REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

22/9/2014

CASE NO 2013/22829

In the Matter between:

TALJAARD, JOHANNA MARINDA N.O. **PLAINTIFF**

AND

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

SUTHERLAND J:

Introduction

1. A single controversy arises from the circumstances described, all other issues having been settled and agreed between the parties:

1.1. The plaintiff is the biological grandmother and, since 13 March 2009, the adoptive mother of Verushca Taljaard, a minor, at present 14 years old.

1.2. Verushca's biological father, and biological son of the plaintiff, is Dirk Cornelius Taljaard, who was killed in a motor car accident on 30 January 2012. (Dirk)

1.3. The Defendant has admitted that it is liable for damages suffered by any person resulting from the death of Dirk, as contemplated by section 17 of the Road Accident Fund Act 56 of 1996 (RAF Act)

1.4. The plaintiff has claimed damages for loss of support from Dirk for Verushca.

1.5. It is common cause that Dirk supported Verushca.

1.6. However, the defendant contends that because Dirk, albeit he was the biological father of Verushca and would have, ordinarily, had a duty of support towards her, that duty was extinguished when the adoption took place.

1.7. Accordingly, the defendant contends that it is not liable to compensate Verushca for the loss of the support which Dirk, de facto, contributed towards her maintenance.

2. The sole question for decision is whether the defendant is liable to compensate Verushca for the loss of the support contributed by Dirk and that turns on whether she had an enforceable right against Dirk.

The relevant Facts

3. The material evidence was given by the plaintiff.

4. Verushca was born on 11 June 2002. Her parents were not married. During the early years of her life, she and her biological mother lived together, at times on their own, and at other times, with the grandparents, the plaintiff and her husband. Dirk was living away from home, a circumstance determined by work commitments. He visited home as opportunities arose. Verushca's biological mother drifted away and sought a life independent of the burdens of child rearing. Subject to his absences away for work, Dirk remained involved in Verushca's life. Verushca's de facto home became that of the grandparents and her day-to-day caregivers were her grandparents.

5. In pursuit of the best interests of the child, a consensus was reached that Verushca ought to have the stability of a permanent home with the grandparents. It was in that context, after some time, it was decided that the de facto situation be formalised by an adoption. The Childrens' Court, Roodepoort, eventually issued an order of adoption on 13 March 2009. Verushca was then 7 years old. Her biological mother has had no further communication with the family.

6. Dirk remained intimately in touch with Verushca at all times. In 2006, he joined his father in business, and thus no longer lived at a material distance from Verushca, whereupon he then established his personal home at the place of business of his father, not far distant from the home of the grandparents. According to the plaintiff, throughout Verushca's life, Dirk had a father/daughter relationship with her and was involved in her life. He contributed financially throughout her life to her upkeep, both before and after the adoption.

7. The factual matrix presented in this case appears to be novel. On behalf of the defendant it is contended that our law does not recognise a duty of support under these circumstances. Whether or not that is correct, and if so, the common law must be developed to provide for such a right is the issue before this court.

The Law

8. Adoption is regulated by chapter 15 of the Childrens Act 38 of 2005. What concerns the present controversy is the invariable consequences of an adoption on the duty of support by a 'former' parent. Section 242 addresses the effects of an adoption order. It provides that:

> "(1) *Except when provided otherwise* in the order or in a post-adoption agreement confirmed by the court *an adoption order terminates-*
>
> (a) *all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption*;
> (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
> (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and
> (d) any previous order made in respect of the placement of the child.
>
> (2) An adoption order-

(a) *confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent;*
(b) confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order;
(c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted; and
(d) does not affect any rights to property the child acquired before the adoption.

(3) An adopted child must for *all purposes* be regarded as the child of the adoptive parent and an adoptive parent must for *all purposes* be regarded as the parent of the adopted child."
(Emphasis supplied)

9. The emphasised text is forthright in its purpose: the extinction of both rights and duties of the 'former' parent. The forthrightness of the text is however qualified by the introductory caveat, ie, that such are the consequences, *unless a court orders otherwise*. Moreover, these consequences can be modified by an agreement reached between the former parent and the adoptive parent, *after* the adoption, which agreement achieves enforceability upon confirmation by a court.

10. In Centre for Child Law v Minister of Social Development 2014 (1) SA 468 (GNP), Louw J dealt with a prayer for a declaratory order in respect of children in two families. In each case, one biological parent had deserted the caregiving parent and child. The caregiving biological parents had married and their spouses wished to adopt their stepchildren. They understood the text of the section to mean that upon such adoption by the 'new' spouse, the remaining biological parent would ipso facto forfeit parental rights. The court endorsed the view that the text, properly interpreted, achieved exactly that result. However, the absurdity of that outcome was capable of being averted by the court upon making an adoption order, 'providing otherwise'(at [14]. Thus, Louw J, in resolving the practical problem put before the court, thereupon found it unnecessary to interrogate the constitutionality of the provisions.

11. In my view, the episode serves to alert one to an unsatisfactory dimension of the primary text in the provision, and it would seem that its overbroad ambit warrants revisiting. The episode also serves to draw attention to another facet of the provisions; ie, the wide scope for judicial discretion in the allocation of parental rights and responsibilities between natural or former parents and present adoptive parents in the terms of an adoption order. The effect of an adoption order in terms of section 242 (1) is therefore not a fixed and immutable bundle of unchangeable rights and duties, but rather, section 242 (1) merely sets out a default position that may be varied in accordance with an order, tailored ad hoc to a specific child. Self-evidently, the scope of such variation is limited by a properly exercised judicial discretion within the compass of the objectives of the Childrens' Act. Moreover, such a variation from the default position can be effected *ex post facto* the grant of an adoption order. The primary value choice that permeates the Childrens Act is the pursuit of the best interests of the child.

12. In the case of Verushca Taljaard, the default position in terms of section 242(1) does prevail. Nevertheless, the significance of these observations is that the Childrens' Act recognises, albeit obliquely, that the extinction, in the literal sense of that term, of parental rights and duties is merely one possible regime of a given adoption, that a reversal is possible, and that a spectrum of positions is possible. In my view these possibilities are inconsistent with the idea that once a 'former' parent ceases to be a parent *ex lege*, the existence of a legally enforceable duty of support is no possible.

13. I now address case law which has dealt with the duty of support in relationships other than that the type of relationship that existed between Verushca and Dirk Taljaard.

14. The scope for the recognition of a duty of support premised on factors other than the traditional grounds, ie, parenthood or marriage, has received considerable judicial attention.

15. In 2006, Grogan AJ had occasion to address a claim by a man for compensation from the RAF arising from the loss of support he enjoyed from his son. The case was reported only four years later as Jacobs v RAF 2010 (3) SA 263 (SE). The issue there, as here, was whether there was a legally enforceable duty of support. The case was decided on the common law principle that a child had a duty to support a parent if the parent was indigent or given the parents 'station in life' supplementation of support was necessary. (see: Oosthuizen v Stanley 1938 AD 322 at 327 – 328) However, in an obiter dictum Grogan AJ said at [22]:

> "[22] There is a further consideration. It would in my view be invidious were this court to rule that the deceased had no duty to support his father *when he had voluntarily assumed that obligation.* In my view this undertaking gave the plaintiff a *reasonable expectation* that his maintenance contributions would continue. *A duty of support between family members is one of those areas in which the law gives expression to the moral views of society.* In the present case the plaintiff did not have to enforce his right to maintenance from the deceased. *The deceased voluntarily assumed that obligation. In my view this is sufficient in itself to warrant a finding that the plaintiff had acquired a right to maintenance from his son, which was enforceable against the insured and, by law, against the defendant." (emphasis supplied)*

16. Grogan J seems to imply that indigence might not be a necessary precondition. Self-evidently, in regard to a minor, the issue of indigence does not arise. Moreover, the voluntary assumption of such a role, Grogan AJ posited, could ground the existence of such right. Moreover, the morality of society endorsed the idea that a family member ought to support another family member.

17. In Fosi v RAF 2008 (3) SA 560 (C), Dlodlo upheld a claim for compensation for the loss of support by a child to a parent. It was held that the origin of the obligation resided in customary law and more especially in the idea that were a child not to support a needy parent the child would not be possessed of Ubuntu. However, at [26], Dlodlo J went on to approve the dictum of Grogan AJ in Jacobs v RAF (Supra) as a distinct ground for so holding.

18. In both these judgments the impact of the morality of society about supporting a parent in need and the voluntary assumption of that support was emphasised as relevant to the duty arising and being enforceable against third parties.

19. In Du Plessis v RAF 2004 (1) SA 359 (SCA) the line of authority which endorses the concept of a 'duty worthy of protection' was addressed in the context of persons, not married, and unable under the law of the day to marry, who voluntarily assumed an obligation to support their partners, and which, in turn, gave rise to a contractual obligation to do so. The primary burden of the judgment was to outlaw discrimination between persons on grounds which do not accord with the morality of society at a given time. In formulating what ought to be the enquiry, the court borrowed from the remarks made by Fleming in The Law of Torts 4th Ed at 136. The court held at [17]:

> "The next question to be decided is whether the right of the plaintiff to such support is worthy of protection by way of an action against the defendant, or, put differently, whether the killing of the deceased should be considered to have been a wrongful act as against the plaintiff. In Amod, relying on Henery, it was said that *the question had to be answered in the light of prevailing boni mores.* In Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 27G - I Botha JA adopted the following formulation of the nature of the enquiry:
>
> > 'In short, recognition of a duty of care is the outcome of a value judgment,that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether

> or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'"

20. The notion of the morality of society is again the premise for the viewpoint.

21. In Verheem v RAF 2012 (2) SA 409 (GNP), Goodey AJ had regard to the morality of society in addressing a claim for compensation for loss of support by a partner in a heterosexual relationship, outside of marriage, upon the death of the other partner. He alluded to the decision in Meyer v RAF, an unreported decision (TPD 2004/29950), in which a couple lived as man and wife and it had been held that nothing inhibited them marrying and in which case a court had held that no duty of support, enforceable against a third party, could exist, and offered, as a rationale, that it was inappropriate to give approval to relationships that resembled marriages because the sanctity of the institution of marriage might be imperilled by so doing. Goodey AJ, nevertheless, found an enforceable duty did exist, distinguishing Meyer v RAF, on the grounds that the relationship between the partners was permanent, stable and long term, included the deceased forging a relationship with the daughters of his partner as a de facto father, and that the parties contemplated marriage, when they had enough money to have a 'decent wedding'. Goodey AJ concluded that:

> ' ..the right of the plaintiff to be supported by the deceased has been well established and is legally enforceable and worthy of protection.'

22. This judgment signals that an enforceable duty of support in the context of a relationship that could be described as a quasi-marriage was worthy of protection. The view expressed in Meyer v RAF has not been followed.

23. In Paixao & Another v RAF 2012 (6) SA 377 (SCA) the court developed the common law to deal with the duty of support between unmarried heterosexual couples and held that a dependant's action existed where a contractual duty of support had been established. The circumstances in that case were that the Plaintiff had formed a relationship with one Gomes and they lived together. Gomes supported the plaintiff and her children. He paid for the wedding of the plaintiff's daughter. He had made a will in favour of the plaintiff. He was already married and an intended marriage between Gomes and the plaintiff was deferred until he was divorced. He eventually did divorce his wife. Before a marriage to the plaintiff could take place he was killed. It was accepted as a fact that he had contractually bound himself to maintain the plaintiff and her family indefinitely. The key issue was whether that contractual right was enforceable against third parties.

24. The judgment addressed several issues bearing on considerations mentioned above. I understand Cachalia JA, writing for the court, to have established that:

24.1. The point of departure is the question whether a dependant claimant has a right worthy of protection by law; [12]

24.2. The answer is determined by reference to the morality of society, which is divined by an exercise of judicial policy-making aimed at acknowledging that social changes warrant 'legal norms to encourage social responsibility' [13]

24.3. The common law, historically, has not been inflexible about the categories of persons who it is appropriate to recognise as having a claim on support from others, and in particular, a blood relationship is not a sine qua non; [14]

24.4. An agreement to support another person may arise tacitly, [17], [18]

24.5. The right to support that may arise does not arise because it is a 'spousal benefit' but rather because the obligation to support *was assumed in a relationship akin to a family relationship* [26], [39]

25. Bertelsmann J in Metiso v Padongeluksfonds 2001(3) SA 1142 (T) addressed a claim against the RAF arising from the death an uncle of certain children who he had supported. After their father died and their mother had deserted them. A formal adoption according to the custom of the community had not occurred because the consent of the absent mother was a prerequisite and she was unreachable. It was contended on behalf the children that the uncle had agreed to maintain them. The court resolved the problem by two finding. First, that a de facto adoption should be acknowledged and that the formal defects be overlooked and, secondly, that a binding offer to support the children was sufficient to ground a duty of support because to do so was consistent with the morality of society.(at 1150G- H). In MB v NB 2010 (3) SA 220 (GSJ), Brassey AJ dealt with whether or not after a divorce an ex-husband had a duty of support towards the children of his former wife, who had been widowed. During the marriage the ex-husband had related the children as a father. At issue was whether he was obliged to continue to contribute to the payment of the school fees of the children. At [22] Brassey AJ took the

view that it was unnecessary to construe a quasi-adoption because it was sufficient that by making the promise to pay the husband was bound.

The law applicable to the present case

26. It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally imbedded notion of 'family,' constituted as being a network of relationships of reciprocal nurture and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in relationships akin to that of a family. This norm is not parochial, but rather, is likely to be universal; it certainly is consonant both with norms derived from the Roman–Dutch tradition, as alluded to by Cachalia JA in Paixao v RAF (Supra) and, no less, from norms derived from African tradition, not least of all, as exemplified by the spirit of Ubuntu, as mentioned by Dlodlo J in Fosi v RAF (Supra).

27. In the case of Verushca Taljaard, although Dirk, her biological father, surrendered his status of legal parent, he surrendered it to his own parents, with her interests at heart, and continued to relate to her as a father, by his presence, and by his financial contribution to her maintenance. He did not repudiate her. His support towards her was seamless, and was divided into two periods only by the intervention of the abstract dictate of the law which made his parents her parents in his stead. On the evidence adduced, there was

never a moment when the assumption of, or the performance of, the role as her support-giver ceased.

28. Given this history, it might, understandably, be asked whether Dirk and his parents would have accepted the default position delineated by Section 242(1) of the Childrens' Act had they been advised in 2009 (three years before Verheem v RAF was decided) that a variation was possible? Any answer would be mere speculation. Nonetheless, the mere fact of its possibility is illustrative of what can be sanctioned by law in acknowledgement of the existence of given relationships, and what, therefore can be considered worthy of protection.

29. Are these circumstances in which Verushca has a claim worthy of protection by law? The answer, in my view, is to borrow and adapt the remarks of Grogan AJ, cited above: ie, it would in my view be invidious were this court to rule that a natural parent had no duty to support his daughter when he had voluntarily assumed that obligation. In my view this undertaking gave the plaintiff a reasonable expectation that Dirk's maintenance contributions would continue. A duty of support between de facto family members is one of those areas in which the law gives expression to the moral views of society.

30. The common law ought to be developed to embrace this norm and the order in this matter serves to do so.

The order

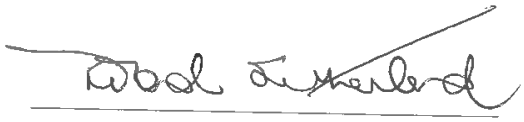
31. An order is made as follows:

31.1. It is declared that the Deceased, Dirk Cornelius Taljaard, by assuming an obligation to support Verushca Talaard conferred on her an enforceable right in respect of a duty of support.

31.2. The Defendant is liable to compensate the plaintiff in respect of the loss of support suffered by the death of Dirk Cornelius Taljaard and shall pay to the plaintiff the sum of damages agreed between the parties.

31.3. The costs of the trial shall be borne by the defendant.

31.4. In the event that the parties require an amplified order to address other aspects of the case upon which agreement has been reached, an approach may be made to me to do so.



ROLAND SUTHERLAND
Judge of the High Court of South Africa,
Gauteng Local Division
Hearing: 26 August 2014.
Judgment 26 September 2014.
For Plaintiff: Adv R Maxwell
Instructed by: Faber & Allin Inc
For Defendant: Adv M M Zondi
Instructed by: Moloto Stofile Inc