

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NUMBER: 17229/2006**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 19 MAY 2023

SIGNATURE:

In the matter between:

A[...] J[...] N[...]

APPLICANT

(Identity number: 6[...])

And

W[...] L[...] N[...]

(Identity number: 6[...])

RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 19 May 2023.

**JUDGMENT**

**COLLIS J**

1. This is an opposed application wherein the applicant as per the Notice of Motion seeks the following relief:

“

1. That the writ of execution issued out of this Honourable Court on 10 August 2021 under case number 17229/2006 be set aside;
2. That the enforcement and execution of the writ of execution issued by this Honourable Court under case number 17229/2006 on 10 August 2021, be stayed, pending the adjudication of this application;
3. That the Respondent be ordered to effect payment of the Applicant's legal costs at the scale as between attorney and client in the event of opposition hereto;
4. That the Applicant be granted such further and/or alternative relief as which this Honourable Court deems appropriate. “

2. As per the Joint Practice note filed by the parties, the issue that this court was called upon to determine is whether there exist grounds for the setting aside of a writ of execution.<sup>1</sup>

3. It is the applicants' case that it is not competent for a major person, in the present instance a parent to “stand in” as a judgment creditor on behalf of another major person (herein an adult child), seeking the enforcement of a maintenance order pertaining to adult children who were minors at the time when the maintenance order was granted.

#### BACKGROUND

4. The applicant and the respondent were previously married to each other, which union was dissolved on 15 May 2009. From the erstwhile marriage relationship, two children were born. Both these children attain the age of majority on 24 January 2018 and 23 April 2021 respectively.

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<sup>1</sup> Joint Practice Note 0003-2 para 7.2 and 7.3

5. The parties divorced on 15 May 2009 and in terms of the settlement agreement concluded at the time, the applicant was ordered to pay maintenance in respect of his two minor children. At present both children are still dependant on the parties for maintenance, albeit that they now have attained the age of majority. This much is common cause between the parties.

#### APPLICANTS CASE

6. It is the applicants' case that the respondent in her capacity as the mother of two adult children (A[...] and M[...]), obtained a writ of execution<sup>2</sup> for the payment of R613 598.14 against the applicant, the father of the adult children. The maintenance was allegedly incurred during the period of time when the children had already attained the majority age.

7. Furthermore it is contended that the writ should be set aside for the reason *inter alia* that when his daughters became majors the obligation to pay maintenance under the court order had ceased by automatic operation of law. The parties' eldest daughter, A[...] turned 18 on 24 January 2018 and M[...], the youngest daughter turned 18 on 23 April 2021<sup>3</sup> and that albeit that both children are studying at university with the youngest child residing at the university,<sup>4</sup> the obligation to pay maintenance ceased to exist when they obtained the age of majority.

8. The applicant as a result contends that the respondent has no *locus standi* to have issued the writ in execution in circumstances where the underlying *causa* in respect of the divorce proceedings no longer exists and where the children are already majors. The order provided for maintenance to be paid by the applicant whilst the children were still minors and that no maintenance was envisioned by the parties in respect of the children, when they became majors. It is for this reason that the argument was advanced that the underlying *causa* in respect of the order is no longer applicable in the present circumstances.

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<sup>2</sup> Index 005-1

<sup>3</sup> Index 004-6

<sup>4</sup> Index 004-7

9. The writ, counsel had argued, should have been issued in the name of the major children themselves and in the absence thereof, it is not competent to have been issued in the name of the respondent and should as a result be set aside.

## THE LAW

10. Rule 45A reads as follows:

*“The court may suspend the execution of any order for such period it may deem fit.”*

11. Apart from the provisions of Rule 45A, a court also has an inherent discretion to order the stay of a sale in execution,<sup>5</sup> which includes the stay of a Warrant of Execution.

12. This discretion of a court must however be exercised judicially. Such exercise of a courts’ discretion shall be fact specific and the guiding principle will be that execution will be suspended where real and substantial injustice would occur.

13. It is for this reason that a court will only do so where injustice will otherwise ensue and a writ in execution will only be set aside where it is just and equitable to set it aside on, *inter alia*, the following grounds:

13.1 Where the writ had not been issued on conformity with the judgment;

13.2 where the wrong person is named therein as a party;

13.3 where the amount payable under the judgment can be ascertained only after deciding a further legal problem;<sup>6</sup> and

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<sup>5</sup> Graham v Graham 1950 (1) SA 655 (T); First Consolidated Leasing Corporation Ltd v Theron 1974 (4) SA 244 (T) at 247; Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd 1981 (2) SA 407 (W) at 411A - C

<sup>6</sup> Muniamma v Ramalingam 1932 NPD 29 at 32, cited with approval in McNutt v Mostert 1949 (3) SA 253 (T); De Crespigny v De Crespigny 1959 (1) SA 149 (N); Ras v Sand River Citrus Estate (Pty) Ltd 1972 (4) SA 504 (T)

13.4 where the debt in respect of which the judgment has been obtained had been extinguished before obtaining the judgment or where satisfaction of the judgment has been made or tendered, whether by offer of the goods claimed, or by payment, or by setoff, or by way of novation.

14. In the present instance, the writ in question was issued pursuant to the respondent making an application before the Registrar. Placed before the Registrar at the time was an affidavit deposed to by the respondent and the order of court upon the dissolution of the marriage. The applicants' obligation to pay maintenance emanates from the settlement agreement attached to the order of the court when the marriage was dissolved.

15. In terms of Clause 2.2 of the settlement agreement, the custody of the two minor daughters born of their marriage was awarded to the respondent and Clause 3.1 thereof, provided as follows in regard to their maintenance:

'3.1 Die Verweerder sal aan die Eiseres ten behoeve van die minderjarige kinders bydra tot hulle onderhoud en wel soos volg:

3.1.1 Betaling van 'n bedrag van R 7500 per maand, oer kind direk in the Eiseres se bankrekening, die besonderhede waarvan aan die Verweerder verskaf sal word en welke betaling 'n aanvang sal neem op die eerste dag van die maand na toestaan van 'n finale egskeiding bevel an maandeliks daarna op of voor die eerste dag van elke daaropvolgende maand.

3.1.2.....

3.1.3.....

3.1.4.....

3.1.5 Die Verweerder sal die kinders se skoolfooie en aanverwante skolastiese uitgawes betaal op lewering van 'n rekening aan hom verskaf van die skool en/of the Eiseres.'

In addition, clause 7.2 provided the following:

“7.2 Geen wysigings deurhaligs en/of byvoegings van hierdie ooreenkoms sal op enige van die partye bindend wees behalwe waar daar ‘s skrif gestel is deur beide partye in die teenwoordigheid van twee onafhanklike getuies geteken is.”

## RESPONDENT'S CASE

16. The respondent contends that the applicants' obligation to pay maintenance continued despite the fact that the children have become majors and that the applicant by his own admission tendered to pay the tuition fees.

17. Further, the respondent argues that the applicant loses sight of the fact that both the children are still in need of accommodation either by staying with the respondent or by staying in a flat and that their day-to-day needs must still be met. They still need to eat, have clothes, pay for water and electricity and stationery and handbooks for their tuition.

18. In addition to the above, they also have medical needs that must be met and must travel to and from classes which will require fuel and maintenance for their motor vehicles or make use of public transport. As such this need for maintenance also still exists.

19. It is on this basis that the argument was advanced that it is therefore not a contentious issue that both the children are still dependent on both their parents for maintenance and that the respondent had taken various steps to secure compliance with the court order. Amongst others, these steps included her attorneys' writing letters requesting compliance,<sup>7</sup> the respondent herself sent letters requesting payment,<sup>8</sup> and on certain occasions the respondent approached the court for assistance.<sup>9</sup> All of these steps were tirelessly opposed by the applicant.

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<sup>7</sup> Opposing affidavit, Index 95 para 23.2

<sup>8</sup> Opposing affidavit, para 23.3 page 95.

<sup>9</sup> Opposing affidavit, para 23.4 page 95.

20. The writ of execution was therefore issued to safeguard the rights of the children in order to secure the maintenance and to see that their day-to-day needs are being met.

#### ANALYSIS

21. Now from the extracts of the divorce order quoted above, it unambiguously refers to the applicant's maintenance obligations in respect of the minor children,<sup>10</sup> and that no express provision was made for the obligation on the part of the respondent to continue making payment of maintenance for any adult children in circumstances where they were not self-supporting.

22. Clause 7.2 of the order further provided that where the parties wanted to amend any clause contained in the settlement agreement that such amendment will only be valid if reduced in writing and signed by both parties in the presence of witnesses.

23. It is common cause between the parties that no such amendment to the court order was ever made by them and as such the order issued by the court on 15 May 2009 stands as an order issued providing for maintenance to only be paid in respect of minor children, and not for children who have obtained the age of majority.

24. That being said, it must follow that the writ issued pursuant to such court order by the Registrar could only have been issued in respect of maintenance due to the minor children and not in respect of maintenance due to any major children. Where it was issued in circumstances where the children are now majors, the said writ was incorrectly issued as the underlying *causa* had fallen away and should therefore be set aside.

25. A Registrar upon receipt of a writ is obliged to interrogate such writ to ascertain that it conforms with the judgment. Also, he or she is further obliged to satisfied himself or herself that the writ is valid before proceeding to issue same. In circumstances where this exercise has not been undertaken, or where it has been incorrectly undertaken, it cannot be said that the writ was validly issued.

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<sup>10</sup> Index 004-7 and Index 005-12.

26. In *casu*, not only has the underlying *causa* fallen away, but the execution creditor (the respondent) further had no *locus standi* to apply for the writ to be issued. This is because the children had already attained the age of majority.

27. The children by attaining the age of majority have passed from their natural guardianship of their parents,<sup>11</sup> and their entitlement to receive and enforce such rights to claim maintenance vests in them and not with the respondent. Our law supports such contention that major children have standing in their own right to bring maintenance claims directly against their parents.<sup>12</sup> For this reason too, the writ should be set aside as the execution creditor lacked the necessary *locus standi* to have applied for the writ in execution.

28. In addition, whilst it is relevant to emphasize that a parent's duty to support a child does not necessarily cease upon that child becoming a major, the very nature of the support changes in that a major child is not supported as lavishly as a minor child and is confined to the necessities.<sup>13</sup>

29. As a general rule an order to pay maintenance in respect of a minor child to a custodian parent loses its effect when the minor achieves majority and although the duty to support may persist into the child's majority, the nature thereof changes. It then must follow that when a child attains majority the nature of the duty to support is now confined to necessities,<sup>14</sup> and in order to ascertain whether a duty to support still exists beyond the age of majority a fresh enquiry is required and when so undertaken, what amount of maintenance should then be paid. In the present instance, this has not taken place.

30. For the reasons alluded to above and given the conspectus of evidence placed before this court, I cannot but conclude that the application is to succeed.

## COSTS

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<sup>11</sup> Richter v Richter [1947] (3) SA 86 (W)

<sup>12</sup> Smit v Smit 1980 (3) SA 1010

<sup>13</sup> B v B 1997 (4) SA 1018 (SE) 1021

<sup>14</sup> Van Vuuren v Sam 1972(2) SA 633 (A).

31. The applicant requested this court to award costs on a punitive scale against the respondent, in the event of being successful. In exercising my judicial discretion, I am of the view that a punitive costs order is not warranted under the circumstances.

#### ORDER

32. Consequently the following order is made:

32.1 The writ of execution issued by the Registrar on 10 August 2021 under Case number 17229/2006 is set aside.

32.2 The Respondent is to pay the costs, including the costs of two counsel where so employed.

C. J. COLLIS  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION PRETORIA

#### APPEARANCES:

Counsel for the Applicant: Adv J.P. Van den Berg SC &  
Adv G Kyriazis

Attorney for the Applicant: Couzyn Hertzog and Horak Attorneys

Counsel for the Respondent: Adv N Erasmus

Attorney for the Respondent: Potgieter Louw Inc. Attorneys

Date of Hearing: 2 November 2022

Date of Judgment: 19 May 2023