

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:84818/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 13/11/24

Signature

In the matter between:

O[...] V[...]

APPLICANT

(identity number:6[...])

And

C[...] M[...] V[...]

RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and all be uploaded on Caselines. The date for hand down is deemed to be 13 November 2024

JUDGEMENT

SCHEEPERS AJ

1. This application stems from a divorce action between the applicant and the respondent, and relates to the settlement agreement entered into between the parties relating to maintenance for the then minor children.
2. There were several disputes between the parties stemming from the original Notice of Motion. For purposes of the judgement, these have fallen by the wayside and only one real issue remains and that relates to the *locus standi* of the respondent to have applied for a writ of execution for alleged arrears maintenance relating to the three children of the parties, and whether the

abandonment of some relief initially sought by the Applicant should incur an adverse cost order against him. The real dispute is simply whether the Respondent had the necessary *locus standi* to claim arrears maintenance on behalf of children who has attained the age of majority subsequent to the divorce of the Applicant and the Respondent.

3. The issues pertaining to the striking out application has to a large extent been overtaken by the facts and I, for purposes of this judgement, do not deal extensively with the application to strike out and only deal with the costs' implication at the end of this judgment.
4. The parties were divorced in terms of a decree of divorce incorporating the settlement agreement on 21 May 2018.
5. Three children were born from the marriage, namely:
 - a) E, born on 28 January 2002
 - b) O, born on 7 May 2004
 - c) N, born on 24 March 2006
6. Clause 2.1, of the settlement provides for the applicant's maintenance obligation with reference to 3 minor children
7. At the time of the divorce the three children were minors and at school.
8. Two of three children, E and O have reached the age of majority since the divorce , and N, attained majority on 24 March 2024 (after the application for a writ had been applied for and issued).
9. During September 2023, the respondent caused a writ of execution to be issued by the Registrar for the non-payment of maintenance in terms of settlement

agreement which writ related to alleged arrears maintenance that was payable in respect of all three children.

THE DISPUTE

10. The applicant disputes the *locus standi* of the respondent to enforce maintenance payments payable to the O and E, the adult children having attained majority prior to the application for the writ having been made.
11. The respondent on the other hand insists that, until such a time as the Court Order, awarding the maintenance is amended, the applicant is bound to make payments in terms of the Order, to her.
12. The true issue that has to be decided is whether the respondent had *locus standi* to seek and enforce the payment of maintenance for the adult children.
13. The issue of *locus standi*, in circumstances where the children's status as minors or adults were dealt with, appear from two reported decisions, one in the Supreme Court of Appeal, and the other, a decision of a single judge in this Division,
14. Adv. van der Westhuizen on behalf of the respondent, relied on the decision in Z v Z (556/2021)[2022] ZASCA 113 (21 July 2022) by the Supreme Court of Appeal, and argued that this decision is a precedent on the *locus standi* of the respondent to enforce the maintenance liability of the applicant, both for minor and adult children .
15. Her argument was that this decision and applying its principles to the dispute *in casu*, entitles the party in whose favour maintenance payments were made, to claim such payments irrespective of the objective fact that O and E in favour of whom the maintenance contributions were ordered, have reached the age of majority

16. The contrary view, was argued by Adv. Haupt SC on behalf of the Applicant. She relies on a recent decision of this division in AJN v WLN, a decision by Collis J , Case Number 17229/2005 dated 19 May 2023
17. Adv Haupt SC, emphasized the difference between the facts of Z v Z , dealing with *locus standi* during divorce proceedings and the facts in AJN v WLN, which is post-divorce and relates to the *locus standi* , for enforcement of the terms of a Court Order regarding maintenance, revert AJN a precedent for the relief sought.
18. In this regard she referred to paragraph 23 and 27, whilst emphasizing the need to read that, with the decisions in Richter¹ and Smit².
19. She submitted that until such a time that the order is varied, the applicant is liable to pay the maintenance as prescribed in the Settlement Agreement., which was made an order of Court.
20. In dealing with the similarity of facts *in casu* WLN / AJN are raised by Adv Haupt SC, she argued that the maintenance payable was not individually allocated to a child and as such, irrespective of the Collis judgment, entitles the respondent to claim the arrears payment and enforce execution thereof, on the basis that the total amount remained payable (as there was no individual breakdown of maintenance per child) and N was still a minor. Therefore, she submitted, even if Adv Haupt's argument had merits, the non-divisibility of the maintenance clause , takes the facts outside the scope of the judgment by Collis J.

THE POINTS IN LIMINE

The failure to disclose a cause of action

21. The pleadings as they stand, having regard that in application proceedings the pleadings are made up by the Notice of Motion and the affidavits filed, supports

¹ *Richter v Richter* [1947] (3) SA 86 (W)

² *Smit v Smit* 1980 (3) SA 1010

the attack against the issuing of the writ of execution and discloses a cause of action.

22. It clearly alleges the lack of *locus standi* of the respondent to seek the relief sought. Considering the point raised here is akin to an exception, it is trite that I have to adjudicate the alleged non-disclosure of a cause of action, on the version of the applicant.

23. The necessary averments were made and sustain a cause of action in the form of attacking the validity of the writ of execution, based on the lack of legal standing on the part of the respondent to apply for the writ as she did, due to O and E having attained the age of majority.

24. The point in *limine* raised in this regard is dismissed.

The abuse of process

25. This is in my view not a true point *in limine* and I will deal with the issue when I deal with the costs relating to the application.

The dispute of fact

26. The point relating to a dispute of fact raised by the Respondent is a non-event relating to the main relief. The common cause facts dictate the relief to be granted and, based on issues relating to interpretation of the agreement and the application of the legal precedents relied upon.

27. I will not deal with this as a separate issue.

THE ATTACK AGAINST THE WRIT

28. The Respondent applied for the writ of execution and claimed arrear maintenance relating to all three children, whilst two of the children had attained the age of majority at the time when the writ was applied for.

29. In *Z v Z*, the Supreme Court of Appeal dealt with the ability of a parent to claim maintenance on behalf of an adult child that is still in need of maintenance. The reasoning for this extended *locus standi* is evident from the judgment.

30. The position *in casu* is different from that in *Z v Z*. The children were all minors when the maintenance provisions of the settlement agreement were made an order of Court.

31. *Z v Z* furthermore does not deal with enforcement of the settlement agreement whilst ALN does.

32. Having regard to the decision of Collis J, in *ALN v WLN*, I am in agreement with the *ratio* of the judgment, and even if I was not, I am bound to follow it, unless it is clearly wrong.

33. Without repeating the reasoning of Collis J in its entirety, I find that:

33.1 The writ was issued by the Registrar based on a claim of non- payment of maintenance and included the enforcement of payment of maintenance contributions relating to two adult children.

33.2 The provisions of the settlement agreement unambiguously refer to maintenance payment relating to minor children (“minderjarige kinders”);

33.3 The Registrar ought to have investigated the liability for the amount claimed in terms thereof by the applicant and did not do so.

33.4 The Respondent had no *locus standi* to claim payment on behalf of the children who attained majority and according to the breakdown provided, it all relates to payments allegedly due after two children attained the age of majority.

33.5The underlying cause for the maintenance payments due, with regard to two of the children had fallen away due to them reaching the age of majority.

34. Collis J, remarked at Paragraphs 27-29 of her judgment:

27. The children by attaining the age of majority have passed from their natural guardianship of their parents, 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. 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.

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 persists 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, 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.

35. I can do no more than agree with those findings and her findings in the preceding paragraphs.

36. The only factual difference between the ALN case and the facts *in casu*, is that the N was still a minor at the time of the issuing of the writ of execution. As a result of his status as a child, the respondent was entitled to apply for a writ of execution in as far as the Applicant was in arrears with his maintenance obligations relating to N.

36.1 I considered whether a part of the writ execution should remain as enforce able, or whether the whole writ should be set aside

37. I Found other concerns with the writ of execution and in particular, it seeking to attach specific assets.

38. Rule 45 of the Uniform Rules prescribes to process to be followed when a writ Of execution is sued for.

39. It has to be substantially in compliance with Form 18.³

40. Rule 45 (3) further prescribes:

(3) Whenever by any process of the court the sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling-house or place of employment or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached), and there —

(a) demand satisfaction of the writ and, failing satisfaction,

(b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ, and failing such pointing out,

³ You are hereby directed to attach and take into execution the movable goods of , the above-mentioned defendant of (address) , and of the same to cause to be realized by public auction the sum of together with interest thereon at the rate of

(c) *search for such property.*

Any such property shall be immediately inventoried and, unless the execution creditor shall otherwise have directed, and subject to the provisions of subrule (5), shall be taken into the custody of the sheriff: Provided —

(i) that if there is any claim made by any other person to any such property seized or about to be seized by the sheriff, then, if the plaintiff gives the sheriff an indemnity to his satisfaction to save him harmless from any loss or damage by reason of the seizure thereof, the sheriff shall retain or shall seize, as the case may be, make an inventory of and keep the said property; and

(ii) that if satisfaction of the writ was not demanded from the judgment debtor personally, the sheriff shall give to the judgment debtor written notice of the attachment and a copy of the inventory made by him, unless his whereabouts are unknown.(4) The sheriff shall file with the registrar any process with a return of what he has done thereon, and shall furnish a copy of such return and inventory to the party who caused such process to be issued.

41. There is a clear process to be followed by the Sheriff when executing a writ of execution. He needs to demand payment of the debt set out in the writ, if not complied with, he / she has to request the execution creditor to point out attachable assets. Only thereafter he/ she may search for assets.

42. The writ as sued for by the Respondent does not comply substantially with Form 18, as it directs the Sheriff to attach the bank account of the Applicant.

43. The authors of Erasmus- Superior Court Practice⁴ seems to support my interpretation of what a writ should look like and, in its commentary, state the following:

⁴ Juta e-Publications

‘Corresponding substantially with Form 18 of the First Schedule.’ The verbatim following of Form 18 is not required. The word ‘substantially’ requires, it is submitted, that the writ must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 18 may be used with such variation as circumstances require. [25](#) Form 18 directs the sheriff to ‘attach and take into execution the movable goods of the judgment debtor’ to be realized by public auction for the sum of the judgment debt. A writ which is over specific in terms of the movable property to be attached, directing the sheriff to attach only the bank account of a government department, does not correspond substantially with Form 18 and contravenes rule 45(1). [26](#)

44. No circumstances or facts to justify a deviation from the wording of Form 18 is included in the supporting affidavit it is not stated why the standard form should not be followed or would be insufficient.

45. The wording used in the writ applied for by the Respondent, and in particular prescriptive nature of the writ to attach the bank account of the Respondent is not compliant with Rule 45(1) and most certainly not “substantially the same”

46. Apart from the fact that the writ as issued has to be set aside due to the lack of *locus standi* of the respondent to apply to enforce payment of arrears maintenance, the form of the writ is in my view not compliant with the provisions of Rule 45(1) of the Uniform Rules of Court and I cannot exercise any discretion (if I had one) ,to allow the portion payable to N to remain.

47. For the reasons set out above, the writ issued under this case number and dated the 4 September 2024 has to be set aside.

48. The Applicant in addition seeks relief pertaining to the variation of the existing maintenance obligations. In as far as O and E is concerned. This led to the plethora of documentation forming part of this application

49. Neither of the two children regarding whom Applicant seeks a variation are parties before the Court and were not parties to the original agreement.

50. Their non-joinder as parties, renders it, absent unequivocal waiver or consent to such an order, non-suited and such relief as sought regarding the amendment of the existing order cannot be granted.

51. Should any of the two adult children have concerns regarding their maintenance this can be addressed by them to their parents, and if not agreed to, in the appropriate forum.

52. In as far N is concerned, the same applies after he attained the age of majority, and he has the requisite *locus standi* to request and / or apply for maintenance should there be a dispute or a need of maintenance that is not satisfied.

53. The application to vary to existing order and the relief claim in Part B is dismissed.

Costs

54. The papers were voluminous and contained pages of bank statements and documents that were not relevant to the granting of the relief in Part A.

55. The Respondents took issue with the way the relief was formulated and the relief that it was eventually expected to contest.

56. Costs are a discretionary issue and the real dispute between the parties was the writ of execution and the *locus standi* of the Respondent in applying for the writ. The Additional relief sought in Part B was superfluous, having regard to the Applicant's own interpretation and reliance on the ALN judgment. In addition, the variation sought necessitated the joinder of the two adult children and subsequent to commencing the application, included the need for joinder of N who, attained majority prior to the hearing of the application. The Applicant is however still substantially successful and entitled to some costs.

57. Considering the substantial success achieved by the Applicant I considered whether the circumstances *in casu* justifies an apportionment of the costs.

58. I am of the view that it does as the relief set out in Part B was refused for the reasons, I set out earlier herein.

59. Having regard to the lack of success on that part and considering that a substantial part of the record consisted of issues relating to the variation / amendment sought, I hold the view that an order that Respondent has to pay 50% of the Applicants party and party costs are appropriate. Such cost to include the costs of Senior Counsel where so employed and in accordance with tariff C.

The following order is made:

1. The warrant of execution, under case number : 84818/2017, issued on 4 September 2023, against the movable assets of the Applicant being, Mercantile Bank, Current (Cheque) Account, Account number: 1[...], Branch code: 4[...], situated at Capitec Bank 1[...] W[...] Street, Sandton is set aside;
2. The Respondent is ordered to pay 50% of the Applicant's party and party costs , such cost to include the costs of Senior Counsel where so employed and in accordance with tariff C.

G J SCEEPERS
Acting Judge of the High Court
Gauteng Division; Pretoria

Appearances:

For the Applicant:

Instructed by:

For the Respondent:

Adv. L Haupt SC

Hills Incorporated

1st Respondent in person

Adv L Van Der Werthuizen

F Van Wyn Attorneys

Date Heard:

24 August 2024

Date Judgement delivered:

13 November 2024