

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 3437 / 2022

In the matter between:

CL

Applicant

and

CJL

Respondent

Coram: Wille, J

Heard: 8th of June 2022

Order: 13th of June 2022

Reasons: 17th of June 2022

REASONS

WILLE, J:

Introduction

[1] This matter was an opposed matter for certain relief *pendente lite*. The parties are in the midst of a divorce action and have one adult-dependent child. The matter came before me in motion court and after hearing the parties, I considered the matter for a short period and issued an order. I informed the parties that it was not necessary for either of them to formally file a request for reasons for my order as there was only a single issue, which in my view, required reasons to be supplied to the parties, irrespective.

[2] This core issue for determination was whether the applicant, in her name, was possessed of the necessary *locus standi* to apply for an order that the respondent maintains the parties' adult-dependent child to the full extent prayed for in the notice of motion. This is in the context of an application chartered for in terms of rule 43 of the Uniform Rules of Court.

[3] I granted some of the relief contended for by the applicant on behalf of the parties' adult-dependent child and I also dismissed some of the relief contended for by the applicant on behalf of the parties' adult-dependent child. These are then my reasons for doing so. I issued out an order in the following terms, namely:

'...That the respondent shall maintain the applicant (and the parties' major child) pending the determination of the divorce action under case number 12685 /2021, as follows:

That the respondent shall pay an amount of R25000,00 per month by way of cash maintenance to the applicant (and the parties' major child), on or before the first day of every month, as from the 1st of July 2022, free of set-off or deduction, by way of a debit order or direct electronic transfer, into such bank account as the applicant may specify from time to time. The maintenance payable in terms of paragraph 1.1 shall be increased annually on the anniversary date of this order, by the percentage change in the Headline Inflation Rate (also known as the Headline Consumer Price Index), as notified by Statistics SA in respect of the Republic of South Africa for the preceding twelve months. Such percentage change shall for convenience be deemed to be equal to the latest index available from Statistics SA on the anniversary date.

That the respondent shall bear the costs of all expenditure in respect of medical, dental, surgical, hospital, orthodontic, and ophthalmological treatment required by the applicant (and the parties' major child), any sums payable to a physiotherapist, practitioner of holistic medicine, psychiatrist/psychologist and chiropractor, the cost of prescribed medication and the provisions where necessary of spectacles and/or contact lenses (the "medical expenses").

That the respondent may elect to accept responsibility for all these medical expenses specified above by paying the monthly premiums required to keep the applicant (and the parties' major child) covered as his dependants on the respondent's current medical aid scheme, or a scheme with similar benefits with the proviso that respondent shall bear the responsibility for all the costs of these medical expenses and, the respondent shall pay the monthly contributions, and any escalations thereon in respect of his current medical aid scheme or a scheme of similar benefits, timeously on the due date.

That the respondent shall be liable for all medical expenses not covered by the respondent's medical aid and shall pay all these medical expenses promptly within seven days of invoice and/or shall reimburse the applicant for any expenses she may have paid within seven days of her having provided him with copies of the relevant invoices of any medical expenses incurred as set out in paragraph 1.2 above.

That the respondent shall pay all expenses in respect of the vehicle which the applicant drives including the monthly payments due, if any, in terms of the existing credit agreement as well as licensing fees, short-term insurance, the replacement of tires, and costs of services and reasonable repairs.

That respondent shall pay the applicant the sum of R50 000,00 for the relocation expenses and other expenses as set out in paragraph 1.6 of the notice of motion. This payment shall be free of set-off or deduction, by way of a debit order or direct electronic transfer, into such bank account as the applicant may specify from time to time and shall be paid on or before the last day of August 2022.

That the respondent shall pay an initial contribution of R100 000,00 to the applicant's costs in the divorce action, payable on or before the last day of September 2022 and directly to the applicant's attorney of record.

That the further claims at the instance of the applicant (on behalf of the parties' major child) are hereby dismissed.

That the costs of and incidental to this application shall stand over for determination at the trial action...'

[4] The claims by the applicant (on behalf of her adult-dependent child) against the respondent which I dismissed were these; (a) the costs of the adult-dependent child's horse-riding activities; (b) a new vehicle for the adult-dependent child to the value of R420 000,00 and, (c) paying all the adult-dependent child's tertiary educational costs for an undergraduate degree at a tertiary educational institution and the costs of textbooks, stationery, the provision of a laptop computer (and software), as well as the cost of all residence accommodation (if the adult-dependent child does not live at home while pursuing her tertiary education). The quantum of the costs of the horse-riding activities of the adult-dependent child was left largely unquantified in the applicant's notice of motion. However, the schedule attached to the application indicated this sum to be the amount of R22 346,00 per month.

[5] It was unclear from the papers before me whether or not the adult-dependent child was living primarily with the applicant or, primarily with the respondent. However, by agreement, it seemed to be common cause that the adult-dependent child at times lived with the applicant and also at times lived with the respondent. More than this was not clear from the papers. However, it was alleged that the adult-dependent child had indeed been living with the respondent for the two months immediately preceding the filing of the respondent's answering affidavit.

The Position Adopted by the Respondent

[6] The respondent took the position that the applicant's claim was limited to only a claim for increased household expenditure incurred by her as a consequence of the adult-dependent child living with the applicant from time to time. Put in another way, it was argued that no other claims may be instituted on behalf of the adult-dependent child, as the adult-dependent child was possessed of her own *locus standi* to do so.¹

¹ *Butcher v Butcher* 2009 (2) SA 421 (C) paras [9] – [18].

[7] A further powerful point made by the respondent's counsel in connection with the tertiary educational expenses was that these claims were not quantified in any manner whatsoever. The adult-dependent child did not indicate at all where she wanted to pursue her tertiary education (if at all), and when she wanted to pursue her tertiary education. Had these facts been placed before me this would have weighed more heavily on me in connection with deciding the issue of *locus standi* in connection with these tertiary educational expenses.

[8] The respondent relied on the decision of *FvF*² in support of his arguments in this connection. The respondent advanced that although their adult-dependent child had completed her secondary education, she had in no manner discussed her future educational plans with him, nor had she exhibited to him her final year results flowing from her secondary education. According to him, his adult-dependent child had not done anything positive to further her tertiary education.

[9] The respondent had provided his adult-dependent child with the unfettered use of a motor vehicle³, pays her R4000,00 per month towards her pocket money, and also covers all her medical-related expenses. She also receives extra pocket money from the respondent on an *ad hoc* basis from time to time. The respondent contended that the claim for a new vehicle for his adult-dependent child for the sum of R 420 000,00 was exorbitant and was totally unnecessary. This claim was at the instance of the applicant. He also argues that the costs of and incidental to his adult-dependent daughter's equestrian expenses must be taken up with him directly and that the applicant was not possessed of any *locus standi* in this connection.

The Position Adopted by the Applicant

[10] The applicant takes the position that under common law both divorced parents have a duty to maintain a child of a dissolved marriage or a yet-to-be-dissolved marriage. The incidence of this duty in respect of each parent depends on the relative means and circumstances of each parent, and the needs of the child

² The as yet unreported case (82419/2015) Gauteng Division (Pretoria) at para[120].

³ A 'Volkswagen Polo' motor vehicle for which the respondent accepts liability for licensing, insurance and maintenance.

from time to time.⁴ This duty does not terminate automatically upon reaching the age of majority but persists for as long as the child needs support and the parent or parents are able to pay.⁵

[11] The argument that was advanced on behalf of the applicant was that by legislative intervention a court is empowered to grant maintenance orders, including interim maintenance orders, in respect of an adult-dependent child of the parties to a divorce action.⁶ It is so that as a matter of expediency the court usually regulates the incidence of this duty between the parents when it grants the decree of divorce.

[12] It is argued that such a maintenance claim is ancillary to the common law duty of support. Further, by way of elaboration, it was submitted that there is no distinction between amounts claimed by a parent in their own right for shared expenses of an adult-dependent child, and any amounts claimed in respect of the adult-dependent child's expenses, which the claiming parent would otherwise have to bear.

[13] It was submitted that this was so because both parents have a duty to support their adult-dependent child and accordingly each parent, therefore, has an interest in securing an appropriate contribution from the other parent, failing which the entire burden of support would fall on him or her. Viewed in this way, it is contended that the parent is not so much claiming on behalf of the adult-dependent child, but in his or her own interest in order to make sure that he or she does not foot the entire bill alone.

Consideration

[14] It was submitted by the respondent that to allow a parent *locus standi* in matters concerning an adult-dependent child's personal claims against the other parent, would deprive the major dependent child of his or her own *locus standi* to establish, negotiate and enforce such claims.

⁴ *Bursey v Bursey* 1999 (3) SA (SCA) at 36 C – D).

⁵ *JG v CG* 2012 (3) SA 103 (GSJ) at para 7.

⁶ Section 6(1) and section (6)(3) of the Divorce Act, 70 of 1979.

[15] As a general proposition, it was submitted that a parent cannot be allowed to assume *locus standi* at the expense of his or her major child and so deprive another person of the full capacity of his or her personal constitutional rights. By contrast, the applicant advanced that if an adult-dependent child was forced to litigate against his or her parent it would place such an adult-dependent child in a difficult position. I accept that this may be so, but could this, as a matter of law, be a justification to deprive such an adult-dependent child of his or her rights and simultaneously confer those rights on one of his or her parents?

[16] This entire subject is one of depressing complexity. I say this because, ultimately the judgment of a court, according to the law, cannot rest upon the ruling of another purpose, not professed, that may be read beneath the surface, and by the purpose so imputed, that the legislative interventions created are destroyed.

[17] As a matter of logic, this may prove legally problematic in that if such parent did have the necessary *locus standi* and enforced such a right against the other parent and, the adult-dependent child thereafter became dissatisfied with the relief awarded as consequence thereof, this may result in severe difficulties for such an adult-dependent child to advance any subsequent similar or better relief in his or her own name. This is particularly so where the adult-dependent child has not been joined to the interim application and/or no confirmatory affidavit has been filed by the adult-dependent child.

[18] In terms of section 18(2)(d) of the Children's Act⁷, parents have a responsibility to contribute to the maintenance of their children. In terms of section 17 of this legislation, as defined, children are seen as adults when they reached the age of majority at the age of (18) years old.

[19] A parent's right to apply for maintenance for their child is usually terminated when the child reaches majority. Clearly, this does not mean that a parent's responsibility to maintain their child ceases when the child reaches majority. No doubt, if either of the parents or both, were historically supporting their child as a

⁷ The Children's Act, 38 of 2005.

minor, a court may order them to continue maintaining that child until the child is self-supporting.

[20] In such a case the court will usually consider the wording of the extant divorce or maintenance order. If the order states that a parent needs to pay maintenance until the child reaches the age of majority, it would then mean that the major child would then be obliged to approach the court to apply for a maintenance order whereby the responsible parent or parents, would have to pay maintenance until that child is no longer dependent and self-supporting.

[21] By contrast, if the extant order states a specific age, such as (21) years old, it would mean that the responsible parent would have to maintain such a child until he or she reaches the age of (21) years, even if they were self-supporting. The wording of the extant order is therefore very important when a court makes an order regarding maintenance.

[22] As alluded to earlier, section 6(1)(a) of the Divorce Act⁸, provides that a decree of divorce shall not be granted until the court is satisfied that the provisions made in respect of minor or dependent children are acceptable under the relevant circumstances. Section 6(3) further makes provision that a court, when granting a decree of divorce, may make any order that it deems fit in respect of the maintenance of dependent children.

[23] Accordingly, the court has the discretion to make an order that it deems fit under the relevant circumstances, including that a parent or both parents need to support an adult-dependent child until he or she becomes independent or self-supporting.

[24] Another consideration that bears some scrutiny is what is envisaged by the words 'self-supporting' in the context of a parent's duty to maintain his or her adult child. Section 8(1) of the Divorce Act indicates as follows, namely that;

⁸ The Divorce Act, 70 of 1979.

‘...such order may be suspended by a court if the court finds that there is sufficient reason, therefore...’

[25] A court may make any order that it deems fit, which includes the suspending of an extant order if a parent is not able to maintain a dependent child after they reach the age of majority. In such a case, the court is enjoined to consider whether the adult child is conceivably capable of supporting himself or herself and (if the adult child is capable of supporting himself or herself), whether he or she is not doing so out of convenience. In the latter case, a court may, in addition, make an order to suspend any maintenance.⁹

[26] The court in *Butcher*¹⁰ observed that neither of the legislative interventions expressly authorized a parent to claim maintenance on behalf of an adult-dependent child from the other parent and concluded generally that in the absence of any enabling statutory provisions, a parent of an adult-dependent child lacked the necessary *locus standi* in divorce proceedings to claim (on behalf of an adult-dependent child), that the other parent pays certain allowances directly to the adult-dependent child or pay certain expenses on his or her behalf.

[27] Put in another way, only the child has the requisite standing to pursue such claims against the parent concerned. On the basis that the parent had no *locus standi* to pursue such claims in the divorce action, it followed that such claims were not competent in proceedings for relief *pendente lite*. I am in wholesale agreement with the following reasoning adopted in *Butcher* in terms of which it was indicated as follows:¹¹

‘...the applicant’s claim for the cash amount to be received by her pendente lite, which in part is intended to cover the children’s food and grocery expenses at the family home, as well as general household expenses, is on a different footing to the claims pursuant in which she seeks certain allowances directly to the children...’

⁹ *M v M* (0042146/17) [2018] ZAGPJHC 506.

¹⁰ *Butcher v Butcher* 2009 (2) SA 421 (C).

¹¹ *Butcher v Butcher* 2009 (2) SA 421 (C) para [17].

[28] This is because it must be so that where an adult-dependent child living with both his parents in a communal household and currently being educated by his or her parents, it would be unnecessary to insist that the adult-dependent child bring separate proceedings to have his or her maintenance rights against one or other parent determined and these expenses may be determined *pendente lite*.

[29] I also accept that an adult-dependent child may be placed under some considerable emotional burden when forced to institute legal proceedings against his or her parent. It is accordingly important to identify both the process and circumstances under which a parent may have the standing to claim maintenance on behalf of an adult-dependent child, particularly when the adult-dependent child resides with one parent who is regularly incurring expenses in relation to such an adult-dependent child.

[30] It must as a matter of logic be so that a court is vested with discretionary powers afforded by section 6 and section 7 of the Divorce Act in ensuring that expenses incurred in respect of the adult-dependent child are catered for, whether these are expenses forming part of the common home or expenses specific to the adult-dependent child.

[31] What is not clear is whether, during the midst of divorce proceedings, a parent claiming maintenance *pendente lite* will in addition have standing to also claim maintenance on behalf of the adult-dependent child with whom they do not reside, or should that adult-dependent child bring his or her maintenance claim separately. I emphasize that I accept and agree with the difficulties that an adult-dependent child may experience when litigating with his or her parent must not be downplayed.

[32] What makes this issue more complicated is also the question of whether the adult-dependent child can independently bring an *interim maintenance* claim during the divorce proceedings involving any or both of his or her parents or whether this should be done separately and not *pendente lite*. In my view, the former would not be competent.

[33] The decision in *Butcher* with regard to *locus standi* was carefully considered by the court in *JG*¹² which declined to follow the reasoning in *Butcher* and indicated, *inter alia*, as follows, namely;

‘...I do, however, respectfully differ from the learned judge's finding in Butcher (despite its careful reasoning), and hold that, upon a proper and purposive interpretation of the provisions of rule 43 read with ss 6 and 7(2) of the Divorce Act and the common law, a court can in rule 43 proceedings make a maintenance award in favour of one spouse against the other in respect of expenses incurred by it in supporting a major dependent child living in the matrimonial home together with both parents, pendente lite, and even if they are specific to the child and not part of the general household expenses...’

[34] Essentially, the view was expressed that a parent does indeed have *locus standi* in proceedings *pendente lite* to claim expenses incurred in supporting an adult-dependent child. This view was, *inter alia*, fortified by a number of reasons some of which, I will now consider.

[35] Firstly, an issue concerning interpretation was piloted in the following terms, namely:

‘...It is no coincidence that a divorce action is defined to include relief pendente lite mirroring the permissible categories of relief listed as being competent in terms of rule 43(1). Hence, whatever considerations are to be addressed by the court in the divorce action can also legitimately be considered to be part of the matrimonial lis in the rule 43 proceedings, and which are specifically designed to regulate such matters pendente lite, provided that they fall within the categories of relief delineated to be justiciable in terms of rule 43(1)...’

[36] Secondly, it was advanced that in terms of the common law that one parent may make a claim against another parent in respect of maintenance obligations owed to children. Where one parent has contributed more than his or her required share to the maintenance of the child, recovery is possible. The court pointed out

¹² *JG v CG* 2012 (3) SA 103 (GSJ).

that this recognition is consistent with an acceptance in principle that one parent may be directed to pay a contribution to another in respect of expenses incurred in regard to a dependent child, *pendente lite*, and observed that:

‘....it would not be alien to accepted common-law principles to make one spouse make a payment to another in respect of their shared obligation to meet the expenses of maintaining the child in the matrimonial home, pendent lite. It would defy logic and principle to only recognize such right in the form of a remedy for recovery after the event, and not accept the court's right to direct that it be paid in advance pendent lite and particularly in the robust discretionary process postulated by rule 43...’

[37] Thirdly, the court reasoned that an interim order made in *pendente lite* proceedings without the participation of an adult-dependent child would bind the parents only and not the child, who would be free to bring his or her own maintenance proceedings against the errant parent. Thus, the non-joinder of the adult-dependent child in the *pendente lite* proceedings would not be an impediment to the entitlement of a parent to make a claim for relief in respect of maintenance for such an adult-dependent child.

[38] However, it must also be accepted that the institution of a separate claim in the maintenance court could also lead to the piecemeal adjudication of issues in that an adult-dependent child's maintenance claim upon his or her parents may also be intrinsically linked to other issues bound up in the issues to be adjudicated in the divorce action. Further, there could be negative repercussions for an adult-dependent child if his or her maintenance claim was to be adjudicated in isolation.

[39] It may very well be that all these arguments have merit (and I have no doubt that they do), but at the end of the day, in my view, it boils down to the procedural foundation and manner in which the claims of the adult-dependent child could and should be formulated and advanced.

[40] I say this because this will enable courts to finalize interim maintenance claims for all the parties concerned which will prevent an adult-dependent child from

having to bring discrete maintenance claims against his or her parent. The latter could have a detrimental effect on the well-being of the adult-dependent child. Further it could complicate and add unnecessary torment to the divorce proceedings.

[41] Moreover, waiting for the divorce proceedings to be finalized while in need of immediate financial support or bringing a separate maintenance claim against any of the parents might be prejudicial to the adult-dependent child who may not have the financial means to pursue a maintenance claim in court.

[42] Accordingly, I hold the view, that the adult-dependent child (in these circumstances) should retain his or her *locus standi* and accordingly falls to be joined (or must at the very least file a confirmatory affidavit) to any *pendente lite* proceedings in which his or her parents may be involved.

[43] This would partially ensure that the result of each application for relief *pendente lite* would depend on the facts presented and each case would be case-specific and fall to be dealt with on the basis of a fact-specific evaluation. The financial needs and views of the adult-dependent child would accordingly be squarely and properly before the court for adjudication.

[44] Also, in my view, this could potentially absolve the court of having to employ an exercise in *legal gymnastics* in order to determine what claims may be reasonable or unreasonable (or necessary or unnecessary) in the circumstances. This proposed procedure would also to some extent protect the adult-dependent child from having to squarely face his or her parent in a maintenance court.

[45] On the facts of this case, I held the view, taking into consideration the circumstances of this matter, that the facts presented to me on the papers were not adequate to justify an order directing payment to be made directly from one parent to another *pendente lite* in respect of the adult-dependent child's equestrian expenses, the cost of a new motor vehicle for the adult-dependent child and, the 'possible' tertiary educational expenses (as yet unknown), for the adult-dependent child.

[46] These are then my reasons for my order.

E. D. WILLE

Judge of the High Court

Cape Town