

LEGAL GYMNASTICS: AN EVALUATION OF THE JUDGMENT IN

Z v Z [2022] ZASCA 113

1 Introduction

The South African Supreme Court of Appeal (SCA) recently considered an appeal (*Z v Z* [2022] ZASCA 113) against an order of the Eastern Cape Division of the High Court, Port Elizabeth (ECD). The ECD upheld a special plea and confirmed that a parent lacks *locus standi in judicio* to claim maintenance from the other parent, for and on behalf of adult dependent children, during divorce proceedings (*Z v Z supra* par 2). The SCA, however, reasoned that the obligations of a divorce court set out in section 6 of the Divorce Act (70 of 1970) (the Act) by implication made provision for a parent to apply on behalf of an adult child for maintenance. The SCA, accordingly, dismissed the special plea and the appeal was upheld with costs.

The SCA judgment is noteworthy as several previous High Court judgments found that adult dependent children must pursue claims for maintenance against their parents in their own name. Interestingly, most courts of first instance have reasoned that adult dependent children should be before the court when applying for maintenance. However, the SCA did not share the same position. In its reasoning, the SCA emphasised convenience and stressed that all the matters relevant to the divorce, including maintenance of dependent children, should and could be disposed of at the hearing of the main action. The SCA confirmed that both parents have a duty to maintain their dependent children and that this duty, at times, persists after the child attains majority age. The SCA further commented that children, including adult children, should be removed from the conflict between the divorcing parents as far as possible. The SCA, therefore, held that the requirements of section 6 of the Act provide the basis for admitting a claim by a parent for maintenance for and on behalf of an adult dependent child. It is submitted that the reasoning of the SCA and the precedent created could undermine the ability of a court to make an order of parental support for adult dependent children, and may ultimately result in outcomes that do not effectively provide for the needs of the adult child. This case note evaluates the facts of the matter together with the reasoning of the High Court and the SCA. The previous judgments on parents representing their adult dependent children during divorce proceedings are then evaluated. The specific intent of the case note is to establish whether section 6 of the Act confers *locus standi* on a parent to apply for maintenance for and on behalf of their adult dependent children during divorce proceedings. The benefits and challenges of conferring *locus standi* on parents of adult children are also considered. The last relevant issue that is evaluated, and

on which the courts did not have to adjudicate, relates to the termination of a parent's duty to provide financial support for their adult children. This case note ultimately aims to establish what obligations and powers are inherent in the application of section 6 of the Act and what procedures may, therefore, be employed by a Divorce Court when an adult dependent child applies for parental support.

2 Factual background and salient features of *Z v Z*

The appellant and the respondent were married to each other, and two children were born of their marriage. It was not in dispute that the children were above the age of 18 and still financially dependent on their parents. The parties' marriage relationship deteriorated, and the applicant initiated divorce action, claiming a decree of divorce and maintenance for herself, as well as for and on behalf of their two adult dependent children (*Z v Z supra* par 3–4). The appellant argued that section 6 provides the required *locus standi* for a parent to claim maintenance from the other parent on behalf of an adult dependent child in divorce proceedings between the two parents. In this regard, the court considered the words of section 6, which is intended to safeguard the interests of both dependent and minor children. Section 6 specifically provides that a court must be 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” before it grants a decree of divorce. The Act further provides that a court, in granting a decree of divorce, may make any order it deems fit regarding the maintenance of a dependent child of the marriage (s 6(1)(a) read with s 6(3) of the Act).

The respondent, in reply to the appellant's claim for maintenance on behalf of the adult dependent children, filed a special plea stating that the children are majors and, therefore, possess the required *locus standi* to pursue maintenance claims in their own names (*Z v Z supra* par 4). The special plea, by implication, thus disputes that a parent under these circumstances would have the required standing to act on behalf of an adult dependent child. The High Court upheld the special plea with costs and confirmed that the plaintiff does not possess *locus standi* to pursue the maintenance claims on behalf of the adult dependent children; it ordered that the adult dependent children be joined as parties to the divorce action, whereafter the hearing of the divorce action could proceed (*Z v Z supra* par 6).

3 The judgment of the Supreme Court of Appeal

The SCA commented that there are conflicting High Court decisions on whether a parent, in divorce proceedings, has *locus standi in judicio* to claim maintenance from the other parent on behalf of their adult dependent children. The SCA further noted that the words in the Act must be interpreted purposively, properly contextualised, and with reference to their ordinary grammatical meaning unless the exercise produced an absurd result. The interpretation must also, where reasonably possible, preserve the constitutional validity of the provisions (*Z v Z supra* par 7). The SCA did not

elaborate further on this, and it is not clear whether such an interpretation with regard to the ordinary meaning of the provision was applied or which words were specifically interpreted by the court.

The SCA reiterated that the parents of minor and adult dependent children have a common-law and a statutory duty to support their children in accordance with their respective means. The dissolution of the marriage by divorce does not terminate this duty and it extends, in specific circumstances, beyond the age of majority. The SCA further commented that a maintenance order by the court is ancillary to the common-law duty of support and that it does not replace or alter a divorced parent's common-law duty to maintain a child (*Z v Z supra* par 8–9). The SCA concluded that a parent, therefore, has the required legal standing in divorce proceedings to apply for a judicial award of parental financial assistance for both minor and adult dependent children from the other parent (*Z v Z supra* par 15–16). The respondent's special plea was therefore dismissed, and the appeal was upheld with costs (*Z v Z supra* par 22).

4 Previous judicial reasoning regarding *locus standi* of a parent to claim maintenance for and on behalf of an adult dependent child

Various High Court decisions relevant to the SCA judgment have already been reported. All these decisions concerned divorce actions where one parent requested maintenance for and on behalf of adult dependent children. Flemming J, in one such judgment, found in *Smit v Smit* (1980 (3) SA 1010 (O)) that a child must, after attaining majority, directly claim maintenance against a parent. This decision was followed in *Sikatele v Sikatele* (1996 (1) All SA 445 (Tk)) and in *Zeelie v Zeelie* (unreported case no 903/2019 (9 March 2021)). However, the Botswana High Court, in *Modise v Modise* (2007 (1) BLR 622 (HC)), referred to in *C[...] v C[...]* ([2020] ZAGPPHC 553 par 77), stated that the test for *locus standi* focuses on whether a litigant can prove “sufficient interest in a matter to litigate”. The Botswana High Court, therefore, found that a litigant “certainly had *locus standi*” to apply for maintenance for a dependent child “emerging from minority” (*Modise v Modise supra* par 7). The Cape High Court, in *Butcher v Butcher* (2009 (2) SA 421 (CPD)), thereafter, again and as required by precedent, held that a divorcing parent lacks the required *locus standi* to apply for maintenance for and on behalf of an adult dependent child.

The North Gauteng High Court, Pretoria, in *C v C (supra)*, relied on *Butcher v Butcher (supra)* and stated:

“parents are regarded unsuited [to claim maintenance for and on behalf of a dependent child] as soon as the dependent child attains the age of majority.” (*C v C supra* par 61)

Khumalo J commented that the dependent adult children should have been automatically substituted as a party in the claim for their maintenance to “facilitate their participation and access to justice”. The adult dependent child was not before the court and the undertaking by the parent to adequately support the child could, as a result, not be incorporated as part of the order of the court

(*C v C supra* par 75). The North Gauteng High Court, Pretoria, confirmed in *DD v FD* ([2020] ZAGPPHC 778 (per Manamela AJ)), in a Rule 43 application, that an adult dependent child must independently and personally approach the court for a maintenance order against a parent (*DD v FD supra* par 19).

The ECD, in *Whitfield v Whitfield* ([2021] ZAECPHC 55), confirmed that the adult dependent children have a direct and substantial interest in the divorce and should, accordingly, be joined in the main action to pursue a claim for maintenance (*Whitfield supra* par 8). The Western Cape High Court, Cape Town, in *CL v CJL* ([2022] ZAWCHC 127), commented that it would be “legally problematic” for a parent to have *locus standi* to act on behalf of an adult dependent child, as this may exclude a later claim for alternative or better relief by the child (*CL v CJL supra* par 17). Wille J found that only the adult dependent child has the requisite standing to pursue a maintenance claim against a parent (*CL v CJL supra* par 29). The adult dependent child must, therefore, be joined to any *pendente lite* proceedings in which the parents are involved. Judicial oversight demands that the relevant facts (the child’s financial needs and views) be properly ventilated before the court (*CL v CJL supra* par 42–43).

5 Discussion

5.1 Judicial oversight

The SCA stated that a court, in granting a decree of divorce, must be satisfied that the welfare of any dependent children born of the marriage is protected, and the onus is primarily on the parties to the divorce proceedings to satisfy the court (*Z v Z supra* par 15). The Divorce Court itself has extensive discretionary powers to cause any investigation that it may deem necessary and or to appoint a legal practitioner to represent the adult dependent child during the divorce proceedings. It is, however, submitted here that there is a difference between the requirement to satisfy the court that the dependent children’s interests have been or will be, adequately provided for, and the duty to prove that an adult dependent child requires maintenance and the scope and extent thereof. The obligation on the Divorce Court is aimed at ensuring that provisions are in place that would either already provide for the support of the adult child (such as in a settlement agreement), that the adult child was joined as a party to the divorce proceedings, or that the children have been made aware that the maintenance claims could, at a later stage, be referred to the Maintenance Court. The SCA further stated that the decree of divorce operates between the parties to the proceedings and the adult dependent children would, therefore, still be free to institute their own maintenance proceedings against an errant parent in terms of the Maintenance Act (99 of 1998) (*Z v Z supra* par 15). The SCA, therefore, confirms that adult children could pursue a maintenance claim against a parent under the Maintenance Act and, it is submitted, that this alone would be sufficient to satisfy the obligation on the parties and the court to ensure that the welfare of any dependent children born of the marriage is, or will be, satisfactorily provided for as required by section 6 (s 6(1)(a) of the Act).

The SCA also stated that the Act does not make provision for the adult dependent children to be party to or joined to the divorce proceedings between their parents. This comment seems to confuse substantive law with procedural law, as joinder of plaintiffs is specifically provided for in Rule 10 of the Uniform Rules of Court (Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa). Rule 10(1) allows for the joinder of

“[a]ny number of persons, each of whom has a claim, ... may join as plaintiffs ..., provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact.”

The SCA also commented that a claim for maintenance by an adult dependent child is “intrinsicly linked to other issues in the divorce” (*Z v Z supra* par 17). Again, Rule 10 of the Uniform Rules of Court specifically refers to relief sought that “depends upon the determination of substantially the same question of law or fact”. The appropriate procedure is thus to join the adult child and not artificially to create *locus standi* for a parent, where such development is neither required nor appropriate. The last comment on this issue is that an adult child who claims maintenance bears the onus to prove that such support is required together with proof of the amount of support needed (*Sikatele v Sikatele supra*; see also *Gliksman v Talekinsky* 1955 (4) SA 468 (W) 469; *Osman v Osman* 1992 (1) SA 751 (W) 754H; *Hoffman v Herdan* NO 1982 (2) SA 274 (T) 275). It is also important to note that both parents are indeed obliged to support their dependent children even after the child attains majority but that the nature of the support may change after the child attains majority (*B v B* (1999 2 All SA 289 (A)). The determination of both the need and the scope and extent of maintenance would, therefore, require that the adult child be brought before the court. The Act also provides discretion to appoint a legal practitioner to represent the adult child, which again implies that the child must be before court for such representation to happen (s 6(4) of the Act).

The SCA found that any interpretation of section 6 that excludes a claim for maintenance by a parent on behalf of a dependent adult child would not preserve its constitutional validity and would thus result in absurdity (*Z v Z supra* par 16). The SCA focused on the term “maintenance” but the Act specifically refers to the “welfare” of a dependent child, which requires that provisions be in place (“made”) or that there at least be a plan (“contemplated”) that is “satisfactory or the best that can be effected in the circumstances”. This would suggest that the SCA entered into judicial review to determine whether awarding *locus standi* to a parent to act for and on behalf of an adult child during divorce proceedings would ensure the constitutional validity of section 6. Judicial review of the constitutional validity of legislation should never be a mere technical exercise where the courts engage in a form of proofreading of the provisions under consideration. There is no evidence that such judicial review was requested or required, or that the SCA measured the provisions of the Act against any of the provisions of the Constitution of the Republic of South Africa, 1996. It is, therefore, difficult to establish if the joining of the adult child to the proceedings or the adult child’s right of access to a Maintenance Court

would not secure the constitutional validity of section 6 of the Act. The Constitutional Court commented in *Zondi v MEC for Traditional and Local Government Affairs* (2005 (3) SA 589 (CC) par 90) that the purpose and effect of legislation that is inconsistent with the Constitution may render it unconstitutional. There was no argument on this issue, and nor did the SCA consider the issue further.

5.2 *Locus standi*

The SCA reasoned that dependent children should be shielded, for as long as possible, from the conflict between their divorcing parents, and acted to maintain a meaningful relationship with both their parents after the divorce. It is reasonable to argue that minor children should be removed from conflict between their parents, but adult children cannot be dealt with in a similar manner. The capacity of children to act and exercise their rights autonomously is subject to their ongoing but diminishing psychological developmental limitations (Rude-Antoine *Forced Marriages in Council of Europe Member States: A Comparative Study of Legislation and Political Initiatives* (2005) 7). Children, interpreted as persons under the age of 18 years of age, have a right to be allowed to take increasing responsibility in decision-making as they progressively develop towards the attainment of adulthood. Adults are generally deemed not to share the limitations of children, even where they are financially dependent on another and, therefore, persons above the age of 18 do not require others to act on their behalf in legal proceedings, and nor do adults require protection from any real or perceived conflict between their parents. Lastly, it is necessary to consider that the Children's Act (38 of 2005) requires appropriate child participation, depending on the child's age, maturity and stage of development, in any matter concerning that child. An adult dependent child's right to participate in legal proceedings in which that adult has a sufficient interest should thus be respected.

The SCA relied on academic writing (Heaton and Kruger *South African Family Law* 4ed (2015) 187) concerning the position of young adult children. Heaton and Kruger argue that it is "undesirable for children to become involved in the conflict between the divorcing parents by being joined as parties in divorce proceedings". It may be undesirable, but it is necessary as the court must be satisfied that the welfare of dependent children has been, or will be, adequately dealt with. This, together with the need for judicial oversight, obliges a court to ensure that an adult child is joined in the proceedings. Heaton and Kruger further argue that there may be instances where adult dependent children do not pursue their maintenance claims (*Z v Z supra* par 18). However, the obligation on the court is to find that the arrangements concerning the welfare of the dependent children are "satisfactory or are the best that can be effected in the circumstances" (s 6 of the Act). This obligation cannot be interpreted to compel a divorce court to adjudicate on claims on behalf of an adult who is, for whatever reason, reluctant to do so on their own.

The SCA also referred to the judgment in *AF v MF* (2019 (6) SA 422 (WCC) par 75), in which the High Court stated that young adult dependent children find themselves in a vulnerable position during a divorce

action between their parents, as there exists a power imbalance between the parent and child. This imbalance complicates access to the necessary support for the child and makes it “unimaginably difficult” to claim maintenance from the parent. It is, however, also reasonable to conclude that a litigating parent may, owing to the influence they have over the adult child, influence the child through manipulative conduct, which would also place unnecessary pressure on the child. It is further submitted that a court that fails to require the joinder of adult dependent children requesting maintenance in divorce proceedings between their parents will not comply with its obligations to deal with cases “efficiently, effectively and expeditiously” (par 5.1(ii) of the South African Norms and Standards for the Performance of Judicial Functions GN R147 in GG 37390 of 2014-02-28, and art 10(1)(c) of the South African Code of Judicial Conduct, issued in 2012, pursuant to the Judicial Service Commission Act 9 of 1994, s 12, GN R865 in GG 35802 of 2012-10-18). There is, accordingly, a duty on the court, to ensure that the maintenance of an adult dependent child is either sufficiently resolved or that a plan is in place to ensure that such an outcome is achieved by requiring the adult child to be joined. The court may appoint a legal practitioner to represent an adult child at the proceedings where it has a reasonable belief that the adult child may not be able to pursue their maintenance claim appropriately or where their involvement in the proceedings may have detrimental effects on the adult’s life (art 6(4) of the Act).

An interesting challenge may develop, based on the SCA’s interpretation of section 6, where both parents claim the right to represent their adult dependent children during the divorce proceedings. A parent may regard it as beneficial to represent the adult children of the marriage, based on the impression that it creates regarding the parent’s relationship with the children. This advantage may also be used strategically to promote concessions in other areas of the divorce proceedings, or possibly to secure a desired settlement. An impasse would then effectively create a situation where the adult child would have to choose sides, or the court would have to make a determination as to which parent may exercise their *locus standi* to represent the child during the divorce. This outcome would be detrimental to the relationship between all the parties.

The institution of a separate claim for maintenance by an adult dependent child against a parent after the divorce proceedings would also, according to the SCA, result in the disjointed adjudication of the issues (*Z v Z supra* par 17). These comments by the SCA erroneously presume that divorce actions will always be confrontational and that these actions will always be opposed. The reasoning of the SCA further creates some confusion regarding the capacity of adult persons who are also the children of a litigating party to act on their own behalf. It must be appreciated that some level of dispute between a parent and an adult dependent child would already exist when a child approaches the court for relief. The court’s role is then to resolve that dispute on behalf of the parties and to avoid further confrontation, insofar as that is possible. Presiding officers are required to “maintain order” during court proceedings (art 9(b)(i) and (iii) of the Code of Judicial Conduct) and presiding officers must maintain “a firm hand on proceedings” (art 9 (i) of the Code of Judicial Conduct). The preservation of a meaningful relationship

must, therefore, be supported and maintained through the child's right to access a court and the courts' intervention to resolve that very dispute.

A parent who intends to institute a claim for maintenance on behalf of an adult dependent child may not be able to do so owing to a real or perceived conflict of interests between the parent and child. The parent and the adult child both require support from the other parent. The parent requiring maintenance is also obliged to contribute to the financial support of the dependent child within that parent's means. A parent may, as a result of such a conflict of interest, forfeit their right to represent a child. The Act, for this reason, allows a court to appoint a legal practitioner to represent the adult child during these proceedings (art 6(4) of the Act). Various other factors may also preclude a divorcing parent from adequately acting for and on behalf of a dependent child during divorce proceedings. Divorce proceedings are still, in essence, adversarial in nature, but this may also serve to prevent either of the parents from adequately representing the child, or may even subordinate the interests of the child to their own interests or prejudices. The court may, as a result, receive a distorted picture of the interests and needs of the adult child. The representation of the parent may also, where the interests of the parent and child do not coincide, or where the parent is unable to determine the needs of the adult child, result in detrimental outcomes for the child. A parent who is also involved in litigation that may have an emotional element may sincerely believe that they are acting in the adult child's best interests while actually promoting their own best interests.

The reasoning of the SCA also suggests some linguistic drift to achieve a goal that the legislation was not intended to provide. The court must be satisfied that the welfare of the dependent child will be secured but this obligation alone does not, by implication, confer *locus standi* on a parent to represent the interests of the adult child. Section 6(3) of the Act also cannot be read in isolation from the rest of the provisions in the Act or without considering the full intent of this section. Section 6(3) of the Act confers the power on a court "in regard to the maintenance of a dependent child" to "make any order which it may deem fit". However, the section specifically relates to minor children where it refers to the determination of guardianship and the custody of the minor.

5.3 Duty of support for adult dependent child – exceptional circumstances

The courts were not required to determine at what stage a parent may expect an adult dependent child to become self-sufficient. The meaning of "adult dependent child" and the duration and extent of the duty were indeed not the focus of the appeal in the SCA matter, and were, as a result, not considered. However, this issue creates an interesting question that is relevant to the current matter. The argument in favour of providing financial support to adult dependent children admittedly relies on the arbitrary and rigid nature of the age of majority. It may be argued that age is merely one non-controlling factor to be considered to determine whether a child has reached adulthood. There is also no formally established post-18 age ceiling

that marks the point where the adult child is no longer eligible for parental support, or where specific limitations or statutory or judicial guidelines on parental liability for educational-related expenses were provided. These uncertainties raise questions as to whether the duty on a parent to support an adult child can logically extend indefinitely. Most parents are likely to assume and expect that their children will progressively achieve economic independence after the age of 18 and that their financial obligations to support their children will gradually diminish and eventually terminate after their child attains majority or legal adulthood (Moore "Parents' Support Obligations to Their Adult Children" 1985 19(2) *Akron Law Review* 183).

It is further debatable whether all parents, even where they can do so, would agree that they have a legal duty to offer financial support for the tertiary or further education of their adult children. The SCA did not comment on the benefits of further education for children, but this issue has received attention in foreign judicial reasoning where the courts found that parents may be liable to provide financial support for an adult child's further education in exceptional circumstances (Moore 1985 *Akron Law Review* 186). The Supreme Court of Mississippi granted a petition against one parent for an increase in child support to pay for future college expenses of the parties' daughter (*Pass v Pass* 238 Miss. 2d 449, 118 So. 2d 769 (1960)). The court commented on the importance of a well-equipped, well-trained, and well-educated citizenship for the State. A financially capable parent must therefore provide a "worthy child" with the opportunity to obtain a further education (*Pass v Pass supra* 453, 118 So. 2d 773; *Accord Khalaf v Khalaf* 58 NJ 63 71–72, 275 A.2d 132 137 (1971)). A further relevant matter concerned a decree of divorce wherein a parent was ordered to pay child support until the twin children attained their majority (*Finn v Finn* 2312 So. 2d 726 (Fla. 1975)). However, during this time, Florida reduced the age of majority from 21 to 18 but authorised courts to order support for "dependent" persons beyond the age of 18. The parent stopped paying maintenance when the children reached the age of 18. The Supreme Court of Florida directed the parent to resume child support as the development of special skills is necessary and a person between the ages of 18 and 21 may qualify as "dependent" to obtain the required education and training to be competitive in the economic system (*Finn v Finn supra* 73 1; see also *Kern v Kern* 360 So. 2d 482 (Fla. Dist. Ct. App. 1978)).

The Supreme Court of South Carolina stated in *Risinger v Risinger* (273 S.C. 36 SC) that a divorced parent must pay maintenance to a 19-year-old child, but certain conditions qualified the order. The adult dependent child had to remain registered as a full-time student in good standing and the obligation would terminate should the child get married. The Supreme Court of Iowa, in the matter of *In re Marriage of Vrbán* (293 N.W.2d 198 (Iowa 1980)) found that the adult dependent child must regularly attend an approved school or must, in good faith, be a full-time student in a college, university, or area school. An adult child's aspiration and ability to pursue further education may, as a result, be regarded as an "exceptional circumstance", as the child's earning potential would be greatly diminished without further education. A New Jersey court, in *Sakovits v Sakovits* (178 N.J. Super. 623, 429 A.2d 1091 (1981)), refused to order a divorced parent to contribute to the further education of a 22-year-old child who had lived

alone and who had been employed for the preceding four years. The court commented that the adult child had structured his financial future and any extension of the parental obligations to support the child would create an unreasonable, open-ended burden on the parents (*Sakovits v Sakovits supra* 632, 429 A.2d 1096).

The issue of the termination of a duty on a parent to support an adult child has been the subject of judicial enquiry but the circumstances of the particular case may be regarded as extraordinary. In *M v M* ([2018] ZAGPJHC 506) (Nkosi-Thomas AJ), the applicant applied for a verification of an existing maintenance order in favour of two adult children born from his previous marriage (*M v M supra* par 1 and 3; art 8(1) of the Act). Section 8(1) of the Act states, *inter alia*, that a maintenance order may at any time be rescinded or varied if the court finds that there is *sufficient reason* therefor (own emphasis). The older child (“S”) was a dependent major enrolled for tertiary education but was not attending lectures and the second child (“L”) was in matric at the time when the marriage was dissolved and the settlement agreement concluded (*M v M supra* par 4). S later re-registered for tertiary education but this attempt also proved to be unsuccessful (*M v M supra* par 7). The applicant intervened and S was allowed to complete the degree studies after the Dean of the Faculty agreed to extend the registration for S, who again dropped out and had, at the time of the hearing, not completed the degree. There is also no certainty as to any possible future prospect of gainful employment for S, but he has again enrolled for further studies at the expense of the applicant (*M v M supra* par 10). L, after successfully finalising her secondary studies at a private school at the expense of the applicant, initially did not pursue further studies for two years but later enrolled for further education, but this endeavour also failed (*M v M supra* par 6–7). Both children thereafter moved to the United States of America without informing the applicant. Both children subsequently returned to South Africa and again pursued further education (*M v M supra* par 8–9). L was 22 years of age at the time of the hearing and was residing in the United States of America, but the applicant had not been informed of her circumstances.

The applicant approached the court alleging that there exists “*sufficient reason*” as provided for in section 8(1) of the Act for the maintenance order to be varied. S was, at this time, 27 years of age, the applicant had paid for the private school education, living expenses and tertiary education, and had offered his child employment at his company. However, the respondent stated that “work is beneath her precious children” and that the applicant should simply pay a monthly salary to both the adult children. The same result occurred when the applicant arranged employment for S. It was further not in dispute that S started consuming alcohol and smoking marijuana, which resulted in anti-social and aggressive behaviour towards the applicant (*M v M supra* par 10). The court referred to *Burse v Bursey* (1999 (3) SA 33(SCA) 38D), where the SCA held:

“In my view, the present order fixed a time for its duration, i.e., until John becomes self-supporting, and it will cease to operate when that event occurs [...]. Whether that event has indeed occurred may be the subject of dispute but it is an objective fact capable of being established with sufficient certainty.”
(*M v M supra* par 20)

Nkosi-Thomas AJ commented that L and S are “conceivably capable of supporting” themselves and that they were the authors of their own predicament (*M v M supra* par 22, 25 and 27). The court referred to *Gliksman v Talekinsky (supra 469 F–H)*, where it was held:

“A child, when it becomes of age, should normally be able to provide for himself or herself ... [and] the liability on her father to support her only arises when it is shown that she cannot support herself, she being a major who should be able to provide for herself in normal circumstances.”

In the final analysis, the court commented that the adult children could not expect the applicant to maintain them “*ad infinitum*” and that *sufficient reason* existed for the maintenance order to be varied (*M v M supra* par 29–30).

Generally, the duty to support an adult child will end when the child becomes capable of, or actually becomes, self-supporting. The determination of whether the child has indeed reached that point will be subject to argument, but it will probably be possible in most instances to evaluate objective facts that will be capable of being established with sufficient certainty. The test of whether an adult dependent child is entitled to maintenance, and the amount payable, is ultimately based on whether the child is capable of being self-supportive, but the court will also have regard to the financial means of the parents.

6 Conclusion

The SCA was acutely aware of the potential conflict between the interests and desires of the adult child and those of the parent. This issue was resolved by allowing a litigant to act on behalf of parties who were not before the court. It may be argued that the adult children were subjected to discrimination based on age and capacity, which was presumed not to exist or that the adult children were unable or unwilling to act in their own interests. The SCA attempted to ensure that the maintenance responsibility of divorcing parents is shared equally between them and that such support would not solely become the responsibility of one parent. However, the SCA did not make a clear distinction between a minor child and an adult dependent child for the purposes of section 6. It is not suggested that the SCA intentionally conflated the competencies and needs of minor and adult children during a divorce. However, the description of an adult who requires maintenance as a child may subconsciously influence the reasoning of any court. Section 6 clearly requires that the court must be satisfied that the welfare of a dependent child is sufficiently considered and catered for before the divorce is finalised. A court cannot determine whether the requirements of section 6 have been satisfied, relying only on a parent and litigant before it to obtain the necessary and credible information regarding the adult child’s needs. The adult child’s interests will, as a result, remain unrepresented and the eventual award of maintenance may not safeguard the child’s welfare.

The SCA should have referred the matter back to the court *a quo* for the adult dependent child to be heard and to make representations as to the nature and level of support needed. The situation of adult dependent children must not be confused with the attributes and limitations that are

normally associated with minor children who are still progressively developing their emotional, physical, and psychological capacity to express their needs. Thus, an adult child should be acknowledged to possess the *actual* developmental capacity of an adult and should accordingly be allowed to make decisions for themselves with binding future consequences.

Arthur van Coller
University of Fort Hare

Ebrezia Johnson
Stellenbosch University