REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 9169/2022

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED

DATE: 15/01/24

In the matter between:

U[…] D[…] J[…] **PLAINTIFF**

And

J[…] H[…] O[…] **DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] The plaintiff and the defendant are the biological parents of K[…] O[…] (child) who was born on […] J[…] 2003 and who is now a major. The relationship between the plaintiff and defendant had broken down irretrievably which resulted in the defendant moving out of the common home during August 2019.

From August 2019 the child had been staying with the plaintiff. The plaintiff has instituted an action against the defendant for the reimbursement of the amount which she alleges was an amount that she had contributed more than her pro rata share towards the maintenance of the child.

[2] The plaintiff in her particulars of claim has stated that for the period 1st September 2019 to 30th May 2020 the defendant contributed a total amount of R12 424.78 in respect of the child's needs. For the period 1st September 2019 to 30th May 2020 the plaintiff allegedly incurred expenditure in respect of the child's maintenance needs to ensure that the child was properly cared for in the amount of R182 112.10. On 3rd August 2020 an order was granted by the maintenance court whereby the defendant was ordered to contribute R4 400.00 per month with effect from 31st May 2020. The aforesaid amount was to increase to R 5 000.00 per month on 31st December 2020. The said amount was payable directly to the plaintiff.

[3] Payment of the child's medical aid contribution in the amount of R471.00 was payable directly to the plaintiff with effect from 31st May 2020, payment of 50% of the reasonable extra medical expenditure not paid by the medical aid, payment of the child's school fees payable directly to the institution, payment of the child's gym fees payable directly to the plaintiff and payment of the child's cell phone contract. The child attained the age of majority on 31st January 2021 and defendant stopped paying the full maintenance for the child's needs. For the period 1st February 2021 to 31st July 2022 the defendant contributed a total amount of R17 901.00 in respect of the child's maintenance needs. During the

period 1st February 2021 until 31st July 2022 the plaintiff incurred expenditure in respect of the child's maintenance needs to ensure that the child was properly cared for in the amount of R241 602.29.

[4] On 21st July 2022 the maintenance court made an order against the defendant in terms of which the defendant had to contribute 60% of the tuition fees for the child at Sae Institute or any other institution providing the similar qualification, nearer to the child's place of residence, and the defendant to retain the child on his medical aid for the duration of his studies and/or until such time as prescribed by the medical aid scheme for student beneficiaries.

[5] As per the plaintiff's particulars of claim, the difference between the defendant's pro rata contributions and his actual contributions during the period 1st February 2019 and 30th May 2020 amounted to R104 297.00. Further that the difference between the defendant's pro rata contributions and his actual contributions during the period 1st February 2021 to 31st July 2022 amounted to R137 800.00. The plaintiff avers that she had contributed more than her required share towards the maintenance of the child and therefore she is entitled to reimbursement of the amount of R242 097.00 from the defendant.

[6] The defendant had raised an exception against the plaintiff's particulars of claim. The grounds of the defendant's exception are that the plaintiff alleges in paragraphs 4.16 and 4.17 that the defendant was legally obliged to pay maintenance for the period 1st September 2019 to 30th May 2020 and 1st

February 2021 to 31st July 2022. The plaintiff relies solely on the conclusion or inference that such a duty existed. No material facts are alleged from which (if proved at trial) such conclusion – that a legal obligation existed upon the defendant to have made any specific payments for maintenance during the period as aforesaid – can be drawn. The only allegation that is made is that a court order was obtained on 3rd August 2020, after the first period, from 31st May 2020 that the defendant was obliged to pay maintenance for the child. This does not impose a duty upon the defendant to have made any payments for the period as alleged or at all.

[7] Further that the defendant as it appears in paragraph 4.5 of the plaintiff's particulars of claim, indeed made maintenance payments towards the child. No allegation is made that a legal duty and/or obligation existed that was required of the defendant to pay more maintenance in the period. The same position applies to the second period, being 1st February 2021 to 31st July 2022 as the major child only obtained a court order for maintenance on 21st July 2022, which order was not granted retrospectively. This does not impose a duty upon the defendant to have made payment, and therefore lacks essential averments to sustain a cause of action.

[8] The general principles applicable to exceptions have been considered in a number of decided cases. *Living Hands v Ditz*[1] Makgoka J said:

[1] 2013 (2) SA 368 (GSJ) at 374G – 375C

"Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars".

[9] The defendant's exception is based on paragraphs 4.5, 4.16 and 4.17 of the plaintiff's particulars of claim. It can therefore not be said that upon any construction of the particulars of claim, no cause of action has been disclosed. From what appears from the plaintiff's particulars of claim, the plaintiff claim is based on the defendant's alleged legal duty to maintain their child. It is the legal duty of both parents to maintain their child according to their relative means and the needs of the child from time to time. That duty does not automatically terminate when the minor child reaches the age of majority, but if the child is in need, that duty will continue until the child is self-sufficient. Whether there is still a need for the child to be maintained beyond the age of majority is for the plaintiff to substantiate that, and that can be done by leading evidence during trial.

[10] In *Z v Z*[2] Meyer AJA said:

"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 the minor child or of an adult dependent child are both under a common law and 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. The parents' duty to support their children is not terminated by the dissolution of their marriage by divorce".

[11] The legal duty to maintain a minor child or the adult dependent child is not established by court a order but emanate from the common law. The court order merely clarifies issues for there to be certainty and also to assist the other party to be able to calculate arrears in case the other party defaults with his/her payments. It is not in dispute that the defendant is the biological father of the child, and therefore with or without the court order had a legal duty to maintain him. The onus will therefore be upon the plaintiff to establish that despite the child having attained the age of majority, he is still an adult dependent in need of support from his parents.

[2] [2022] ZASCA 113; 2022 (5) SA 451 (SCA) 921 July 2022) at para 8

[12] The plaintiff in her particulars of claim is alleging that she had contributed more than her pro rata share to the needs of their child, and is therefore claiming the excess from the defendant. Whether she will be able to proof that is matter of evidence. Therefore, the plaintiff's particulars of claim read as whole establish the cause of action, and the defendant's complaints may be cured by further particulars. It follows that defendant's exception stand to fail.

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

13.1 The defendant's exception is dismissed with costs.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	**: MC de Klerk**
Instructed by	**: DDKK Attorneys Inc**
Counsel for the defendant	**: Adv Basson**
Instructed by	**: Anita Campbell Attorneys**
Date heard	**: 9th October 2023**
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