THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 548/19

In the matter between:

PHILLIPA SUSAN VAN ZYL NO **APPELLANT**

(In her capacity as *curatrix ad litem* to B T)

and

KEITH GETZ NO **RESPONDENT**

Neutral citation: *Phillipa Susan van Zyl NO v Getz* (548/19) [2020] ZASCA 84 (6 July 2020)

Coram: MAYA P and ZONDI, SCHIPPERS and PLASKET JJA and GORVEN AJA

Heard: No oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 6 July 2020.

Summary: Uniform Rules of Court – rule 33(4) – stated case to determine whether estate of deceased grandparent has duty to support grandchild – both parents alive – father's whereabouts and financial means unknown – no facts showing mother's support inadequate – not a proper case to decide legal issue separately under rule 33(4) – inappropriate to determine whether common law

should be developed in terms of secs 39(2) and 173 of the Constitution to provide for said duty – order by court below two years after hearing without reasons – improper – duty of Judge to deliver judgment expeditiously.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Kose AJ, sitting as court of first instance):

1 The appeal is dismissed with no order as to costs.

2 The Registrar of the court is directed to forward a copy of this judgment to the Judicial Service Commission to investigate the conduct of Acting Judge Kose.

JUDGMENT

Zondi JA (Maya P and Schippers and Plasket JJA and Gorven AJA concurring)

[1] The issue in this appeal is whether it is appropriate to develop two rules of the common law that govern the legal duty of support of grandchildren by grandparents. The first basic rule provides that where a grandchild is in need of support, his or her grandparent will have a legal duty to maintain him or her, only if both parents are unable to support the child and the grandparent is able to provide support.[1] The rule is not clear as to a situation where the parents or one of them is able but unwilling to support the grandchild, or cannot be found. The second rule as set out in *Barnard NO v Miller* 1963 (4) SA 426 (C) is that a legal duty to support a grandchild is not enforceable against a grandparent's deceased estate. It is this rule that we were asked to develop so that the common law

[1] *Ford v Allen and Others* 1925 TPD 5 at 7; *Motan and Another v Joosub* 1930 AD 61; *Ex parte Jacobs et Uxor* 1936 OPD 32; Van Heerden et al *Boberg's Law of Persons and the Family* 2 ed (1999) at 252-3.

would recognise a duty of support on the part of a grandparent's deceased estate.

[2] The background to the matter is the following. The appellant, Phillipa Susan Van Zyl, in her capacity as the *curatrix ad litem* to B T (B) instituted action for damages on behalf of B against the respondent in his capacity as an executor in the estate of the late S T in the Western Cape Division of the High Court, Cape Town (high court). She alleged that B suffered damages as a result of the respondent's and his co-executor's failure to recognise B's claim for maintenance in the estate of her deceased grandparent. The respondent and N T (N) were appointed co-executors in the estate of the late S T (S or the deceased), B's grandfather. N was B's grandmother and was married to the deceased. She sadly passed away on 21 October 2012. Neither she nor her executor participated in the proceedings in the high court.

[3] In his will, the deceased left his entire estate to N. The net value of the estate was R554 799.82. A claim for maintenance was lodged on behalf of B against the deceased's estate. This claim exceeded the total value of the estate available for distribution. The executors rejected B's claim for maintenance on the basis that there is no obligation in law on a grandparent's estate to maintain a grandchild. This rejection was in accordance with the common-law rule as set out in *Barnard*. The basis for the claim instituted by the appellant was that the payment made to N was in contravention of s 35 of the Administration of Estates Act 66 of 1965 and was wrongful and caused B to lose her claim for payment against the deceased's estate.

[4] As the common-law rule set out in *Barnard* stood in the way of B's claim for maintenance against S, the appellant sought an order in terms of s 172(1)*(a)* of the Constitution declaring that the common-law rule in *Barnard* is inconsistent with the Constitution and invalid. The appellant further sought an order in terms of secs 8(2)*(a)* and 173 of the Constitution declaring that henceforth, the

common-law rule is that when parents or their deceased estates are unable to support their children who are in need of support and the grandparents are deceased, there is a duty on the grandparents' deceased estates, if they are able to do so, to support the grandchildren.

[5] The parties agreed, in terms of rule 33(4) of the Uniform Rules of Court, that certain issues be separately adjudicated from and prior to all other issues. The high court issued a direction to this effect in terms of rule 37(8). The separated issues were the following:

'5.1. whether, at all relevant times during the lifetime of the late S T, if he could do so he was legally obliged to maintain his granddaughter B T ("B") to the extent that his son, who is B's father, L T ("L") did not do so and B's mother T T ("T") could not do so;

5.2. whether, at all relevant times after S's death, his deceased estate was legally obliged to maintain B to the extent that L did not do so and T could not do so;

5.3. whether the Court should make an order in terms of section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") declaring that the common-law rule articulated in *Barnard NO v Miller* 1963 (4) SA 426 (C) that the deceased estates of grandparents are not liable to maintain the deceased's grandchildren is inconsistent with the Constitution and invalid;

5.4. whether the Court should make an order in terms of sections 8(2)*(a)* and 173 of the Constitution declaring that henceforth the common-law rule is that:

5.4.1. when parents or their deceased estates are unable to support their children who are in need of support; or

5.4.2. one of the parents does not support his or her children who are in need of support and that parent cannot be traced and the other parent or his or her deceased estate is unable to support such children; or

5.4.3. both of the parents do not support their children who are in need of support and both parents cannot be traced; and

5.4.4. the grandparents are deceased or one of the grandparents is deceased, there is a duty on the grandparents' deceased estates, or on the grandparent's deceased estate, if they are or it is able to do so, to support the said grandchildren; and

5.5. the costs of the separated proceedings.'

[6] The parties further agreed on a stated case containing the facts and assumptions relevant to the determination of the separated issues and that the separated issues would be determined on the basis of the stated case alone, without any evidence being led.

[7] The matter was heard by Kose AJ on 6 September 2016. She reserved judgment. Some two years later, on 15 October 2018, following entreaties from the parties' legal representatives and attempts by the Judge President to get her co-operation, she made an order, without furnishing reasons. She decided the separated issues in favour of the respondent and directed that each party pay its own costs.

[8] The appellant sought leave to appeal to this Court without requesting and waiting for reasons from Kose AJ. This was because she had long since ceased serving as an acting judge of the court below and due to fear that this would again result in an inordinate delay. On 30 April 2019, Judge President Hlophe heard and granted the application for leave to appeal to this Court. The parties agreed to have the appeal determined without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

[9] Before setting out the facts and assumptions contained in the stated case, I am compelled to comment on two disturbing features of this case. The first is the inordinate delay by Kose AJ to deliver judgment. As I have pointed out above, it took her more than two years to make an order in this matter and this was only done after the intervention of the Judge President. The delay is grossly unreasonable and is lamentable.

[10] Secondly, Kose AJ's failure to supply written reasons for her decision is equally lamentable. The appellant, fearing further delays, was forced to apply for leave to appeal without reasons. Leave to appeal was granted to this Court and we considered the appeal without the benefit of a reasoned judgment.

[11] I can do no better than quote with approval what the Constitutional Court stated in *Strategic Liquor Services*:[2]

'It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process. In *Botes and Another v Nedbank Ltd*, Corbett JA pointed out that "a reasoned judgment may well discourage an appeal by the loser":

"The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did".'

[12] The court went on to hold at para 17:

'. . . Judges ordinarily account for their decision by giving reasons – and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons–

"explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters."'

(Footnotes omitted.)

[13] In *Mphahlele*,[3] the Constitutional Court observed that although there is no express constitutional provision requiring the judges to furnish reasons for their decisions, a reasoned judgment is indispensable to the appeal process.

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[2] *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC) para 15.

[3] *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

[14] It is clear that poor judicial service was rendered in this matter. The delay to take a decision as well as a failure to give reasons for the order that was made, was unreasonable. It is for this reason that it was decided that the Registrar of this Court should be directed to forward a copy of the judgment to the Secretariat of the Judicial Service Commission for it to inquire into the conduct of Kose AJ.

[15] With this background I return to the facts of this matter. The stated case contained the following facts and assumptions:
(a) On 7 July 1990 B was born of the marriage between T and L, the son of S and his wife N. B is thus the granddaughter of S and N.

(b) B is a psychiatric patient with bipolar affective disorder, mild intellectual disability and an autism spectrum disorder. Consequently, at all relevant times during S's lifetime and after his death she was not self-supporting and required maintenance and that remains the position.

(c) On 25 July 2001, the marriage between L and T was dissolved by an order of divorce of the Western Cape Division of the High Court, Cape Town. In terms of the order sole custody and sole guardianship of B was awarded to T and L was obliged to maintain B until she became self-supporting.

(d) Prior to the grant of the divorce order, L left South Africa to reside in the USA. He has failed to keep in contact with T and B. The appellant alleged that despite sustained attempts by T she has been unable to trace him. The fact that L could not in fact be traced or that all reasonable efforts were made to establish his whereabouts was not admitted by the respondent.

(e) L has failed to maintain B in terms of the divorce order or at all. L's financial position and the extent to which he has been or is able to maintain B are not

known. B receives a government disability grant of R1 410 per month which is insufficient for her needs.
(f) At all relevant times T has been B's only other source of financial support and has maintained her to the best of her ability. T has been unable to meet all B's financial needs and that remains the position. These allegations were not admitted by the respondent but the parties assumed its correctness for the purposes of adjudicating the stated case.

(g) The appellant alleges that at all times during S's lifetime he was able to maintain B to the extent that L did not do so and T could not do so. The respondent did not admit this allegation but its correctness was assumed for the purposes of adjudicating a stated case.

[16] On 29 August 2004, S died. In his will he left the whole of his estate to his wife N and appointed the respondent, who is an attorney, and N, as the executors of his estate.

[17] At all times after S's death and until the payment of R554 799.82 by Getz and N (in their capacities as executors of the estate) to N (in her personal capacity as S's sole heiress) described below, the estate was able to maintain B to the extent that L did not do so and T could not do so. In this regard, it is recorded in the stated case that although the respondent denied these allegations, for purposes of adjudication of their stated case the parties proceeded on the assumption that they are correct.

[18] As I have already stated, a maintenance claim that was lodged on behalf of B against S's estate was rejected by the respondent relying on the common-law rule as set out in *Barnard.*

The current legal position in regard to the duty of support

[19] Liability to maintain *ex lege* is based on three factors: firstly, the claimant's inability to support himself or herself; secondly, his or her relationship to the person from whom he or she claims support; and thirdly, the latter's ability to provide support.[4]

[20] The common law recognises that parents are the primary caregivers of their children by imposing on them a duty of support insofar as they are able to do so. Section 18(2) of the Children's Act 38 of 2005 maintains this position. There is a reciprocal duty of support between parents and children. If parents are unable to support their children who are in need of support, other relatives including grandparents, may be obliged to support them.[5] But that duty is imposed first upon a nearer relative before it moves to remoter ones.[6]

[21] The duty of maintenance or support between certain relatives was fairly well-established under the common law. But it was not clear whether such duty ended with the death of a person responsible or whether it was transmitted to his or her heirs (or estate). Professor Beinart deals with this subject extensively in 1958 Acta Juridica 92 in his article entitled *Liability of a Deceased Estate for Maintenance*. He points out that under the Roman law the duty of support (*alimenta*) could arise either from contract, or from legacy, or by operation of law. After a thorough review of old authorities including Voet (D 34.1) who dealt with transmissibility of the duty of support arising from contract or from legacy; he concludes at 95, that the principle of transmissibility was well-established in the case of legacies. And the duty could even pass to the heirs of the legatee initially charged with the legacy until the duty was discharged. It was only where the tenor of the will implied the contrary that there would be no transmission of the duty.

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[4] Hahlo *Book Reviews* - Acta Juridica (1959) 76 South African Law Journal at 236.
[5] *Ford v Allen and Others* 1925 TPD 5 at 7.
[6] *Ex Parte Pienaar* 1964 (1) SA 600 (T) at 606A.

[22] As regards the transmissibility of a duty of support imposed by law, Beinart at 101, states that the Roman law did not recognise, nor felt the need for recognising the principle of transmissibility of the duty of support except in the case of extreme need of the person to be maintained. This was so, Beinart explains, because the Romanists generally regarded the duty of support as highly personal to the person owing the duty and accordingly the duty would transmit to the heirs of such person. With regard to the position under the Dutch law of succession Beinart points out that it would seem that the Roman rule had received little extension in the Netherlands. Support *ex lege* was dealt with in D 25.3. He observes at 104 that although Groenewegen discussed transmissibility in connection with legacies of *alimenta*, he is silent on the point when he commented on D 25.3 dealing with *alimenta ex lege*.

[23] It is clear from this historical analysis of a maintenance claim against deceased estates that in Roman-Dutch law the estate of a deceased person did not assume his or her liability to maintain a grandchild. However, in *Carelse v Estate de Vries*[7] the court, relying mistakenly on Groenewegen, ad D 34.1.15, held that the duty to maintain was transmissible to the estate of a deceased person. Beinart points out at 104, that the court in *Carelse* misread a passage in Groenewegen.[8] He notes that Groenewegen, although he discusses transmissibility in connection with legacies of *alimenta*, is silent on the point when commenting on D 25.3 dealing with *alimenta ex lege*. Despite this Court acknowledging that it had been extended to parents' estates in error, *Carelse* and subsequent decisions to similar effect were held to be settled law.[9] As to how the child's claim for maintenance was to be treated in the parent's estate the court held in *Goldman*[10] that it is a debt resting on the estate which must be satisfied before any payments of legacies are made. Payment of the estate's

[7] *Carelse v Estate de Vries* (1906) 23 SC 532.
[8] *Tractatus de Legibus Abrogatis*.
[9] *Glazer v Glazer* 1963 (4) SA 694 (A) at 707(A).
[10] *Goldman NO v Executor Estate Goldman* 1937 WLD 64.

debts takes precedence over payment of claims for support.[11] The success of a claim does not depend on whether the parent's estate is still intact or not.[12]

[24] While the liability of a parent's estate for the child's maintenance is now well-established, liability of the grandparent's deceased estate for the support of the grandchildren still remains open. *Lloyd*,[13] has been said to extend the rule in *Carelse* to hold a grandfather's estate liable to support grandchildren. The court stated that it would be illogical not to do so, because, had the grandfather been alive, he would indeed have had a duty to support.

[25] In *Lloyd* the court was concerned with a claim by a widowed mother against her father's estate for the maintenance of her three children. Her father's estate was under administration, in terms of his will, in trust in the hands of three trustees. In paragraph 1 of her notice of motion the widow sought an order:

'That with effect from the date of the death of (their father) . . . the administrators testamentary in the estate of the late Patrick Sarsfield McNamee, be and they are hereby authorised and empowered out of the surplus income of the estate to expend a sum not exceeding seven hundred and fifty pounds (£750) per annum to maintain and educate in such manner as they may consider desirable the three minor children of (the applicant). . .'.

[26] In paragraph 2 she sought:

'That such monies as may be expended by the said administrators in terms of clause 1 of this order shall be debited against such monies as (the applicant) may become entitled to from the estate of the late Patrick Sarsfield McNamee, or if such monies be insufficient therefor, then against such monies as the said three minor children may become entitled to from the said estate.'

[27] The court at 100 characterised the widow's claim as follows:

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[11] In re *Estate Visser* 1948 (3) SA 1129 (C) at 1135.
[12] *Barnard* at 426.
[13] *Lloyd v Menzies NO & Others* 1956 (2) SA 97 (N); [1956] 2 All SA 155 (D).

'It will have been observed that the applicant does not claim an order on the administrators to provide maintenance for her children, but seeks authority and power for them to expend a sum not exceeding £750 per annum; and that the applicant contemplates refund being made to the estate of so much as is so expended.'

[28] The administrators (trustees) opposed the application on the following grounds:

'(a) It would interfere unduly with freedom of testation to hold a grandfather's estate liable;

(b) A father is directly responsible for the existence of his offspring and it would accordingly be contra bonos mores to allow a father to bring children into the world and avoid responsibility for them by himself departing from the world. That is why the father's estate is liable. This argument does not apply to grandparents.'

[29] The court observed at 102E that the question whether the estate of a deceased parent was liable for the support of his child was a matter of conflict between Voet and Groenewegen; noting that the former answered in the negative and the latter in the affirmative. Relying on *Carelse,* which adopted Groenewegen's view, and subsequent cases which followed *Carelse*, the court held that because it was accepted that a deceased parent's estate could be held liable for maintenance, it would be 'illogical not to maintain the liability upon the estate of anyone, who, if living, is under the duty to provide support.'

[30] Consequently the court made an order in terms of the relief the widow sought in para 1 of the notice of motion and also in para 2 in amended form which read:

'That such monies as may be expended by the said administrators in terms of clause 1 of this order shall be debited against such monies as (the applicant) may become entitled to from the estate of the late Patrick Sarsfield McNamee, or if such monies be insufficient therefor, then the monies, or balance thereof, expended by the administrators in respect of each such minor child shall be debited against such monies as each such child respectively may become entitled to receive from the said estate.'

It should be noted that, rather than this being a claim for maintenance against the deceased estate, it was tantamount to the amendment of the provisions of the trust created in the will of the deceased.

[31] The reasoning in *Lloyd* that it would be illogical not to extend a duty of support to a grandparent's estate was criticised by Hahlo (1959) 76 SALJ 234 and by Ludorf J in *Glazer*.[14] It was also criticised by Bloch J in *Barnard* who declined to follow it.

[32] Hahlo doubted the soundness of the extension of the *Carelse* principle to a grandfather's deceased estate. The basis of his criticism (at 236) is that:

'Liability to maintain *ex lege* is based on three factors: the claimant's inability to support himself; his relationship to the person from whom he claims support; and the latter's ability to provide maintenance. With the death of the person who has the obligation of support, two of these factors undergo a change. The deceased's earned income ceases and his estate devolves upon heirs who may or may not be liable to support the claimant. To hold as a general rule that liability to provide maintenance *ex lege* is in every case transmitted to the estate of the person under obligation is to treat an estate as if it were the continuation of the deceased's personality and may well result in shifting the burden of maintenance on to persons who are not legally liable to carry it.'

[33] In *Barnard* the court was concerned with a claim based on the *condictio indebiti* by the father of three minor children against the heir of the children's maternal grandfather. The father's case was that the deceased estate of the maternal grandfather was under a duty to maintain the three children. No such claim for maintenance had been made during the grandfather's lifetime or before his deceased estate had been fully administered upon the payment of the amount due to his heiress. The first such claim to be made was against the heir of the heiress after her deceased estate too had been fully administered and the bequest due to him had been paid. Bloch J rejected the claim. He declined to

[14] *Glazer, NO v Glazer* 1962 (2) SA 548 (W); *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 706H-707C.

follow the reasoning of Caney J in *Lloyd*, namely that it would be illogical not to extend the *Carelse* principle to cover the estates of grandparents because parents and grandparents were both classes of persons who, if living, are under a duty to provide support to their children or grandchildren. The reasons for Bloch J's decision appear from the following excerpts of his judgment (428B-D):

'The question is not one as to whether it would be illogical or otherwise to extend a remedy, but whether such extension is warranted by our law. Certainly under the old law such an extension was not permitted, and to make the extension to-day merely on the grounds of supposed logic would be for the Court to arrogate to itself the functions of the law-maker.

I also have difficulty with the virtue which seems to have been derived out of the fact that the estate was still intact at the time when an order of maintenance was made against it by CANEY, J. If the transmissibility to an estate is to be permitted I see no reason for incorporating a requirement that the estate must still be intact at the moment when the question falls to be decided, and this seems to me to be a quite irrelevant factor.'

[34] And he went on to state at 428D-G:

'As I see our common law no case before that of *Lloyd v Menzies* lays down that there is a transmissibility of obligation to the estate of a grandparent. If anything, our law has erroneously gone further than the authorities permit in finding transmissibility in the case of the estate of parents themselves. It may be too late, and undesirable, to alter what has already been generally laid down, but no case seems to have been made out for extension of liability to the case of the estate of a grandparent, whether on the paternal or maternal side. The case of *Glazer, N.O v Glazer* [1962 (2) SA 548 (W)] is an illustration of the refusal of the Court to enter the province of lawmaking. The law did not admit maintenance of a wife out of the estate of her deceased husband. Questions of logic do not enter into the consideration. I similarly feel that in the case of maintenance through an estate of a grandparent there had been no basis in law at all prior to the decision in *Lloyd v Menzies*, and I do not regard the latter decision as sufficient in itself to warrant a legal extension of transmissibility.'

[35] And Bloch J had this to say at 428G-H:

‘For myself I can see every reason why there should not be transmissibility to the estates of grandparents. The door would be opened wide to complete uncertainty as to the devolution of the estate of a grandparent. The uncertainty would necessarily have to prevail for a considerable period of time until it could be established finally and completely that there would be no claim made upon a grandparent’s estate or upon his heir/s by grandchildren. Such uncertainty, it seems to me, is extremely undesirable. If it were necessary, the necessity should be created, if at all, by the lawgiver and not by a Court of law.’

[36] *Barnard* has not been without criticism. *Mackintosh & Paleker* (2014) Acta Juridica 41 at 59 state:

‘The reason evinced in *Barnard v Miller* and subsequently endorsed by some academic writers for the reluctance to recognise a claim for maintenance against a deceased grandparent’s estate may have held sway in the past, but they certainly cannot justify a denial of the claim today, especially in light of the Bill of Rights. It is submitted that the non-recognition of a grandchild’s claim for maintenance may be inconsistent with the rights of the child (s 28) and the right to dignity (s 10). It is further submitted that once an infringement of these rights has been established, neither freedom of testation, which falls within the ambit of the property rights (s 25), nor the general limitations clause (s 36) of the Constitution will offer adequate justification for such infringement.

Once unconstitutionality has been determined, either the common law would have to be developed or a court would have to suspend the declaration of constitutional invalidity in order to afford the legislature a reasonable opportunity to investigate, formulate and promulgate appropriate legislation.’

[37] The appellant submits that the common-law rule that the deceased estates of grandparents are not liable to maintain their grandchildren is inconsistent with the rights to human dignity (s 10) and with the principle that a child’s best interests are of paramount importance in every matter concerning the child (s 28 (2)). She says the common law must be developed in order to be consistent with the Constitution.

[38] The respondent contends that it would be inappropriate to develop the common law in the two respects sought by the appellant and advances three grounds for this contention. He argues, first, that the agreed and assumed facts as set out in the stated case do not support these developments. Secondly, that constitutional and public policy considerations not mentioned by the appellant point away from the relief she seeks which include the values of dignity and freedom that inhere in the right of individuals to arrange their private affairs, including how their estate will be dealt with on their demise. Thirdly, that the proposed developments of the common law are not incremental in nature and go beyond the ordinary scope of judicial functions. In this regard he points out that changing the legal duties which attach to relationships between grandparents and grandchildren have complicated implications and consequences for other relationships and legal duties. The respondent argues that the suggested changes to the rules of law governing private relationships, have multifaceted implications for the duties of support' which involve making hard choices among competing constitutional values, are best left to Parliament as the major engine for law reform.

[39] The question is whether the common law should be developed and, if so, the extent of such development. In *MEC for Health and Social Development, Gauteng v DZ obo WZ*[15] (*MEC for Health*) the Constitutional Court set out how development of the common law is to be undertaken. With reference to *K v Minister of Safety and Security*,[16] the Constitutional Court stated that the common law develops incrementally through the rules of precedent, 'which ensure that like cases are treated alike'. This development occurs not only when a common-law rule is changed altogether or a new a rule is introduced, but also when a court needs to determine whether a new set of facts falls within or beyond the scope of an existing rule. It was for this reason the court stated that

[15] *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC).
[16] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC) para 16.

development of the common law cannot take place in a factual vacuum.[17] The Court stressed that 'where a common-law rule is to be changed altogether, or a new rule is to be introduced, it will usually be better to make a decision only 'after hearing all the evidence' so that the decision can be given in the light of all circumstances of the case, with due regard to all relevant factors'.[18]

[40] In this case we are asked to develop the common-law rule enunciated in *Barnard*, which is contended to be inconsistent with the Constitution to the extent that it does not recognise the grandchild's claim against the estate of the deceased grandparent. It is submitted that the non-recognition of a grandchild's claim for maintenance violates the child's right to human dignity in s 10; the right not to be unfairly discriminated against under s 9 and the children's rights under s 28 of the Constitution. Section 39(2) of the Constitution enjoins the courts, including this Court, to promote the spirit, purport and objects of the Bill of Rights when developing the common law. This requires the courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.[19]

[41] The Constitutional Court in *S v Thebus*[20] stated that development of the common law may be necessary in the following circumstances:

'The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution.'

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[17] *MEC for Health* para 28.
[18] Ibid para 29.
[19] Ibid para 30.
[20] *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC) para 28.

[42] The Constitutional Court in *MEC for Health* para 31 provides guidance as to how development of the common law under s 39(2) should be approached:

'The general approach to development of the common law under section 39(2) is that a court must: (1) determine what the existing common law position is; (2) consider its underlying rationale; (3) enquire whether the rule offends section 39(2) of the Constitution; (4) if it does so offend, consider how development in accordance with section 39(2) ought to take place; and (5) consider the wider consequences of the proposed change on the relevant area of the law. (Footnote omitted.)

[43] Finally the Constitutional Court noted with reference to *Mokone v Tassos Properties CC*[21] that in some instances a common-law rule may be deficient even if it does not offend s 39(2). A court will then develop the rule utilising its inherent power in s 173 of the Constitution taking into account the broader interests of justice. After making these remarks the Constitutional Court went on to emphasise that 'when exercising their authority to develop the common law, courts should be mindful that, in accordance with the principle of the separation of powers, the major engine for law reform should be the legislature'.[22]

[44] Against this background I return to the consideration of the issue before us. The question is whether the common-law rule in *Barnard* offends the normative structure of the Constitution; and, if not, whether there are wider interests of justice consideration that require their further development. It is important to emphasise the context in which this Court is requested to develop the common-law rule. The court a quo was asked to adjudicate the legal issues identified in the stated case on separated basis under rule 33 of the Uniform Rules of Court. This means that the court was only called on to decide the questions of law put forward by the parties in their stated case and had to do so only on the basis of the facts agreed by them.[23]

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[21] *Mokone v Tassos Properties CC and Another* [2017] ZACC 25; 2017 (5) SA 456 (CC).
[22] *MEC for Health* para 34.
[23] *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC) para 15.

[45] It is correct that in terms of rule 33(1) parties to a dispute may agree upon a statement of facts in the form of a special case for the adjudication of points of law. The written statement sets out the facts agreed upon and the questions of law in dispute between the parties as well as their contentions. In terms of rule 33(3) the court has the discretion to draw any interference of fact or law from the facts and documents as proved at trial. But the resolution of a stated case must proceed on the basis of a statement of agreed facts.

[46] In my view, the development of the common law in the respects sought by the appellant is not supported by the agreed and assumed facts. The appellant seeks a complete change of the common-law rule relating to the liability of the estates of the grandparents for the support of their grandchildren. The Constitutional Court in *MEC for Health*[24] cautioned that where a common-law rule is to be changed altogether, or a new rule is to be introduced, it will usually be better to make a decision only 'after hearing all the evidence' so that 'the decision can be given in the light of all circumstances of the case, with due regard to all the relevant factors'.

[47] On a factual level, the appellant's case is deficient. The appellant seeks on the stated facts to impose a duty to support a grandchild on a grandparent and his or her deceased estate where the parent of a grandchild cannot be traced. But it does not seem that T has taken reasonable steps to locate the whereabouts of L after he left South Africa to live in the United States of America or that she has exhausted all reasonable options open to her to find him.

[48] T in her reply to the respondent's request for further particulars, set out the nature of the steps she had taken to locate the whereabouts of L since 2001 after she became aware that L left South Africa. It is apparent from the steps she took that she never approached the office of the Family Advocate for assistance since the matter involved the maintenance of a disabled child and there is no

[24] Para 29.

explanation for her failure to approach that office. Furthermore, for many years, T took no steps to contact the deceased or N at their known address to establish the whereabouts of their son.

[49] Financial inability by a person from whom maintenance *ex lege* is sought must be established before that obligation is assumed by, or transferred to, another person. The statement of facts does not establish this requirement. The court is not told of T's lack of financial means to meet the needs of B. What further complicates this case is the lack of evidence regarding L's financial position. The appellant seeks to impose a duty to maintain a grandchild on the estate of a deceased grandparent through the development of the common law in circumstances where the child's father, who is primarily responsible for the child's maintenance, may be able to financially support the child. L may have the means to support B which will then render it unnecessary to develop the common-law rule. Yet this Court is asked to develop the common law by burdening the estates of deceased grandparents with liability to maintain grandchildren in circumstances where there is no sufficient basis to do so. Further, nothing is said in the pleaded case about T's parents, more specifically the extent to which they may have supported B or been able to do so. An inability on the part of the parents to maintain a child must be established before a grandparent will be legally liable to do so.

[50] This case demonstrates that in certain cases the objectives of rule 33(4) – facilitating the convenient and expeditious disposal of litigation – may not be achieved by adjudicating the issues separately. This Court has repeatedly cautioned that a separation of issues should not be resorted to readily where the issues that arise are intertwined. In *City of Tshwane Metropolitan Municipality*[25] this Court referred to *Denel*[26] where it was held:

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[25] *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176 para 51.
[26] *Denel (Edms) Bpk v Vorster* 2004 (4) 481 (SCA) para 3.

'Before turning to the substance of the appeal, it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed as facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.'

[51] The appellant asks this Court to change the common-law rule altogether on the basis of the facts and assumptions contained in the stated case. But the evidence regarding the sufficiency of steps taken by the appellant to trace the whereabouts of L and of his financial situation is disputed by the respondent.

[52] These are some of the issues which the parties should have properly considered before submitting the stated case to the court for adjudication. It is clear that insufficient thought by the parties and the court a quo was given to whether rule 33(4) should have been resorted to and applied particularly having regard to what the Constitutional Court in *MEC for Health*,[27] stated in relation to how the common law should be developed.

[53] There is a further reason why it is inappropriate for this Court to develop the common-law rule in the manner sought by the appellant. The appellant contends that the common-law rule is inconsistent with the rights to human dignity and equality in the Bill of Rights and also with the principle that a child's interests are of paramount importance in every matter concerning the child to the extent that it does not recognise a grandchild's right to seek maintenance from

[27] Para 29.

the estate of a grandparent where both of the grandchild's parents are unable to do so; or where one parent is unable to do so, and the other parent does not do so and cannot be traced; or both parents do not support their child and cannot be traced; and the grandparents are deceased, or one of the grandparents is deceased.

[54] The development of the common-law rule sought by the appellant implicates the foundational values of human dignity, equality and freedom of the testator to decide how he or she wishes to have his or her property distributed upon his or her demise. The extension of the *Carelse* principle to the grandparents' deceased estates will have a considerable impact on the rules of succession in South African private law and in particular on the freedom of testation. If such claim is recognised, it has the potential to compete with the heirs of a deceased grandparent. It could also compete with other claims for maintenance that may arise, including by a surviving spouse or child. These concerns which are, in my view, legitimate are not adequately addressed by the appellant other than by stating that the consequent adverse impact on the grandparents' human dignity is far outweighed by the invariable infringement of needy grandchildren's human dignity that will occur if their right to the material support they need to live a decent life is cut off just because their grandparents have died without making provision or adequate provision for them in their wills.

[55] It is correct that the right to human dignity in s 10 of the Constitution underlies the duty of parents and grandparents to support their children and grandchildren because, without support, the children or grandchildren will be poverty-stricken and poverty reduces a human in his or her dignity. But that does not mean that the interests of a child, and in particular of a grandchild with mental impairment, such as B, are superior to other fundamental rights.[28] Freedom of

[28] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34; 2020 (1) SA 1 (CC) para 58.

testation also enjoys protection under s 25(1) of the Constitution. This Court in *Harvey*[29] held that:

'Freedom of testation, which is an important facet of the right to dignity, protects an individual's right not only to unconditionally dispose of her property, but also to choose her beneficiaries as she wishes.'

[56] I disagree with the appellant that if the *Carelse* principle is extended to grandparents' deceased estates, the result will be the same as they are in relation to parents' deceased estates. This is so because the common-law rule as regards the maintenance of children and grandchildren stipulates that parents are the primary caregivers of children. Only if the child's parents or their estates cannot support her or him will other ascendants and descendants be liable to support; a legal duty to support a child is imposed first on the nearest relative who can support her or him, before it is imposed on a relative who is not close.

[57] In other words, the structure of the common-law rule as it currently exists, recognises the special role and responsibility that parents have in raising children in South African law. It also recognises that the role and responsibilities which attach first to the relationship between parents and their child may only be passed on to other family members, and to the larger community, where parents are unable to fulfil them.

[58] The appellant seeks the extension of the *Carelse* principle so as to render the estates of the deceased grandparents liable to support grandchildren in circumstances where it is not clear whether a parent is unable to discharge that duty. Thus, it has the potential to upset the order in which obligations to maintain children are imposed. The development of the common law would therefore be inappropriate due to the nature of the development sought and the effect it may have on the law of succession and other foundational values of the Constitution. The common-law rule sought to be changed deals with social policy in relation to

[29] *Harvey v Crawford* [2018] ZASCA 147; 2019 (2) SA 153 (SCA) para 64.

the maintenance of children by their parents and grandparents and the grandparents' freedom of testation. Unfortunately, it is a type of policy that this Court is not competent to engineer. It is for Parliament to decide whether the common-law rule should be developed and, if so, how.

[59] In conclusion, I hold that due to the insufficiency of the evidence upon which to develop the common-law rule enunciated in *Barnard* and the wider consequences the proposed change will have on the rules of the law of succession, it would be inappropriate for this Court to develop the common law. The development sought by the appellant is quite drastic and may implicate various constitutional values. Parliament is the forum best suited to undertake such development if it is considered appropriate.

[60] As regards costs, the respondent did not ask for a costs order against the appellant if the separated issues should be decided in his favour. In addition, the case raises important common law and constitutional issues relating to the duty of support and freedom of testation. The appellant and the respondent are before court in their capacities as *curatrix* and executor respectively. In the circumstances justice and fairness require that neither party should be burdened with an order of costs.

[61] The following order is made:

1 The appeal is dismissed with no order as to costs.

2 The Registrar of the court is directed to forward a copy of this judgment to the Judicial Service Commission to investigate the conduct of Acting Judge Kose.

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ZONDI JA
JUDGE OF APPEAL

Appearances:

For appellant:	A M Breitenbach SC
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	Webbers, Bloemfontein
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