)

The learned Judge *a quo* held that in the event that he was wrong in his interpretation of clause 2 i.e. that the order *did* persist after John's majority, he would hold it to be enforceable only at the suit of John, and not of appellant. In this regard the learned judge relied upon a passage from the judgment of Flemming J (as he then was) in *Smit v Smit* 1980 (3) SA 1010 (O) at 1018B-C, and a passage in the judgment in *Richter's* case (*supra*) at 91.

(*f*)

Lastly, the learned Judge held that "an agreement between parties contemplating divorce that must be payable beyond the child's minority is in essence a *stipulatio alteri* in favour of the child. The fact that the agreement is contained in the consent paper which is then made an order of Court does 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 would have the competency to enforce the obligation, in the absence of decisive indication to the contrary (*Gardner v Richardt* 1974 (3) SA 768 (C)".

(*g*)

In regard to costs the Court *a quo* found that appellant had not acted other than *bona fide*, in the best interests of her child, and upon legal advice. He made his costs order that each party pay his or her costs so motivated.

Mr *Whitehead* who appears on behalf of appellant submitted, in effect, that the learned Judge *a quo* had erred in his interpretation of clause 2, and had accordingly erred in holding appellant to have no *locus standi* to enforce this Court's order of 17 October 1994; that the learned Judge erred further in finding that clause 2 amounted to a *stipulatio alteri*; that he ought to have dismissed first respondent's application with costs.

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In my view in providing that "the said maintenance order shall be paid until the said children become self-supporting" clause 2 is unambiguous. Were there to be a discernible ambiguity as to the parties' intention expressed in clause 2, so it was argued on appellant's behalf, that intention should surely be scrutinised against the background fact that John was, to the knowledge of the parties, nineteen-and-a-half years of age at date of divorce and a first year university student; it had never been contended, on first respondent's behalf, that John was not entitled to look to his parents to be maintained to the end of university training. It was submitted on first respondent's behalf that when clause 2 provides "the defendant shall pay to the plaintiff, as and for maintenance for the said minor children ...", there is a clear indication that the duty upon first respondent to maintain terminates upon majority. I cannot agree. Clause 1 states:

"Custody of the minor children, John Stuart Bursey and Kevin George Bursey, shall be awarded to the plaintiff."

Clause 2 in referring to "the said minor children" is, in view of the unambiguous terms as to the duration of the obligation which follow, in my view doing nothing more than identifying by reference. It was argued further on behalf of first respondent that the papers reveal that the parties had never intended clause 2 to oblige first respondent to pay maintenance to appellant for the maintenance of John beyond his majority; this was to be found in the fact that first respondent's letters showed clearly that *he* had never understood that, and the responses of appellant's attorney revealed a matching understanding in appellant. Accepting for the moment, without so deciding, that there was room for such an approach to interpreting clause 2, and furthermore that first respondent's letters written *after* divorce correctly reflect his intention *at* divorce, I can find nothing in what he said therein to substantiate the submission. Rather, the reverse is true. I refer to the passage quoted above from first respondent's letter of 21 February 1996. It does *not* refer to a joint or mutual intention of the parties present at the time of concluding clause 2. It seemingly does no more than to state first respondent's contentions as to his legal position and that of John at date of writing. Insofar as the letters of appellant's attorney are relied upon, the correspondence appears to reveal clearly that appellant was in Cape Town and was not utilising the services of her divorce

attorney at all at the relevant period. Such communications as took place were solely between the minor son, John, first respondent and the Grahamstown attorney. There is no evidence of the intention of appellant when concluding clause 2.

The learned Judge *a quo* was moved by the decisions in *Kemp*, *Richter*, and *Gold* (*supra*) to hold that as a general rule an order to pay maintenance in respect of a minor child to a custodian parent loses its effect when the minor achieves majority. In my view none of these decisions is authority for a statement of the law so broad in its terms. In *Kemp*, the non-custodian undertook to pay a fixed sum until minor children reached the age of 18 years. Applicant, non-custodian, applied for a variation of the order because one of the minor children, albeit not yet 18, was earning an income in excess of the sum of maintenance payable by him for her. The variation order sought was granted by Jansen J, as he then was. The passage in the judgment upon which the learned Judge *a quo* relied was a summary of a submission as to our law which Jansen J disapproved. What Jansen J held was the following at 738H to 739A:

"It would seem that if the order stipulates periodic payments 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 child becomes self-supporting (cf. *Raichman's Estate v Rubin* 1952 (1) SA 127 (C)). Insofar as the case of *Rheeder v Rheeder* 1950 (4) SA 30 (C) may be read to the contrary, I would, with the greatest respect, disagree."

This followed upon the learned Judge's earlier statement, at 738C-E:

"Does the fact that the order of Court is ancillary in this sense to the duty to maintain mean that its effect fluctuates in harmony with the incidence of that duty without the intervention of the Court? That the order is varied *ipso jure* by the force of circumstances! If this were so there would be no certainty. Despite the existence of an order of Court in explicit terms, it would be impossible to say without an exhaustive enquiry into the circumstances that the order is still fully effective at any point of time. This does not seem to be in accord with the nature of an order of Court, the fact that its disregard may be contempt of Court and that it may be visited with a criminal penalty (section 110 of Act 46 of 1935). There seems much to be said for the point of view that once the order is pronounced it has an existence divorced from the fluctuations of the incidence of the common law duty to maintain but that it may be brought into harmony with that duty by the Court at any time (cf. *Russell v Boughton* 1955 (2) SA 229 (SR)."

In *Richter's* case (*supra*) the non-custodian father was "ordered to pay plaintiff £9 per month for the maintenance of the said children ..." Price J, as he then was, held at 91 of the report as follows:

"There are several reasons to support the view that the order does not extend beyond the age of majority at the latest. In the first place, the dependants are referred to as children. That is only a very slight indication of intention because I think the word is used more for identification than for descriptive purposes. It is true that the word children can be applied to adults – in such a phrase as the children of Abraham – but in ordinary language a person certainly ceases to be a child at the age of 21, if not several years earlier. However, there are other reasons for this view. The money is ordered to be paid to the mother for the children, therefore, it follows that it is to be paid only until the children pass out of her natural guardianship at the latest. It is true that there is a reciprocal obligation in certain circumstances for sons and daughters to support their parents, and vice versa, *but this under quite a different rule of law* and has nothing to do with the obligation of parents to support and educate their minor children, and if such a claim were preferred against a father by a destitute major daughter it would have to be preferred by the daughter herself and not by the mother as her natural guardian, for she would no longer be the natural guardian of such a daughter. An order of Court such as the one under consideration cannot continue to operate after the children have attained majority." (My emphasis.)

The learned Judge would appear not to have placed any serious reliance upon the fact that the dependants were referred to as "children". Insofar as the second ground viz. that the maintenance was to be paid "*for* the children" (my emphasis), the learned Judge appears to have misdirected himself as to our law relating to the reciprocal obligations of support between parents and children. It is not, with respect, "quite a different rule of law" that obliges parents to support children in certain circumstances after majority from that rule which obliges them to support and educate their minor children. It is the same duty. This is correctly expressed in the contributor to *Family Law Service*, edited by ID Schäfer, as follows at "C Maintenance", 4(2)-5

"A parent's duty to support a child does not cease when a child reaches a particular age. See *Raichman's Estate v Rubin* 1952 (1) SA 127 (C), *Kemp v Kemp* 1958 (3) SA 736 (D), *Ex Parte Pienaar* 1964 (1) SA 600 (T), *Smit* v *Smit* 1980 (3) SA 1010 (O), S v *Mujee* 1981 (3) SA 800 (Z), *Hoffmann v Herdan NO and another* 1982 (2) SA 274 (T). It does come to an end when the child becomes self-supporting. Majority is not the determining factor here ... The fact that a child is working does not mean that he/she is necessarily self-supporting. Continued but reduced support by parents may be necessary in accordance with the family's standard of living; that is, the standard of living of both parents and child. The duty of support likewise revives if a child ceases to be self-supporting for reasons such as ill-health, disability or compulsory military service."

In *Russell v Boughton* (*supra*) Beadle J, as he then was, heard an application to vary a maintenance order to "pay until the minor child reached the age of 21 years." Because applicant had not paid maintenance, the minor child had left school at 15 and had become a self-supporting minor. She having now established the whereabouts of the defaulting non-custodian, and the minor child wishing to study further, the custodian mother sought

to recover the arrears of maintenance and this prompted the application to vary. Beadle J, having described as "a dictum" Price J's statement that "in my view, however, the payment of maintenance is to cease when any child reaches the age of majority, or earlier if he or she begins to earn his or her own living", said the following at 231D:

"The effect of the judgment in *Richter's* case is not to hold that the original order had been cancelled or varied *ipso jure* but simply to imply a condition into that order so that proper effect could be given to it. In the circumstances I am not prepared to extend the application of the *dictum* in *Richter's* case beyond the facts of that case."

And again at 231H-232A:

"Generally a judgment of a competent court is binding on the defendant until rescinded or varied by the order of a competent court. I am satisfied, therefore, that in a case like the present the order of Court for maintenance stands until it is varied or discharged by a competent court. See also Hahlo *South African Law of Husband and Wife* p 390, note 99."

In *Gold's* case (*supra*) Howard J, as he then was, heard a contempt application where the non-custodian father had ceased paying R40 per month for his sons who were doing National Service. His termination of payment was prompted by legal advice that the sons were self-supporting and that accordingly his liability had lapsed. The application failed because of the Court's express finding of an absence of any wilful disobedience of the Court order on the part of respondent. In the circumstances the passage to the following effect at 239D is surely *obiter*:

"As the maintenance order did not fix any period for its operation it was implied that the respondent's liability thereunder in respect of each child would cease when the child reached the age of majority or earlier if he became self-supporting. The liability would cease *ipso jure* in either of those events, without the necessity for a variation of the order by the Court (see *Richter v Richter* 1947 (3) SA 86 (W) at pp. 90-91; *Kemp v Kemp* 1958 (3) SA 736 (D) at p. 738; *Phillips v Phillips* 1961 (2) SA 337 (D) at p. 339; *S v Richter* 1964 (1) SA 841 (O) at pp. 843-5)".

As appears from the above passage, the authorities relied upon by Howard J, albeit for an *obiter* statement, which have not already been referred to herein, were *Phillips v Phillips* (*supra*) and *S v Richter* (*supra*).

In *Phillips'* case, a non-custodian father applied for the cancellation, with retrospective effect, of an unusual order included in the parties' decree of divorce, that he pay maintenance for their minor children "until further order." The daughter had some years prior to the application and unbeknown to applicant become a Natal University lecturer and was both a major and self-supporting by the date of the application. Caney J dealt

thus at 339A-B with the submission, based on the authority of *Kemp* (*supra*) that applicant's liability had *ipso jure* ceased when the daughter became self-supporting.

"He referred to *Kemp v Kemp* 1958 (3) SA 736 (D) at p 740 as authority for the proposition that 'good cause' for cancelling the order was the fact that she was self-supporting. It is convenient at this point to observe, however, that Jansen J, who decided that case, expressed the view, at p 738, that an order of Court, if it is for a fixed time, continues to operate until it is set aside or varied; he said: 'There seems much to be said for the point of view that once the order is pronounced it has an existence divorced from the fluctuations of the incidence of the common law duty to maintain but that it may be brought into harmony with that duty by the Court at any time.' With respect I agree that this is so. Where such an order stands it may be varied by the Court upon change of circumstances. although the time stated has not arrived."

He held against applicant at 340C-D in the following terms:

"What I have said indicates that I agree with Mr *Brink* that whilst the order stands the liability remains on the applicant. The order in the present instance was expressed in unusual terms. The applicant was ordered, not to pay maintenance for the child until she reached her majority or reached 18 years of age or until she was self-supporting, but 'until further order'. The agreement between him and the respondent which preceded the making of the order was not referred to in it. The order was clearly binding on him until varied or terminated and its terms placed upon him the burden of taking steps to obtain a 'further order' if and when he considered he was entitled to a variation or termination of it. Until then he was liable, and the money he has paid he was liable to pay at the time he did so."

In *S v Richter* (*supra*) appellant had been charged with contravening section 110 (1) of Act 46 of 1935 in that he had defaulted in making payments pursuant to an order of Court. The Full Bench of the Orange Free State Provincial Division, *per* Hofmeyr J, as he then was, held that it was a complete defence to the charge that the child to be maintained had become self-supporting. In the premises the Court set aside the conviction. The order in that case was for payment of R30 per month with no qualification as to its duration. The learned Judge referred to *Richter's* case (*supra*) and to *Rheeder v Rheeder* 1950 (4) SA 30 (C) and proceeded to hold, at 844G-H as follows:

"Ek meen dat die kritiek in *Russell* se saak op bl. 231 op bogemelde gewysdes en teen die opvatting dat 'n vonnis *ipso jure* en *ipso facto* ophou om te geld sodra die gemeenregtelike plig om te onderhou opgehef is, nie geregverdig is nie. Dit is na my mening ongewens dat partye elke keer wanneer die gemeenregtelike plig opgehef word, verplig moet wees om na die Hof te kom om die bevel van die Hof nietig te laat verklaar – selfs (as 'n mens logies wil wees) in gevalle waar die kind meerderjarig geword het. Dit is na my oordeel heeltemal doeltreffend as 'n persoon by wyse van verdediging kan bewys dat die bestaansreg van die bevel verval het. *Kemp v Kemp* (*supra*) is ook 'n saak waar die bevel

bepaal het dat onderhoud by wyse van periodieke betalings sou plaasvind totdat die minderjarige ’n sekere ouderdom sou bereik. Daar was dus g’n ruimte vir die implikasie dat die bevel *ipso jure* voor daardie ouderdom weens die omstandigheid dat die minderjarige selfonderhoudend geword het, sou ophou om effektief te wees nie.”

Erwin Spiro has correctly observed of this judgment in his work *Law of Parent and Child*, 4th ed, 1985 at 410 note 35: “With respect there is a difference between the two cases”.

The clearest authority for the proposition that a divorce order for the maintenance of a minor child can not only properly provide for the payment of maintenance to the custodian spouse after the minor child reaches majority, but also be enforceable by the custodian spouse after majority is that of *Raff v Cohen* 1956 (4) SA 426 (C). In that case the relevant clause of the consent paper which was made an order of Court related to daughters aged 19 and 12 and read:

“... Defendant shall pay to the plaintiff £30 per month for the two children such maintenance to continue until both the children shall have married i.e. that on the marriage of one of the children the maintenance in respect of the other shall continue at the rate of £30 per month until she has also contracted a marriage.”

It was argued for applicant for a declaratory order that the order could only mean that the sum would be payable up to the age of 21 years because ordinarily the Court only has power to award maintenance to the spouse who is given custody of the minor children until the child reaches the age of 21. Newton-Thompson J, in dismissing the application stated the following at 428F:

“I can hardly imagine words which are clearer that 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 had turned 21. We all know that probably the majority of girls today are not married until after they are 21.”

And at 429A-B the following:

“Mr *Bloch* has argued that if it was meant to go on after 21 then it might have been put in the document: ‘until she has also contracted a marriage or reached the age of 21, whichever occurs last’. I do not see any reason for that argument at all. It seems to me that, if it had been intended that the words should not mean what they say, i.e. that the payment should go on until each of the girls has married, it would have been quite simple to say in the document: ‘or until each of them reaches the age of 21, whichever shall first occur’. It seems to me that that is the first thing that would have occurred to anyone.”

Mr *Mullins*, in supporting the judgment of the court *a quo* that appellant's *causa* for the issue of the writ fell away when John reached majority, relied upon the decision of Cillie J in *Van Dyk v Du Toit* 1993 (2) SA 781 (O). In that case application was made by a non-custodian father, after divorce, for the setting aside of a writ issued at the instance of the custodian mother to recover arrears of maintenance payable in terms of a consent paper made an order of Court at divorce. The report is unsatisfactory for a number of reasons, chief of which is the absence of any report of the precise terms of the consent paper. Applicant had simply ceased to make payments for a daughter of the parties who in his view had become self-supporting. The learned Judge, without reference to the relevant case

law, held that the obligation in terms of the consent paper to maintain a child lapses *ipso jure*, or by operation of law, when the child becomes self-supporting; no Court order to that effect is necessary; as the validity of the writ could only be determined by an investigation of whether the daughter was self-supporting or not, and no such investigation had as yet taken place, the learned Judge held that the writ fell to be set aside. With respect, I cannot accept that this judgment correctly reflects our law.

In *Smit v Smit* 1980 (3) SA 1010 (O) applicant was a Rhodes University student aged 21 who had sought an order against his father to enforce payment under a contract, and not in reliance upon the common law parental duty to support. The outcome of the matter was the grant of an order for referral to oral evidence on the issue of whether or not a contract had been concluded between applicant and respondent as alleged by applicant, and certain ancillary orders. Accordingly it would seem that what the learned Judge then had to say in respect of the duration of divorce orders for the maintenance of minor children, and whether such orders lapsed *ipso jure* would be *obiter dicta*. Nevertheless it is desirable to examine the passage from the judgment upon which the learned Judge *a quo* relied viz. at 1018B-C:

"Secondly, although it may be true that Courts in divorce proceedings refuse to order maintenance beyond the age of 21 (*Raff v Cohen* 1956 (4) SA 426 (C) is an instance where such an order was not frowned upon), the reason would probably be that when the child turns 21 a claim by one parent against the other for the latter's portion of the common parental duty to support is, usually at least, no longer relevant. It is the child itself who henceforth must claim directly against one or both parents to the extent that he may have a claim for support with effective content."

The proposition contained in the first clause of that passage asserts the very opposite position to that which has pertained in this division for many years. The Courts of this division have consistently refused to approve consent papers in which the parties have purported to limit their liability to maintain a minor child to the age of majority. It has been the all but invariable practice, so I am advised, to ensure that the liability extends to the date of the attainment of self-supporting status. The general conclusion contained in the balance of the passage that a claim by the custodian parent against a non-custodian

parent for payment of the latter's contribution to the support of the child is irrelevant after the child's majority, and that only the child will have an enforceable claim, is not only not in accordance with a decision such as that in *Raff's* case (*supra*) but is also not in accordance with several of the judgments reviewed above.

It was submitted with some vehemence before us that for appellant to continue to enforce clause 2 against first respondent after John attained majority was an intolerable situation. I cannot agree. The effect of an order such as the present is *not* that there is any diminution of or in the major status of John. There is no inroad made upon his right to enforce his common law right to an upward variation of the maintenance payable to him by his parents upon proof by him of such need. The effect *is* that the maintenance payable to him by his parents continues to be paid to him by his erstwhile custodian parent, the appellant, who recovers the contribution thereto to be made by first respondent pursuant to a valid order of this Court. If first respondent were to conclude, at any time, that John had become self-supporting, his remedy would be to seek the agreement of the erstwhile custodian, appellant, thereto, and upon securing such agreement terminate payments. In the event of appellant declining so to agree, in the face of compelling

evidence to the contrary, first respondent would be at large to elect either to terminate payments and undergo the dual risk of criminal prosecution and the issue of a writ, or apply for a declaratory order, the costs of which ought to be recoverable from appellant in the event of agreement being wrongly withheld and the application succeeding.

Having concluded that clause 2 means what it says viz. that first respondent undertook to pay maintenance for John until he is self-supporting even if that date is reached after majority, and further that there is no reason to be found in practical considerations or legal principle why clause 2 should not continue to be enforceable by appellant after John's majority, it remains only to consider the judgment of the Court *a quo* that clause 2 is a *stipulatio alteri* in favour of John and therefore only he has "the competency to enforce the obligation".

Mr *Mullins* did not support this finding and seemingly for good reason. One reason would be that relied upon by Jansen J at 741E-F of his judgment in *Kemp* (*supra*). The learned Judge was there dealing with whether respondent custodian mother had been unreasonable in not allowing the non-custodian applicant father to discontinue payment without an order of Court, and for not consenting to an order of variation. He said:

"Respondent's submission that she could not consent because the agreement constituted a *stipulatio alteri* is clearly unfounded. In entering into the agreement the parties had no intention of conferring upon Davina Rosemary a right which, upon acceptance by or on her behalf, would be a contractual right, a right other than that flowing from their common law duty to maintain her (cf. Spiro 251-252)."

The extent to which the terms and patent intention of clause 2 are inconsistent with it constituting a *stipulatio alteri* emerged from the following statement by RH Christie, *The Law of Contract in South Africa*, 4th ed, 1996 at 295 as follows:

"There must be a positive intention to empower the third party to adopt and become a party to the contract if he wishes."

There is no greater evidence of such intent in clause 2 than there was in the clause with which Jansen J dealt in *Kemp's* case (*supra*). In the case of *Gardner v Richardt* (*supra*) relied upon by the court *a quo*, Friedman AJ, as he then was, quoted the following passage, at 772G from Professor McKerron's pioneering article on the *stipulatio alteri* contained in (1929) 46 *SALJ* 387 at 391:

"Turning now to the rights and liabilities of B, the promisee, the first point to note is that as a general rule B cannot claim from A fulfilment of a promise made to him on C's behalf. Where the contract is exclusively for the benefit of C, B cannot sue for specific performance of the contract for the simple reason that A's promise is a promise to render performance not to him but to C".

For all the above considerations I am satisfied that clause 2 was not a *stipulatio alteri* and accordingly that the effect which the learned Judge *a quo* found to flow from such a finding does not apply in this matter.

In the alternative to his submissions that the *causa* for the writ either did not exist, or had fallen away by the date of its issue, Mr *Mullins* submitted that we should dismiss the appeal on the ground that the court *a quo* could and should have exercised its discretion to stay or set aside the writ. As I understood the submission, the grounds for exercising the discretion against the present appellant were either the vexatiousness of the manner in which appellant had litigated against first respondent, or the fact that the debt was one disputed by first respondent. I agree

with the learned Judge *a quo* that there was no basis for holding appellant to have acted vexatiously. While in Cape Town in June, and with limited means, she was plainly drawn to the possibility of enforcing the maintenance order without incurring significant legal cost through the Small Claims Court and was misled to commence proceedings in that forum. When in Grahamstown in September she adopted the advice of her attorney in the divorce proceedings and authorised the issue of the writ. I cannot find evidence of an improper motive to harass. The Maintenance Court proceeding was that of John commenced on the earlier advice of the same attorney. It is irrelevant to determining appellant's intentions. The decision in *Geldenhuys v Meyers and another*, an unreported decision in this Court which was relied upon, is no authority for the proposition for which it was cited.

In regard to the submission based on the disputing of the debt by first respondent, the three authorities relied upon were, once more, not authority on the strength of which this writ should properly have been set aside. The first of them, *Van Dyk's* case (*supra*) was in my view incorrectly decided. The other two were *De Crespigny v De Crespigny* 1959 (1) SA 149 (N) and *Les Marquis (Pty) Ltd v Marchand and others* 1989 (2) SA 651 (T). In these cases the courts held correctly, with respect, that the judgment had either not fixed a liquidated indebtedness as yet (as in the former case), or not fixed any indebtedness at all (as in the latter case).

In the result the appeal is upheld with costs. The order of the Court *a quo* is set aside and replaced by the following:

The application is dismissed with costs.

NEPGEN J

I agree.

VAN ROOYEN AJ

I agree.

For the appellant:

J Whitehead SC instructed by *Borman & Botha*, Grahamstown

For the 1st respondent:

N Mullins instructed by *NN Dullabh & Co*, Grahamstown