

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 014357/2022

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
<hr/>	
DATE	SIGNATURE

L[...] L[...]

(Identity No. [...])

(In her capacity as the biological mother of the
minor children: E[...] O[...] G[...] L[...]
and J[...] O[...] C[...] L[...])

Plaintiff/Respondent

and

ANGELA JOAN MCCALL

(Identity No. [...])

First Defendant/First Excipient

LOUIS STEPHANUS VENTER

Excipient

(Identity No. [...])

(As a nominee of Wealth Succession Trustees
and Executors (Pty) Ltd)

Second Defendant/ Second

NEUKIRCHER J:

1] The plaintiff is the mother of two minor children¹ whose father - the deceased - passed away on 18 May 2021. On 13 October 2021, the plaintiff submitted a maintenance claim on behalf of the two minor children to the defendants who are the appointed executors of the deceased estate. The claim was supported by an Actuarial Report penned by Arch Actuarial Consulting. The actuary has calculated the childrens' maintenance as follows:

- a) EOGH = R1 250 299; and
- b) JOGH = R1 399 959.

2] On 16 October 2021 the defendants informed the plaintiff that the maintenance claim was declined. Their reasons were the following:

“3.1 We have not been provided with answers to our questions as to your client's own means of capital and income to provide for the maintenance of the minor children. This failure means we cannot assess whether their mother is able to maintain them, nor what the reasonable contribution from her should be.

3.2 Kindly refer to par 3.8 of your actuarial report which also provides the current legal position that a claim such as this only arises where the natural guardian is unable to provide for the children. This notion finds support in Meyerowitz 10th Ed par 21.31. See also Ritchken's Executor vs Ritchken and Goldman vs Goldman's Executor referred to by the author in footnote 7. This seems to be the current legal position.

¹ EOGL who is 15 years old; and JOCL who is almost 13 years old.

- 3.3 *Kindly refer to par 3.7 of your actuarial report which states that the claim is based on a notion that the minors will receive no proceeds from the deceased estate. This is not a correct assumption, as the testator left his entire residue to the two children, in trust.*
- 3.4 *Any benefit received by a claimant reduces the claim for maintenance. As residual heirs, as the residue is greater than the claim submitted, any claim, even if successful reduces to zero in such a case. See also Meyerowitz 10th Ed par 21.31 and the case law he quotes in footnote 12. We do not understand the law to have changed on this aspect.*
- 3.5 *The Testator created a trust in the will to provide for the minor heirs. Accepting the claim lodged herein would thwart the wishes of the Testator. The Testator provided for his children in the manner provided for in the will and approving the claim would mean that the funds provided for would have to be paid into the guardian's fund, which was not the wish of the Testator."*

3] The first and final liquidation and distribution account was advertised in the Government Gazette on 10 December 2021 and the plaintiff then filed an objection in terms of s35(7) of the Administration of Deceased Estates Act 66 of 1965². In response, the defendants informed the Master on 20 December 2021 that:

1. *"The Executors formally rejected the maintenance claim lodged against the estate, which now forms the basis of the objection in question, on 16 October 2021. ("Annexure B")*
2. *The grounds for the rejection of the claim against the estate, as clearly set out and explained in Annexure B, now constitutes the Executors' comments on the objection lodged at your office.*

² "Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefor, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof."

3. *Notwithstanding the various grounds for the rejection of the maintenance claim against the estate as set out in Annexure B, the Executors persist that there is no claim for maintenance allowable where the minors in whose favour the claim is lodged is also the sole residual heirs.”*

4] The plaintiff then re-lodged the maintenance claim with the defendants on 18 January 2022, but without success.

5] On 15 August 2022 the plaintiff, in her capacity as the biological mother, (and sole guardian), of the two minor children instituted the present action against the defendants for the total amount of R2 650 258. The defendants filed an exception to the particulars of claim on the basis that it did not disclose a cause of action. The plaintiff's subsequent Rule 28 amendment fared no better as the defendants persisted with the exception and it was set down for hearing before me on 6 May 2024.

6] The parties have agreed that the exception should be adjudicated based on the amended particulars of claim and the exception filed on 10 October 2022. I take no issue with that practical approach.

THE PARTICULARS OF CLAIM

7] The essence of the relevant allegations in the particulars of claim is the following:

- a) that the plaintiff institutes action against the defendants - as executors of the deceased estate - in her capacity as biological mother of the two minor children;

- b) that she and the deceased are the biological parents of the two minor children;
- c) that the minor children have a claim for maintenance against the deceased estate based on the deceased's common law duty to maintain the minor children;
- d) that the plaintiff and the deceased estate have a joint duty of support;
- e) that *"Given the financial means of LL and the financial means of the deceased estate, LL and the deceased estate are liable to maintain the minor children on the basis that each is liable to contribute 50% to the maintenance of the minor children."*;
- f) that an actuary has calculated the fair maintenance needs of the children as being:
 - (i) R1 250 299 for EOGL;
 - (ii) R1 399 959 for JOCL;
- g) that the calculations are set out in the actuarial report which is attached to the particulars of claim as "PoC2".

THE EXCEPTION

- 8] The defendants have excepted to the particulars of claim on the ground that the averments, as contained in the particulars of claim and the actuarial report, do not disclose a cause of action. The defendants except on the basis that:
- a) the plaintiff has failed to plead that the minor children have no assets sufficient for their support, that their assets are of nil value and that she

- has failed to attach any documentary evidence to support such an averment;
- b) that the plaintiff had failed to plead that the children will receive no benefit from the deceased estate other than their claim for maintenance;
 - c) that the plaintiff failed to attach the last will and testament to her particulars of claim to support the averments in the actuarial report;
 - d) the plaintiff has failed to plead that she is unable to maintain the minor children;
 - e) she has failed to make any averments regarding her own financial means or append documentary proof.
- 9] They plead that the support for the exception is founded on the following:
- a) the actuarial report contends *“that the Court should consider whether the children have an income or assets (perhaps in the form of benefit from the estate) sufficient for their support”*;
 - b) the actuary has accepted the minor childrens’ earning capacity and available assets are NIL;
 - c) the actuary “notes” that the children will receive no proceeds from the deceased estate other than the claim for maintenance;
 - d) the actuary has assumed that the plaintiff and the deceased shared a maintenance obligation and states *“although case law infers that a claim on the estate only arises to the extent that the surviving parent is unable to maintain the children.”*

RULE 23 EXCEPTIONS

10] I emphasize that this exception is not based on the particulars of claim being vague and embarrassing - it is based on it failing to disclose a cause of action. I mention this because at the conclusion of her argument in reply Ms Howard submitted that should I not be with her on the cause of action argument, the pleading is in any event vague and embarrassing. But this argument cannot be entertained:

- a) firstly, the exception is not based on that ground;
- b) secondly, the plaintiff has been called to respond to a specific set of facts and the entire argument is based on that;
- c) thirdly, to change argument at the dying gasp amounts to little more than a so-called: "trial by ambush";
- d) lastly, the requirements for the 2 bases of exception are not the same: whereas an exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action; whether it fails to disclose a cause of action goes to the heart of its validity.³

11] Importantly, vis-à-vis the ground of vague and embarrassing, it has been held in **ABSA Bank Ltd v Boksburg Traditional Council**⁴, that it is sufficient if a defendant knows 'adequately' what a plaintiff's case is or 'sufficiently' shows the defendant the case which he is called upon to meet⁵.

³ Trope v SA Reserve Bank 1993 (3) SA 264 (A) at 269 I

⁴ 1997 (2) SA 415 (A) at 422

⁵ Liquidators Wapejo Shipping Co Ltd v Lurie Bros 1924 AD 69 at 75

12] Insofar as a “*bad in law exception*” is concerned, the excipient must show that on any construction of the pleadings, the claim is excipiable⁶. In **Trope v SA Reserve Bank and Another**⁷, McCreath J stated that:

“(p)leadings must ... be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.”

13] It is for this reason that the particulars of claim must be viewed as they stand and a court must assume the correctness of the factual averments made, unless they are palpably untrue or so improbable that they cannot be accepted⁸.

THE LEGAL POSITION

14] It does not appear that the defendants deny that an obligation rests upon the deceased estate to maintain the minor⁹ children. This finds support in several decisions dating back to 1924:

- a) In **Ritchken’s Executors v Ritchken**¹⁰, a testator bequeathed 75% of his estate to his minor son, but directed that should he reside with his mother,¹¹ he would forfeit all rights to the bequest. In finding that this provision is void, the court stated:

“...It is true that under our law it is open to everyone freely to dispose of his property by will without any regard to his offspring, but, nevertheless, the maintenance and education of his minor children after his death, provided the surviving spouse is unable to maintain and educate them, is an obligation due

⁶ Klerck NO v Van Zyl & Maritz NNO and related cases 1989 (4) SA 263 (NE) at 288

⁷ 1992 (3) SA 208 (T) at 210 G-H

⁸ Voget v Kleynhans 2003 (2) SA 148 (C) at 151

⁹ The major children as well in certain circumstances (Hoffman v Herdan NO & Another 1982 (2) SA 274 (T)) but as this is not relevant to the present discussion, I leave it there.

¹⁰ 1924 WLD 17

¹¹ The testator's divorced wife who was given primary care and residence of the child at the time of the divorce.

by the estate, a debt resting on the estate, which, like all other debts, must be discharged before a legacy devised by the will of the deceased can be paid out.”

b) In **Goldman NO v Executor Estate Goldman**¹², the court stated:

“The estate of a deceased father is always liable for the maintenance of a minor child, and it is a debt resting on the estate which must be satisfied before any payments of legacies are made ... And there seems to me to be no reason why the same responsibility should not be placed on the estate of a deceased mother... As the applicant is unable to provide adequately for his children their mother's estate is legally bound to assist in their maintenance...”

c) In **Van Zyl v Serfontein**¹³, Foxcroft J stated:

“It is also now well established that the right to maintenance does not arise out of any principle of inheritance but out of the family relationship between parent and child. As is pointed out by Spiro in his work, The Law of Parent and Child 4th ed at 390, Voet was of the opinion that the duty of maintenance terminated with the death of the parent, but a mistaken reading of Groenewegen has prevailed. On the strength of Carelse v Estate De Vries (1906) 23 SC 532, In re Visser 1948 (3) SA 1129 (C) and many subsequent cases, the position appears to be that the duty of a parent to maintain his child does not cease upon his or her death and is a debt resting upon his or her estate. (See too Hoffmann v Herdan NO and Another 1982 (2) SA 274 (T) at 275H.) However, the child's claim against the parent's estate for maintenance, although it enjoys preference vis-a-vis inheritances and legacies which, if insufficient, must abate in proportion to the amounts bequeathed by the deceased, cannot be brought in competition with the claims of ordinary creditors.”

¹² 1937 WLD 64

¹³ 1989 (4) SA 475 (C) at 477 G-J

- d) In **Du Toit NO v Thomas NO and Others**¹⁴ the mother of a minor child obtained an order in the Maintenance Court against the executors of the father's deceased estate in the period before the executor lodged the liquidation and distribution account with the Master. In dismissing the application by the executors to set aside the order of the Maintenance Court, the Court stated:

"[17] It has become settled law that the duty of a parent to maintain a child does not cease upon a parent's death, but is transmissible and becomes a debt resting upon the deceased estate. The correlative right of a child to such maintenance does not arise out of any principle of inheritance, but out of the family relationship between parent and child..."

[18] As a testamentary executor the applicant stepped into the shoes of the deceased and became the person chosen by the deceased to represent him. From the date the applicant received letters of executorship he represented the estate. This included paying, under certain circumstances, estate liabilities. Maintenance of the minor child is one such liability..."

[20] In the light of the above it follows that while the deceased estate is intact the child's claim for maintenance will lie against the executor, as it did against her deceased father during the father's lifetime."

15] The objection flows from the position adopted by the defendants in their letter of 16 October 2021¹⁵ that, in order to succeed in the claim, the plaintiff must prove that she is "unable to maintain and educate" the minor children¹⁶. This position,

¹⁴ 2016 (4) SA 571 (WCC)

¹⁵ Para 2 supra

¹⁶ Ritchken supra and Goldman NO supra

according to the defendants, flows from the text in par 21.31 of Meyerowitz 10th edition, the relevant portion of which states:

“Both the father and the mother are liable for the support of their minor children during minority until the children are able by their own industry or means to support themselves. Numerous cases have held that this duty of maintaining and educating their children does not cease upon their deaths but is a ‘debt resting on their estates’...

During the lifetime of the parents the burden of maintenance is distributable between them according to their means. It should follow, therefore, that the burden should be distributed between the estate of the deceased parent and the surviving parent on the same basis and not merely where the surviving parent is unable to maintain the minor or can only do so adequately. The cases cited in note 7¹⁷ rather suggest, however, that the claim on the estate only arises where the surviving parent is unable to maintain the minors adequately...

Any benefits received by a minor from the estate of the deceased parent, whether ad intestate or by will, must be taken into account in considering his claim for maintenance.”

16] But what is clear from the authorities upon which the defendants rely in rejecting the claim and in founding this exception is that, at the very best, there is a difference of opinion in whether or not the plaintiff must first demonstrate that she is unable to maintain the minor children adequately before she can claim maintenance from the deceased estate.

¹⁷ Ie Ritchken and Goldman supra

17] Mr Els submitted that the words *“provided the surviving spouse is unable to maintain and educate them”* in **Ritchken** was said *obiter dictum* and no more - I agree. In any event, even were that to have been the position in 1924, given s28(2) of the Constitution¹⁸, and s9 of the Children’s Act 38 of 2005,¹⁹ our law has progressed to a stage where fathers of illegitimate children are obligated to support them financially, and a surviving spouse may claim maintenance from a deceased estate by virtue of the Maintenance of Surviving Spouses Act 27 of 1990 which was not the position prior to this.

18] Insofar as the cases are interpreted to suggest that it is only when a surviving spouse/parent is unable to support a minor child that a claim lies against a deceased estate, I am of the view that they are wrongly decided and I decline to follow them:

- a) it is clear from the authorities that the obligation to support a minor child extends to a deceased estate;
- b) during his/her lifetime, a parent’s obligation to support a child arises not only out of the common law, but also is encapsulated in the Maintenance Act 99 of 1998, s15(1) of which states:
“Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child’s parent to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.”;
- c) for purposes of the definition of a “child”, the Children’s Act defines a child as a person under the age of 18 years;

¹⁸ “S28(2) A child’s best interests are of paramount importance in every matter concerning the child.”

¹⁹ “S9 In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.”

- d) the interpretation of the words “*who are unable*” to support themselves in s15(1) supra, is nothing more than a statement of fact ie that minor children are deemed to be unable to support themselves. This finds support too in Meyerowitz (supra).

19] But over and above this, the Constitution and the Children’s Act cannot be ignored:

- a) s28(2) of the Constitution states:

“A child’s best interests are of paramount importance in every matter concerning the child.”

- b) s9 of the Children’s Act 38 of 2005 states:

“In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.”

20] If the executor steps into the shoes of the deceased, and he assumes the maintenance obligations of the deceased, it stands to logic that the principles generally applicable to maintenance claims for minor children must be applied: ie that the duty of support falls to both parents according to their means. What their means is, is informed by the evidence placed before the court at the time of the enquiry²⁰ and on the executor in accordance with his duties to utilise the assets, finances and income of the deceased estate to maintain the children in accordance with the general principles applicable.

21] Furthermore:

²⁰ Lamb v Sack 1974 (2) SA 670 (T); Burse v Burse 1999 (3) SA 33 (SCA)

- (a) “care” is defined in the Children’s Act as
- “... (a) *within available means providing the child with -*
- (i) *a suitable place to live;*
 - (ii) *living conditions that are conducive to the child’s health, well-being and development; and*
 - (iii) *the necessary financial support.”*
- (b) s18(2)(d) prescribes that parental responsibilities and rights include the right to contribute to the maintenance of the child;
- (c) the Maintenance Act 99 of 1998 applies:
- “(1) *in regards of the legal duty of any person to maintain any other person, irrespective of the nature of the relation between those persons giving rise to that duty.”*

22] In Beck’s Principles of Pleadings the learned author states:

“Evidence must not be pleaded. “It is a trite rule of pleading that a defendant is entitled to know what the case is which he has to meet. He is not entitled to know the evidence but he is entitled to know the grounds upon which the case is based.”

“There is a distinction between giving evidence of fact and stating that fact... Stating that a thing was done is stating a fact; giving the details of how it was done would be giving evidence of it. Sometimes it is very difficult to state a fact concisely, without in stating it, indicating the evidence of it.... Under the present rules of pleading you may not only state the necessary facts, but you are required to state all material facts relied on. So that if a fact which, not absolutely necessary but material either in aggravation or mitigation, is within your knowledge and you intend to lay it before the Court, you are invited and it is certainly your privilege to plead it.” To plead evidence may be most embarrassing.”²¹

²¹ at page 29

23] Thus, in order to disclose a cause of action, the plaintiff's pleading must set out *'every fact (material fact) which it would be necessary for the plaintiff to prove, if traversed in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'*²²

24] Given all the above, I am of the view that insofar as **Ritchken** and **Goldman** **NO** suggest that a claim only lies against a deceased estate in the event that the plaintiff is unable to support them, this is clearly wrong and I decline to follow these decisions. Thus, it is not necessary for plaintiff to aver this in her Particulars of Claim to found her cause of action.

25] As to what allegations the plaintiff must make: the basis of the defendants' objection is that the plaintiff has failed to specifically plead the basis upon which the actuary reached his calculations - but this is not necessary as it is no more than opinion and ultimately rests on the evidence placed before the court. At best for the defendants, the issue is whether the failure to plead the *facta probantia* renders the pleading bad in law - it does not.

26] On every construction of the Particulars of Claim the defendants are able to plead as the pleading shows the defendants the case they are called upon to meet.

27] The exception must therefore fail.

²² McKenzie v Farmers Co-Operative Meat Industries Ltd 1922 AD 16 at 23
Nel NNO v McArthur 2003 (4) SA 142 (T) and Koch Property Consultants CC v Lepelle-Nkumpi Local Municipality 2006 (2) SA 25 (T) at 30-31

COSTS

28] The plaintiff has asked for attorney and client costs de bonis propriis against the defendants. In **Du Toit NO v Errol Thomas NO and Others**²³ the court granted this costs order because of the executor's "unconscionable conduct".

29] In **In re: Alluvial Creek Ltd**²⁴ the court stated:

"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case."

30] I see no reason why the deceased estate should bear the costs of this exception: it was ill-advised and ill-founded. On every construction of the law, and more especially bearing in mind s28(2) of the Constitution and the provisions of the Children's Act set out supra, the deceased estate bears a duty of support and the only question is: what is the extent of that duty? The extent of the duty will be advised by the evidence placed before the trial court.

²³ (635/2015) [2016] ZASCA 94 (1 June 2016)

²⁴ 1929 CPD 532 at 535

ORDER

1. The exception is dismissed with costs, such costs to be paid by the first and second defendants (first and second excipients) de bonis propriis on Scale C.

**NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 June 2024.

Appearances:

For the plaintiff/respondent	:	APJ Els SC
Instructed by	:	Arthur Channon Attorneys
For the 1 st and 2 nd defendants/ excipients	:	K Howard
Instructed by	:	Vermeulen Attorneys
Matter heard on	:	6 May 2024
Judgment date	:	7 June 2024