

IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

Case number: 53514/2012

In the matter between

16/5/2013

BEATRIX SUSANNA MAGRIETHA JEWASKEWITZ

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED ✓

16/05/2013

THE MASTER OF THE HIGH COURT, JOLEKWANE

SIGNATURE

First Respondent

UNITA VISSER N.O.

Second Respondent

ANNA MARIA ELIZABETH ERASMUS

Third Respondent

DANIEL BELZASAR ERASMUS

Fourth Respondent

ILONKA FICK

Fifth Respondent

JUDGMENT

BAM AJ

1. The issues in this application turn upon: (i) the claim of maintenance by the third respondent against the estate of the late George Daniel Erasmus, "the Deceased", to whom she was married for nine months immediately preceding his death, and, (ii) the dealing with this claim by the first respondent, "the Master".
2. The deceased died testate on 15 September 2009. The applicant and the fourth respondent, children of the deceased, were the only beneficiaries. On 10 May 2010 the second respondent was appointed executrix of the estate. The fifth respondent was an agent of the second respondent who *de facto* dealt with the affairs of the

estate, including drafting of the liquidation account and all correspondence relevant to the matter. On 13 May 2011 the fifth respondent informed the applicant of the third respondent's claim for maintenance against the estate. The applicant then directed certain enquiries to the fifth respondent. On 2 June 2011 the fifth respondent informed the applicant that the liquidation account in the said estate had been drafted and that it included the third respondent's claim for maintenance in the amount of R366 096. Fifth respondent also informed the applicant that the Master did not have the authority to reject the claim, and consequently, that the applicant should lodge a court application to have the claim reduced. The applicant was also informed that the estate would not bear the costs of any such application. On 27 July 2011 the applicant lodged an objection against the third respondent's claim with the Master. On 28 October 2011 the Master stated that he " . . . *cannot give a decision as to whether the surviving spouse qualifies to get maintenance as provided for by the Maintenance of the Surviving Spouse Act, No 27 Of 1998.*" The Master further stated that the determination of the amount was not within the area of his "expertise" and directed, in terms of the provisions of sections 35(9) and (10) of the Administration of Estates Act, No 66 of 1965, that the applicant should approach this Court for the appropriate relief.

3. Consequently the applicant applied for the following relief:
 1. That the First Respondent be directed to consider the Applicant's objection against the Liquidation and Distribution Account in the estate of the deceased George August Erasmus, estate number 3526/2010, and to make a decision as to whether the Applicant's objection is well-founded in terms of the provisions of Section 35(9) of the Administration of Estates Act, Act 66 of 1965;
 2. *Alternatively*, that the First Respondent be directed to amend the Liquidation and Distribution Account of the late George August Erasmus, estate number 3526/2010 and to dismiss and/or delete the Third Respondent's claim for maintenance against the aforesaid estate in the amount of R336 096 00;
 3. Costs against the First Respondent;
 4. Costs against the Second to Fifth Respondents only in so far as they oppose this application.

4. The application is opposed by all the respondents. Save for the Master, answering affidavits were filed by the other respondents. It must therefore be assumed that the Master abides this Court's decision.

5. On 9 May 2013, when the matter was heard, the applicant withdrew the application against the fifth respondent. The parties agreed that no costs were involved.
6. Regarding the Master's rights and duties pertaining to the consideration of, and dealing with, objections against maintenance claims of the nature in question, the specific wording of the applicable legislation has to be considered.

Section 35(9) of the Administration of Estates Act, No. 66 of 1965, reads as follows:

"If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of the opinion that such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit. (My emphasis.)"

7. The Master, in considering the objection against the maintenance claim lodged by the third respondent, therefore had several options in terms of the provisions of section 35(9). The question arising is whether the conclusion of the Master, to direct that the matter be heard by a court of law, was a competent direction in terms of the provisions of the section.
8. The Master is not a judicial officer. To expect the Master to adjudicate whether a claim for maintenance should, upon consideration of the facts and the applicable law, be allowed or rejected, where an objection had been lodged, in my view, would not be fair or in the interests of justice. In this regard I am in respectful agreement with the views expressed in *Broodryk v Die Meester 1991 4 SA 825 (C)* and *Ferreira v Die Meester 2001 3 SA 365(O)*. The learned authors of *LAWSA, Volume 31*, par 453, seems to also support this approach.
9. Accordingly, in my view, the Master was indeed entitled, in terms of the provisions of Section 35(9), alluded to above, to direct that the issue between the applicant and the third respondent, regarding the latter's claim for maintenance against the estate, be referred to a court for adjudication.

10. Regarding the applicant's alternative prayer, the applicant bears the onus to prove on a preponderance of probabilities that the third respondent's claim for maintenance is not justified and substantiated, and that the Master should accordingly be ordered to reject same.
11. In terms of the provisions of section 2 of The Maintenance of Surviving Spouses Act, No 27 of 1990, a surviving spouse is in principle lawfully entitled to a maintenance claim against the estate of the deceased spouse. It is common cause that the third respondent was married to the Deceased and that the marriage subsisted until his death. Therefore the third respondent is, in principle, in law entitled to lodge her claim for maintenance against the estate. The applicant's allegation that the third respondent undertook, before the death of the deceased, that she would have no maintenance claim against his estate is denied by the third respondent. That issue was not pursued by the applicant.
12. The remaining question is whether the third respondent is in the circumstances factually entitled to claim maintenance from the estate. This Court is clearly called upon to determine this issue before the Court would be able to decide whether the applicant should succeed with her alternative prayer or not. If the answer to this question is in the negative, the applicant should succeed with the alternative prayer. On the other hand, if the Court should find that the third respondent has in fact made out a case for maintenance, the said prayer is doomed for failure.
13. To enable the Court to determine whether the maintenance claim is factually valid, which means that the quantification thereof justifies the finding that the third respondent will be entitled to the payment of maintenance, the Court is guided by the provisions of section 3 of the aforementioned Act, No 27 of 1990. This section provides as follows:

"In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account ---

 - (a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;*
 - (b) The existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and*

(c) The standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse."

14. From the papers it appears that there is certain evidence on record pertaining to the aspects mentioned above. However, in my view, what is clearly lacking, is a proper actuarial calculation of the amount claimed by the third respondent. A proper actuarial calculation will enable the Court to determine and quantify, *inter alia*, the third respondent's needs, which calculation, in matters of this nature, is of cardinal importance. The evidence adduced by the third respondent in this regard was attacked by the applicant, but no actuarial evidence was adduced by the applicant. The attack on the third respondent's calculation is, in my opinion, understandable, in view of the fact that it lacks a proper calculation and computation. All relevant issues have to be considered. Accordingly I found it impossible to determine whether the amount claimed by the third respondent is justified and reasonable. To my mind it is indeed of importance to have comprehensive actuarial evidence before court before it can be decided whether, in the circumstances, the maintenance claim is reasonable and that it should be allowed or dismissed by the Master.

15. Although some of the aspects referred to in section 3 of Act 27 of 1990, referred to above, were to some extent addressed by the applicant in the papers, it was insufficient. Without the benefit of comprehensive expert evidence in that regard, no court will be in a position to find whether the claim of third respondent is justified and reasonable at all. Strictly speaking, it may be so that without proper evidence adduced by the applicant in that regard, the application should be dismissed. However, in that event the issue will remain unresolved and the Master will still be seized with the same problem experienced previously, namely that he would not be able not resolve the problem. Such order will therefore clearly not be in the interests of justice.

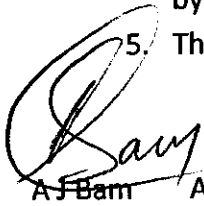
16. During argument it was debated with counsel, Ms Bezuidenhout, for the applicant, Ms Barnard, for the second respondent, and Mr Schoeman, for the third and fourth respondents, that this matter should be referred to evidence in the event of the Court finding that the issue pertaining to the calculation and computation of the third respondent's maintenance claim, cannot not be decided on the papers. Counsel agreed. In the circumstances, especially in view of the fact that it would serve no purpose to burden the Master with the same problem as before, I am of the

opinion that the matter should indeed be referred to evidence to ensure a just and expeditious decision.

17. Both Ms Barnard and Mr Schoeman argued that, in the event of the matter being referred for evidence, the applicant should be ordered to pay the wasted costs, in view of the fact that the applicant bore the *onus* and that the applicant failed to come to Court with the required expert evidence. Ms Bezuidenhout submitted that the trial court will be in a better position to adjudicate the costs issue.
18. In considering the costs issue, it is clear that the applicant is largely to be blamed for not ensuring that the calculation of the third respondent's maintenance claim could be resolved. Accordingly the applicant should therefore be ordered to pay the wasted costs of the third and fourth respondents incurred on 9 May 2013. However, as far as the second respondent is concerned, it is not clear why the second respondent deemed it necessary to oppose the application. No relief was sought against second respondent. The real conflict lies between the applicant and the third respondent. Unfortunately the issue, why the second respondent joined in the dispute, was not debated or argued by counsel. In preparing this judgement, I considered to request counsel to attend court to debate the latter issue but decided against it, in that it probably would have involved further costs to the parties. The second respondent is entitled to, and should be afforded the opportunity to address the court in that respect. Therefore I am presently not prepared to make an order that the applicant should pay the costs of the second respondent as well. This is an issue that can be debated before the trial court.
19. I intend to make the order below. However, counsel representing the parties, may, if they deem it expedient, approach this Court to apply for any appropriate amendment thereof.

20. The following order is made:

1. The issue raised pertaining to the Third Respondent's right to, in principle, claim maintenance from the estate of the late George August Erasmus, in terms of the provisions of the Maintenance of Surviving Spouses Act, No 27 of 1990, is determined in favour of the Third Respondent;
2. In terms of Rule 6(5)(g) the matter is referred to evidence in regards to the issue of computation and quantification of the Third Respondent's claim for maintenance.
3. The parties are entitled to adduce expert evidence, in accordance with the Rules of Court, regarding the computation and quantification only.
4. The Third and Fourth Respondents' costs incurred on 9 May 2013 must be paid by the Applicant.
5. The costs issue regarding the Second Respondent is reserved.



A.J. Bam

ACTING JUDGE OF THE HIGH COURT

15 May 2013