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

Case No: A222/2021

In the matter between:

D[....] W[....] T[....] Appellant

And

M[....] T[....] First Respondent

FIRST NATIONAL BANK Second Respondent

Court: Justices NC Erasmus et VC Saldanha
Heard: 31 August 2022
Delivered electronically: 19 October 2022

JUDGMENT

SALDANHA J:

[1] On 31 August 2022 we court made the following order in the appeal:

1.1 The appeal is dismissed.

1.2 The Order of the Magistrate is confirmed, in that, the application to attach the remaining funds of the pension payout in the account of the first respondent at First National Bank (the second respondent), is granted. The

funds held therein must immediately be paid out to the first respondent by First National Bank (the second respondent).

These are the reasons for the order.

[2] The appeal arose out of an application in the George Magistrates' Court for the enforcement of a maintenance order, obtained by the first respondent (hereafter referred to as the respondent) against the appellant, her ex-husband. The appellant challenged the respondent's *locus standi* to bring the application, on the basis that a part of the maintenance order against him related to adult dependent children; that he disputed the amounts alleged owed by him as arrear maintenance; and, he moreover, claimed that he was unable to afford to pay any maintenance to the respondent for their adult dependent children and a remaining minor child. The respondent, who appeared in person, vigorously opposed the appeal. It was apparent that there was a long and acrimonious history between the parties relating to the maintenance of the children.

[3] The central issue for determination in the appeal, as contended for by the appellant's legal representative was, that of the respondent's *locus standi* to have brought the application, in light of two of the three children having attained the age of majority.

[4] On 21 July 2022 the Supreme Court of Appeal, in *Z v Z* (556/2021) [2022] ZASCA 113 per Meyer AJA (on behalf of the full court), unanimously settled the question, on which there had been various conflicting High Court decisions, as to whether a parent had *locus standi* to claim maintenance from the other, on behalf of adult dependent children, in divorce proceedings between them. A number of decisions held that the parent has the requisite *locus standi* to do so, while others held to the contrary. In that matter the father's special plea in respect of the latter view found favour with the High Court. In a detailed and substantive interpretive analysis of the relevant sections of the Divorce Act 70 of 1979, in particular sections 6 (1) (*a*)[1] and (3)[2], the SCA was of the view that the sections led to the inevitable

[1] '(1) A decree of divorce shall not be granted until the court-
(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances; . . .'

conclusion that the parents were indeed vested with the requisite legal standing to claim maintenance for and behalf of their dependent adult children in divorce proceedings. The father's special plea thus failed on appeal. The appellant's legal representative in this matter sought to distinguish the decision in *Z v Z*, on the basis that the application before the court *a quo* did not relate to the provisions of the Divorce Act, and persisted that the rule nisi granted by the court *a quo* freezing an amount held in the appellant's bank account with the second respondent, be discharged and that the enforcement order against him for the maintenance of the parties' children be dismissed with costs.

BACKGROUND

[5] The parties have three children: R[....], who turned 18 on 4 December 2018; M[....]2 who likewise turned 18 on 28 May 2020; and a minor child R[....]2.

[6] In divorce proceedings in the Gauteng Division, Pretoria, under case number 64008/14 the respondent on 25 May 2017 obtained an order, in terms of Rule 43 of the Uniform Rules of Court, that the appellant contribute towards the maintenance of the minor children, in the amount of R2000 per month per child, in accordance with an existing order of the Maintenance Court. The appellant was also ordered to retain the minor children on his medical aid and to pay 50 per cent of all shortfalls and medical expenses not covered by the medical aid. He was also ordered to pay 50 per cent of the minor children's school and hostel fees and which had to be paid directly to the school. The final order of divorce was not placed before the court *a quo*, nor before this court in the appeal.

[7] On 26 January 2017, in the George Magistrates' Court, the parties entered into and signed a settlement agreement, in terms of section 17 of the Maintenance

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[2] 'A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.'

Act .99 of 1998[3] which was made an order of court. The order provided that the appellant would pay an amount of R8 727,50 per month in respect of the three children, who were at that stage, all minors. The order, which formed an annexure to the application in the court *a quo*, provided that the respondent pay an amount of R2 512,50 in respect of R[....], R3 730 in respect of M[....]2, and R2 485 in respect of R[....]2, and provided that the first payment in terms of the consent order be made on 31 July 2017, and on or before the last day of each succeeding month, into the 'Absa Bank Account [....] in favour of M T[....]'.

[8] In the official application form filled in by the respondent headed "Application for Enforcement of Maintenance or Other Order in Terms of Section 26 of the Maintenance Act[4]" dated 26 January 2017 to which the respondent deposed to under oath, she claimed, amongst others, the following;

That the appellant would be receiving a pension pay out and would not voluntarily pay anything towards his existing arrears in respect of the maintenance of the children. She also claimed: 'I've(sic) had another warrant of execution for R99 962.00 against Mr T[....] for arrears. As he proof (sic) not to settle any arrears out of his own will'. She further claimed that an amount of R78 885,38 was outstanding and was calculated as the balance of the 'total amount of R92 885.38 from which R14 000.00 was deducted where full payments were made towards the maintenance and

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[3] 17. Orders by consent. – (1) Any order referred to in section 16 (1) (a) or (b) may be made at the enquiry, if it is made in accordance with his or her or their consent in writing handed in by the maintenance officer at the enquiry.

[4] '(a) If any maintenance order or any order made under section 16 (1) (*a*) (ii), 20 or 21 (4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident- (my emphasis).

(i) …

(ii) …

(iii) for an order for the attachment of any debt referred to in section 30 (1)

(b) …'

garnishee orders marked with an asterisk (*)(sic,)' with reference to a "Schedule of Arrear Maintenance Payments " she had attached to the affidavit.

[9] On 19 April 2021 she obtained a *rule nisi* against the appellant in terms of section 26,read together with section 30[5] of the Maintenance Act ,on an ex parte basis with the return date as the 6 May 2021 in respect of the following relief;

> "2. The bank account of the First Respondent held at First National Bank with account no: [....] in the name of the First Respondent be frozen until the Return date.
>
> 2.1 The First Respondent to pay R78 885,38 of the available net amount to the Applicant MS. M[....] T[....] (ID: [....]) in lieu of Arrear Maintenance in terms of section 26, read together with section 30 of the Maintenance Act, No 99 of 1998 into Account Number: [....] held at ABSA.
>
> 2.2 The Applicant be entitled to any and or further alternative relief.
>
> 2.3 Pending the finalisation of the matter in the Maintenance Court, the Second Respondent is interdicted from paying any benefit to the First Respondent."

[10] In a further supporting affidavit to the application deposed to by her on 13 April 2021 she claimed, amongst others, that it had come to her attention that the appellant was to receive the proceeds of his provident fund from MIBCO (Provident Fund), in an amount of R62 640,08. She therefore sought that his bank account be frozen, in light of him not paying his arrear maintenance. She was of the view that

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[5] '(1) A maintenance court may-

(a) on the application of a person referred to in section 26 (2) (a); or

(b) . . .

make an order for the attachment of any debt at present or in future owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall direct the person who has incurred the obligation to pay the debt to make such payment as may be specified in that order within the time and in the manner so specified.'

the money in the account would be squandered by the appellant to the prejudice of their children. She attached to the affidavit the Maintenance Order made on 26 January 2017. She also attached the Schedule in which she had set out for the period January 2019 to April 2021 monthly amounts of R9 727,50 (this amount represents the maintenance order of R8 727,50 plus an additional amount of R1 000 (towards the arrears), as per an emoluments attachment order issued out against the salary of the appellant) that she claimed the appellant ought to have paid. She also set out the amounts paid by the appellant over the succeeding months, with the total amount of arrears recorded as R78 885,38.

[11] In the answering affidavit deposed to by the appellant on 1 June 2021 he stated that he resided in Polokwane, Limpopo Province, and that he opposed the *ex parte* application to freeze his bank account. He stated: 'it is also my intention to apply for a reduction of maintenance, but I had been advised that given that two of my children are now adults the applicant does not have locus standi to claim maintenance on their behalf'. The appellant also disputed the respondent's version, but admitted that he had been ordered to pay the amount of R8 727,50 in terms of the consent order of the 26 January 2017. He disputed the applicant's calculations, as set out in the Schedule, and that he had been ordered to ordered to pay R9 727,50 as indicated. He pointed out that R[....] had since attained the age of majority, and claimed that the amount of R8 727,50 'payable to the applicant should have been reduced to R6 215.00 from January 2019 and reduced by a further R2 485 from June 2020'. The appellant claimed that, on his calculations and in light of the fact that the two children had since turned eighteen, he had overpaid the respondent an amount of R44 603,16. He stated further: 'I accept that I have a maintenance obligation until the children become self-supporting and have no intention of reclaiming the money but on these grounds alone the application should be dismissed'.

[12] The appellant also disputed that he was in arrears and he took exception to the implication that he would squander the provident fund pay out. He claimed that the respondent had caused him undue financial hardship over the years. He admitted though, that maintenance had been deducted by way of the garnishee order against him and that in the months where he had not paid the full maintenance

amount, there were simply insufficient funds in his bank account. He claimed that in those months the balance of his whole salary was paid over to the respondent and he had no money to survive. In respect of the money in the bank account with the second respondent, the First National Bank, he claimed that there was a balance of no more than R32 178,77 that remained and attached a copy of his bank statement as proof thereof (It was apparent that he had already spent a substantial part of his pension payout). He also stated that his nett income was not even R3 000 and attached his last three payslips. He claimed that he simply did not have the resources to meet the respondent's "constant and unreasonable request for more money even though I do not deny my obligation towards my children'. On that basis, he sought a dismissal of the rule nisi in respect of the freezing of his bank account, and the order of the court a quo that he pay whatever amount remains in the bank account to the respondent in respect of arrear maintenance.

[13] The magistrate in the court a quo rejected the appellant's reliance on the dicta of *Richter v Richter* 1947 (3) SA 86 (W), to the effect that a maintenance order terminates automatically once minor children attain the age of majority. In doing so, the magistrate relied principally on the decision of Vivier JA in *Bursey v Bursey and Another* 1999 (3) SA 33 (SCA), where the following is stated at page 36C-G:

'According to our common law both divorced parents have a duty to maintain a child of the dissolved marriage. The incidence of this duty in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time. The duty does not terminate when the child reaches a particular age but continues after majority. (*In re Estate Visser* 1948 (3) SA 1129 (C) at 1133-4; *Kemp v Kemp* 1958 (3) SA 736 (D) at 737 *in fine*; *Lamb v Sack* 1974 (2) SA 670 (T); *Hoffmann v Herdan NO and Another* 1982 (2) SA 274 (T) at 275A.) That the duty to maintain extends beyond majority is recognised by s 6 of the Divorce Act 70 of 1979. Section 6(1)(*a*) provides that a decree of divorce shall not be granted until the Court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. Section 6(3) provides that a Court granting a decree of divorce may make any order which it deems fit in regard to the maintenance of a dependent child of the marriage. This provision must be contrasted

with the provision in the subsection relating to the custody or guardianship of, or access to, a minor child. A maintenance order does not replace or alter a divorced parent's common law duty to maintain a child.'

[14] In that matter, however, the divorce order had clearly stipulated that maintenance to be paid was 'until the said children become self-supporting'. The appellant therefore sought to distinguish this matter from that of Bursey.

[15] In *Bursey, Vivier JA* nonetheless dealt with the situation as to whether an order automatically ceased upon a child becoming self-supporting, with the following remarks at page 38G-H:

'Although not raised on appellant's behalf it is desirable to consider the question whether the order automatically ceases to operate when John becomes self-supporting. As explained in *Kemp's* case at 738 E-G, depending on the terms of the order, a maintenance order exists separately from the fluctuations of the incidence of the common law duty to maintain but may be brought into harmony with that duty by the Court at any time. The order is thus not *ipso jure* varied by changed circumstances but remains fully effective until terminated or varied by the Court. The order itself may, however, stipulate a period for its operation, for example until the child reaches a certain age, and it will cease to operate at that stage (*Kemp's* case at 738 E-G).'

[16] As with the decision in *Z v Z* the appellant's legal representative sought to distinguish *Bursey* from the present matter, on the basis that it dealt with the interpretation and application of the Divorce Act. In my view, the distinction sought to be drawn between the relevant provision of the Divorce Act with that of the Maintenance Act are without any merit. The respondent sought the enforcement of the maintenance order in terms of section 26 (2) (*a*) and (*b*) of the Maintenance Act, which provides as follows:

(a) <u>If any maintenance order</u> or any order made under section 16 (1) (*a*) (ii), 20 or 21 (4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident-

(i) …

(ii) …

(iii) for an order for the attachment of any debt referred to in section 30 (1) (my emphasis).

(b) …'

As indicated, the consent order made on 26 January 2017 specifically provided that it was made 'in favour of the respondent against the applicant' (my emphasis), of various amounts towards the maintenance of the children set out therein. In my view, nothing could be clearer than that the person in whose 'favour the order was made' was the respondent on behalf of the children, and the amount was to be paid into her bank account, as stipulated in the order.

Once again it is clear that the attachment relates to an amount to be paid to the person in whose favour the maintenance order was made; in the instant matter, as per the order of 26 January 2017. Again nothing could more clearly have established the *locus standi* of the respondent in this matter.

[17] More importantly, in its interpretive analysis of the relevant provisions of the Divorce Act, the court in *Z v Z* significantly refers to the sentiments expressed by Mokgoro J in *Bannatyne v Bannatyne and Another* (CCT18/02) [2002] ZACC 31 (20 December 2002), which in my view must with equal force apply to maintenance orders in terms of the Maintenance Act, that:

'[29] . . . The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.'

The court in *Z v Z* likewise referred with approval to the decision of Vivier JA in *Bursey*. It stated that an interpretation of section 6 of the Divorce Act that excluded the claim of maintenance by a parent on behalf of a dependent child who has attained majority, would not preserve its constitutional validity and would result in an absurdity.

[18] Significantly, the court was of the view that it implicated the constitutionally entrenched fundamental rights to 'human dignity, emotional wellbeing and equality of adult dependent children.' In this regard the court noted that most children are not financially independent by the time they attain the age of eighteen. Many would not have even concluded their secondary education and would only commence tertiary education or vocational training after they have attained the age of majority. A further reality would be that it often takes time for young children to obtain employment, and a restrictive interpretation of section 6 of the Divorce Act, as not allowing for a parent to claim maintenance on behalf of a dependent adult child in a divorce, would result in the absurdity that a parent, usually the mother in divorce proceedings, who claimed maintenance for a school going minor child from the other divorcing parent, would have no standing to claim maintenance for and on behalf of another school going child, simply because he or she has attained the age of eighteen. That the court found would also implicate the major child's fundamental right to equality. Needless to say, that reasoning applies equally where an order for maintenance is made under the Maintenance Act, as opposed to the Divorce Act.

[19] Significantly too, in *Z v Z*, the court very usefully and elaborately set out the underlying rationale for arriving at its view, and in this regard pointed out that dependent children should remain removed from the conflict between their divorcing parents for as long as possible, unless they themselves elect to assert their right to the duty of support. The court was also of the view that it would be undesirable that they should have to take sides, and institute a claim together with one parent against the other, and that they should preferably maintain a meaningful relationship with both parents after the divorce. That consideration, in my view, applies equally in respect of claims for maintenance under the Maintenance Act.

[20] The court added that: '[t]he institution of a separate claim for maintenance by an adult dependent child against his or her parent or parents would further lead to

the piecemeal adjudication of issues that arise from the same divorce and are intrinsically linked to other issues in the divorce action, such as claims for maintenance 'for spouses and other minor children born from the marriage'. Moreover, the court was of the view that the invidious position of the indigent adult child in such a situation would be clearly evident.

[21] In the exposition of the rationale for its order, the court referred with approval to the views expressed by Professors Heaton and Kruger, *South African Family Law*[6]:

'Firstly, it is generally accepted that it is undesirable for children to become involved in the conflict between the divorcing parents by being joined as parties in divorce proceedings. Secondly, the adversarial system of litigation still forms part of the divorce process. Although our courts permit a relaxation of the adversarial approach in cases involving children, this approach does not benefit young adults as they are no longer children. Thirdly, it may be very awkward for the parent with whom the child lives to expect the adult child to pay over some of the maintenance received as a contribution to the child's living expenses. Further, some adult dependent children refuse to institute their own maintenance claims, thereby placing an even heavier burden on the parent with whom they reside, who is usually the mother. This further exacerbates the already vulnerable position many women find themselves in after divorce.' (Internal footnote omitted.)

So too ,did the views expressed by Professor M de Jong, on the policy considerations in regard to maintenance clause in respect of adult dependent children in the interpretation of section 6 of the Divorce Act, find favour with the court, where the author states[7]:

'In the context of family law, policy considerations therefore include the values of equality and non-discrimination and the obligation of parents to maintain their children in accordance with their ability, as well as the needs of the children. Other policy considerations that should accordingly be taken into account are the following: the fact that adult dependent children's general reluctance to get involved in litigation

[6] *Z v Z*, para 18.
[7] *Z v Z*, para 19.

against one of their parents and institute their own separate maintenance claims upon their parents' divorce may perpetuate and exacerbate women's social and economic subordination to men and real inequality of the sexes; the fact that the duty to support their minor children should be borne equally by both parents; and possibly the fact that it could have negative repercussions for adult dependent children if their maintenance claims were to be adjudicated in isolation or after the date of their parents' divorce . . .'

The court also referred to the views expressed by Davis AJ in *AF v MF* 2019 (6) SA 422 (WCC), where the following was stated:

'[75] . . . courts should be alive to the vulnerable position of young adult dependents of parents going through a divorce. They may be majors in law, yet they still need the financial and emotional support of their parents. The parental conflict wrought by divorce can be profoundly stressful for young adult children, and it is particularly awkward for the adult child where the parents are at odds over the quantum of support for that child. Moreover, where one parent is recalcitrant, the power imbalance between parent and child makes it difficult for the child to access the necessary support. It is unimaginably difficult for a child to have to sue a parent for support – the emotional consequences are unthinkable.'

[22] Once again with reference to *Bannatyne*, the court in *Z v Z* reiterated that the disparities between mothers who upon divorce face the double disadvantage of being overburdened with responsibilities and under-resourced in terms of means, and fathers who remain actively employed and generally become economically enriched[8]:

' . . . undermine the achievement of gender equality which is a founding value of the Constitution. The enforcement of maintenance payments therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. Effective mechanisms for the enforcement of maintenance obligations are

[8] *Z v Z*, para 21.

thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.' (Internal footnote omitted.)

[23] The constitutionally inspired analysis in the matter of *Z v Z*, in my view, applies with equal force to an order of maintenance under the Maintenance Act. In fact, the Maintenance Act appears to be more direct, in that the payment order in whose "favour it is made" was specifically stipulated as the respondent in this matter.

[24] The appellant's legal representative also contended that the maintenance order did not stipulate that the maintenance was to be paid by the appellant, for the children, until they were no longer dependents. The appellant himself accepts that he remains responsible for the payment of maintenance in respect of his dependent children. He has moreover not sought a suspension, nor the upliftment, of that order in respect of the dependent children on the basis that they are now majors. The magistrate correctly pointed out that the order would endure until set aside by consent or by court order. The appellant also contended that he did not have the means by which to comply with his maintenance obligations. In my view it is beyond question the amount that the appellant received from his provident fund should have been used by him as a contribution towards the arrear maintenance he owed the respondent in respect of all three children. He had not obtained a reduction or a setting aside of any of the maintenance orders against him. The appellant's legal representative moreover accepted that any dispute with regard to any further amounts of maintenance owed, or the appellant's ability to meet his future maintenance obligations, should best be dealt with in the maintenance court and not before this court. It is, however, apparent that the amount remaining in the First National Bank account, R32 178.77, appears, even on the appellant's own calculations, to be significantly less than what is actually owed by him, as at the date on which the order was obtained against him. In my view, there can be no question that the remaining amount in the First National Bank account must be paid to the respondent, as no more than a part payment of the outstanding arrears owed by the appellant in respect of his maintenance obligations towards all three of his children.

V C SALDANHA

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

N C ERASMUS
JUDGE OF THE HIGH COURT

REPORTABLE

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

Case No: A222/2021

In the matter between:

D[....] W[....] T[....]	Appellant
and	
M[....] T[....]	First Respondent
FIRST NATIONAL BANK	Second Respondent

COURT:	ERASMUS, J et SALDANHA, J
HEARD:	31 August 2022
DELIVERED:	19 October 2022

ATTORNEY FOR APPELLANT:	Millers Incorporated
COUNSEL FOR APPELLANT :	Mr Arno Crous
COUNSEL FOR FIRST RESPONDENT:	In Person