FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5024/2013

In the matter between:-

DAWN DELANE ELS	Applicant
and	
ANTONIE JAGGA N.O.	1st Respondent
MAGDALENA ELS	2nd Respondent
MEESTER VAN DIE HOë HOF	3rd Respondent
FALICITY DELLIEU	4th Respondent
RECONA BOEDEL & ADVIESDIENSTE (EDMS) BPK	5th Respondent

CORAM: MOCUMIE, AJP *et* VAN ZYL, J *et* JORDAAN, JJ

JUDGMENT BY: JORDAAN, J

HEARD ON: 13 APRIL 2015

DELIVERED ON: 23 APRIL 2015

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[1] This is an application for the review of the third Respondent's decision not to sustain objections lodged against the liquidation and distribution account in the estate of the late I.J.P. Els.

[2] The Applicant is the daughter and testamentary heir of the late Els (deceased). The first Respondent is the appointed executor in the deceased estate who in turn appointed the fifth Respondent as his agent is dealing with the estate. The third Respondent was previously married to the deceased but divorced from him in 1992. The third Respondent is the Master of the High Court against whose decision the application is aimed.

Background:

[3] During his lifetime the deceased was married to the second Respondent which marriage was dissolved by divorce and which order incorporated a deed of settlement entered into between the second Respondent as plaintiff and the deceased as Defendant. The settlement was signed on the 6th of November 1992 and clause 2 thereof reads as follows:

> "Verweerder betaal onderhoud aan eiseres in die bedrag van R1650.00 per maand, die eerste betaling te geskied voor of op 1 Desember 1992 en daarna voor of op die 1ste dag van iedere en elke daaropvolgende maand tot en met die Eiseres se dood of hertroue, welke gebeurtenis okal eerste mag geskied. Betreffende die voormelde onderhoud jaarliks met minstens die helfte van die netto verhoging in die

maandelikse pensioen wat Verweerder ontvang, sal verhoog. Sodanige verhoging sal inwerking tree vanaf en met ingang van die einde van die maand waarin die Verweerder se pensioen aldus verhoog word."

[4] After the death of the deceased the second Respondent lodged a claim for maintenance flowing from the aforesaid consent paper which claim was admitted by the executor in the amount of R302774.16. The L & D account also reflects some cash assets in the estate to the amount of R231676.68.

[5] The Applicant lodged a complaint against the L&D account with third Respondent, which the third Respondent refused to sustain. The complaint entailed in essence an objection to allowing the second Respondent's claim for maintenance as a claim in the estate and secondly the objection was aimed at the executor not investing the cash assets in an investment account and earning interest thereon. It was contended on behalf of the Applicant that, because of the aforesaid, the executor should be disallowed his fees as claimed in the L&D account.

[6] The Applicant therefore asked this court to set aside the third Respondent's refusal of the objections and to declare that the second Respondent's maintenance claim against the estate is unenforceable and to direct the first Respondent to amend the L&D account accordingly.

Secondly it was asked that this court should declare that the first Respondent failed to discharge his duties in a satisfactory manner and therefore to disentitle him to his fees.

[7] Although the second and fifth Respondents filed opposing papers, they did not appear in opposition when the matter was argued. Only the second Respondent, who also filed opposing affidavits, opposed the application when it was argued.

Condonation:

[8] Since the Applicant resides in Norway, the application was brought somewhat out of time and she asked for condonation in that regard. That was not opposed by any of the Respondents and it appears that the reasons for the lateness are satisfactorily explained and, in view of the importance of the issues raised, I am satisfied that condonation should be granted.

The maintenance claim:

[9] A similar agreement to pay maintenance to the divorced wife in a deed of settlement that was made an order of court on divorce was the subject of the decision in **Colly v Colly's Estate** 1946 WLD 83 in which decision the court inter alia found that a wife getting divorced surrenders a

status and give up rights of substantial value. The court then poses the question whether a woman in that position, if she had insufficient means, would be willing to "burn her boats" unless her future was secured. The court found that the plain language of the settlement agreement was that she would be maintained until her death or remarriage and that that was just what the agreement meant. The court remarked "any woman reading the agreement would be entitled to think that that is what the language used actually says and meant." The court regarded the clause as a contractual claim with the result that the legal representative in the estate of the husband would be bound to perform such contract.

[10] In the matter of **Owens v Stoffberg N.O. and another** 1946 CPD 226 a similar question arose and the court, relying on Colly's case, agreed with the former decision. The court found, if it was meant that the obligation to maintain the wife would cease at the husband's death, that could have been easily inserted in the settlement agreement.

[11] In **Hughes v The Master** 1960 (4) SA 936 (C) a similar question arose and the court, again relying on the decisions of Colly and Owens (supra) found that the said decisions were correctly decided. At p 938 H the court found that he question whether an obligation was intended to bind the estate would depend on the terms of the particular contract

and the nature of the obligation. At p 939 the court found that, where the nature of the obligation required personal performance by a party, it would terminate at such party's death. It however found that the obligation to pay a certain amount, although that of the deceased, can be performed by somebody else, for instance if the deceased arrange with an insurance company to pay the stipulated sum. The court therefore found that it was not an obligation of a personal nature. At p 904 the court inter alia found that the executor of the deceased estate is not entitled to ask for a variation, suspension or rescission of a maintenance agreement that was made an order of court.

[12] In **Copelowitz v Copelowitz And Others N.O.** 1969 (4) SA 64 (C) the consent paper explicitly bound the husband's estate to pay maintenance after his death. The divorced wife applied for an increase of maintenance against the estate. At p 71 H Van Zyl, J remarked that he always was of the opinion that the decisions in Colly's estate and Owens were wrongly decided. That appears to have been the first, and as far as I know, only dissent with the aforesaid decisions.

[13] In this matter the Applicant strongly relied on the decision of **Kruger N.O v Goss and Another** 2010 (2) SA 507 (SCA) and **Hodges v Coubrough N.O.** 1991 (2) ASA 299 (D) for the argument that maintenance orders do not outlast the lifetime of the person liable to pay. In the same vein, so it

was argued, maintenance payable in terms of a settlement agreement should be treated on the same basis and, except if specifically declared to be binding on the estate, should terminate at the death of the person liable.

[14] On behalf of the second Respondent it was argued that the aforesaid decisions of Colly, Owens and Hughes are still law and that maintenance payable in terms of a deed of settlement, distinct from an order made by court, constitutes an ordinary contractual obligation which, according to common law, binds the estate unless there are sufficient indications to the contrary.

[15] It is trite that, when a dispute exists about the terms and effect of contractual undertakings, the court has to establish the real intention of the parties. For the purpose of interpreting contractual terms or clauses, the court is at large to take into consideration all relevant circumstances. In **Bothma-Batho Transport v S Bothma & Seun Transport** 2014 (2) SA 494 (SCA) p 499 par 12 the learned judge of appeal summarised it as follows:

> "whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and

admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise". Accordingly it is no longer helpful to refer to the earlier approach."

[16] In the present matter, as in the decisions in Colly, Owens and Hughes, the agreement is silent on whether the obligation will outlast the lifetime of the person liable to pay. To that extent it at least contains a latent ambiguity.

[17] I am of opinion that an important factor in interpreting the agreement in this matter is the relative position in which the parties found themselves at the time. It can be accepted that, being involved in a divorce, the parties were not friendly with each other and rather at logger heads. The second Respondent as plaintiff claimed for divorce and the payment of maintenance. If the deceased chose not to defend the matter, the second Respondent would have obtained an order for maintenance at best for the lifetime of the deceased. (Kruger v Goss supra and Hodges v Coubrough N.O. supra). It is hard to believe that the deceased as defendant would have been willing to give her more than she would have been entitled to in an undefended divorce.

[18] As far as the nature of the obligation is concerned, it was dealt with in Hodges v Coubrough N.O. (Supra) at p 305 where in the learned judge referred to the obligation to pay maintenance as a debt sui generis, a special kind of obligation and an obligation which is not discharged or reduced by set off. It was pointed out that the right to receive maintenance cannot be ceded or alienated and the obligation to pay maintenance cannot be assigned or delegated. The court remarked that an obligation to pay maintenance has a character distinctly personal to the individual to whom it attaches which tells against its transmission to the estate of anybody who dies bearing it. It is usually payable from the income of that individual and the rate of payment is normally in relation to his income potential. The court points out that the income of most people stops when they die.

[19] To the aforesaid can be added the fact that an obligation to pay maintenance, even if contained in a settlement agreement, can be altered by an order of court and is subject to increase or decrease. The obligation to pay maintenance can form the subject of an application for contempt of court. Although the performance of the obligation can be arranged with a third party, the obligation remains personal to the person liable therefore.

[20] It would obviously be a one sided view if a clause such as the present should be viewed from the viewpoint of another woman (as in Colly's case). Concededly, it would have been easy to insert a clause to the effect that the obligation terminates at the deceased's death. It however would have been just as easy to insert an explicit clause binding the estate.

[21] The reality is that, a husband defending a claim for maintenance usually does it either on the basis of denial of an entitlement to maintenance post-divorce at all or as to the amount thereof. The duration thereof usually only comes into play when the husband or person liable to pay maintenance disputes the entitlement for longer than a certain period (the so called rehabilitative maintenance.).

[22] In my view it is inconceivable that a party who claims maintenance, would expect more than what she would have received if the matter was undefended, when it was defended and agreement reached. It would be just as inconceivable that a husband who defends the matter and then agrees to pay maintenance would be worse off than one who doesn't defend the matter. One would expect that a woman who wants to obtain maintenance for a longer period than she would have obtained in an uncontested divorce, would explicitly stipulate to that extent and the same goes for a husband who defends a matter and

intends to maintain his former wife for a longer period than she would have received if he did not defend the matter.

[23] What is more, in the instant matter the parties agreed that the amount of maintenance would be adjusted in accordance with any adjustment to the pension of the husband and in the same relative percentage. That serves as a further indication that the parties had in mind that the maintenance would be payable during the lifetime of the husband for as long as he receives a pension. That would obviously come to an end at his death.

[24] In my view it is also of relevance that the decisions in the **Colly**, **Owens** and **Hughes** matters were decided at a time when the general perception of the community was that the traditional role of women are to stay at home, have and raise children and see to the household. The perception was that it was the husband that, in general, had to earn an income for the household, the husband being the traditional breadwinner. That is obviously not the case in modern times anymore. Women are regarded in all respects as equal to men and rightly so. The intention of the parties should therefore be viewed against the modern view and background.

[25] In view of the aforesaid I am convinced that, in general, an agreement to pay maintenance until the death or remarriage of the receiving partner terminates at the death

of the paying partner, unless there are sufficient indications or express stipulations to the contrary.

Executors fees:

[26] As far as the complaint about the executors fees is concerned, it is based on the fact that the first Respondent did not invest the cash assets in an interest bearing account and secondly that the first Respondent made an advance payment towards the Second Respondent as to her claim for maintenance.

[27] As far as the last mentioned advance is concerned, it appears that the first Respondent advanced payment to the second Respondent with the consent of the third Respondent in terms of section 26(1)(A) of the Act. The first Respondent obviously regarded the second Respondent's claim as valid in law in view of the Colly, Owens and Hughes decisions. That appears to me to be bona fide and not an indication of dereliction of duties.

[28] As far as the investment of moneys are concerned, section 28(1)(a) requires an executor to open a cheque account in which to deposit all cash moneys. That is obligatory. In terms of subsections (b) and (c) he is allowed to invest moneys in a savings account. That however does not create a legal obligation. The primary obligation of an executor is to collect, retain and distribute the assets in an

estate. His primary function in not to make a profit in the interest of the estate. Of course, if large amounts of money is involved, it would be prudent to invest such money in an interest bearing account. In the present matter, the first Respondent gives a reasonable explanation for the way he dealt with the available cash in the estate and shows that, if he invested earlier, it would only make a difference of about R9000.00 in interest.

[29] In the present circumstances, I am not convinced that the first Respondents neglect is of such a nature as to disentitle him to his fees.

Costs:

[30] As far as costs are concerned it is true that the Applicant succeeds with the main leg of the application. However the Applicant's reliance on Kruger v Goss and Hodges v Coubrough N.O. (supra) was misplaced. Both of these decisions explicitly deals with maintenance orders made by the court in terms of section 7(2) of the Act and explicitly differentiates that from a maintenance order in terms of a settlement agreement.

[31] The opposition to the application was based on the law as found in the Colly, Owens and Hughes decisions. The opposition was therefore based on existing law and in the circumstances reasonable.

[32] In view of the aforesaid I am of opinion that the only appropriate order would be that the costs be borne by the estate.

Order:

[33] In conclusion I am of the view that the following orders should be granted;

1. The application for condonation is granted.
2. The third Respondent's decision in refusing the applicants objection to the admission of second Respondent's claim is reviewed and set aside.
3. It is declared that second Respondent's maintenance claim against the estate of late IJP Els, masters reference nr 983/2011, is unenforceable against the estate and the first Respondent is ordered to amend the liquidation and distribution account accordingly.
4. The relieve claimed in par 2.2 of the notice of motion is dismissed.
5. The costs of the application including the opposition thereto shall be borne by the estate.

A. F. JORDAAN, J

B.C. MOCUMIE, AJP

I concur.

C. VAN ZYL, J

On behalf of the applicant:	Adv. P.J.L. Venter Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the second respondent:	Adv. P. J. T. de Wet Instructed by: Symingtong & De Kok BLOEMFONTEIN