CIVIL CASE NO 3698/2014

DATE 19 NOVEMBER 2014

Edited 18 February 2015

In the matter between:

LUTCHMI GOUNDEN & ANOTHER APPLICANTS

and

THE MASTER OF THE HIGH COURT & OTHER RESPONDENTS

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# JUDGMENT

D PILLAY J This case turns on a principle of common law concerning vesting, enjoyment or enforcement of inheritance and the interpretation of section 15(2) and (3) of the Matrimonial Property Act 88 of 1984. The third and fourth respondents raise the preliminary procedural objection that the applicants should have proceeded in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to review the administrative decision of the Master. That was an option open to the applicants. They chose to seek a declarator in terms of section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959. Concession by counsel for the third and fourth respondents that the PAJA process is immaterial as all the relevant information is before Court enabled the matter being disposed of substantively.

The common cause facts are that the first applicant was married to Gopaulsamy Gounden (the deceased) in community of property. They had one child of the marriage, namely, the second applicant. The first applicant and the deceased separated and lived apart for about 35 years but they were never divorced. The deceased and Miriam Bibi Abdul Raman had one child, namely, Mahomed Faraad Gounden, the first and second intervening parties. The deceased died intestate. His estate is now represented by the third and fourth respondents . All the parties excluding the first respondent Master are beneficiaries in the estate of the deceased.

The first applicant's sister, Sivalutchmi Somnaidoo died. Her estate is represented by the second respondent who does not oppose this application. The first applicant is one of the intestate beneficiaries of her estate. The liquidation and distribution account in the estate of Somnaidoo has not been finalised. The accounts were lodged. The applicants and the third and fourth respondents objected to them. The Master, ruled in favour of the third and fourth respondents that:

> 'If the deceased's sister, Lutchmi Gounden, is one of the intestate heirs and she was married in community of property at the time of the deceased's death, then she <u>and</u> by virtue of her matrimonial property regime <u>also her spouse</u> (who was then still alive) – in other words their joint estate are intestate heirs.'

The first applicant renounced the benefits in the estate of Ms Somnaidoo. The Master refuses to accept the renunciation without the consent of the deceased or his executor.

The issue for determination is whether the first applicant's renunciation without the consent of the deceased or his executor is valid. The answer can be sourced from the Matrimonial Property Act. Section 15(1) provides:

> 'Subject to the provisions of subsection (2), (3) and (7), a

> spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.'

Subsection (2) lists a series of transactions that require the written consent of the other spouse. The nature of these transactions are such that they encumber or diminish the joint estate or expose it to the risk of loss. Subsection (3) requires the consent, not necessarily in writing, of the other spouse. Subsection (3)(b)(iii) states:

> 'A spouse shall not without the consent of the other spouse receive any money due or accruing to that other spouse or the joint estate by way of –
>
> (iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse.'

The third and fourth respondents and the intervening parties contend that the inheritance from estate late Somnaidoo was received or accrued to the joint estate upon the death of Somnaidoo.

Turning to the authorities, all acknowledge that inheritance in an intestate estate vests on the death of the deceased.[1] In *De Leef* the Appellate Division had to decide on the liability of shareholders for transfer duty arising from the transfer of property to two trusts prior to the Master confirming the liquidation and distribution accounts. The court distinguished between vesting *(dies cedit)* and acquisition of an enforceable right *(dies*

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[1] Corbett CJ in *Engineering & Others Estate Greenberg* 1955(3) SA 361 (A) at 366; *Estate Smith v Estate Follet* 1942 AD 364; *Commissioner for Inland Revenue v Estate Crew* 1943 AD 656/692; *Union Government (Minister of Finance) v Oliver* 1916 AD 74 at 90; *Harris v Assumed Administrator Estate McGregor* 1987(3) SA 563 (A) at 575B-E; Wille's *Principles of South African Law* 9th Ed. pp 679 and 703; Corbett, Hofmeyr & Khan *The Law of Succession in South Africa* 2nd Ed. Juta 147; *Jubelius v Griesel N.O.* 1988(2) SA 610 (C) at 624-5; *De Leef Family Trust & Another v Commissioner for Inland Revenue* 1993(3) SA 345

*venit)*. *Dies cedit* is the right of a shareholder to participate in the distribution of the company's surplus assets 'at some future time' (the Appellate Division's emphasis). *Dies venit* occurs only 'after' the Master confirms the liquidation and distribution account. The Appellate Division relied on the administration of estates to bolster its opinion as follows:

> 'Besides, according to our modern system of administration of deceased estates, the heir or legatee of an unconditional bequest obtains a vested right (*dies cedit*) to be entitled to the bequest on the death of the testator (*a morte testatoris*). Such a right is transmissible but his claim is enforceable *only at some future time* when the executor's liquidation and distribution account has been confirmed (*dies venit*). He then has an enforceable right to claim payment, delivery or transfer of his bequest (*ius in personam ad rem acquirendam)*.'[2]

The Appellate Division cites various authorities to support its opinion. It also points out that confirmation of the account actually means allowing the accounts to lie for inspection without objection.

McLaren J of this division wrote in *Eyssell & Another v Barnes N.O & Others* 2000 JOL 23413 N that:

> 'The right of election is conferred upon the persons having the most direct interest in the election, namely, in this case ... her intestate heirs.'

[2] *De Leef Family Trust* at 358 D-E.

The person having the most direct interest in this matter is the first applicant. It is not for the executors in any estate to make such election. The first applicant acquires on *dies cedit* a right to claim her inheritance. It is that right that vests in her on the death of Somnaidoo. It is not the right to the inheritance itself. The inheritance would only vest in her joint estate with the deceased after the accounts have lain for inspection without objection. The accounts have not been approved by the Master. Furthermore, creditors have still to lay their claims and, until *dies venit* occurs, the first applicant was free to dispose of her inheritance as she pleased.

Returning to subsection 3(b)(iii) of the Matrimonial Property Act, the express text is unambiguous. It is only the receipt of an inheritance that accrues to the joint estate that requires the consent, informal as it might be, of the other spouse. The joint estate is not the heir to Somnaidoo and therefore the consent of the deceased was not required. Counsel for the third and fourth respondents requested that one should read into the text of the section 3(b)(iii) words to the effect that consent of the other spouse should be required to not only receive but also ‘reject or renounce’ any inheritance, is a far-reaching intervention that cannot be entertained in the circumstances of this case. This case clearly exposes and takes into account why it is necessary to allow the heir to retain the power of acceptance or rejection of an inheritance. That is part of our common law and cannot be varied for the convenience of some parties.

In this case the parties who seek to share in the estate of Somnaidoo are the intervening parties who had no relationship to Somnaidoo. Given the prolonged estrangement between the first applicant and the deceased it is unconscionable and repugnant to permit the amendment suggested by the third and fourth respondents. As the Master has not approved the liquidation and distribution account, the inheritance has not vested or accrued to the joint estate.

Accordingly the application should be GRANTED.

The order I grant therefore is in terms of paragraphs 1 and 2. Regarding paragraph 3, the costs shall be borne by the third and fourth respondents and the intervening parties jointly and severally, the one paying the others to be absolved.

D Pillay J

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# IN THE KWAZULU-NATAL HIGH COURT, DURBAN
# REPUBLIC OF SOUTH AFRICA

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**LUTCHMI GOUNDEN & ANOTHER**

versus

**THE MASTER OF THE HIGH COURT & OTHERS**

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**BEFORE THE HONOURABLE MADAM JUSTICE D PILLAY**

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| ON BEHALF OF APPLICANTS | : | MR MOGAN |
| ON BEHALF OF RESPONDENTS AND INTERVENING PARTIES | : | MR MOGAN<br>MR D D NAIDOO<br>MR MHLONGO |

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**<u>REPORT ON RECORDING</u>**

Satisfactory.

**CONTRACTOR**
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