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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

From: The Registrar, Supreme Court of Appeal
Date: 6 July 2020
Status: Immediate

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

Today, the Supreme Court of Appeal (SCA) dismissed an appeal against a judgment of the Western Cape Division of the High Court, Cape Town (the high court).

Central to this appeal was whether it was 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. 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 the court was asked to develop so that the common law would recognise a duty of support on the part of a grandparent's deceased estate.

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 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 co-executor was N, B's grandmother, who was married to the deceased and sole beneficiary of the deceased's estate. She sadly passed away on 21 October 2012.

B was born of the marriage between T and L, the son of the late Solomon and his wife N. When the marriage between L and T was dissolved, sole custody and sole guardianship of B was awarded to T and L was obliged to maintain B until she became self-supporting. However, 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. L has failed to maintain B in terms of the divorce order or at all. B is a psychiatric patient with bipolar affective disorder, mild intellectual disability and an autism spectrum disorder. Consequently, at all relevant times during Solomon's lifetime and after his death she was not self-supporting and required maintenance and that remains the position. The appellant alleged that at all times during Solomon's

lifetime he was able to maintain B to the extent that L did not do so and T could not do so. Following Solomon's death, a maintenance claim was lodged on behalf of B against Solomon's estate.

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*. As a result, 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.

This court found, on a factual level, the appellant's case is deficient. The appellant sought 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 T to trace the whereabouts of L and to establish his financial situation was disputed by the respondent. 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. In this case the child's father, who is primarily responsible for the child's maintenance, may be able to financially support the child and this, according to the Court, would then render it unnecessary to develop the common-law rule. Thus, there is no sufficient basis to do so.

This Court held accordingly 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. Further, the concerns relating to 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 which are all implicated in development of the common-law rule are, in this Court's view, legitimate and were not adequately addressed by the appellant.

It was further held that poor judicial service was rendered in this matter as a result of an inordinate delay by Acting Judge Kose, as it took her more than two years to make an order in this matter. Once the order was made, Kose AJ further failed to furnish reasons for her decision. This Court found the delay to have been grossly unreasonable and lamentable, and that Kose AJ's failure to supply written reasons for her decision to be equally lamentable.

As a result, the appeal was dismissed with no order as to costs. The Registrar of the court was 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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