



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 556/2021

In the matter between:

Z

APPELLANT

and

Z

RESPONDENT

Neutral citation: Z v Z (556/2021) [2022] ZASCA 113 (21 July 2022)

Coram: Schippers, Nicholls and Carelse JJA, and Meyer and Matojane AJJA

Heard: 4 May 2022

Delivered: 21 July 2022

Summary: Divorce – Maintenance – Adult dependent child – Divorce Act 70 of 1970 – s 6 – whether parent has *locus standi in judicio* to claim maintenance from other parent for and on behalf of adult dependent child of their marriage upon their divorce.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Zilwa J, sitting as court of first instance):

1. The appeal is upheld with costs, including those of two counsel.
2. The order of the court below is set aside and replaced with the following:
'The defendant's special plea is dismissed with costs.'

JUDGMENT

Meyer AJA (Schippers, Nicholls and Carelse JJA and Matojane AJA concurring)

[1] '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 issues that arise for consideration in this appeal call to mind these sentiments expressed by Mokgoro J two decades ago in *Bannatyne v Bannatyne and Another*.¹

[2] The appeal is against the order of the Eastern Cape Division of the High Court, Port Elizabeth (Zilwa J), upholding with costs a special plea in divorce proceedings that a parent lacks *locus standi in judicio* to claim maintenance for and on behalf of the parties' adult dependent children from the other parent. The respondent abides the decision of this Court.

¹ *Bannatyne v Bannatyne and Another* [2002] ZACC 31; 2003 (2) SA 363 (CC) (*Bannatyne*) para 29.

[3] The pertinent facts are neither unusual nor controversial. The appellant, Mrs Z (the mother), and the respondent, Mr Z (the father), married each other on 10 January 1995. Two major, but still financially dependent, children were born from their marriage; a son, R, born on 21 May 1997, and a daughter B, born on 13 March 1999. The marriage relationship between the mother and father deteriorated over time, ultimately resulting in the father moving out of the matrimonial home in April 2018.

[4] On 9 April 2019, the mother initiated divorce proceedings against the father. Apart from claiming a decree of divorce, she *inter alia* claimed maintenance for herself as well as for R and B from the father. In his counterclaim, the father also *inter alia* claimed a decree of divorce. It is common cause that R and B are financially dependent and in need of maintenance from their parents. The father filed a special plea, averring that the two children have reached the age of majority and accordingly have the necessary *locus standi* to pursue maintenance claims against him in their own names, and that the mother lacks the requisite *locus standi* to do so on their behalf. The mother relies on the provisions of s 6 of the Divorce Act 70 of 1970 (the Divorce Act), which she contends authorises a parent to claim maintenance from the other parent on behalf of a major dependent child in divorce proceedings between the two parents.

[5] Section 6 is titled '[s]afeguarding of interests of dependent and minor children' and provides as follows:

'(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; and

(b) if an enquiry is instituted by the Family Advocate in terms of section 4(1)(a) or 2(a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4(1).

(2) For the purposes of subsection (1) the court may cause any investigation which it deems necessary, to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.

(3) 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.

(4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.’

[6] There are conflicting high court decisions on the question of whether a parent has *locus standi in judicio* to claim maintenance from the other parent on behalf of an adult dependent child in divorce proceedings between the two parents. Some have held that a parent has the requisite *locus standi* to do so,² whilst others have held to the contrary.³ In determining the father’s special plea, the latter view seems to have found favour with the high court. On 9 March 2021, it issued the following order:

- ‘1. The special plea succeeds. The plaintiff is held to lack the *locus standi* to pursue the maintenance claims on behalf of the parties’ dependent adult children as sought in prayers (b) and (c) of the amended particulars of claim.
2. The plaintiff is ordered to join the parties’ adult dependent children, [R] . . . and [B] . . . as parties to the divorce action under Case No. 903/2019 of this Court.
3. The hearing of the divorce action shall only proceed after the joinder referred to in paragraph 2 above and after all the relevant Pre-Trial proceedings have been concluded.
4. The plaintiff is ordered to pay the costs of the special plea.’

[7] The father’s special plea raised the proper interpretation of s 6 of the Divorce Act. The now well-established test on statutory interpretation is this:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity. There are three important interrelated riders to this general principle, namely:

- (a) the statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and

² *JG v CG* 2012 (3) SA 103 (GSJ) (*JG*) paras 22 *et seq*; *AF v MF* 2019 (6) SA 422 (WCC) (*AF*) paras 71-77; *SJ v CJ* 2013 (4) SA 350 (GSJ) (*SJ*) paras 6-7.

³ *Smit v Smit* 1980 (3) SA 1010 (O) (*Smit*) at 1018B-D; *Butcher v Butcher* 2009 (2) SA 421 (C) (*Butcher*) para 15.

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).⁴

Thus, what needs to be undertaken is a linguistic, contextual, purposive and constitutional⁵ interpretative analysis.

[8] The age of majority was reduced from 21 years to 18 years in terms of s 17 of the Children's Act 38 of 2005 (the Children's Act), which became effective on 1 July 2007. The parents of a minor child or of an adult dependent child are both under a common law and a statutory duty to support their minor children and their major dependent children in accordance with their respective means. It is an inescapable fact of modern life that marriages often end in divorce.⁶ The parents' duty to support their children is not terminated by the dissolution of their marriage by divorce.

[9] In *Burse v Bursey and Another*,⁷ this Court stated the following: '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 a 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 it deems fit in regard to the maintenance of a

⁴ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28.

⁵ Section 39(2) of the Constitution provides as follows: 'When interpreting any legislation, and when developing the common law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights'. In *Investigation Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) para 23, the Constitutional Court said that 'judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section'.

⁶ *S v S and Another* [ZACC] 22; 2019 (8) BCLR 989 (CC) para 1.

⁷ *Burse v Bursey and Another* 1999 (3) SA 33 (SCA) at 36D-H.

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. In *Kemp v Kemp (supra)* Jansen J stated at 738A-B that as a matter of expediency the Court, as the upper guardian of the child, usually regulates the incidence of this duty as between the parents when it grants the divorce and that its order for maintenance is ancillary to the common-law duty to support.'

[10] The Divorce Act governs the law relating to divorce and provides for incidental matters. A 'divorce action' is defined in s 1 to mean 'an action by which a decree of divorce or other relief in connection therewith is applied for'. A marriage between spouses may, in terms of s 3, be dissolved by a court by a decree of divorce only on the grounds of the irretrievable breakdown of the marriage relationship between the parties to the marriage as contemplated in s 4 or mental illness or the continuous unconsciousness of the defendant as contemplated in s 5. The *lis* relating to the claim for a decree of divorce, therefore, is one between the parties to the marriage. A decree of divorce between those parties, however, will not be granted until the court is satisfied that the provisions made 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 (s 6(1)(a)). A court granting a decree of divorce may, *inter alia* in regard to the maintenance of a dependent child of the marriage, make any order which it may deem fit (s 6(3)).

[11] Unsurprisingly, ss 6(1)(a) and 6(3) do not differentiate between a minor child and a major dependent child of the marriage in regard to the payment of maintenance. For, as was observed by the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)*,⁸ albeit in a different context,

'... there is no intrinsic magic in the age of 18, except that in many contexts it has been accepted as marking the transition from childhood to adulthood'.

⁸ *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)* [2009] ZACC 18; 2009 (2) SACR 477 (CC) para 39. Also see *Centre for Child Law and Others v Media 24 Ltd and Others* [2019] ZACC 46; 2020 (4) SA 319 (CC) para 102.

And in *Smit*,⁹ it was said about a 21 year old university student that he, ' . . . though well on the way towards being self-supporting, is, because of his youth and the resultant absence of the completion of his training, still legally a child within his father's household and a member who shares his family's mode and standard of living.'

[12] The court may, in terms of s 6(3), also in regard to the maintenance of an adult dependent child of the marriage, 'make any order which it may deem fit'. The concomitant of that power of a court granting a decree of divorce between the parties to the marriage, is the legal standing of a spouse or both spouses to claim and counterclaim the payment of maintenance for and on behalf an adult dependent child of the marriage. In so doing, the parent will plead the necessary *facta probanda*, such as their relative means and circumstances, the needs of the adult dependent child, the most fitting method of payment - i.e. directly to a parent or to the adult dependent child or in parts to a parent, to the adult dependent child, to an educational institution, lump sum or periodic payments, and so on – in order to persuade the court what is most satisfactory or best to be effected in the circumstances regarding the payment of maintenance.

[13] As was said in *SJ*:¹⁰

'The parties in the process of the divorce will provide all the relevant data concerning their assets and liabilities, income and expenses and the relevant evidence required for the trial. To the extent that there is any inadequacy in the production of evidence, the parties in the pursuit of their own claims *inter se* will deal with such inadequacies. In the course of doing so the data required by the court to assess the respective amounts each party is to pay will become apparent.'

[14] Furthermore, s 6(2) empowers the court to cause any investigation which it may deem necessary to be carried out and may order any person to appear before it for the purpose *inter alia* of being 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(4) further empowers the court to appoint a legal practitioner to represent a child at the

⁹ *Smit* fn 3 at 1021H-I.

¹⁰ *SJ* fn 2 para 18.

proceedings. Sections 6(2) and 6(4) respectively empower the court to order the parties or one of them to pay the costs of the investigation and appearance and of the representation. It is to be noted that the adjectives 'minor' and 'dependent' used in ss 6(1)(a) and 6(3) are not used in s 6(4), but only the noun 'child'. The dictionary meanings of the noun or adjective 'minor' includes a 'person under age', the noun or adjective 'dependent' includes 'one who depends on another for support' or 'maintained at another's cost', and of the noun 'child' includes 'son or daughter (at any age)', 'offspring' or 'descendent'.¹¹ Section 6(4), therefore, also finds application to the incidence of the duty to support a major dependent child as between the parents when the court grants the divorce between the parties to the marriage relationship.

[15] Given their ordinary grammatical meaning, properly contextualised, the words used in ss 6(1)(a) and 6(3) of the Divorce Act support an interpretation of s 6 that a parent is allowed to claim maintenance on behalf of adult dependent children upon divorce. The *lis* relating to the claim for a decree of divorce is one between the parties to the marriage. The purpose of s 6 is crystal clear: it serves to safeguard the welfare of both adult dependent and minor children of the marriage. Unless and until the court is satisfied that the provision made or contemplated with regard to, *inter alia* the maintenance of an adult dependent child is satisfactory or the best that can be effected in the circumstances, the marriage between the spouses 'shall not' be dissolved by the court granting a decree of divorce. The onus is on the parties to the marriage to so satisfy the court, and the court itself is given extensive discretionary powers to cause any investigation which it may deem necessary and or to appoint a legal practitioner to represent the adult dependent child at the divorce proceedings. There is no legal requirement in the Divorce Act for the adult dependent child to be a party to or to be joined to the divorce proceedings between his or her parents. A court order issued upon divorce between the parties to the marriage would only bind the parents and the adult dependent child would still be free to institute her or his own maintenance proceedings against an errant parent in terms of s 6 of the Maintenance Act 99 of 1999.¹²

¹¹ The Concise Oxford Dictionary 5th ed at 206, 327 and 771.

¹² Section 6 of the Maintenance Act provides as follows:
'(1) Whenever a complaint to the effect-

[16] An interpretation of s 6 of the Divorce Act that excludes a claim for maintenance by a parent on behalf of a dependent child who has attained majority would not preserve its constitutional validity and result in absurdity. It would implicate the constitutionally entrenched fundamental rights to human dignity,¹³ emotional wellbeing¹⁴ and equality.¹⁵ Most children are not financially independent by the time they attain majority at age 18: Many have not even concluded their secondary education and only commence their tertiary education or vocational training after they have attained the age of majority.¹⁶ A further reality is that it often takes time for young adults to obtain employment. Such interpretation of s 6 of the Divorce Act would in a given case result in the absurdity that a parent, usually the mother, in divorce proceedings claims maintenance for a school-going minor child from the other divorcing parent but would have no standing to claim maintenance for and on behalf of another school-going child of the marriage, simply because he or she has attained the age of 18. That would also implicate the dependent major child's fundamental right to equality.

[17] Dependent children should also remain removed from the conflict between their divorcing parents for as long as possible, unless they elect to themselves assert their rights to the duty of support.¹⁷ It is undesirable that they should have to take sides and institute a claim together with one parent against the other; they should preferably

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- (a) that any person legally liable to maintain any other person fails to maintain the latter person;
 - (b) that good cause exists for the substitution or discharge of a maintenance order; or
 - (c) that good cause exists for the substitution or discharge of a verbal or written agreement in respect of maintenance obligations in which respect there is no existing maintenance order, has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.
- (2) After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides, carries on business or is employed with a view to enquiring into the provision of maintenance for the person so to be maintained.'

¹³ Section 10 of the Constitution: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35, the Constitutional Court held that human dignity is a value that informs constitutional adjudication at a range of levels and the interpretation of many, possible all other rights. It is not only a *value* fundamental to our Constitution, but also a justiciable and enforceable *right* that must be respected and protected.

¹⁴ Section 12(2) of the Constitution: 'Everyone has the right to bodily and psychological integrity . . .'

¹⁵ Section 9(1) of the Constitution: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

¹⁶ *Butcher* fn 3 paras 13 and 14; *JG* fn 2 para 48.

¹⁷ *JG* fn 2 para 46.

maintain a meaningful relationship with both their parents after the divorce. The institution of a separate claim for maintenance by an adult dependent child against his or her parent or parents would further lead to a 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.¹⁸ Further, the invidious position of an indigent adult child in this situation is clearly evident.

[18] Professors Heaton and Kruger *South African Family Law*¹⁹ concisely summarise the prejudicial position faced by young adult children when s 6 of the Divorce Act is improperly interpreted, thus:

'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.'²⁰ (Reference omitted.)

[19] Professor M de Jong²¹ also advocates a similar interpretation of *inter alia* s 6 of the Divorce Act. In doing so, she persuasively advances the view that²²

'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 against one of their parents and institute their own separate maintenance claims upon their parents' divorce may perpetuate and exacerbate

¹⁸ M de Jong *A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce* 2013 THRHR 654 at 655.

¹⁹ Jacqueline Heaton and Hanneretha Kruger *South African Family Law* 4th ed (2015) at 187.

²⁰ See *JG* fn 2 paras 45-47; *Butcher* fn. 3 para 14.

²¹ Footnote 18.

²² *Ibid* at 661.

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 . . . '

[20] In *AF*²³ it was correctly observed that,

' . . . courts should be alive to the vulnerable position of young adult dependants 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.'

I also agree with the conclusion reached that,²⁴

' . . . it is important to protect the dignity and emotional wellbeing of young adult dependants of divorcing parents by regulating the financial arrangements for their support in order to eliminate family conflict on this score and create stability and security for the dependent child.'

[21] In *Bannatyne*²⁵ the Constitutional Court stated that the disparities between mothers who upon divorce face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means and fathers who remain actively employed and generally become economically enriched,

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

²³ *AF* fn 2 para 75.

²⁴ *Ibid* 76.

²⁵ *Bannatyne* fn 1 para 30.

[22] An interpretative analysis, therefore, leads to the inevitable conclusion that ss 6(1)(a) and 6(3) of the Divorce Act vest parents with the requisite legal standing to claim maintenance for and on behalf of their dependent adult children upon their divorce. Given the words used in their ordinary grammatical meaning, properly contextualised, and the manifest purpose of s 6, an interpretation that preserves its constitutional validity is reasonably possible. It follows that the father's special plea must fail.

[23] In the result the following order is made:

1. The appeal is upheld with costs, including those of two counsel.
2. The order of the court below is set aside and replaced with the following:
'The defendant's special plea is dismissed with costs.'

P A MEYER
ACTING JUDGE OF APPEAL

Appearances

For appellant: E Crouse SC (assisted by AN Masiza)
Instructed by: Annali Erasmus Inc., Port Elizabeth
C/o Legal Aid South Africa, Bloemfontein

For respondent: No appearance