

SOUTH AFRICA / JUDGMENT

J v J (2011/46076) [2013] ZAGPJHC 53; 2013 (4) SA 350 (GSJ) (28 March 2013) [2013] ZAGPJHC 53

COURT

South Gauteng High Court, Johannesburg

BEFORE

C G Lamont

CASE / FILE NUMBER

2011/46076

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2011/46076

In the matter between:

J, SM Plaintiff and J, CC Defendant

J U D G M E N T

LAMONT, J:

[1] This is an application brought, by the plaintiff in an action, for the appointment of an independent legal representative for a child. The plaintiff and defendant are married to each other. A child was born of that marriage some 35 years ago. The child is physically and mentally handicapped and is dependent upon her parents, the parties, to support her. She is hereafter referred to as the dependant daughter.

[2] The claims in the divorce action encompass:

2.1 A claim by the plaintiff for a re-distribution of the defendant's assets in terms of section 7 of the Divorce Act No 70 of 1979 ("the Act").

2.2 A claim for an amount of maintenance for herself.

2.3 A claim for an amount of maintenance for the dependant daughter.

- [3] The plaintiff claims that an independent advocate should be appointed to assist the dependant daughter in the action. The plaintiff states:

“I hold the view that considering the nature of the disputes to be determined at the hearing of the divorce action and more particularly my claims for a re-distribution of the respondent’s assets in terms of section 7(3) ... and spousal maintenance a conflict of interests may exist between Julie and I as well as the respondent and Julie.”

- [4] There is no issue between the parties that such needs as the dependant daughter may have will be met by them. The issue between the parties is the amount which each of them should contribute towards those needs.
- [5] Such claim as the dependant daughter has against her parents will be met. This is apparent from the pleadings in the action. In the action the plaintiff (mother) claims that an amount of money should be paid by the defendant (father) to her for the maintenance of the dependant daughter.
- [6] There is no need for the dependant daughter herself to institute any claim against either of her parents as such claim is academic. She in fact has made no claim in the action. When I raised the question of whether or not a curator ad litem should be appointed it was dealt with on the basis that no curator was required. This concession can only have been made in light of an acknowledgement by the parties that the needs of their dependant daughter will be met.
- [7] Section 6(3) of the Act provides that a court which grants a decree of divorce may make an order in respect of the maintenance of a dependant child of the marriage. This section in my view is intended to and does provide the power for a Court to make orders directing parents who are in the process of seeking a divorce to make payment for major children who are dependent.
- [8] Section 28(1)(h) of the Constitution provides that every child has the right to have a legal practitioner assigned to the child by the State and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. Relief under this section is not sought in the present matter and I need not consider it further.
- [9] Section 14 of the Children’s Act No 38 of 2005 provides:

“14. Every child has the right to bring, and to be assisted in bringing a matter to court, provided that matter falls within the jurisdiction of that court.”

No relief is sought under this provision. The child is not a party to the action neither is it proposed that the child be made a party. There is no relief which the child claims and none which the child will receive by way of order.

- [10] The submission was made that the plaintiff's position is compromised in the action in that the plaintiff will seek to obtain a capital re-distribution in as great a sum as possible and that this will impact on the child's rights to be paid maintenance. The submission was that the plaintiff accordingly cannot represent the child and herself.
- [11] I disagree. The court making the maintenance order contemplated by the Act will have regard to the factors affecting maintenance.
- [12] Section 6(1) of the Act requires a court to be satisfied when it makes the decree of divorce that the provision made in respect of the dependent daughter are satisfactory or at least the best that can be effected. Section 6(3) of the Act empowers the court to make such order as to maintenance as it deems meet. In approaching the question of maintenance the court will have regard to:
- 12.1 The needs of the dependant daughter.
- 12.2 The ability of each parent to meet those needs.
- [13] The assessment of the ability of each parent to meet the needs of the dependant daughter requires an investigation into the assets and liabilities, income and expenses (existing prospective) of each parent. Thereafter the court is required to perform an intricate balancing act to determine to what extent the needs of the dependant daughter can be met by both parents and the amount inter se which each parent is required to contribute towards those needs.
- [14] In the process of considering the assets and liabilities of the parties the court must have regard to the order it proposes making effecting a re-distribution of the assets. The court is required to consider the position of each party as it will be at the end of the re-distribution it directs. This is logically so as this is the position which will obtain after the divorce, which is the period when the maintenance is to be paid.
- [15] It is accordingly irrelevant to the dependant daughter what assets are re-distributed and what the value of those assets is. These are matters which affect the parents not the dependant daughter.
- [16] It follows that in my view there is no conflict between the interests pursued by the plaintiff and those of the dependant daughter.
- [17] On the foregoing analysis there is no reason to appoint anyone to care for the interests of the child.
- [18] It seems to me that the matter could be approached differently by considering what contribution the representative for the child would make at the hearing. The parties in the process of the divorce will provide all the relevant data concerning their assets and liabilities, income and expenses and the relevant evidence required for trial. To the extent that there is any inadequacy in the production of evidence the parties in the pursuit of their own claims inter se will deal with such inadequacies. In the course of doing so the data

required by the court to assess the respective amounts each parent is to pay will become apparent.

[19] The rhetorical question then to be answered is what will the child's counsel to do? It seems to me that the child's counsel has no function of any value and will make no contribution of any relevance at the trial.

[20] I have accordingly reached the conclusion that the application should be dismissed.

[21] I make the following order:

1. The application is dismissed.

C G LAMONT

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Counsel A De Wet SC attorneys

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