LOCUS STANDI IN IUDICIO – THE RIGHT OF A PARENT TO CLAIM MAINTENANCE ON BEHALF OF AN ADULT DEPENDENT CHILD

Z v Z 2022 (5) SA 451 (SCA)

1 Introduction

This matter dealt with an appeal to the Supreme Court of Appeal (SCA) from the Eastern Cape Local Division of the High Court in respect of a claim for maintenance by one parent on behalf of the adult dependent children against the other parent. The facts of the case were as follows. Mrs Z (the mother) and Mr Z (the father) were married on 10 January 1995. Two children were born of the marriage. The marriage deteriorated and Mr and Mrs Z separated for a period. Both parents continued to support their children financially. Mr Z had been maintaining the children by depositing amounts directly into their individual bank accounts. The marriage relationship between mother and father deteriorated, resulting in Mrs Z initiating divorce proceedings and claiming from Mr Z, *inter alia,* maintenance for herself and the two major and financially dependent children. Although they were majors, in that they were both over the age of 18, the children were financially dependent on their parents at the time of the divorce. The daughter (B) was a student and unemployed. As part of her studies, she was required to do practical training and received remuneration from time to time for the work she did for a social media company. Notwithstanding these efforts to maintain herself, B remained financially dependent on her parents. Insofar as the adult dependent son (R) was concerned, he was mobile only by means of an electric wheelchair owing to injuries sustained in a motor car accident. Despite obtaining a probationary internship in January 2021, R was still financially dependent on his parents. Owing to his injuries, it was uncertain whether he would be able to continue working as the work required long hours of sitting which caused him to suffer pressure sores, making prolonged sitting impossible.

In defending the action, Mr Z raised a special plea, claiming that Mrs Z could not lodge a claim for maintenance on behalf of the children born of the marriage, since they were both adults and, therefore, had the necessary capacity to claim maintenance on their own behalf *(Z v Z* par 2). As a result, Mr Z contended that Mrs Z lacked the *locus standi in iudicio* to initiate a claim on behalf of the major children.

2 Question of law

The issue that both the Eastern Cape High Court and the SCA were required to consider was whether a parent can institute a claim for maintenance against the other parent on behalf of their adult dependent child. In other words, the courts were called upon to decide whether a parent has the necessary *locus standi in iudicio* to lodge a claim against the other parent on behalf of an adult dependent child.

3 The decision of the courts

The decisions of both the Eastern Cape High Court and the SCA are discussed.

3 1 The decision of the Eastern Cape High Court

In the court *a quo* (*Rosemary Ann Zeelie v Johannes Andries Zeelie* (unreported) 2021-03-09 Case no 903/2019), Mr Z (the defendant) entered a special plea that, as their two children were now adults, they should pursue their maintenance claim against him in their own names, because they had the necessary legal capacity to do so. Furthermore, he pleaded that the plaintiff lacked the necessary *locus standi* to pursue maintenance claims on behalf of the children. The special plea had to be argued before the hearing of the divorce action could commence. The plaintiff based her claim in large on section 6 of the Divorce Act (70 of 1979) (Divorce Act), claiming that it regulates the position in the best interests of the children to ensure that the current position regarding the financial support paid to the children be maintained. The plaintiff maintained that while she agreed that the children had the necessary capacity to initiate maintenance proceedings in their personal capacity, this did not remove the duty of the parents to demonstrate that the current arrangement was not the best that could be made under the circumstances.

Zilwa J, deliberated in considerable depth on the cases – often in conflict with one another – on which both the plaintiff and defendant relied.

The plaintiff relied on the judgments in *JG v CG* (2012 (3) SA 103 (GSJ)), *Bursey v Bursey* (1999 (3) SA 33 (SCA)), *SJ v CJ* (2014 (4) SA 350 (GSJ)) and *AF v MF* (2019 (6) SA 422 (WCC)) to support her claim that she had the required *locus standi* to lodge a claim for maintenance against her spouse on behalf of their adult dependent children.

On the other hand, the defendant referred to the judgments in *Smit v Smit* ((1984) All SA 52 (O)), *Butcher v Butcher* ((2009) JOL 23359 (C)), *LW v LW* (North Gauteng High Court (unreported) 2019-06-22 Case No 2148/2007) and *Sikatele v Sikatele* ((1996) 1 All SA 445 (TK)) to support his argument that the children themselves should be joined as parties to the action regarding the aspect of their post-divorce maintenance by the defendant.

Judge Zilwa's approach to each case referred to by the applicant is now considered.

With reference to the decision in *JG v CG*, Judge Zilwa stated that the *ratio* of allowing the mother's claim in this case rested on the fact that the plaintiff had herself incurred expenses pertaining to the maintenance of the children, and on this basis, she would be entitled to claim the contribution for such expenses from the other parent. Zilwa J further stated that the distinguishing factor between *JG v CG* and the present case before the court was that there was no contention by the plaintiff that the children resided with her, and that she had incurred expenses for their maintenance for which the defendant would in part bear responsibility. The adult dependent children in the matter before the court, each incurred their own maintenance expenses and paid for those from, *inter alia*, the monies that were deposited directly into their bank accounts by the defendant. Zilwa J, therefore, concluded that the factual matrix in the *JG v CG* case was totally different from that of the present case before the court.

In the *Bursey* case, the meaning and effect of an order for the maintenance of a child until they become self-supporting was considered. In this matter, the parties had divorced, and a consent paper had been concluded between them in terms of which, the respondent (the father of the child) undertook to pay maintenance to the appellant (the mother of the child) until the child became self-supporting. Judge Zilwa stated that the judgment in this case was not directly relevant to the point in issue in the present matter before the court.

In *SJ v CJ*, the wife had lodged a claim for maintenance on behalf of her major son in terms of Rule 43 against her husband. The son resided with the parties in the marital home. Judge Zilwa found that this case was not relevant to the case before him as the factual matrix in *SJ v CJ* differed from that in *Z v Z*. In *Z v Z*, the dependent adult children did not reside in the matrimonial home.

Zilwa J also stated that the decision in *AF v MF* could not be regarded as authority for the position that a parent has *locus standi* to institute a claim for maintenance against the other parent in respect of their adult dependent children. The *AF v MF* case merely highlighted the vulnerability of young adult dependents and the stress that they undergo when their parents divorce. The case also highlighted the difficulty for a child where they are required to institute a claim for maintenance in their own name against the parent.

Zilwa J concluded his consideration of the cases relied on by the plaintiff by stating that in none of the cases was one parent permitted to claim maintenance for adult dependent children who were not residing with that parent and where they were running their own financial affairs with some income of their own, as was the position in the case before the court.

The court then turned its attention to the cases the defendant used to support the special plea filed by him – namely, *Smit v Smit* (*supra*), *Butcher v Butcher* (*supra*), *LW v LW* (*supra*) and *Sikatele v Sikatele* (*supra*).

In *Smit v Smit*, the court held that the difference between a maintenance claim for a child and a claim for an adult dependent offspring of divorced parents lay in the principle that a parent has *locus standi in iudicio* to initiate

a claim on behalf of a child, while adult offspring must claim in their personal capacity directly from the respective parent. In terms of section 1 of the Children's Act (38 of 2005) (Children's Act), a "child" is defined as a person under the age of 18 years. Where a child has attained majority, the adult dependent offspring of a parent must claim support against one or both parents to the extent that they may have a claim for support.

Zilwa J considered the judgment in *Smit* and held that that there was no dispute that the dependent adult children may very well have a claim for support against the defendant. The court held that, in the present case, the adult dependent children ought to pursue claims for maintenance in their own name and not through the plaintiff.

In the *Butcher* case, the court held that if adult dependent children are joined as parties in the divorce proceedings and claim maintenance in their own name, this is not a bar to giving effect to section 6 of the Divorce Act. In a similar vein, the decisions in *LW v LW* and *Sikatele v Sikatele* lend authority to the position that adult dependent children must be joined in divorce proceedings to enable them to claim maintenance from the defendant.

The plaintiff's reliance on section 6 of the Divorce Act was also dismissed for the following reasons:

a) Section 6 does not prescribe the manner or machinery that the court must use to ensure that the interests and welfare of minor or dependent children of the marriage are satisfactorily catered for before a decree of divorce is granted.
b) Section 6 does not appear to tamper with the ordinary procedural law regarding the aspects of *locus standi* that adults generally enjoy in (enforcing or defending their rights or interests.
c) Section 6 does not make a decree that a parent or parents of adult dependent children at the time of the divorce proceedings has the right, duty or entitlement to take up the cudgels on behalf of such adult dependent children on the aspect of ensuring their welfare prior to the granting of the divorce decree (*Rosemary Ann Zeelie v Johannes Andries Zeelie supra* par 25).

Zilwa J, therefore, held that the children had the legal capacity to initiate their own maintenance proceedings against their father and concluded that the children concerned must be joined as parties to the divorce action. Consequently, the court *a quo* held that the plaintiff could not claim maintenance on behalf of her adult dependent children from their father.

An appeal was lodged with the SCA. A discussion of the SCA decision follows.

3 2 The decision of the SCA

In granting the special plea, the High Court highlighted the need for a proper interpretation of section 6 of the Divorce Act. The judgment of the SCA did not consider the reasoning and judgment of the court *a quo* in great detail,

but rather approached the legal question from a different perspective – namely, the proper interpretation of section 6 of the Divorce Act.

3 2 1 Interpretation of section 6 of the Divorce Act

The primary issue before the SCA concerned the interpretation of section 6 of the Divorce Act.

The SCA referred to the judgment in *Cool Ideas v Hubbard* ([2014] ZACC 16), which confirmed the (now well-established) test on statutory interpretation as being that the words in a statute must be given their ordinary grammatical meaning, unless doing so would result in absurdity. This test is, however, subject to the following three interrelated provisos: that the statutory provisions should always be interpreted purposively; that the relevant statutory provision must be properly contextualised; and that 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.

The SCA analysis of section 6(2) and (4) demonstrated that these subsections respectively empower the court to order any investigation it may deem necessary by a legal practitioner representing a child to ensure 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 under the circumstances.

The court took cognisance that the words “minor” and “dependent” used in section 6(1)(*a*) and (3) are not found in subsection (4), which instead uses the word “child”. The ordinary grammatical, properly contextualised meaning of the words in these subsections lends weight to the argument that subsection (4) also applies to the incidence of the duty by parents to support a major dependent child when a court grants a divorce between parties to a marriage relationship.

Furthermore, the ordinary grammatical, properly contextualised meaning of the words used in section 6(1)(*a*) and (3), as well as the rationale of section 6, lend support to an interpretation of section 6 that grants a parent *locus standi in iudicio* to claim maintenance on behalf of adult dependent children upon divorce from the other parent. The Divorce Act does not require an adult dependent child to be a party to, or to be joined to, the divorce proceedings between their parents. Furthermore, a divorce order terminating a marriage between the spouses only binds the parents, and the adult dependent child can claim for maintenance from the parent(s) in terms of the Maintenance Act 99 of 1999.

The SCA stated that an interpretation of section 6 of the Divorce Act that excluded a parent from having *locus standi in iudicio* to claim for maintenance from the other parent on behalf of an adult dependent child would not pass constitutional muster, as it would infringe the adult dependent child’s right to dignity, emotional well-being and equality. Furthermore, to allow such an interpretation of section 6 would result in the absurdity of excluding a parent from having *locus standi in iudicio* to claim

for maintenance for and on behalf of a school-going child born of the marriage merely because they have reached the age of 18.

The SCA, therefore, held that an interpretative analysis of section 6(1)(*a*) and (3) of the Divorce Act leads to a recognition of parents' *locus standi in iudicio* 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 section 6, an interpretation that preserves the section's constitutional validity is reasonably possible.

3 2 2 The age of majority

The enactment of the Children's Act reduced the age of majority from 21 to 18 years. Parents have both a common-law and a statutory duty of support towards their children according to their means. This duty of support means that parents are under a legal obligation to provide for the needs of the children by either providing the items that they need or alternatively, by providing money towards payment for these items. Where a child has two parents, the duty of support is shared between the two parents on a *pro rata* basis according to the means of the parents. In other words, the parent who earns more or who has more means of other kinds is obligated to provide more child support than the other parent.

This duty of support will remain intact for as long as the parent is able to supply the support and the person who is claiming the support is in need of it. The majority status of the child does not dissolve a parent's duty to provide support to the child. This position prevailed even prior to the enactment of the Children's Act when the age of majority was 21 years old.

The court recognised that at the age of 18 years the majority of children are still in the process of completing their secondary education, or have just started their tertiary education, and therefore, remain financially dependent on their parents long after they reach the age of majority. The court also took cognisance of the fact that it often takes time for young adults to obtain employment. Therefore, the fact that children lose some of the protective measures afforded to them on the basis that they have reached the age of majority in terms of section 1 of the Children's Act is problematic, as, in most cases, 18-year-old persons lack the financial independence that is commonly associated with majority.

The court proceeded to cite various cases that support the position that parents have a legal duty to support their children, even when a marriage is terminated by divorce, and that this duty of support is not dissolved when a child reaches the age of majority. The court also confirmed that section 6 of the Divorce Act recognises the duty to support an adult dependent child, and a maintenance order does not replace or alter a divorced parent's common-law obligation to support their dependent children.

Having established that the parental duty to support adult dependent children is recognised by section 6 of the Divorce Act, the court furthermore, stated that insofar as the duty of support is concerned, section 6(1)(*a*) and

(3) do not distinguish between a minor and a major dependent child. Furthermore, section 6(3) allows the court to make any order it deems fit with regard to the maintenance claim of an adult dependent child.

3 2 3 The best interests of a minor or dependent adult child of the marriage

Cognisant of the best-interests-of-the-child standard, the SCA echoed a sentiment expressed in *JG v CG* (*supra* par 46) that dependent children should for as long as possible not be involved in the conflict between divorcing parents, and it is undesirable for children to have to take sides. The court acknowledged, rather, that it is in the best interests of a child to maintain a meaningful relationship with both their parents after a divorce. Therefore, to interpret section 6 as excluding a parent from having *locus standi in iudicio* to claim maintenance from the other parent on behalf of an adult dependent child would not be in a child's best interests. The court cited the case of *AF v MF* (*supra* par 75), where it was correctly observed that:

> "[c]ourts 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."

At paragraph 25, the court observed that

> "[i]t 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."

The court furthermore cited *Bannatyne v Bannatyne* ([2002] ZACC 31; 2003 (2) SA 363 (CC) par 30) to highlight 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. 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."

The SCA, therefore, held that an interpretative analysis, leads to the inevitable conclusion that section 6(1)(*a*) and (3) of the Divorce Act vests parents with the requisite legal standing to claim maintenance for and on behalf of their dependent adult children upon their divorce.

The SCA held that given the words, used in their ordinary grammatical meaning, properly contextualised, and the manifest purpose of section 6, an interpretation that preserves its constitutional validity is reasonably possible.

The special plea filed by the father failed, and the SCA upheld the appeal with costs. The order of the Eastern Cape High Court was, therefore, set aside.

4 Legal implications and discussion

Parenthood automatically gives rise to the legal obligation of maintenance of a child. This is evidenced by section 28 of the Constitution, the common-law parental duty of support and sections 18(2)(*b*) and 1(1) of the Children's Act. Furthermore, section 6 of the Divorce Act also refers to the parental duty of support and maintenance. It is trite law that the parental duty of support is not terminated when a child reaches the age of majority, provided the child is still financially dependent on the parents. Therefore, the biological children of parents are allowed to bring a maintenance claim, even where these children are well over the age of majority.

This duty of support arises at the birth of the child. In the case of the common law, this duty of support subsists until the child is financially independent. This means that a biological child may have a claim for maintenance against their parents even when they are well over the age of majority. The problem facing the initiation of such a claim is in the practical execution of the claim and this is most evident with respect to an adult child who is still financially dependent on their parents for financial support.

In terms of section 17 of the Children's Act, a person attains the age of majority on their eighteenth birthday. However, despite such majority, the individual nonetheless remains in the position of a child as the age of majority does not automatically mean that they have the maturity, capability or independence normally associated with majority status. The case under consideration questions the practical execution of lodging a claim for maintenance, and whether an adult dependent child is required to lodge a claim for maintenance for themselves. The effect such application for maintenance would have on the welfare of children who find themselves having to institute proceedings against a parent and the potential negative consequences such application may have on the parent-child relationship in light of the recognised advantages of family preservation must be considered. Furthermore, while a child has attained the age of majority, this does not automatically mean that the child has the maturity, ability, independence and attributes usually associated with majority status. Although South African legislation makes provision for the right to maintenance, consideration must be given to the effect that an application for maintenance has on the welfare of a child who has to institute proceedings against a parent, and the potential negative consequences such application may have on the parent-child relationship in light of the recognised advantages of family preservation.

Where there are financially dependent major children born to parents whose relationship has broken down irretrievably, and a divorce has been initiated, the question arises as to whether one parent of the children has *locus standi in iudicio* to claim maintenance from the other parent on behalf of their adult dependent child. In some instances, the High Court has held

that a parent does in fact have the requisite *locus standi*, while other judgments have concluded to the contrary (see discussion of the court cases by the High Court under heading 3 1 above). The reason that courts have reached opposing decisions in this regard is that the adult dependent child has *locus standi in iudicio* by reason of being a major, and therefore has the legal capacity to claim maintenance on their own behalf.

However, in circumstances where an adult dependent child does not wish, for whatever reason, to initiate maintenance proceedings against their parent, the question arises as to whether the parent of the child has the necessary *locus standi in iudicio* to lodge a claim for maintenance against the other parent. Where a financially dependent adult child has the necessary capacity, does a parent no longer have the legal capacity to initiate proceedings on their behalf?

Section 28 of the Constitution recognises that children are especially vulnerable to violation of their rights and that they need special protection, especially given the South African legal past, where children's rights were often neglected and unlawfully infringed. It is for this reason that, although children can invoke rights conferred upon everyone in terms of the Constitution, they are afforded special protection by virtue of section 28. Moreover, section 28(2) specifically prescribes that a child's best interests are of paramount importance in every matter relating to the child. Section 28(2) constitutionalises both the South African common-law rule relating to the child's best interests and its recognition in international law (see article 3 of the United Nations Convention on the Rights of the Child; and article 4(1) of the African Charter on the Rights and Welfare of the Child).

Section 9 of the Children's Act similarly requires that the standard of the child's best interests is of paramount importance and must be applied in all matters concerning children. Case law has demonstrated that the principle of the child's best interests is applied in matters involving children, especially in matters where a child's parents are getting divorced. In the implementation of the standard of the best interests of the child, divorce courts are required to make meaningful and informed decisions pertaining to children born of the marriage so that the welfare of the children is protected. As can be imagined, when parents are getting divorced, it is often extremely stressful for the children. To have a prolonged and acrimonious battle between parents regarding the care, custody and maintenance of the children is obviously not in the best interests of the children. Section 6(4) of the Children's Act emphasises the need for a quick and non-confrontational divorce.

It is submitted that the High Court in this case did not properly consider the effect that application for maintenance by a child against their parent can have on their relationship. The court in this instance did not concern itself with the preservation of a healthy relationship between the divorcing parties and their children despite taking cognisance of the *AF v MF* case, which highlights the vulnerability and stress of young adult dependants when their parents are divorcing. It is submitted that children born of the marriage, even if they are adults, should be as far removed from the divorce proceedings as possible.

While R and B had the necessary mental capacity and ability to institute a claim for maintenance in their own names, it is submitted that the High Court did not consider the physical disability and challenges experienced by R because of the car accident.

It is furthermore submitted that while the High Court established that both R and B were financially dependent on their parents, the decision of the court that they had to be joined in the divorce proceedings in respect of their claim for maintenance was not in the best interests of the adult dependent children as required in terms of section 6 of the Divorce Act.

For this reason, it is submitted that the SCA's approach to the legal issue – that a proper interpretation of section 6 of the Divorce Act had to be undertaken – is the correct approach.

5 Conclusion

A maintenance claim is ancillary to the common-law duty of support, and both parents remain responsible for the upkeep of their children during and after divorce. The overall theme of this SCA case concerns the judicial interpretation of the provisions of the Divorce Act with respect to the *locus standi* of a parent to initiate maintenance proceedings on behalf of a child. Case law has provided varied interpretations of section 6. As such, either parent has the necessary *locus standi* to claim maintenance from their estranged partner on behalf of their adult dependent children.

The court considered the vulnerable position of mothers of adult dependent children, and their position when faced with limited resources and being left to bear the continuing (and in instances such as the case considered, increased) financial responsibility to provide the necessary care for their children during a divorce, while fathers "remain actively employed" and become "economically enriched" during and after the proceedings.

The judgment is to be welcomed, as it has now affirmatively resolved the question whether a parent can claim maintenance on behalf of adult dependent children from the divorced partner. Furthermore, the SCA resolved the conflicting High Court decisions by providing the proper interpretation of sections of the Divorce Act.

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