

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A25/2024

In the matter between:

R S

Appellant

And

J P S

First Respondent

ACTING MAGISTRATE, T NOVEMBER

Second Respondent

THE MAINTENANCE OFFICER

Third Respondent

Heard: 10 May 2024

Delivered: Electronically on 03 June 2024

JUDGMENT

LEKHULENI J (Bishop AJ Concurring)

INTRODUCTION

[1] Children are the cornerstone of society; when we neglect them, we neglect our society's future. Every child deserves proper parental care and support for the well-being of society. This is an appeal against the whole judgment and order delivered on 18 November 2023 by the magistrate for the district of Cape Town, held in Kuilsriver, in which the court dismissed the appellant's claim for maintenance of her foster care child, LX. The magistrate found that the first respondent did not adopt LX, and as such, there was no legal duty upon the first respondent to maintain LX. Consequently, the magistrate dismissed the appellant's claim against the first respondent for the maintenance of LX. It is this order that the appellant seeks to assail in this court.

[2] At the hearing of this appeal, despite proper service of the record and the notice of set down upon the first respondent and his attorneys of record, the first respondent and his legal representative did not file any opposing papers to the appeal. They also did not appear at the hearing of this appeal. The matter was initially enrolled for hearing on 03 May 2024. However, to allow the first respondent and his legal representative to attend the appeal proceedings, especially considering the issues raised in the appeal, the hearing was rescheduled for 10 May 2024.

[3] The first respondent and his legal representative were informed of the postponement. However, they did not attend the appeal proceedings on the subsequent date. However, we had the benefit of comprehensive heads of argument that the first respondent's legal representative submitted to the court a *quo* on behalf

of the first respondent when the matter was heard on that basis on 10 May 2024.

THE BACKGROUND FACTS

[4] To fully understand the key issues in this appeal and the view I take in this matter, it is necessary to briefly outline the background facts underpinning my conclusion. The material facts in this matter are simple and can be summarised briefly as follows. The appellant and the first respondent were married to each other in community of property on 02 February 1991. Their marriage was dissolved by the Bellville Regional Court on 17 May 2019 after it was found that the marriage had broken down irretrievably with no prospects of reconciliation towards a normal marriage relationship.

[5] During their marriage, particularly in 2014, the appellant and the first respondent lived in Bloemfontein. During this period, the appellant volunteered at the Heidedal Child and Youth Care Centre, where she met an abandoned child, LX, who was born on 10 March 2012. LX is orphaned, and her biological parents are deceased. At the time the appellant met LX, the minor child was 18 months old and still a baby. The appellant and the first respondent decided to adopt LX. LX formed a bond with the appellant and the first respondent as her parents.

[6] Subsequent thereto, the appellant and the first respondent commenced the process of adopting LX at the Bloemfontein Children's Court. The appellant asserted that they were told by the Children's Court that they first needed to foster LX to monitor if they were suitable parents before the adoption could be finalised. Pursuant

thereto, the Bloemfontein Children's Court issued an initial foster care order on 07 November 2014 under case number 14/1/4-223/2012.

[7] Whilst the adoption process was pending, the parties took in the minor child as foster parents with the intention of continuing the adoption process until it was completed. The child came to live with the appellant and the first respondent and became part of their family. The parties undertook parental rights and responsibilities in respect of the minor child. They cared for, supported, and provided for all the needs of the child. The appellant and the first respondent agreed to adopt LX and raise her as their own daughter. To this end, they completed the necessary form 60 in terms of Regulation 99 (application for and consent to the adoption of children) read with section 231 of the Children's Act 38 of 2005 (*the Children's Act*). The application form was signed by both the appellant and the first respondent on 29 February 2016.

[8] Unfortunately, before the adoption process could be completed, the marriage relationship between the appellant and the first respondent broke down. On 02 February 2019, the first respondent instituted divorce proceedings against the appellant at the Bellville Regional Court. In the summons, the first respondent explicitly acknowledged that a minor child is involved in the marriage with the appellant through the adoption process. In the particulars of claim, the first respondent sought an order obliging him to pay maintenance of R5 000 for LX until she reached 18, or became self-supporting. The maintenance was to be paid into the appellant's bank account and subject to an increase of 5% per annum. The first respondent also sought an order that he would be responsible for LX's educational

and medical costs. In addition, the first respondent completed the necessary Annexure A provided for in Regulation 2 of the Mediation in Certain Divorce Matters Regulations, in which he acknowledged that the child resides with the appellant and that both parties support the child. The first respondent also stated that visitation rights have been arranged through mutual agreement.

[9] On 23 May 2018, the first respondent signed a commitment letter wherein he stated as follows:

“To whom it may concern.

I JPS, ID number... state that I will be paying child support for LXS on a monthly basis on or before the 30th of every month. The amount of R5000 (five thousand Rand only). This letter is to serve as my commitment to the child support until its (sic) final agreement is in place. For any further information, I can be contacted at the following number 082...”

[10] Further, in contemplation of their divorce, on 2 and 3 August 2018, the appellant and the respondent signed a settlement agreement, respectively. The settlement agreement addressed the division of assets, the maintenance of the minor child, and spousal maintenance for the appellant. The agreement for LX’s maintenance largely reflected what the first respondent had sought in his particulars of claim. In paragraph A1.3 of the settlement agreement, the first respondent agreed to pay maintenance for LX in the sum of R5000 per month, payable in advance on or before the 28th day of each month directly into the appellant’s bank account. The parties also agreed that the first respondent’s maintenance obligations towards the

minor child will terminate once the child becomes a major or self-supporting, whichever occasion may occur first. The first respondent also agreed to pay spousal maintenance for the appellant in the sum of R500 per month.

[11] Insofar as medical expenses are concerned, the parties also agreed that the appellant and LX would remain dependants of the first respondent until the divorce was finalised. The parties also agreed that the first respondent would be liable for the payment of all reasonable and necessary medical expenses incurred by the appellant on behalf of the minor child and medical expenses incurred for the appellant. The parties also agreed that after the divorce, the first respondent would contribute R800 towards the monthly medical aid premium for the appellant and for LX. It was further agreed that the applicant would furnish the first respondent with proof of any surcharge or levy not paid by the medical aid fund, whereafter the first respondent would attend to reimburse the appellant the amount within seven days thereof.

[12] As far as educational expenses are concerned, the parties agreed that the first respondent will pay half of the reasonable and necessary educational expenses incurred on behalf of the minor child. The parties also agreed that the first respondent would be liable for half of the school uniform, schoolbooks, stationery, outings, and extramural activities costs incurred by the appellant with respect to the minor child. This would be paid at least twice per annum. The appellant was to provide the first respondent with proof of such expenses, whereafter the first respondent undertook to settle the same within seven days thereafter. The parties

agreed that the settlement agreement would be incorporated into the final divorce order.

[13] As the parties had settled the patrimonial consequences and the maintenance issue, the appellant did not attend court on 17 May 2019, when the divorce was heard and finalised. The first respondent attended court in the absence of the appellant and the Bellville Regional Court granted a decree of divorce. For reasons that do not appear from the record before us, the decree did not incorporate the settlement agreement signed by the parties. Even though there was no court order requiring the first respondent to pay maintenance, he continued to make child support payments for the minor child after the divorce was finalised. However, he reduced the payments to a monthly amount of R4000.

[14] The appellant asserted that due to the traumatic experience leading up to the divorce, she left all the administrative work in the hands of her then-attorney, who represented her. Due to the depression and anxiety after the divorce, she never checked the prayers granted in the divorce order. The appellant asserted that she gave specific instructions that the agreement regarding the maintenance of their minor child should be included in the court order. After she discovered that the prayer for maintenance was not included in the divorce order, she attempted to have this rectified at the Bellville Regional Court but was not assisted. Meanwhile, in January 2023, the first respondent stopped paying maintenance for their foster care daughter.

[15] Subsequent thereto, the appellant approached the Kuilsriver Maintenance

Court for a maintenance claim against the first respondent. The first respondent was subpoenaed to appear in court on 10 July 2023 for a financial inquiry in terms of section 10 of the Maintenance Act 99 of 1998 (*the Maintenance Act*). Upon receiving the subpoena, the legal representative of the first respondent sent a letter to the Kuilsriver Magistrates Court. In the letter, it was stated that the minor child is not the biological child of their client, and she was not legally adopted by him. Therefore, the first respondent's legal representatives asserted that the first respondent was not obligated under common law or the Maintenance Act to financially support the minor child. The first respondent's legal representative also impugned the extension of the foster care order, which I will deal with later in this judgment.

[16] The matter was eventually placed before the second respondent to argue whether the first respondent had a legal duty to maintain LX. On 18 November 2023, the matter was argued in court by the first respondent's legal representative and the third respondent (the maintenance officer). After hearing arguments, the magistrate gave an extempore judgment and found that there was no legal duty on the first respondent to maintain the minor child.

[17] On 30 November 2023, the magistrate provided his additional reasons and found that the respondent's commitment to serve the best interests of this minor child was rooted in affection, emotional attachment, fondness, and the apparent sense of care that the respondent had towards the minor child concerned. The magistrate also noted that, in his view, the human kindness the respondent showed towards the minor child does not, without more, translate into a legal duty to

maintain. He reaffirmed his previous conclusion that the first respondent had no legal obligation to support LX. As mentioned before, the appellant is seeking a reversal of this decision in this court.

THE GROUNDS OF APPEAL

[18] The Appellant assails the judgment granted by the magistrate in favour of the first respondent on several grounds. The grounds of appeal as discernible from the notice of appeal may, in a nutshell, be summarised as follows:

1. That the court *a quo* erred in finding that because the adoption process had not been concluded at the time the parties separated, therefore the first respondent was not legally liable to maintain the minor child.
2. That the magistrate erred in concluding that the respondent was absolved from maintaining the minor child even though after the divorce proceedings had been concluded, the first respondent continued to maintain the child.
3. That the magistrate acknowledged that adoptive parents have a legal duty to maintain their adopted child but overlooked the intention of the first respondent at the time he signed the adoption papers that he made a commitment to take responsibility for taking care of the minor child.
4. That the court *a quo* overlooked the well-known principle that it is the upper guardian of all minor children and must protect the rights of children and the interest of the child as provided for in section 28 of the Constitution.
5. That the magistrate erred in concluding that, at the time, the first respondent made an undertaking to contribute towards the expenses for the minor child,

that this was intended to be temporary until the divorce proceedings were finalised.

ISSUES TO BE DECIDED

[19] This court is enjoined to consider whether the first respondent has a legal duty to maintain LX.

APPLICABLE LEGAL PRINCIPLES

The best interest of child principle

[20] Children have a right to proper parental care. As reflected in the preamble to the Maintenance Act, South Africa has committed itself to giving high priority to the constitutional rights of children. South Africa has provided the legal infrastructure through the Maintenance Act, thereby giving effect to the imperative contained in section 28 of the Constitution. It is universally recognised in the context of family law that the child's best interests are paramount. *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 24.

[21] Both international law and the domestic law of many countries have affirmed the paramount importance of the best interests of the child. Many countries have subsequently incorporated it into their constitutions or child and family legislation. Examples of African countries that incorporated children's clauses in their

constitutions include Namibia (Art 15 of the Constitution of the Republic of Namibia) and Uganda (s 34 of the Constitution of the Republic of Uganda). See *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC) at n 29.

[22] Meanwhile, the Bill of Rights in the South African Constitution is renowned for its extensive commitment to the protection of the rights of children in section 28, more particularly section 28(2). Section 28(2) of the Constitution emphatically underscores the paramountcy of the child's best interests. It enjoins a court to give paramountcy to the child's best interests in every matter concerning the child. These pronouncements are echoed in several statutes. For instance, section 9 of the Children's Act provides that 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. Section 8 of the Children's Act provides that the rights that a child has in terms of the Act supplement the rights that a child has in terms of the Bill of Rights. However, in *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) para 25D-F, the Constitutional Court observed that the paramountcy principle must be applied in a meaningful way without unduly obliterating other valuable and constitutionally protected interests.

[23] It is, therefore, evident that the child's best interest is the guiding criterion that underpins all decisions in respect of any dispute involving minor children. Against this backdrop, I turn to consider the disputed issues in this appeal. However, before I do so, it is important to consider the legal effect of both *de jure* adoption and *de facto*

adoption, as these have a critical bearing on the resolution of the disputed issues in this case

Formal (*de jure*) Adoptions

[24] Chapter 15 of the Children's Act regulates the adoption process in South Africa. Adoption is the legal process through which the rights and obligations between a child and its natural parent or parents are terminated, and a new parental relationship enjoying full legal recognition is created between the child and its adoptive parent or parents. (see *Naude v Fraser* 1998 (4) SA 539 (SCA) at 548J - 549A). In terms of section 230 of the Children's Act, any child may be adopted if the adoption is in the best interest of the child. Only a minor child can be adopted, and the minor must be adoptable. Among others, a child is adoptable if the child is an orphan and has no guardian or caregiver who is willing to adopt the child, or the whereabouts of the child's parents or guardian cannot be established, or the child is in need of a permanent alternative placement. An application for adoption must be accompanied by a report of an adoption social worker containing information on whether a child is adoptable, as contemplated in section 230(3).

[25] Section 233 provides that a child may be adopted only if consent for the adoption has been given by each parent of the child, regardless of whether the parents are married or not: provided that, if the parent is a child, that parent is assisted by his or her guardian. In terms of section 236 of the Children's Act, such consent may be dispensed with in an application for adoption, inter alia, where a

child had been deserted or abandoned by a parent or guardian or where the parent or guardian has consistently failed to fulfil his or her parental rights and responsibilities towards the child during the last 12 months. Section 233(8) of the Children's Act provides that a parent or guardian who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final.

[26] Section 239 of the Act regulates the application for adoption. An application for the adoption of a child must be made to the Children's Court in the prescribed manner and must be accompanied by the relevant social worker's report in the prescribed format. The report must, in terms of s 239(1)(d) of the Act, be accompanied by a letter from the provincial head of social development recommending the adoption of the child. The requirement of the section 239(1)(d) letter is peremptory. It reaffirms and recognises the role to be played by governmental institutions in the protection and well-being of children within our borders and those leaving them. (see *In Re XN* 2013 (6) 153 (GSJ) at para 14). Section 240 governs the consideration of the adoption application. The court that considers the adoption application must take all relevant factors into account, including the religious and cultural background of the child, the child's parents, and the prospective adoptive parents.

[27] A Children's Court considering an application for adoption may make an order for the adoption of a child only if the adoption is in the best interest of the child and the adoptive parents are fit and proper to be entrusted with full parental rights and

responsibilities in respect to the child. The court must also consider whether consent to adoption has not been withdrawn in terms of section 233(8) of the Act. The effect of an adoption order in terms of section 242 terminates any previous order made with respect to the placement of the child. It also terminates all parental responsibilities and rights any person had in respect of the child immediately after the adoption, as well as all rights and responsibilities the child had against that person and that person's family members. Expressed differently, upon adoption, the reciprocal duty of support between the adopted child and his or her natural parents ceases to exist. An adoption order confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent. Adoptive parents have a legal duty to support their adopted children.

[28] However, in terms of section 242(2)(e), the adoption order does not automatically terminate all parental responsibilities and rights of the parent of a child, when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent.

Informal (*de facto*) Adoptions

[29] The informal adoptions, for the purposes of this judgment, refer to those putative or ostensible adoptions that have not been formalised in terms of the Children's Act or in terms of any legislation. However, even though they are not officially recognised by law, they exist, nonetheless. Informal adoption involves children who were not legally adopted but are factually adopted and are nurtured by

their putative parents. Ordinarily, there is no duty of support between a putative parent and an informally adopted child. The Children's Act recognises the formal adoptions discussed above and does not recognise informal adoptions.

[30] However, in recent years, our courts have consistently recognised *de facto* adoptions, particularly in recognition of a duty of support between the child and a putative parent. *Maneli v Manali* 2010 (7) SA 703 (GSJ); *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T). In other words, the courts have recognised a duty of support notwithstanding the fact that the adoption has not been formalised in terms of the relevant legislation or in compliance with specific requirements set out in the statute. Louw points out that 'despite the seemingly bright-line distinction between adopted and non-adopted children, the South African courts have in recent times shown an increased willingness to grant *de facto* adopted children some if not all, the rights reserved for formally adopted children. (see Louw A "De Facto Adoption Doctrine in South Africa" *Obiter* (2017) at 459).

[31] The courts correctly justified, in my view, the recognition of informal adoption based on the child's constitutional rights to parental care and the best interests of the child encapsulated in section 28 of the Constitution. Undoubtedly, the recognition of *de facto* adoptions for the purposes of care, maintenance and proper parental care ensures that the protection of children for whom the adoption statute was intended is not eroded.

EVALUATION

[32] In the present matter, it is common cause that the first respondent supported LX. The first respondent committed himself to supporting the minor child in 2014 when the child was still 18 months old. Mr Skibi, who appeared for the appellant, submitted at the hearing of this appeal that the first respondent had a very strong bond with the minor child during his marriage with the appellant and even after the divorce decree was granted. Counsel submitted that in his divorce summons, the first respondent committed himself to support the minor child until she reaches the age of majority or becomes self-supporting. In the settlement agreement, which was concluded in contemplation of their divorce, the first respondent committed himself to support the minor child and to pay all her school fees and medical expenses. Mr Skibi further submitted that, for all intents and purposes, the parties intended to adopt the minor child.

[33] In my view, the submissions of Counsel are to the point and cannot be faulted. The fact that the adoption proceedings were not concluded, in my view, does not absolve the first respondent of his obligation towards the minor child. Significantly, the child was in the foster care of the appellant and the respondent. The child formed a strong bond with both appellant and the first respondent. The attached photographs in the appeal record beautifully capture the loving father-and-daughter relationship between the first respondent and LX. Additionally, these images unmistakably depict the parent-child bond between LX, the first respondent and the appellant.

[34] In addition to the above, the first respondent faithfully performed the functions

and discharged the duties of a father in his dealings with the minor child. Even after the parties were divorced, the first respondent continued to pay maintenance for the minor child. The commitment he made in the settlement agreement and in the divorce summons attests to the relationship between the daughter and father. The first respondent regarded the minor child as his own. The minor child regarded the first respondent and the appellant as her parents. Notwithstanding that the adoption had not been completed, the first respondent referred to LX by his own surname.

[35] On the evidence that has been presented to this court, I firmly believe that the first respondent *de facto* adopted the minor child and considered her as her own. He supported and nurtured the child during the marriage and even after the marriage was dissolved. He maintained a father-daughter relationship during the marriage and even after the marriage was dissolved. He committed to retaining his parental rights and responsibilities towards the minor child. In the settlement agreement, he agreed that the minor child would primarily reside with the appellant and that he would have reasonable contact rights with the child, including, but not limited to, every alternate weekend and alternate school holiday. The parties also agreed that the December / January school holidays will be divided, counting as two separate holidays, thus ensuring that the minor child spends alternative Christmases with the first respondent. Crucially, the first respondent and the appellant agreed in the settlement agreement to finalise the adoption process as soon as possible.

[36] In my view, the child's best interest is paramount and must prevail in this matter. The first respondent's decision to stop providing for the minor child, after previously committing to care for her since she was a baby and supporting her for

the past ten offends against the best interest of the child principle and goes against the hallowed principle of *ubuntu* as well as considerations of propriety and morality. As was correctly noted in *NB v MB* 2010 (3) SA 220 (GSJ), while these considerations do not determine the law, they certainly inform it.

[37] As previously stated, the first respondent and the appellant raised the child since she was 18 months old. The child is now 12 years old. The minor child regarded the first respondent and the appellant as her parents. The first respondent represented to the appellant that they would finalise the adoption process as soon as possible. He also represented to the child that he would look after her. He pledged to provide food and clothing for the child. He stayed with the child in the same house for many years and fostered her. He held himself to his community and the world at large that he was the father to LX and took responsibility as such. The community accepted the first respondent and his wife as adoptive parents of LX, and they did not regard the informal adoption as opprobrious. The appellant and the minor child relied on the first respondent's representation.

[38] I am of the view that it is unconscionable for the first respondent to renege from his representation to the child and the appellant. The best interest of the child is the most important consideration and must take precedence in this case. The first respondent must be held to his promise. His promise and commitment had given the appellant a reasonable expectation that he would maintain LX until she reached the age of majority or became self-supporting. To my mind, the first respondent has a legal duty to maintain LX. The court *a quo* erred in absolving the first respondent of

his legal duty to maintain LX.

[39] I am mindful that the adoption of LX was commenced but not completed. The appellant and the first respondent signed the necessary adoption form 60 in contemplation of adopting LX. Unfortunately, their marriage broke down before the adoption process could be completed. I am also mindful that a child is adopted if the child has been placed in the permanent care of a person in terms of a court order that has the effects of terminating all parental responsibilities and rights any person, including a parent, had in respect of the child in question immediately before the adoption order is granted. I am also mindful that the duty of support arises for adoptive parents to maintain their adopted children and that the legal consequences that flow from a *de jure* adoption do not ordinarily find application in *de facto* adoption. This judgment does not hold that, merely by commencing the adoption process, parents automatically assume all the rights and responsibilities of the child's parents.

[40] It is the particular facts of this case that stands it on a different footing. The intention to adopt the minor child and the concomitant commitment to maintain her until she reaches the age of majority or self-supporting cannot be discounted or ignored. The appellant and the respondent factually adopted the child. In my opinion, from the totality of the evidence, it is in the best interest of the minor child that the duty of support that applies to *de jure* adoption be extended to the minor child in this case. In my view, this finding is fortified by several decisions discussed below in which our courts, including the Constitutional Court, extended the duty of support

and/or spousal benefits to *de facto* marriage relationships. Those cases endorsed the concept of a duty worthy of protection and were 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.

[41] For instance, although partners in a same-sex relationship (*de facto* marriage relationship) were by no means placed on the same footing as spouses in a civil marriage, the Constitutional Court was prepared to extend spousal benefits to same-sex partners in several cases decided before the coming into operation of the Civil Union Act 17 of 2006 on an *ad hoc* basis. The Constitutional Court justified its findings on section 9(3) of the Constitution, which forbids unfair discrimination, and section 10 of the Constitution, which guarantees the right to human dignity (see *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); *Gory v Kolver* 2007 4 SA 97 (CC)).

[42] By parity of reasoning and considering the child's best interest, there is no reason, in my view, for excluding a *de facto* adopted child from the benefits of the duty of support conferred upon other children in terms of adoption contemplated in Chapter 15 of the Children's Act. Equity in this context is justified by the child's constitutional rights to proper parental care and the child's best interests, as encapsulated in section 28 of the Constitution.

[43] I accept that the common law does not recognise the duty of support between

children and adoptive parents and that this duty has been introduced into our law in terms of statute. However, I am of the view that the best interest of the child is paramount and must prevail. It demands and cries loudly for the protection of informally adopted children in circumstances like this case. Simply put, the duty of support that applies to formally adopted children, in my view, can apply with equal force in informal adoption where the duty of support has – like here – been established by the parents' conduct in that case.

[44] I am emboldened in my finding by the decision of *Paixao and Another v RAF* 2012 (6) SA 377 (SCA), where the Supreme Court of Appeal 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 appellant and her daughters sued the Road Accident Fund, under section 17(1) of the Road Accident Fund Act 56 of 1996, for loss of maintenance and support arising from the death of her life partner, Gomes who died in a motor vehicle collision on 2 January 2008. The appellant had formed a relationship with 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 appellant. He was already married, and an intended marriage between Gomes and the appellant was deferred until he was divorced. Gomes eventually divorced his wife, who was based in Portugal.

[45] Before he could marry the appellant, he was killed in a collision. It was accepted as a fact that he had contractually bound himself to maintain the plaintiff

and her family indefinitely. The critical issue was whether that contractual right was enforceable against third parties such as the Road Accident Fund. The high court concluded that Gomes had merely promised to take care of the appellant but had not undertaken a legally enforceable obligation to do so. The Supreme Court of Appeal disagreed with this conclusion and found that the evidence indicating that the deceased and the appellant's family had, at least tacitly, undertaken a reciprocal duty of support was compelling. According to the court, there was clearly a tacit agreement that Gomes would assume the obligation to support the family before the marriage. According to the court, the marriage would change nothing except for the relationship being formally recognised.

[46] Drawing inspiration from this authority, the formal adoption of LX by the appellant and the first respondent would have changed nothing except that the adoption process would have been completed and the adoption would have been formally recognised. Notably, notwithstanding the fact that the parties were not officially married in terms of the relevant legislation in *Paixao and Another v RAF*, the court recognised the duty of support between Gomes and the appellants. The court rejected the High Court's finding that Gomes had supported the appellants out of 'gratitude', 'sympathy' and 'kindness'.

[47] In the same way, in the present case, the evidence indicating that the first respondent has expressly undertaken a duty of supporting his informally adopted daughter is compelling. It was not mere charity – his voluntary inclusion of a maintenance obligation in his divorce action, in his letter preceding the divorce, and

in the settlement agreement, all point ineluctably to the undertaking of a *legal* obligation to maintain. It would be invidious and repugnant to the legal convictions of the community for the first respondent to be absolved from supporting his daughter when he had voluntarily assumed that obligation. In my view, the best interests of LX cannot be sacrificed at the altar of formalism.

[48] I also find the decision of the court in *MB v NB (supra)* apposite in this matter. The facts were briefly as follows: a widow with a teenage son married a man who developed a particularly close bond with her son. In the early years of the relationship, the commitment between them was so strong that the husband agreed to adopt the boy. However, the adoption was never pursued, perhaps because the parties considered that a change of name would suffice. The boy did, however, formally take his stepfather's surname. The stepfather agreed with the boy's mother that he should enrol in a private school, and they completed and signed, as father and mother, the application forms for the boy's admission to the school as a boarder at St Andrews College in Grahamstown. The application was successful. The marital relationship between the parties subsequently came to an end because of the husband's infidelity.

[49] During the divorce proceedings that followed, the wife sought to hold the husband liable for the boy's school fees for so long as he remained at St Andrew's College. The wife placed reliance on the agreement to pay maintenance and contended that the agreement to pay school fees constituted a contract that bound the husband until the child left St Andrew's College. As the boy's stepfather, the

husband denied liability for the boy's support, including a contribution towards the school fees to which he had agreed. The court rejected the alleged contractual basis of the claim. However, the court held that by agreeing to give the boy his name, the husband impliedly represented to the boy himself, to the plaintiff and the world at large that he proposed to stand in relation to the boy as a father to a son.

[50] The court argued that during the marriage, the defendant faithfully performed the functions and discharged the duties of a father in his dealings with the boy – willing to place himself, literally, *in loco parentis* when the family was still intact. In the court's view, renouncing his obligations now that he had fallen out with his wife was unconscionable. The court noted that consideration of propriety and morality would be offended if he did. With reference to a child's right to parental care in terms of section 28(1) of the Constitution, the court intimated that the boy, having become an ostensible son of the defendant, had the right to expect him to provide the family and parental care that the section contemplates. Crucially, and for present purpose, the court stated as follows in para 21 of the judgment:

To find that, in such circumstances, the defendant bears the obligation to contribute towards S's private school tuition gives due recognition to the constitutional rights and protections to which children are entitled in terms of the clause in the Bill of Rights I have cited above. *The defendant had in effect promised to do this, and the law would be blind if it could not hold him to his promise.*" (my emphasis)

[51] Similarly, in *JT v Road Accident Fund 2015 (1) SA 609 (GJ)*, a child was adopted by her grandmother when she was 7 years old, but her biological father continued to contribute to her maintenance after her adoption. When the father died in a motor vehicle accident, the plaintiff sued the Road Accident Fund (the Fund) for

damages for the loss of support to her teenage granddaughter following the death of her natural father in the accident. The Fund admitted that it was liable for damages suffered by any person resulting from his death but contended that the deceased's legal obligation to support his child had been extinguished when the adoption had taken place; consequently, there was no liability on the Fund to compensate such loss. The issue, therefore, was whether the Road Accident Fund could be held liable for the loss of support the child had suffered because of the death of her biological father.

[52] The court answered the question in the affirmative, finding that the father's undertaking to support his child after the adoption created an enforceable right. After reviewing several cases wherein the courts recognised the duty of support in *de facto* relationships, Sutherland J stated:

“[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 embedded 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.”

[53] It is evident from the cases discussed above that our courts have developed the common law to recognise that a duty of support can arise from 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. The current facts align

with the above proposition in all aspects. Furthermore, the first respondent undertook support for LX. As the court noted in *NB v MB (supra)*, the law would be blind if it could not hold him to his promise.

Conclusion

[54] As I have found herein above, the legal duty for the first respondent to maintain his child has been established. The first respondent voluntarily assumed this responsibility. From the totality of the evidence, I am of the view that the first respondent has a legal duty to support LX. I am further of the view that the court *quo* erred in finding that the first respondent's commitment to serving the minor child's best interest was only rooted in affection, emotional attachment, fondness, and care that the first respondent had towards the minor child concerned. The first respondent's legal duty to support LX was not based on his affection and fondness towards the child but on a freely assumed legal obligation to do so.

[55] Lastly, the minor child is currently in the foster care of the appellant. On 23 October 2018, the Kuilsriver Children's Court, acting in terms of section 159 of the Children's Act, extended the foster care from 7 November 2018 to 10 March 2030. In other words, the foster care order was extended for 12 years. According to the letter addressed to the maintenance officer by the first respondent's legal representatives dated 5 September 2023, the first respondent was not made aware of the foster care extension request and the subsequent order, nor did he consent to the same. In my view, the order granted by the Children's Court was legally incompetent and did not

meet the requirement of section 159.

[56] An order made by a Children's Court in terms of section 156 of the Act lapses on expiry of two years from the date the order was made. When deciding on an extension of the period of a court order made in terms of section 156, the court must take cognisance of the views of the Child, the parent and any other person who has parental responsibilities and rights in respect of the child or any alternative caregiver of the child. In the present matter, this involves the first respondent. The first respondent's view must be considered. However, the validity of the foster care order was not before us, and we therefore do not have the power to set it aside. I note this as it is vital that the appellant and the first respondent take the necessary steps to regularise the foster care arrangement in the best interests of LX.

[57] Finally, there is the question of maintenance pending the outcome of the maintenance enquiry. The first respondent has not paid maintenance since January 2023. In my view, there is no reason why he should not immediately be ordered to pay maintenance at the amount he agreed to pay, pending the outcome of that enquiry. I note that the first respondent never suggested that he was unable to pay – he simply asserted that he was not obliged to do so. There is nothing on the papers before us to indicate that he is unable to meet his commitment. If that has changed, he can raise it in the maintenance enquiry. Until then, he must pay what he has agreed to pay.

[58] Given all these considerations, I am of the view that the appeal must succeed

with no order as to costs.

ORDER

[59] In the result, the following order is granted.

59.1 The appeal is hereby upheld with no order as to costs.

59.2 The decision of the court *a quo* that the first respondent has no legal duty to support the minor child is hereby set aside and replaced with the following: The first respondent is legally liable to support the minor child – LX.

59.3 The matter is referred to the Maintenance court for a maintenance enquiry in terms of section 10 of the Maintenance Act.

59.4 Pending the outcome of the maintenance enquiry, the first respondent shall, as an interim measure, pay R5 000 per month for the maintenance of LX, by depositing it into the appellant's nominated bank account on or before the first day of each month as from 30 of June 2024. This amount shall be free from any deduction of whatsoever nature.

LEKHULENI JD

JUDGE OF THE HIGH COURT

I agree:

BISHOP AJ

ACTING JUDGE OF THE HIGH

COURT

APPEARANCES

For the Appellant: Mr Skibi

Instructed by: Legal Aid South Africa

Strategic Litigation Unit

Bloemfontein

For the Respondents: None