IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: 53198/2013
Date: 14/4/16
Not reportable
Not of interest to other judges
Revised.

In the matter between:

SONE CLOETE **PLAINTIFF**

AND

JOHANN CHRIS BLIGNAUT **DEFENDANT**

JUDGMENT

TOLMAY, J:

INTRODUCTION:

[1] Plaintiff instituted action against the defendant for payment of expenditure that she alleged she incurred during 2009 up to 2012 as *negotiorum gestor* in regards to maintenance for the children born of the marriage between the parties. The defendant appeared in person at the trial whilst the plaintiff was represented.

[2] The parties were previously married to each other and got divorced on 11 October

1996. Two children were born of the marriage a boy M. born on […] 1991 and a girl Y. born on […] 1993.

[3] When the parties got divorced in 1996 they entered into a settlement agreement. In terms of the settlement agreement defendant had to pay maintenance in the amount of R1 000-00 per month per child, which amount included medical, dental, hospital as well as educational expenses.

[4] In her pleadings plaintiff alleged that she managed the affairs of the children during 2009 up to 2012 with intention to be recompensated. She alleged that the expenses she incurred on a monthly basis were reasonable and represented the maintenance needs of the children. She alleged that she incurred expenses in the amount of R2 561 939-76. She claims half of that amount being R1 280 969-88 from defendant. This amount was reduced during the course of the evidence, as plaintiff testified that this case was actually about the tertiary education of the children, and consequently limited her claim to those expenses.

THE EVIDENCE:

[5] Plaintiff testified that she paid all the children's expenses and that defendant paid only the amount of maintenance, initially R1 000-00 per month per child as agreed in the settlement agreement. He never increased this amount and in September 2003 she approached the Maintenance Court and this amount was increased to R1 200-00 per month per child.

[6] At a certain point the defendant fell in arrears with his maintenance payments and on 1 March 2010 the defendant was found guilty of contravention of sec 31(1) of the Maintenance Act 99 of 1998 as amended after he pleaded guilty and was sentenced to 6 months imprisonment suspended for a period of 5 years on condition that he was not again found guilty of a contravention of the Maintenance Act. The amount that he was found in arrears with at the time was R122 400-00 which he had to pay off in instalments of R2 000-00 per month. It is common cause that defendant paid the tertiary education for the first and second year of M. for the period 2009 and 2010. M. was enrolled at an educational institution in Pretoria during this period. M. however wanted to complete his

studies in Stellenbosch and enrolled in Stellenbosch for his third year. Defendant did not make any contribution for the third year as he did not approve of the move to Stellenbosch.

[7] M. turned 18 during 2008 and Y. during 2011, as a result they reached the age of majority. During 2012 plaintiff launched another application for arrear maintenance. The Maintenance Court dismissed the application and found that plaintiff did not have *locus standi* to bring the application, as the children have reached the age of majority.

[8] M., during 2012 launched an application for maintenance against the defendant. This application was later withdrawn. Plaintiff testified that defendant delayed the proceedings and said that this led to the withdrawal. She testified that the matter was postponed several times because defendant did not appear at the hearings. She said that defendant on one occasion did not attend the Court but merely sent a doctor's certificate stating that he was incapacitated. She however went to defendant's place of employment and photographed defendant at his work in Centurion on the day that he should have been in court in Stellenbosch. Defendant in his evidence explained that he suffered from nausea and that he could not fly down to Cape Town but admitted that he was at work on that day. He however denied that he delayed proceedings and stated that M. on occasion did not attend the proceedings which led to him incurring fruitless expenses to travel from Pretoria to Stellenbosch. M.'s claim, in terms of the application amounted to expenses of R29 242-00 per month, which he claimed from defendant.

[9] Y., the daughter also launched an application for maintenance against the defendant in the maintenance court sitting in Stellenbosch during 2012. This application was also not proceeded with. Defendant testified that he and Y. investigated the possibility of studying and that he agreed to pay for studies at Damelin College, where the annual costs were R30 000-00. Y. would then stay in Pretoria while she studied. She however enrolled in Stellenbosch which resulted in the escalation of costs to R120 000-00 per year. Defendant did not approve of this and refused to contribute to her expenses. Neither Y. nor M. testified during the proceedings before me.

[10] Plaintiff initially testified that she paid all the expenses of the children, but the evidence was that defendant did pay for M.'s first two years of tertiary education. The

plaintiff did indeed pay for his third year and she paid for Y.'s studies. Plaintiff's claim in the end was for payment of M.'s last year of studies and Y.'s 3 years of tertiary education.

[11] Plaintiff stated that the expenses incurred on behalf of the children were reasonable. She however did not lead any evidence about her income, general expenses, assets and financial worth. She instructed Mr Rabaney, an auditor to calculate her claim. He testified that he received instructions from the plaintiff pertaining to the expenses of the children but said that, although source documents were made available to him, that he did not use them in his calculations. His calculations were made for the period of 2006 to 2012, but due to the concessions made during the plaintiff's evidence the figures were adjusted. Due to the conclusion that I came to I need not deal with these figures. Suffice it to say that Mr Rabaney could not testify to the fact that the expenses were actually incurred nor could he say whether they were reasonable or not.

[12] Defendant brought an application for absolution of the instance at the end of plaintiff's case. This was dismissed as I was of the view that at that point there was a prima facie case which could lead to the Court ruling in favour of the plaintiff.

[13] The defendant testified and confirmed the initial order and subsequent Court orders. He gave evidence regarding his employment history. He testified that he was unemployed for the period 2005 - 2006. During 2008 he worked with the plaintiff as a sales representative and assisted her in a guesthouse that she was running. He testified that there was a very good relationship between them at the time. During 2009 he worked for a company who sold liquor, but the company was liquidated. During this period he also worked for a person who processed vegetables. His evidence was that he struggled financially. In 2009 he started at an Estate Agency and then started his own business as a rental agent. He formed a close corporation, his wife who works with him is the only member of the Close corporation. He said that he earned R15 000-00 per month during 2009 and he testified that he now earns R16 000-00 per month. His bank statements for 2011 however shows an income of R16 500-00 per month at that time.

[14] Defendant does not own any immovable property and the house that was awarded to him in the divorce settlement was taken back by the bank. He drives an 11 year old

Nissan bakkie, which he bought from his sister. He had to terminate his policies and medical aid in 2005 when he was unemployed. He could only afford to obtain a medical aid again during 2013. He and his wife earn the same amount. His evidence was that he struggled financially and the situation did not seem to have improved much.

[15] He said that he fell in arrears with maintenance payments because of his financial woes and he admitted guilt and agreed to pay the arrear maintenance as set out above during the hearing in 2010. As a result the amount that he had to pay towards the children increased from R2 200-00 to R4 400-00 per month. The last payment for the arrear maintenance was made in October 2014. When he started to pay M.'s studies he had to pay a further R5 000-00 per month. Consequently he paid R9 400-00 per month maintenance for that period of time.

[16] According to him plaintiff managed to buy 4 immovable properties since the divorce whereas he was only able to rent a property to live in and had to move to a smaller property due to financial restrictions. This was not disputed by the plaintiff.

THE LEGAL PRINCIPLES:

[17] The plaintiffs action is based on *negotiorum gestio* and unjust enrichment. Plaintiff claims that she paid more than her fair share of the children's expenses and that she is therefore entitled to be reimbursed. She claims half of her actual expenses from the defendant. She alleged in the pleadings that from 2009 to 2012 she, as *negotiorum gestor* managed the affairs of the minor children on behalf of the defendant with the intention to be recompensated. We however know that M. turned 18 in 2008 and Y. in 2011. It is trite law that parents have to contribute *pro rata* and according to their financial resources towards the maintenance of dependant children.

[18] In Wille's Principles of South African Law[1] the following is said:

> *"A parent who has paid more than his or her pro rata share towards the child's maintenance has* a *right to recourse against the other parent, irrespective of*

[1] Juta 2007, p 359

whether the duty of support was apportioned between them by an order of court. In determining the amount to be paid, usually by the non-custodial parent (or both parents) to the custodial parent (or a custodial third party), the primary factors to be taken into consideration by the court are the needs and interest of the child and the financial and social position of its parents".

[19] The amount to be recovered must be the amount that the Court considers reasonably represents the defendant's share of the joint duty to maintain the child.[2]

[20] The *gestor's* claim is limited to the extent of the unjustified enrichment of the *gestor.*[3] In this instance the children have already reached the age of majority but I accept that they were still dependant on their parents and the same principle should apply to them.

[21] It is trite that the amount of maintenance due to a child from his parent is determined by the means of the parents and the needs of the child. The general principle is that children should be maintained jointly by their parents according to the parents' financial circumstances and resources.

[22] In **Modise v Modise & Another**[4] the right to recover maintenance in terms of the *actio negotorium gestio* based on undue enrichment was discussed and the well-known principles pertaining to the parents' *pro rata* contribution was restated. The following was said in this regard:

"The amount of child support due to a child from his parents is determined by the means of the parents and the needs of the child, the general principle being that a child of divorced parents has a right to be maintained by them, and they in tum, have a duty to provide the child with everything that the child reasonably requires for its proper living and upbringing according to their means, standard of living and situation in life. The obligation attaches to both parents jointly, but their respective shares of that obligation are apportioned according to the financial resources and circumstances of each of them".

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[2] Woodhead v Woodhead 1955(3) SA 138 (SR)
[3] Van Rensburg V Straughan 1914 AD 317, 329-330
[4] 2007(1) BLR 622 (HC)

[23] There is no doubt that under appropriate circumstances a parent who paid more than his/her pro rata share may recover the excess. However in order to determine the contribution various factors should be considered in **Modise**[5] the following factors that need consideration were set out:

> *"(i) The financial resources of the child.*
>
> *(ii) The financial resources of both parents, including their respective incomes, assets and capital.*
>
> *(iii) The standard of living the child would have enjoyed had the marriage not ended in divorce.*
>
> *(iv) The needs of each party in order to support himself or herself at a level equal to or greater than that such party enjoyed before divorce.*
>
> *(v) The needs of any person, other than the child, whom either party is legally obligated to support.*
>
> *(vi) The standard of living of each parent of the divorce.*
>
> *(vii) The cost of the child-care or maid services, if the custodial parent works outside the home, or the value of child-care services performed by the custodial parent, if the custodial parent remains in the home.*
>
> *(viii) The physical, mental and emotional health needs of the child, including any costs for health insurance.*
>
> *(ix) The child's educational needs.*
>
> *(x) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work* as *well as the willingness of each parent to secure work in accordance with his or her earning capacity.*
>
> *(xi) The best interest of the child.*
>
> *(xii) Any other factors which the court, in each case, might determine to be relevant."*

[24] In order to determine whether reimbursement should follow it was stated that the following factors were set out to be considered[6]:

> *"(i) The reasons that led to the failure by the other parent to contribute to the*

[5] p 627

maintenance of the child.

(ii) Whether the claiming parent has *acted within reasonable time, regard being had to her ability to claim from the other party, the relationship between the parties, the availability of the other party, etc.*

(iii) Whether the parent who did not contribute was aware that the other party was making expenses for the benefit of their children.

(iv) What steps, if any, the party who failed to contribute made to enquire about his own obligations in the maintenance arrangements made and executed by the other party.

(v) The reasons advanced for the non-participation of the parent who failed to participate in child-support arrangements.

(vi) If the dominus negotii was aware of the gestor's payment of maintenance, whether he, at any point specifically forbade her from acting for him or in any way indicated his views on the matter.

In calculating the amount to be reimbursed, where a finding has been made that reimbursement is due, the following will be considered:

(i) The amounts actually expended by the claiming parent.

(ii) The relative financial; situation of each parent in each year of the children's minority and/or the period of support in question.

(iii) Whether there were any other children either or both of the parents were supporting during the period of support in question."

[25] In this matter I am faced with the problem that plaintiff led no evidence whatsoever detailing her income, expenses and financial position during the relevant period. She led only general evidence that she incurred expenses on behalf of the children and that those were reasonable and then proceeded to claim half of those expenses from the defendant. The expert did not assist as he merely calculated her contributions and calculated what the defendant's half should be. In the absence of evidence pertaining to the financial position of the plaintiff it is impossible to determine if she should be recompensated and if she should be recompensated what defendant's contribution should be.

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[6] Modise, supra P 628

[26] Plaintiff did not succeed in proving the contributions, if any, which defendant should make nor did she prove enrichment of the defendant or impoverishment of the plaintiff. Consequently the action can't succeed. In the light of the above plaintiff did not prove that she should be reimbursed for the payments that she made on behalf of the children.

[27] Due to the fact however that plaintiff acted as custodian of the affairs of the children born of the marriage I am of the view that each party should pay his/her own costs.

[28] I make the following order:

28.1. The action is dismissed; and

28.2. Each party to pay his/her own costs.

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RG TOLMAY

JUDGE OF THE HIGH COURT