

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO. 02/2021

In the matter between:

JENNIFER ANNE WHITFIELD (born CARTER)

Applicant

and

IAN LINDSEY WHITFIELD

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

GQAMANA J:

[1] For the convenience, the parties shall be referred to as cited in the main divorce action. The parties are married to each other, out of community of property with the inclusion of the accrual system. Two children were born of such marriage relationship. Both of them are not self-supporting and are financially dependent on the parties. The plaintiff, Mrs Whitfield, instituted the divorce proceedings against her husband, the defendant. Such action is opposed and still pending.

[2] Subsequent to filing of his plea, the defendant launched an interlocutory application for the joinder of their adult dependent children, as the second and third defendants in the divorce action. Both the adult dependent children deposed to affidavits in support of the aforesaid relief and intimated that they wish to institute maintenance claims against the plaintiff.¹ The parties' children reside with the defendant, the elder one is

¹ Joinder : p 8, para 14.

enrolled for a Master's degree at Nelson Mandela University and the youngest is studying to complete his matric. Moreover, it is common cause that both are financially dependent on their parents.

- [3] It was the defendant's contention in the joinder application that, neither of the parents have *locus standi* to champion their children's claims for maintenance and that, both children have a direct and substantial interest in the divorce proceedings between the parties. Given these contentions, it was argued by the defendant that it would be most convenient and cost-effective for the maintenance claims of their children be heard together in the same action. The plaintiff unsuccessfully opposed the joinder application.
- [4] Disenchanted with the *ex tempore* judgment and order issued by this court granting the joinder application, the plaintiff filed an application for a leave to appeal. The grounds for appeal are set out in detail in the application for leave to appeal, but in a nutshell, the plaintiff contends that the court erred in finding that it was appropriate for the adult dependent children to be joined as parties in the main divorce action. Argument was advanced at the hearing of this application that, this matter is of considerable importance because proper consideration has not been given as to who has the *locus standi* to bring application for maintenance on behalf of the dependent children in circumstances as the present one. In advancing his argument, *Mr Dyke SC*, plaintiff's counsel, argued that both the Divorce Act 70 of 1979 and the Children's Act 38 of 2005 are silent on whether the parent or the child has the *locus standi* to pursue a claim for maintenance where the children are not yet self-supporting and are fully financially dependent on their parents.
- [5] Furthermore, *Mr Dyke SC*, with great enthusiasm criticised this court for relying in the judgment in *Butcher v Butcher*,² in finding that the parents have no *locus standi* to institute maintenance claims on behalf of adult dependent children. In my *ex tempore* judgment, I said the following:

² 2009 (2) SA 421 (C).

“In *Butcher v Butcher*, although the matter was decided in the context of a Rule 43 application, however the court held that even though a divorce court is empowered in terms of section 6 of the Divorce Act to make maintenance orders, for adult dependent children, but the same section is silent as to whether any of the parents as a party to a divorce proceedings have the *locus standi* to claim maintenance on behalf of the dependent adult children. However, it concluded that the applicant in that case lacked the necessary *locus standi* to claim on behalf of the adult children and only the children themselves that have the standing to pursue such claim against the parents.

I then concluded that:

“Aligning myself with the principles postulated in *Butcher v Butcher*, *Smit v Smit* 1980 (3) SA 1010 (O) at 1018C, *Sikatele v Sikatele* 1996 (1) All SA 445 (Tk) and *Zeelie v Zeelie* case no: 903/2019 unreported judgment of this Division (dated 9 March 2021), neither of the parties could champion their claims and only the children themselves have the *locus standi* to pursue such claims against the parties.”

[6] *Mr Dyke SC*, now seeks to persuade me that, because of the uncertainty on whether adult dependent children have to be joined as of necessity in every divorce action, there are therefore compelling reasons of policy and administration of justice as provided for in s 17(1)(a)(ii) of the Superior Court Act 10 of 2013 for the appeal to be heard as it affects all divorces where there are adult dependent children. *Mr Dyke SC*, however conceded that in the present matter, the children have a direct and substantial interest as envisaged in Rule 10 of the Uniform Rules of Court.

[7] In terms of section 17(1)(a) leave to appeal should only be granted if there are reasonable prospects of success or if there are some compelling reasons why the appeal should be heard. In *Ntshokovu v S*,³ it was held that the test is now more stringent.

[8] The plaintiff although she raised interesting points in an attempt to persuade me to grant leave to appeal, but those points are academic. This is so because it was conceded on her behalf that their children have a direct and substantial interest. Furthermore, the children also deposed to affidavits indicating that they intend to institute maintenance claims and that it would be convenient and cost-effective for them to do so in same action between their parents. Given the unique facts herein, the argument whether dependent adult children must be joined as of necessity, is not a compelling reason for the appeal to be heard, as provided for in section 17(1)(a)(ii).

³ Unreported, SCA case no. 157/2015 [2016] ZASCA 112 dated 7 September 2016.

The children themselves want to be joined as parties in order to pursue their claims for maintenance. They have a direct and substantial interest in the matter and as indicated above, they have deposed to affidavits in support of the relief that the defendant sought in the joinder application.

[9] For these reasons, the application for leave to appeal must fail and accordingly the following order is issued:

1. The application for leave to appeal is refused.
2. The plaintiff is ordered to pay the costs.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant	:	<i>Adv B Dyke SC</i>
Instructed by	:	Moya Rossouw Inc. Port Elizabeth
Counsel for the Respondent	:	<i>Adv L Gagliano</i>
Instructed by	:	Badenhuizen Inc. Port Elizabeth
Date heard	:	13 October 2021
Date judgment delivered	:	26 October 2021