

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)**

CASE NO: 3326/2022

Reportable: No

Of interest to other judges: No

Revised: No

14/07/2022

In the matter between:

CINDY PRETORIUS APPLICANT

APPLICANT

[Identity Number: [....]]

AND

JOHAN MOODIE KRÜGEL N.O.

FIRST RESPONDENT

J JOACHIM HENDRIK BOTHA N.O.

SECOND RESPONDENT

**THE MASTER OF THE HIGH COURT,
MIDDELBURG**

THIRD RESPONDENT

JUDGMENT

LANGA J:

Introduction

[1] The relief sought in this urgent application is for an order that, pending the finalisation of the administration of the estate of the late Casper Jeramia Pretorius (“the deceased”) and/or the financial assistance from Kern Technologies (Pty) Ltd (“Kern”), the First and/or Second Respondents be directed to make maintenance payments towards the Applicants in the amount of R65,000.00 per month, alternatively, that such payment be made for the month of June 2022 and thereafter as and when additional funds become available in the deceased’s estate.

[2] The First and Second Respondents opposed the application which was heard and argued on 28 June 2022. Advocate L Louw appeared for the Applicant whereas Advocate D Prinsloo appeared for the First and Second Respondents hereinafter together referred to as the Respondents, unless otherwise indicated. During the hearing counsel for the Respondents, who had not filed any heads of argument, undertook to file the concise heads of argument in amplification of the oral submissions made. Counsel for the Applicant, who had filed written heads of argument, also undertook to file supplementary heads of argument after receipt of the Respondents’ written heads, which she did.

The Parties

[3] The Applicant is the wife of the deceased and she is claiming spousal maintenance for herself as well as maintenance for her minor daughter, Anke Pretorius. The First Respondent, who is cited in his representative capacity, is Johan Moodie Krugel N.O., the duly appointed executor of the estate of the late Casper Jeramia Pretorius, who passed away on 9 June 2021. The Second Respondent is the First Respondent’s duly appointed agent who is also cited in his representative capacity. The Third Respondent is the Master of the High Court, Middelburg. According to the founding affidavit the Third Respondent is cited in the application

purely for purposes of noting same and no relief is sought against the Third Respondent.

Applicants contentions on the merits

[4] The Applicant is a financial manager at Vital Security, one of the companies created by the deceased and of which was a director and shareholder. She is claiming interim maintenance of R65 000.00 per month from the deceased's estate. The Applicant states that she is currently earning R16 500.00 per month at Vital Security and that since the passing of the deceased, his son from a previous marriage, Louw Jacobus Pretorius, is now the director of the company. The company is involved in the provisioning of security in the mining sector. The deceased had also created another company namely, Kern Technologies (Pty) Ltd "Kern" which is owned by the CJ Family Trust as the sole shareholder. The First Respondent also happens to be one of the Trustees of CJ Family Trust, albeit in a different capacity. The Applicant further asserts that she was involved in the building and development of these companies with the deceased.

[5] The Applicant asserts that during her marriage with the deceased, the latter was responsible for all the household and living expenses and that she was not required to make any contribution thereto. She states further in her affidavit that she is also in the process of lodging a preferent claim against the deceased's estate and is awaiting the actuarial calculations in that regard.

[6] Concerning the maintenance claim, the Applicant states that after the death of the deceased she took out a loan from Kern since she could not maintain herself and her minor child from her salary of R16 500.00 per month. She stated that she therefore paid herself R65 000.00 per month from Kern's coffers for their maintenance and that this loan was taken with the knowledge and approval of the Trustees of Kern, including the First Respondent together with his partner Mr Frank Heinsen, who both found the arrangement to be in order until such time that the deceased's estate is in a position to maintain her and the minor child. She stated further that the arrangement with the First Respondent and his partner was that the loan from Kern would be repaid by the estate of the deceased at a later stage.

[7] She, however, stated further that despite this understanding, the loan was subsequently terminated by the Trustees on 26 May 2022 and any further financial assistance to her and the minor child from Kern was stopped. This decision was apparently followed by the questioning of the payments by Louw Jacobus Pretorius who did not agree therewith.

[8] The Applicant states that immediately after the termination of the loan payments, she approached the Second Respondent and informed him of her predicament and requested maintenance payment to be made from the deceased's estate. After an exchange of correspondences and telephone calls, the Second Respondent eventually informed her that he must first consider certain administrative costs payable such as insurance premiums etc. before any maintenance can be considered. To this end the Second Respondent requested further information which was furnished to him in order for him to determine the possibility of maintenance payment to the Applicant and Anke. She states that despite having provided the Second Respondent with the required information, no favourable response has been received from the Respondents regarding the request for the payment of the maintenance out of the estate.

[9] On 31 May 2022 a further request was addressed to the Second Respondent for a maintenance contribution subsequent to that on 01 June 2022 the Second Respondent was requested to give the Applicant information relating to the urgent administrative costs, the nature and extent thereof, if any, and also whether they have preference over her request for financial assistance. She records that she did not receive any response to that request and no decision was taken by the Respondents regarding her request for maintenance contribution from the estate. The Applicant then decided to approach court for assistance.

[10] The Applicant submitted that she has been forced in these circumstances to even use the money from the child and also used her credit and overdraft facilities in order to get by as some of the expenses are urgent. She contends therefore that she has establish that her expenses and those of the child show that R65 000.00 would constitute a reasonable maintenance contribution as she previously received the same as a loan from Kern.

The First and Second Respondents' contentions and Defences

[11] While the Respondents acknowledge the right of the Applicant and the minor child to claim maintenance from the deceased's estate, they however question the basis of the claim *in casu*. The Respondents take issue with the basis upon which the Applicant claims maintenance prior to the liquidation and distribution account having laid open for inspection, and prior to the Applicant having submitted a formal claim for maintenance against the deceased's estate.

[12] The Respondents further contend neither Section 26(1A) of the Administration of Estates Act, Act 66 of 1965 ("the Estates Act") and the common law entitles the Applicant and her child to enforce their right and claim for maintenance before the executor's account has lain open for inspection. Advocate Prinsloo for the Respondents submitted that Section 26(1A) of the Estates Act is the only provision in this statute that deals with the payment of maintenance prior to the executor's account has lain open for inspection.

[13] The Respondents further argue that the Applicant's right to maintenance against the estate as a surviving spouse is derived from Section 2(1) of the Maintenance of Surviving Spouses Act, Act 27 of 1990 ("the MSS Act"), which provides that where a marriage is dissolved by death, the surviving spouse shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs. They contend that the Applicant, as surviving spouse, therefore has no remedy outside what is provided for in the Estates Act. This argument appears to be based on the provisions of Section 2(3) (a) of the MSS Act which provides that the proof and disposal of a claim for maintenance of the surviving spouse shall be dealt with in accordance with the provisions of Estates Act.

[14] The Respondents further contend that although no claims have been lodged by creditors yet, it is however evident from the papers that the estate has creditors. In respect of the claim alleged by Kern, the Respondents contend that it is evident from her affidavit that the Applicant is also aware of the fact that Kern contends that it is a creditor of the deceased's estate and that therefore the contention by the Applicant that the deceased's estate has no creditors by virtue of the fact that no formal claims

were lodged on or before the expiry of the time provided for in the Section 29 notice does not reflect the correct state of affairs. It is further argued in this regard that although she asserts that she is also a creditor of the deceased's estate, the Applicant herself has to date also not yet lodged a claim which she says she still intends lodging according to her affidavit.

[15] The Respondents argue further that the Applicant, however, fails to inform Court when she commenced with the preparation of her claim and/or when the necessary documents were submitted to the actuary in order to prepare the actuarial calculations. They argue that the Applicant does not provide the required information in her replying affidavit either save to say that the First Respondent has at all times been aware that the Applicant is awaiting her actuarial calculation in order to submit her claim.

[16] From the affidavits by Respondents' defences can be summarised as follows:

16.1 The citation of the Second Respondent as a party constitutes a misjoinder.

16.2 They further contend that the application is not urgent, and that the Applicant

has failed to demonstrate that she cannot attain substantial redress in due course.

16.3 They also argue that the relief sought by the Applicant is not for an interim

interdict but is final in nature as the Applicant requires a final distribution to made to herself and the minor child.

16.4 They also contend that neither Section 26(1A) of the Administration of Estates

Act 66 of 1965 “hereinafter Estates Act” nor the common law entitle the Applicant to the relief applied for.

16.5 The Respondents further contend that the Applicant should have joined the

creditors of the deceased’s estate to the application.

16.6 Lastly, it is stated that the First Respondent has reason to believe the

deceased’s estate is, in fact, insolvent and in those circumstances, it is not possible to make a maintenance payment to the Applicant and minor child.

Urgency

[17] Before the hearing of the submissions on the merits the court dealt with the issue of urgency first. The First Respondent essentially averred that the matter was not urgent and that the Applicant has failed to demonstrate that she could not obtain substantial redress in due course. It is however not clear based on the papers why the First Respondent contends that the matter is not urgent.

[18] On the other hand, it is clear from the uncontested evidence that the Applicant is not in a position to maintain herself and the child and further that they are entitled to claim maintenance from the deceased’s estate. It was further conceded by the First Respondent that it could take a long time before the estate can be finalized.

[19] Having regard in particular to the plight of the child and also considering the fact that it may take a substantially long time for the estate to be finalized, I was satisfied that there is a need to deal with this matter urgently. The Applicant has persuaded the court that she cannot obtain substantial redress in due course. I accordingly ruled that the holding in abeyance of the issue of maintenance is potentially detrimental to the Applicant and the child. I accordingly found that the issue of maintenance, in particular the maintenance of the minor child, is inherently urgent and consequently proceeded with the matter on the basis that it is urgent.

[20] Having made that ruling I will now deal with the various defences raised by the Respondents. However, before I deal with the Respondents' main defence that the application should be dismissed on the basis that neither Section 26(1A) of the Administration of Estates Act 66 of 1965 "hereinafter Estates Act" nor the common law entitles the Applicant to the relief sought, I will deal with the following concomitant defences first.

Misjoinder of Second Respondent

[21] Regarding the citation of the Second Respondent as such, the Respondents argue that this is a misjoinder as the First Respondent is the *executor* of the deceased's estate and the Second Respondent is only the First Respondent's duly appointed agent. The contention by the Respondents is that as the agent of the First Respondent the Second Respondent should not have been cited as a party as he can only act in accordance with the instructions provided to him by the First Respondent as his principal. It was argued that as a result no order can and should be granted against him.

[22] The Applicant submitted that the citation of the Second Respondent is not a misjoinder considering that he is also involved in the day-to-day administration of the deceased's estate and that the Applicant referred to direct correspondence with the Second Respondent in her application. The Applicant submitted that the general rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the Court might make or if such an order cannot be sustained or carried into effect without prejudicing that party. The Applicant submitted that the Second Respondent has a substantial interest in the matter. The Applicant's counsel argued further that in the circumstances, the Applicant was not barred from joining the Second Respondent and that his joinder does not in any event render the application defective, as the Court can still make an order solely against the First Respondent only if it deems it appropriate.

[23] I am in agreement with the submission by the Applicant's counsel in this regard. The joinder of the Second Respondent does not bar the matter from proceeding nor does it bar the Applicant from obtaining the relief sought. Given that the Applicant's

case is based partly on her request made to the Second Respondent, I am of the view that it was not incorrect to cite him as a party. Even though am in agreement that no order should be made against the Second Respondent, he however remains an interested party and his citation as a party does not amount to a misjoinder. Therefore, nothing turns on this aspect and this defence ought to be dismissed.

Application not for an interim interdict

[24] I must state from the onset that nothing turns on the argument by the First Respondent that the application should not be granted as it is not for an interim interdict but for final relief. This contention ignores the fact that the word '*interim*' is capable of more than one meaning and it can mean either that the relief sought is of a temporary nature or it is sought pending the finalisation of something. I see nothing wrong with the application of the word interim in the context of this matter as it clearly means pending the finalization of the administration of the estate and the concomitant determination by the executor of the Applicant's preferent claim. Interim maintenance sounding in money is not unheard of in an interim interdict. The mere fact that the order sought is for payment of money does not mean it cannot also be for an interim interdict. The argument by the Respondents in this regard therefore also stands to fail.

Non-joinder of creditors

[25] Another contention raised by the Respondents is that the application is defective as the Applicant failed to join the creditors of the estate in this application. The Applicant responded to this contention by saying that she could not join any creditors as she was not aware of the identity of the creditors of the deceased's estate. It is common cause that no claims were lodged against the deceased's estate by any creditors so far despite Section 29 publications. The *de facto* position is that up to this point in time there are recorded creditors who can be joined as no creditor has lodged any claim. In the written heads of argument, the Respondents' counsel suggested that the Applicant was aware that Kern is a creditor of the estate and has a claim against the deceased's estate to the value of R1,600,000.00.

[26] In her supplementary heads of argument, counsel for the Applicant argued that on the facts, and despite the fact that she had taken a loan from Kern which was to be repaid by the estate, the fact remains that up to this stage Kern is not a creditor of the deceased's estate for the amount claimed. The Applicant's counsel therefore submitted that this argument too should be dismissed. I agree. While the Applicant may be aware that Kern has to repay the loan she took out, it is however nowhere stated by the Respondents that Kern's alleged indebtedness relates to the loan payments that were made to the Applicant. Instead their case is that the deceased's estate is allegedly indebted to Kern for expenses incurred by Kern in maintaining the assets of the estate and not based on the loan. The fact that the applicant may have had knowledge of the indebtedness of the estate to Kern does not assist the Respondents in this argument. The fact remains that there are no creditors so far. Likewise, the argument that the Applicant herself is an example of an unregistered creditor does not take their case any further. In my judgment this defence of non-joiner of the creditors also stands to fail and should be rejected. However, even if I was wrong on this aspect, I am nevertheless of the view that the interim claim for maintenance ought not to prevent the Applicant from proceeding with her claim.

Solvency of the Deceased's estate

[27] Another defence relied on by the Respondents is found in the contention that there is great potential for the deceased's estate to be insolvent and that as a result thereof no payment can be made to the Applicant. In this regard the First Respondent contends that he and the Second Respondent must first be satisfied about the solvency of the deceased's estate before an interim maintenance payment can be considered.

[28] In support of the argument of the alleged insolvency, the First Respondent submitted *inter alia* that the amount of R10,779,904.38 is due, owing and payable by the deceased's estate to Nkosi in terms of a suretyship agreement signed by the deceased. It was further submitted that the deceased's estate has assets in the total amount of R26,841,000.00 and liabilities in the amount of R24,222,45.70, which liabilities do not include the Applicant's claim for maintenance or claims which may be forthcoming from SARS. The First Respondent further pointed out that there are

necessary payments to be made by the deceased's estate which include an administrative fee in the amount of at least R8,500.00, the executor's fee of R939,435.00, VAT in the amount of R140,915.25 as well as estate agent commission, auctioneer's commission, insurance, rates and taxes etc. The Respondents, however, do not argue that the estate is insolvent but contend that there is a possibility that it may be insolvent.

[29] The Applicant, however, contends that she is entitled to approach the Court for the relief sought. She pointed out that that the First Respondent's defence on the merits of the claim is that the deceased's estate is believed to be insolvent and that any payment would prejudice the creditors. The Applicant stressed that the First Respondent purely relies on hypothetical scenarios to persuade the Court of a possibility of the estate becoming insolvent and that this is not consistent with the *de facto* position that the deceased's estate is indeed solvent and liquid.

[30] The Applicant argues further that, in any event, even if the Court accepts that the other liabilities in JMK4 are in fact debts payable by the deceased's estate, however, upon a proper calculation, there remains a substantial surplus in the estate for the payment of maintenance and there can therefore be no prejudice to any alleged creditors as the surplus is arrived at after taking into account the alleged creditors.

[31] The Applicant also contends further that from a proper calculation, the total value of the assets of the deceased's estate is a lot more and the total liabilities are less than what is put out by the First Respondent. She asserts therefore that the factual position is that the deceased's estate is much more solvent than what the First Respondent wants the Court to believe. The Applicant argues that the First Respondent's concerns regarding a possible insolvency are purely speculative as they are premised on the supposition that maybe in future, a creditor might lodge a claim against the estate.

[32] Regarding the alleged indebtedness of the estate to Nkosi in the amount of R10,779.904.38, the Applicant maintains that this cannot be included as a liability of the deceased's estate as the suretyship can only be considered when same is

actually called up by Nkosi and not before. The Applicant contends that the calling up of the suretyship is, however, only one of the contractual remedies open to Nkosi and, accordingly, it is unlikely that Nkosi will become a creditor of the deceased's estate. Even if the suretyship is called up by Nkosi, the argument continues, and a claim is lodged against the deceased's estate, the indebted amount in this respect is for far less than what the First Respondent contends, and only amounts to approximately R3,414,259.01.

[33] The Applicant contends further that the First Respondent's contention that the deceased's estate has assets in the total amount of R26,841,000.00 and liabilities in the amount of R24,222,45.70, which liabilities exclude the Applicant's claim for maintenance or claims forthcoming from SARS is also incorrect. She argues that this is based on incorrect calculations. The Applicant argues that, for instance, in calculating the total value of the assets of the deceased's estate, the First Respondent states that the Ballito property is worth R9,100,000.00 whereas the property is in the process of being sold for R12,000,000.00. She further contends that the First Respondent also left out the value of the deceased's shares in Vital, the immovable properties situated at 20 Cormorant Place and 4 Nicol Street and the deceased's life policies, which have been paid, to the value of R13,680,000.00. She argues therefore that these examples demonstrate that the First Respondent's calculations are incorrect and that the contention that the estate may be insolvent should therefore also be dismissed.

[34] As already stated in the preceding paragraphs, it is common cause that to date hereof, the liquidation and distribution account in respect of the deceased's estate has not laid open for inspection as envisaged in Section 35(4) of the Estates Act. It is further common cause that up to the date of the hearing of this matter no creditors have formally lodged claims against the deceased's estate despite the publication of the notice envisaged in Section 29(1) of the Estates Act. It is also evident from the evidence, as demonstrated by the Applicant, that the alleged insolvency of the deceased's estate is based not only on suppositions but the calculations of the assets and liabilities are prima facie inaccurate. In the circumstances I am therefore not persuaded that the First Respondent's evidence has established that the estate is insolvent and therefore this defence cannot avail the Respondents.

Common cause issues and issues in dispute

[35] I have already dealt with some of the issues which are common cause and those in paragraph 34 and elsewhere and will therefore not repeat them here. Regarding the issues in dispute it is, however, necessary to mention the issue not yet dealt with which is the Respondent's contention that the Applicant's entitlement to bring the claim for maintenance against the estate. The Respondents are essentially questioning the basis upon which the Applicant is claiming maintenance prior to the liquidation and distribution account having lain open for inspection, and prior to the Applicant having submitted a formal claim for maintenance against the deceased's estate. In this regard the Respondents point out that Section 26(1A) of the Estates Act is the only provision in the Estates Act dealing with the payment of maintenance prior to the executor's account having lain open for inspection and argue that the Applicant is not entitled to proceed outside of the scope of the Estates Act, in particular section 26(1A).

Legal principles and analysis

[36] Section 2(1) of the MSS Act creates a right of the surviving spouse to claim maintenance and provides as follows:

(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

On the other hand, Section 2(3) of the MSS Act deal with the exercise of this right provides as follows:

"(3) (a) The proof and disposal of a claim for maintenance of the survivor shall, subject to paragraphs (b), (c) and (d), be dealt with in accordance with the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965)."

Section 26(1A) of the Estates Act reads as follows:

“(1A) The executor may before the account has lain open for inspection in terms of section 35 (4), with the consent of the Master release such amount of money and such property out of the estate as in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household.”

[37] The Respondents contend that from a plain reading of the provisions of Section 26(1A) of the Estates Act the executor has the discretion to pay maintenance sufficient to provide for the subsistence of the deceased's family or household prior to the account having lain open for inspection. They point out further that any such payment can only be made with the consent of the Master who also has a discretion. The Respondents' argument, as I understand it, is that the Court cannot direct the First Respondent to make payment of maintenance to the Applicant as that will be outside the ambit of what is expressly provided for in the provisions of Section 26(1A) of the Estates Act.

[38] The Respondents further challenge the Applicant's assertion that the procedure provided for in Sections 29, 32, 33 and 35 of the Estates Act does not preclude a creditor from his common rights to enforce his claim against the deceased's estate. The Respondents' assertion that the Applicant, as the surviving spouse, has no remedy outside what is provided for in the Estates Act also appears to be based on the provisions of Sections 2(1) 7of the MSS Act, and in particular Section 2 (3) (a) which provides that *“The proof and disposal of a claim for maintenance of the survivor shall, subject to paragraphs (b), (c) and (d), be dealt with in accordance with the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965).”*

[39] The Respondents argue further that the right to be paid maintenance prior to the account having lain open for inspection is a specific statutory remedy provided for in Section 26(1A) of the Estates Act and rely in this contention on the decision in *Nedbank Ltd v Steyn and others* 2016 (2) SA 416 (SCA) (*Steyn*) which they contend also finds application in respect of the maintenance claim on behalf of the minor child.

[40] The Respondents are further asserting that insofar as the First Respondent and the Master allegedly failed to exercise their discretions in favour of the Applicant, their alleged failures constitute administrative actions for purposes of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA") and may be subjected to review in terms of the provisions of PAJA. The Respondents argue that for this reason the Applicant's criticism of the First Respondent's assessment of the deceased's estate and whether or not the deceased's estate may in fact, be insolvent, is immaterial.

[41] The Applicant's counsel however holds a different view on the interpretation and understanding of the principles laid down by the courts, particularly in *Steyn*. She submitted that based on case law, Section 26(1A) does not confer upon the First Respondent a discretion as contended by the First and Second Respondents. She further argued that the requirement of consent from the Master does not detract from the First Respondent's duty to alleviate family hardship before his account has lain open for inspection and that the Master's functions includes protecting the rights of minor children.

[42] In the absence of any prejudice to creditors, she argued further, the Master would be constrained to protect the interests of dependent children. Counsel argued further that it is not exceptional for a Court to exercise jurisdiction over an executor and an estate in order to compel an executor to provide maintenance as contemplated in Section 26(1A) and that this Court, as the upper guardian of minor children, should view the First Respondent's dereliction of duty, in refusing to come to the assistance of the minor child, in a serious light and come to the assistance of the minor child.

[43] The Applicant's counsel referred to the matter of *Du Toit NO v Thomas and Others* (22649/2014) [2015] ZAWCHC 80; 2016 (4) SA 571 (WCC) dealing with the review of a maintenance order granted against the executor of the deceased's estate by a maintenance Court following an application by the wife of the deceased. The executor sought to review and set aside the proceedings in the maintenance court on the ground that the maintenance court lacked the jurisdiction to make an order against the deceased's estate. The Master was not joined to the proceedings, nor

was there any indication that he objected to the orders made by the maintenance court or the payments due in terms thereof.

[44] As is the case in the current matter, when the matter was argued, the executor had not yet lodged a liquidation and distribution account with the Master. The executor's contention was that an interpretation of the Maintenance Act which makes an executor liable to maintain another person is inconsistent with the provisions of the Estates Act and contrary to the processes set out in the Estates Act for establishing rejected claims, and the normal process of paying out claims, only after the account has lain open for inspection and objections thereto have been dealt with and the consent of the Master obtained in terms of Section 26(1A) of the Act.

[45] When the proceedings commenced the estate had R1,182,260.00 available for distribution to the heirs and this amount did not take into account any maintenance claim by the minor child. However, the capacity of the deceased's estate to pay maintenance at all was in question because of a large potential claim by ABSA Bank.

[46] In *Du Toit and Others, supra*, the Court, with reference to the provisions of Section 26(1A), made the following relevant remarks at paragraphs [21] and [22]:

Para [21] *"I respectfully agree with the remark of Stretch J in NB v Maintenance Officer, Butterworth and Others 2014 (6) SA (116) ECM, to the effect that section 26(1A) was specifically designed to alleviate family hardship pending the winding up of the estate"*.

Para [22] *"The use of the word 'may' in section 26(1A) is not intended to confer the executor with a discretion. Instead, it suggests that the section is intended to enable an executor to do what he would not otherwise be authorised to do."*

[47] The Court recognized that in terms of the Estates Act, maintenance may be claimed from the executor, first, before the executor's account lies open for inspection and that this power to release money or property for the subsistence of the deceased's family is expressed in the Estate Act anterior to and independent of the sections which regulate the separate and second process of winding up the

estate. It stated further that the executor may release money if he is of the opinion that there are sufficient funds for the subsistence of the deceased's family and household.

[48] The court further stated that at the first stage, the executor carries a responsibility to alleviate hardship on the family for the period before his account lies open for inspection and the requirement of consent by the Master does not detract from the above conclusion as that such consent is meant to protect the executor from personal liability should he make a wrong distribution. It stated further that the consent by the Master could only legitimately be refused where the release of estate money or property for maintenance would prejudice creditors and that in the absence of such prejudice the Master would be constrained to protect the interests of the dependent children and consent to the payment of maintenance. The Court further pointed out that the Master's responsibility in terms of the Estates Act came before the Maintenance Act and that the framers of the Estates Act therefore took this into account when the Maintenance Act was enacted. It stated in this respect that "*It follows that the Legislature must have intended the Maintenance Act to provide a remedy against an executor who fails to carry out responsibility in terms of Section 26(1A).*"

[49] Regarding the question whether the executor could be prosecuted if the Maintenance Court was allowed to exercise jurisdiction over the executor and the estate, the court stated the following:

"The Master can consent to the release of estate money and property for maintenance purposes anterior to the winding up stage in the administration of an estate. The employment of prosecution of the executor and execution over released money and property in order to compel an executor to provide maintenance, as contemplated in section 26(1A), is therefore not exceptional."

[50] The Court dismissed the review application with costs. The appeal to the Supreme Court of Appeal was dismissed with costs *de bonis propriis* on the attorney client scale against the executor.

[51] The *Butterworth* matter, *supra*, also involved the provision of maintenance and the facts are briefly as follows: The applicant, the mother of four minor children, unsuccessfully requested the executor to pay maintenance for the children from the estate. After the maintenance officer refused to investigate the maintenance claim that she lodged with the maintenance officer in terms of Section 6(1)(a) of the Maintenance Act, the applicant approached the high court to review and set aside the decision. The Court per Stretch J stated *inter alia* that “*I have no doubt that if she [the Applicant] had made her best endeavours in terms of the Act to secure maintenance for the children and the executor did not come to her assistance, this Court as the upper guardian of minor children would have viewed such a dereliction of duties in a very serious light indeed, and would have come to the assistance of these children much quicker...*”

[52] The Applicant’s counsel argued that although these matters referred to above dealt with the provisions of the Maintenance Act and proceedings in the Maintenance Court, the decisions, however, demonstrates that it is open for the Applicant to approach the Court for assistance in circumstances where the Executor (First Respondent) fails to come to the claimant’s and the minor child’s assistance through the provisions of Section 26(1A).

[53] I agree with the submission by the Applicant’s counsel. As stated in the *Butterworth*, *supra*, an applicant is entitled to approach the High Court as the upper guardian of minor children where the executor fails to exercise his/her discretion. As in the *Butterworth* case above, the Applicant *in casu* attempted to secure maintenance for her and the minor child in terms of the Estates Act when she approached the Second Respondent who unfortunately did not come to her assistance. In such instances this court cannot as the upper guardian of minor children fold its arms. It is obliged to intervene and come to the assistance of the minor child as the upper guardian of all minor children.

[54] The Respondents specifically relied on the *Steyn* matter, *supra*, in support of their contention that the Applicant is precluded from bringing her action based on common law. It is therefore necessary to analyse this decision and to also consider the matter of *Nedbank Ltd v Samsodien NO 2012 (5) SA 642 (GSJ)* (*Samsodien*

NO), which is not only relevant, but was also referred to by the SCA in *Steyn's* matter.

[55] The issue before court in the *Steyn* matter was whether the institution of a common law action against a deceased estate is ousted by the provisions of the Estates Act which provides a procedure for the recovery of a claim from a deceased estate. Nedbank was one of the applicants in the case of *Standard Bank of South Africa Ltd and Others v Ndlovu and Others* (GP) (unreported case no 33265/13, 24-10-2013). The Gauteng Division of the High Court in Pretoria, dismissed the 17 default judgment applications, some of which were against the executors of estates, on the basis of non-compliance with the provisions of Sections 29, 32, 33 and 35 of the Estates Act. The refusal to grant the judgments meant that the plaintiffs could not claim through the action procedure and their only remedy according to the Court *a quo* was to lodge a claim with the executors in accordance with the Estates Act. The creditors therefore had to institute proceedings afresh. However, Nedbank, the appellant in *Steyn*, aggrieved by this decision, lodged an appeal to the SCA with the leave of court *a quo*.

[56] The SCA remarked that the issue before the court was in fact not novel, having been considered by other courts before, albeit under the provisions of the previous Administration of Estates Act 24 of 1913 (the 1913 Act), which the Court noted, contains substantially similar provisions as the current Estates Act. One of these decisions under the 1913 Act referred to was *Estate Stanford v Kruger* 1942 TPD 243, which held that there was nothing under the old Act to indicate that the legislature intended to deprive a creditor of their common law right to sue the deceased estate.

[57] In making two fundamental rulings, the SCA in *Steyn* cited the judgment of Watermeyer AJ in *Davids v Estate Hall* 1956 (1) SA 774 (C) in which it was decided that the 1913 Act had not created the right which it sought to enforce and therefore the remedy supplied by it could not be applied to the exclusion of all other legal remedies. The executors in *Davids*, had sought to rely on an established legal principle referred to in *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718, providing that '*where a statute creates a right or an obligation and gives a*

special and particular remedy for enforcing it, the remedy provided by the statute must be followed and it is not competent to proceed by action at common law.' The Court, (Watermeyer AJ), found that the right in question in that matter emanated from a contract and that therefore, under the common law, Davids as the creditor, was entitled to enforce it by way of action.

[58] The Supreme Court of Appeal in *Steyn* concluded that the principle in the *Madrassa Anjuman Islamia*, *supra*, found no application in the matter and accordingly held that the Estates Act does not preclude a creditor from instituting an action against the deceased estate based on common law. It further held that even if the application of the principle in *Madrassa Anjuman Islamia* were to be extended to cases where the statute does not itself create the right/obligation, then it must be clear that the legislature intended that the remedy provided by the Act must be the only remedy available, to the exclusion of all others. In this regard the court cited Tindall J in *Mhlongo v McDonald* 1940 AD 299 at 310, which articulated this principle as follows: *'If the legislature's intention be to encroach on existing rights of persons it is expected that it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt.'*

[59] The Supreme Court of Appeal in *Steyn* went on to state that the decision *a quo* was in conflict with the ratio decidendi in *Samsodien NO*. to the effect that that the procedure laid down in the Act does not preclude the plaintiff from instituting an action in common law against the estate. In *Samsodien NO* the plaintiff had instituted action against a deceased estate represented by the defendant as the executor. The bank averred that it was entitled, at common law, to enforce its claim prior to the confirmation of the executor's account. The question for determination by the Court was also whether the claim procedure provided for in Sections 29, 32, 33 and 35 of the Estates Act precludes the creditor from its common law rights to enforce its claim against the deceased estate. The Court referred to the findings in, *inter alia*, *Estate Stanford*, and *Estate Hall*, and *Benade*, *supra*, and noted that they are all in favour of allowing the creditor to avail itself of the common law enforcement procedures.

[60] Lastly, the Benade matter incidentally also involved the Executor of an estate where the applicant, Benade, did not lodge a claim in response to the executor's notice in the Government Gazette but instituted action for the recovery of his claim and obtained judgment in the Magistrate's Court on the basis of which he then sought to sequester the deceased estate. The executor contended that the Magistrate's Court judgment was invalid since Benade did follow the claims procedure laid down in the old Act which he was bound to. The court followed *Stanford Estate* and *Davids* cases, *supra*, and rejected the contention by the executor as unsustainable.

Conclusion

[61] Based on the discussed above I find that Section 26(1A) does not confer discretion on the executor but enables an executor to do what he would not otherwise be authorised to do. Furthermore, notwithstanding the requirement of consent by the master, the executor is still responsible for alleviating the family hardship even before estate account has lain for inspection. I therefore find that the Applicant is entitled to bring this claim of maintenance against the estate. The claim is not conflict with Section 26(1A) of the Estates Act and the court can therefore compel the executor to provide the maintenance.

[62] Lastly, in the light of the above, the Respondents' assertion that the alleged failure by the executor and the Master exercise their discretions in favour of the Applicant constitute administrative actions for purposes of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA") and should therefore be subjected to review in terms of the provisions of PAJA, cannot stand. The Applicant does not have to take that route as it is clear from case law that she can enforce her claims against the estate based on her common law rights.

[63] I therefore find that the common law rights of the Applicant to enforce the claims against deceased estate have not been ousted by the provisions of the Estate Act and consequently the Applicant is entitled to approach Court for relief in the circumstances. The Respondents' defence in this regard therefore also must fail. I am accordingly satisfied that a proper case has been made out and the Applicant is

entitled to interim relief sought, albeit with slightly different orders from the orders sought in the notice of motion.

Amount to be paid

[64] The outstanding issue is therefore the determination of the contribution to be paid as maintenance for the Applicant and the minor child. The Applicant stated that taking into account their comfortable standard of living she and Anke were accustomed to before the death of her husband, which was maintained even after his death through the contributions by Kern, their monthly living expenses amount to R85 000.00. She records that after deducting her salary of R16 500.00, this leaves her with a shortfall of R69 000.00 per month. She recorded their living monthly expenses as follows:

<u>Item</u>	<u>Expenditure</u>
Groceries and dining (R15 000.00)	R20 000.00
Cleaning services	R3 000.00
Toiletries	R1 500.00
Clothing (Winter and summer) (R4 500.00)	R6 500.00
School Uniforms and Related clothing	R1 500.00
Personal Care (R4000.00)	R5 000.00
School Fess and Educational Expenses	R10 000.00

Archery and Other Extra Mural Activities	R10 000.00
Medical Aid and Additional Medical Aid Expenses	R9 000.00
Insurance Policies and Annuities	R12 500.00
Entertainment and Recreational	R250.00
Pocket Money	R2 500.00
Religious Contributions	R700.00
Reading Material	R700.00
Pets	R3 000.00
Bank Charges	R200.00
TOTAL	<u>R85 850.00</u>
MINUS INCOME	<u>R16 500.00</u>
SHORTFALL	<u>R69 350.00</u>

[65] In determining the amount of maintenance it has to be remembered that the interim maintenance *in casu* is sought against a deceased estate comprising of assets and liabilities and no income. Although the Applicant states that she was receiving R65 000.00 per month from Kern as a loan with the knowledge of the Trustees and the First Respondent, this is disputed by the First Respondent. She, however, also states that she paid herself this amount. There is no evidence as to how the R65 000.00 was arrived at. Although it has to be considered, this amount is, however, not a reliable yardstick in the determination of the maintenance contribution to be made.

[66] In addition, it needs to be mentioned that apart from the groceries and the monthly maintenance for the pets, the Respondents did not raise major issues with the Applicant's listed expenses and merely noted her averments. Their defences were in the main based on what is discussed in the preceding paragraphs. However, during the course of the hearing the Applicant's counsel correctly conceded that some of the above expenses could be reduced to the amounts indicated in the brackets above, which reductions bring the total expenses to R77 850.00. Therefore, based on this figure, the total shortfall should be approximately R61 350.00.

[67] However, after considering these expenses, I have, nevertheless found justification for the reduction of some of the expenses. I am not persuaded that the suggested reduction of the groceries expense to R15 000 is reasonable for a mother and the minor child only. Even if it is accepted that their standard of living was very high, it is also necessary that, given their changed circumstances, some lifestyle adjustments have to be made pending the finalization of the estate. I am therefore of the view that R12 000.00 per month would be a reasonable amount for groceries and dining. The amount of R3 000.00 per month for the care of the pets can also be trimmed and it is therefore reduced to R1 500.00 per month. Taking into account these further reductions the total shortfall is brought down to R56 850.00 per month and I consider this amount to be a reasonable interim maintenance and intend awarding same as maintenance contribution by the estate in favour of the Applicant and minor child.

[68] Finally, as already mentioned above, although the Applicant sought an order against both the First and Second Respondent, I conclude that an order against only the First Respondent will suffice. Consequently, the order below is made only against the First Respondent as the executor of the estate.

Order

[69] In the result it is ordered that:

1. Pending the finalization of the administration of the estate of the late Casper Jeremiah Pretorius (Identity Number 700402 5013 082) and/or

financial assistance from Kern Technologies (Pty) Ltd towards the Applicant in terms of Section 45 of the Companies Act 71 of 2008 (whichever occurs first), the First Respondent is ordered to make maintenance payments in the amount of R56 850.00 per month from the deceased's estate, (Estate number 006238/2021), towards the Applicant and the minor child Anke Pretorius, effective from the date of this order;

2. The first payment to be made within 14 days of the date of this order and the subsequent payments thereafter to be made on or before the 7th day of each succeeding month;

3. The Applicant is ordered to file her claim against the estate within three (3) months of the date of this order;

4. The costs of the application to be paid out of the estate.

MBG LANGA
JUDGE OF THE HIGH COURT
MIDDELBURG LOCAL SEAT

Appearances:

For the Applicant: Advocate L. Louw, Circle Chambers Advocates,
Pretoria.

Instructed by: Bezuidenhout Incorporated, Pretoria.

For the Respondent: Advocate D Prinsloo, Pretoria

Instructed: Krugel Heinsen Incorporated, Pretoria.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 14 July 2022 at 10h00.