**REPORTABLE**

# IN THE HIGH COURT OF SOUTH AFRICA

## [CAPE OF GOOD HOPE PROVINCIAL DIVISION]

Case No: 6541/03

In the matter between:

**JADE LEE PETERSEN** Applicant

and

**THE MAINTENANCE OFFICER**

**SIMON'S TOWN MAINTENANCE COURT** First Respondent

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**GASANT ABRAHAMS** Second Respondent
**SAADIA ABRAHAMS** Third Respondent
**BEULAH PETERSEN** Fourth Respondent
**EUGENE BREDENKAMP** Fifth Respondent

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**JUDGMENT DELIVERED: 11 NOVEMBER 2003**

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**FOURIE, J:**

[1] In **Motan and Another v Joosub** 1930 AD 61, it was held that in terms of our common law the paternal grandfather of an extra-marital child owes no duty of support to the child. The issue in this application is whether the common law rule as enunciated in **Motan**, passes constitutional muster.

[2] The applicant, an 18 year old single female, gave birth to a boy ("the child") on 7 January 2003. The natural father of the child admits paternity, but has failed to contribute towards the maintenance of the child. In June

2003, the applicant approached the Maintenance Court at Simon's Town and an enquiry in terms of section 10 of the Maintenance Act No. 99 of 1998 ("the Maintenance Act") was held with a view to enquiring into the provision of maintenance by the father of the child. However, in view of his poor financial position, the father was only able to offer payment of an amount of R200,00 per month, which amount the applicant maintains is grossly inadequate to enable her to maintain the child. The applicant is a student with no income and she and the child are supported by her parents with whatever means they have at their disposal.

[3] On 20 July 2003, the applicant lodged a complaint with the first respondent in terms of section 6(1) of the Maintenance Act, to the effect that the paternal grandparents of the child are legally liable to maintain the child, but have failed to do so. The applicant, through her legal representative, requested the first respondent to summon the paternal grandparents of the child to attend an enquiry in terms of Section 10 of the Maintenance Act, with a view to enquiring into the provision of maintenance by the paternal grandparents of the child. The first respondent, however, refused to take such steps and in her affidavit which forms part of the papers in this application, she states that her decision *"was taken on the basis of my understanding that the law does not recognise a legal duty of support by the paternal grandparents of an extra-marital child. I was not in a position to deviate from this principle which, as I understand it, finds authority in the case of* ***Motan v Joosub*** *1930 AD 61."*

[4] The applicant then launched the present application in which the main relief sought is a mandamus directing the first respondent to take the necessary steps for an enquiry to be held in terms of Section 10 of the Maintenance Act, to consider the applicant's complaint that the paternal grandparents of the child are liable to maintain the child, but fail to do so. The applicant has joined the paternal grandparents of the child as second and third respondents and the maternal grandparents as fourth and fifth respondents.

[5] The application was initially opposed by the first respondent, but the opposition was subsequently withdrawn and she abides the decision of the court. The second to fifth respondents do not oppose the application, but Ms. **Weyer** was appointed as amicus curiae by the Cape Bar Council to assist the court in determining the matter.

[6] The **Motan** decision is generally accepted as authority for the assertion that the paternal grandparents of an extra-marital child do not owe a duty of support to the child. The interpretation of the common law in **Motan** and the resultant denial of a duty of support by the paternal grandparents of an extra-marital child, has even prior to the present constitutional dispensation, been widely criticized by South African writers. **F. P. van den Heever**, **Breach of Promise and Seduction in South African Law** (1954) at 70 says the following:

*"It is submitted that the decision is so patently wrong that it should be*

*reconsidered; for it is based on legislative considerations and methods, which are, moreover, unsound. It is contrary to public policy and humanity and should, if necessary, be rectified by the legislature."*

See too: **Boberg's, Law of Persons and the Family**, Second Edition, 423 and 424 (footnotes 312 and 313); **Jordaan and Davel**, **Law of Persons Source Book**, Second Edition, 358 – 360; **Lee and Honoré**, **Family, Things and Succession**, paragraph 161 (footnote 3); **Van der Vyver en Joubert**, **Persone- en Familiereg**, Third Edition, 223 -224; **Barnard, Cronje and Olivier**, **The South African Law of Persons and Family Law**, 314 (footnote 81) and **Wille's Principles of South African Law**, Eighth Edition, 214. **Spiro**, **Law of Parent and Child**, 395, however, supports the interpretation of the common law in **Motan** and states that the Hooge Road of Holland never decided in favour of a duty of support between an extra-marital child and his/her paternal grandparents.

[7] Mr. **Abduroaf**, who appears for the applicant, submitted that the common law rule as interpreted in **Motan**, violates the extra-marital child's constitutional rights to equality and dignity enshrined in sections 9 and 10 of the Constitution of the Republic of South Africa, Act No. 108 of 1996 ("the Constitution") and is contrary to the best interest of the child (See section 28(2) of the Constitution). He accordingly submits that the common law rule is unreasonable and unjustifiable and should be declared unconstitutional and invalid.

[8] I am bound by the decision in **Motan** with regard to the interpretation of the common law, but section 173 of the Constitution provides that the court has the inherent power to develop the common law, taking into account

the interest of justice. Section 8 (3) (a) of the Constitution enjoins the court in order to give effect to a right in the Bill of Rights set out in Chapter 2 of the Constitution, where necessary, to develop the common law to the extent that legislation does not give effect to that right. Section 39 (2) of the Constitution provides that when developing the common law, the court must promote the spirit, purport and objects of the Bill of Rights.

[9] The discharge of this duty to develop the common law, involves a two-stage enquiry to be undertaken by the court. The first stage is to consider whether the existing common law, having regard to the section 39 (2) objectives, requires development in accordance with these objectives. This requires a reconsideration of the common law in the light of section 39 (2) of the Constitution and involves a careful examination of the existing principles which underpin the common law rule and a comparison thereof with the key principles of the Constitution. If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39 (2) objectives. See **Carmichele v Minister of Safety and Security and Another** 2001 (4) SA 938 (CC) at 955I - 956C; **Rivett-Carnac v Wiggins** 1997 (3) SA 80 (C) at 87E-F and **McNally v M & G Media (Pty) Ltd and Others** 1997 (4) SA 267 (W) at 274 G – 275C.

[10] The rationale for this common law rule is described as follows in **Motan** at 70:

*"I now come to Mr. de Villiers' argument that we ought to draw no distinction between the maternal and the paternal grandfather. They are both bound to the illegitimate child of their daughter or son respectively nexu sanguinis and therefore the same duty lies upon both. From an ethical point of view there is much to be said for this contention, and the Civilians may have taken this view if there were no great practical difficulties in the way. But there are. The father of the mother of an illegitimate child knows full well that it is his daughter's child, and if called upon to pay for its support, the proof of the nexus sanguinis is at hand. If, however, the paternal grandfather is called upon to pay, he may perhaps be sufficiently certain in those cases where the woman is the concubine of his son, where they live together as man and wife, but in no other case can he be certain. He must either accept the word of the mother or trust to the wordly wisdom of his son. He is called upon to prove a negative where he has no real means of repelling the claim. To hold, therefore, that the paternal grandfather is liable to maintain every illegitimate child of his son would be to cast upon him a burden which it may be difficult for him to remove by proof. In these circumstances it appears to me to be the more correct view to follow the Civil law as adopted by the Supreme Court of Appeal at Mechlin and as laid*

*down by Gluck and others to the effect that no such liability as we are considering lies upon the paternal grandfather."*

[11] **Boberg**, supra, at 423 (footnote 312), states that it is illogical to argue (as Wessels JA did in **Motan** at 70) that the paternal grandfather (unlike the maternal grandfather) cannot be certain that the child is his grandchild, for this begs the question and confuses adjective with substantive law. See too **F. P. Van den Heever**, supra at 70 (footnote 66). I agree, with respect to the learned Judge of Appeal, that the envisaged evidentiary difficulties should not serve as a basis for the formulation of a rule of substantive law. In any event, the post 1930 developments in technology and science have significantly eased the evidentiary burden which may rest upon the paternal grandparents to disprove that their son is the father of the extra-marital child. See **Boberg**, supra, at 369 (footnote 142) with regard to blood tests, the HLA system of tissue typing and the DNA fingerprinting test. In my view the grounds upon which our common law sought to draw a distinction between the maternal and paternal grandparents in this regard, are at this juncture not persuasive and the validity thereof should be seriously questioned.

[12] In the mid 1980's the South African Law Commission ("the Commission") investigated the legal position of extra-marital children, including the aspects relating to support. In its report issued during October 1985, the Commission recommended at paragraph 8.50 that the following duties of support be imposed by legislation: paternal blood relations towards the extra-marital child; the extra-marital child towards the father; and the extra- marital child towards blood relations on the paternal side. This resulted in the publishing of the Children's Status Bill, No. 30 of 1987, which contained the following provisions:

(a) Clause 4 (1) which provided that the paternal relations of an extra-

marital child would be liable to maintain that child to the same extent as that to which the maternal relations are liable.

(b) Clause 4 (2) which provided that the extra-marital child would be liable to maintain his/her father and a blood relation of his/her father to the same extent to which he/she would be liable to maintain his/her mother and a blood relation of his/her mother.

However, clause 4 was not included in the Children's Status Act, No. 82 of 1987. The reason for the omission does not appear from Hansard, which merely contains the following report by the Chairman of the Standing Select Committee on Justice, dated 24 June 1987:

*"Your committee wishes to recommend that in the light of objections and submissions received in respect of the negatived clause 4 of the Bill, this clause be referred to the Department of Justice with a view to the revision thereof and the possible introduction of a further amending measure."*

[13] To date the legislature has not, and despite the passing of the Maintenance Act (which came into operation on 26 November 1999), seen fit to give effect to the abovementioned recommendations of the Commission. Section 2 of the Maintenance Act provides that:

"(1) The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty.

*(2) This Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons".*

The "legal duty" referred to in section 2 (1) of the Maintenance Act, is not defined in the said Act.

[14] Mr. **Abduroaf** submitted that the constitutional values embodied in sections 9, 10 and 28 (2) of the Constitution, dictate that the common law rule as enunciated in **Motan**, be developed by imposing a duty of support upon the paternal grandparents of an extra-marital child in the event of the natural parents of such child being unable to support the child. The said sections of the Constitution provide:

"9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to*

*protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.*

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

*10. Everyone has inherent dignity and the right to have their dignity respected and protected.*

*28(2) A child's best interest is of paramount importance in every matter concerning the child."*

[15] The importance of the right to equality has been stressed by the

Constitutional Court and the Supreme Court of Appeal. See **Fraser v Children's Court**, **Pretoria North and Others** 1997 (2) SA 261 (CC) at par. 20; **President of the Republic of South Africa and Another v Hugo** 1997 (4) SA 1 (CC) at par. 41 and **Antonie Michael Du Plessis v Road Accident Fund**, judgment delivered by the Supreme Court of Appeal under Case No. 443/2002 on 19 September 2003. The nature of the enquiry to be followed in determining whether the common law rule in this case violates the fundamental right to equality, appears to be as follows:

(a) Does the common law rule differentiate between people or categories of people? If so,

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to discrimination? If it is on a ground specified in section 9 (3), then discrimination will have been established.

(ii) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed.

(c) If the differentiation is found to be unfair then a determination will have to be made as to whether the common law rule can be justified under the limitations clause (Sec. 36 of the Constitution).

See **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC) at par. 54 and **Daniels v Campbell NO and Others** 2003 (9) BCLR 969 (C) at 992E – 993D.

[16] In terms of our common law the maternal and paternal grandparents of a child born in wedlock are obliged to support him/her, if the child's parents are unable to do so. In the case of an extra-marital child whose parents are unable to support him/her, our common law, as interpreted in **Motan**, provides that the maternal grandparents have a duty of support towards the extra-marital child, but not the paternal grandparents. The common law rule accordingly differentiates between children born in wedlock and extra-marital children on the ground of birth. This differentiation amounts to discrimination as birth is a ground specified in section 9(3) of the Constitution. In terms of section 9(5) of the Constitution discrimination on the ground of birth as a listed ground is presumed to be unfair unless it can be justified under section 36 of the Constitution.

[17] The importance of the right to dignity enshrined in section 10 of the Constitution, was emphasised as follows in **Dawood, Shalabi, Thomas and Others v Minister of Home Affairs and Others** 2000 (8) BCLR 837 (CC)

at par. 35:

*"The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings…dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."*

[18] In my view the rights of equality and dignity in this case are closely related, as was the case in **Antonie Michael Du Plessis v Road Accident Fund**, supra; **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 (1) SA 6 (CC) and **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC). In the latter case the Constitutional Court put it as follows at par.42:

*"The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they whether viewed as individuals or in their same sex relationships, do not have the*

*inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships…It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be."*

[19] I am of the opinion that this common law rule which differentiates between children born in wedlock and extra-marital children, not only denies extra-marital children an equal right to be maintained by their paternal grandparents, but conveys the notion that they do not have the same inherent worth and dignity as children who are born in wedlock.

[20] In addition, section 28 (2) of the Constitution underlines the paramountcy of the best interest of the child, which has always been a golden thread which runs throughout the whole fabric of our law relating to children. (See **Kaiser v Chambers** 1969 (4) SA 224 (C) at 228E-G; **Fletcher v Fletcher** 1948 (1) SA 130 (A) and **Bethell v Bland and Others** 1996 (2) SA 194 (W) at 208). The general standard of the best interest of the child introduced in section 28 (2), provides a benchmark in the review of all proceedings in which decisions are taken regarding children. The reach of the "best interest" principle has already been viewed as extending beyond the ambit of the rights specified in section 28 (1) of the Constitution. See **Cheadle, Davis and Haysom, South African Constitutional Law: The Bill of Rights**, at 530-1 and the authorities there cited. As stated at 531 by Cheadle et al, the "best interest" standard is, however, not without limitation. If statutory provisions or rules of the common law are inconsistent with the best interest of the child, such inconsistency may be found to be justified under the provisions of section 36 of the Constitution. In **LS v AT and**

**Another** 2001 (2) BCLR 152 (CC), it was held, on the assumption that the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act No. 72 of 1996, were inconsistent with the short term best interest of the child, that such inconsistency was justifiable in an open and democratic society based on human dignity, equality and freedom.
[21] In my view, the common law rule as interpreted in **Motan**, and in particular the differentiation between the duty of support of grandparents towards children born in wedlock and extra-marital children, constitutes unfair discrimination on the ground of birth and amounts to an infringement of the dignity of such children. The common law rule is also clearly contrary to the best interests of extra-marital children. It follows, in my view, that it violates the constitutional rights of extra-marital children, and in particular the rights enshrined in sections 9, 10 and 28 (2) of the Constitution.

[22] It remains to be considered whether this violation of the constitutional rights of extra-marital children is justifiable under section 36 of the Constitution. This would be the case if the violation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I am of the view that if the importance and purpose of the common law rule are weighed against the nature and extent of the gross infringement caused by the said rule, there is no justification for the retention of the common law rule. In this regard it should be borne in mind that extra-marital children are a group who are extremely vulnerable and their constitutional rights should be jealously protected. This would not only be in line with our constitutional principles, but also in accordance with public international law which dictates that children should not be allowed to suffer on account of their birth. See **Cheadle et al, South African Constitutional**

**Law: Bill of Rights** at 528.

[23] In view of the aforesaid, I conclude that the limitation imposed by the common law rule, is clearly unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom. It follows, in my view, that in this respect our common law has to be developed to promote the spirit, purport and objects of the Bill of Rights.

[24] How should the development of the common law be undertaken? Mr. **Abduroaf** submitted that the court should undertake this task. Ms. **Weyer** submitted that although it may be desirable for the court to highlight the need for further urgent legislative scrutiny of the issue of the duty of support of paternal grandparents of an extra-marital child in the context of the constitutional imperatives, it would not be appropriate or desirable for the court to undertake this task. She submitted that for the following reasons the court should not enter this field of mixed common law and statutory law by effectively nullifying the common law position as it currently prevails:

(a) The legal position of extra-marital children has and is still determined by policy decisions governing the proper

relationships between the adults related to and associated with the extra-marital child and the child's relationships with those adults. In developing the common law the legislature has been mindful to ensure that a proper balance of interests between the single mother and natural father has been maintained, while applying the ultimate yardstick of the best interest of the child. This has been achieved by maintaining a maternal preference and allowing the natural father *locus standi* to approach the courts for relief in a proper case. (See sections 10 and 11 of the Births and Deaths Registration Act No. 51 of 1992; section 3 of the Children's Status Act No. 82 of 1987; section 2 of the National Fathers of Children Born out of Wedlock Act No. 86 of 1997; section 1 of the Guardianship Act No. 192 of 1993 and section 19 of the Child Care Act No. 74 of 1983.)

By extension, and given that the legislature has- by not specifically legislating to the contrary in regard to the duty of paternal grandparents of an extra-marital child- apparently intentionally maintained the common law position where only the maternal grandparents would be liable to maintain such a child. This approach, so it was argued, at the very least appears

to ensure consistency in the approach to maternal preference.

[b] In affording extra-marital children rights *vis-à-vis* their paternal grandparents the "delicate balance" achieved in related areas of our law will be disturbed. This will necessarily give rise to the consideration of whether or not such duty of support is to operate reciprocally and the desirability thereof. This is a particularly vexed question where the child has been conceived in circumstances of rape. In addition, concomitant matters of access, custody and the like would have to be revisited in the context of paternal grandparents and extra-marital children.

[c] The impact of such a decision on the wider community needs wider debate and careful consideration.

[25] In **Carmichele v Minister of Safety and Security and Another** 2001 (4) SA 938 (CC) at par. 36, it was stated that it is implicit in section 39 (2), read with section 173, of the Constitution, that where the common law as it stands is deficient in promoting the spirit, purport and objectives of the Bill of Rights, the courts are under a general obligation to develop it appropriately. The court, however, warned that judges should be mindful of

the fact that the major engine for law reform should be the legislature and not the judiciary. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

[26] The legislature has adopted a number of measures to ameliorate the negative impact of the common law relating to extra-marital children, as appears from paragraph 24 (a) above. However, the law continues to treat extra-marital children differently from children born in wedlock, particularly in relation to the duty of support. This discrimination should not be tolerated. In my view the attempts of the legislature to strike a balance between the rights of the single mother and natural father of an extra-marital child, would not be impeded by extending the duty of support to the paternal grandparents of an extra-marital child. On the contrary, I hold the view that this extension of the duty of support would enhance what ultimately ought to be one of the aims of the legislature, i.e. to serve the best interests of extra-marital children.

[27] In my view it is necessary, in order to keep our common law in step with the values enshrined in the Constitution, that a duty be imposed on paternal grandparents to support their extra-marital grandchildren to the same

extent to which the maternal grandparents are liable to maintain their extra-marital grandchildren. The imposition of this duty of support would be an incremental step in the development of the common law. It is not necessary for the purposes of this judgment to consider whether such duty of support is to operate reciprocally between the extra-marital child and his/her grandparents and other paternal relations. It is also not necessary for purposes of this judgment to deal with matters of access, custody and the like in the context of paternal grandparents and extra-marital children. With regard to the presumption of paternity and the envisaged evidentiary difficulty which it may present to paternal grandparents, I wish to reiterate that it should not serve as a basis for the formulation of a rule of substantive law, nor should it be used as an excuse or justification to perpetuate the violation of the constitutional rights of extra-marital children.

[28] I am indebted to counsel, as well as Mr. **Hutton** who assisted in the preparation of the heads of argument of the *amicus curiae*, for their full and most helpful arguments.

[29] In the result I make the following order:

[1] It is declared that the second and third respondents have a legal

duty to support the extra-marital child of the applicant, Jordan Petersen born on 7 January 2003, to the same extent to which the fourth and fifth respondents are liable to maintain the said child.

[2] The first respondent is directed to take the necessary steps for an enquiry to be held in terms of section 10 of the Maintenance Act No. 99 of 1998, with a view to enquiring into the provision of maintenance by the second and third respondents for the said extra-marital child of the applicant.

[3] No order as to costs is made.

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**P.B. Fourie, J**

**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

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**GASANT ABRAHAMS** Second Respondent
**SAADIA ABRAHAMS** Third Respondent
**BEULAH PETERSEN** Fourth Respondent
**EUGENE BREDENKAMP** Fifth Respondent

Advocate for Applicant : Adv. M. Abduroaf

Amicus Curiae : Adv. P. K. Weyer

Attorney for the Applicant : AJ Hamman & Associates
Date of hearing : 24 October 2003
Date of Judgment : 11 November 2003