

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2019/39063

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
11 June 2024	
DATE	SIGNATURE

In the matter between:

ANDRE VAN DER MERWE N.O.

FIRST APPLICANT

MARIA ELIZABETH VAN DER MERWE

SECOND APPLICANT

and

TERISA DUCKETT BASSON N.O.

FIRST RESPONDENT

TERISA DUCKETT BASSON

SECOND RESPONDENT

**MASTER OF THE HIGH COURT,
JOHANNESBURG**

THIRD RESPONDENT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 June 2024

Summary: Claim against the joint estate for the wrongful actions of the deceased. Does the claim lie against the joint estate or the separate estate of the deceased? The provisions of section 19 of the Matrimonial Property Act considered. There is no claim that lies within the contemplation of section 19 of the Matrimonial Property Act. Held: (1) The application is dismissed. Held: (2) Applicants to pay costs on attorney and own client scale jointly and severally.

JUDGMENT

Moshoana, J:

Introduction

- [1] This is an application in terms of which the trustees of the Vanina Trust, IT389/01 (Vanina) claim three separate amounts against the joint estate of Ms Tersia Duckett Basson (the widow) and the late Jan Willem Frederik Basson (the deceased). The amounts claimed are R 333 750.00; R 51 250.00; and R 74 608.83 respectively. These three separate amounts are claimed on the basis that the trustees of Vanina paid to the deceased those amounts for the purposes of him defraying the debt owed by Vanina to the South African Receiver of Revenue (SARS). Instead of defraying the debt, the deceased appropriated the funds for his personal benefit.
- [2] The trustees, Mr Andre Van Der Merwe and Ms Maria Elizabeth Van Der Merwe chose to proceed by way of motion proceedings as they did not anticipate any *bona fide* dispute of fact. The respondents, the widow cited in her capacity as an appointed executor and in her personal capacity, had raised three legal objections (points in *limine*) which were jettisoned at the hearing of this application. That having been done, one legal question remained; namely, does the undisputed money claim lie against the joint estate of the widow and the deceased or against the separate estate of the deceased, if any existed. Accordingly, this application turns on the interpretation of section 19 of the Matrimonial Property Act.¹

¹ 88 of 1984 ("Property Act").

- [3] The trustees contend that on proper interpretation of the section, since the deceased did not have a separate property, the debts attracted by his conduct during the subsistence of the matrimony lie against the joint estate of the matrimony. On the other hand, the respondents contend that since there is no longer a joint estate, which ceased to exist after the death of the deceased, the trustees' claim cannot lie against a non-existing joint estate.

Background facts

- [4] Given the limited basis upon which this application oscillates, it is obsolete for this Court to, in this judgment, provide a full rendition of the facts of the present application. Salient background facts shall suffice, and those are: During his lifetime, the deceased was engaged by the trustees to provide them with professional services relating to bookkeeping and tax related services. At the relevant time, the deceased traded as a sole proprietor under the name and style "Basson Consult".
- [5] During 12 December 2017, Basson Consult informed the trustees that the amounts R 105 000.00 and R 110 000.00, in respect of the financial years of 2016 and 2017 respectively were owed by the trustees to SARS. The said amounts were paid into a trust account personally held by the deceased. On 22 August 2016, the deceased informed the trustees that an amount of R 121 120.56 was owing to SARS. Since the trustees had a credit of R 50 000.00 held by the deceased, an amount of R 51 250.00 was paid to defray that debt. It later turned out that the deceased failed to defray the SARS debt and had appropriated the funds for his personal benefit.
- [6] Owing to the fact that the amount due and payable to SARS was not settled, the trustees attracted penalties to the tune of R 74 608.63. On 20 August 2018, the deceased once again advised that an amount of R 67 500 was due and payable to SARS. All these amounts were paid to the deceased and no payments were transmitted to SARS. Accordingly, the total claim that the trustees had against the deceased was R 333 750.00. Sadly, on 11 July 2019, the deceased passed away having not repaid the total claim of the trustees. On 24 June 2019, prior to his demise, the trustees made enquiries with SARS and were informed that no returns nor payments were made to SARS. The trustees attempted to discuss the issue with the deceased at Basson Consult offices during the month of June

2019 to no avail. Following the demise of the deceased, Estate late J.W.F Basson was opened. The widow was appointed as the executrix of the estate. The liquidation and distribution (L&D) account was approved on 30 March 2022, with the claim of the trustees not included. The trustees did not file any objection to the L&D account.

- [7] That notwithstanding, on 06 November 2019, the trustees launched the present application claiming the amount misappropriated by the deceased from the widow in her capacity as executrix and in her personal capacity as the widow of the deceased.

Analysis

- [8] The sole legal question that arises for determination by this Court is whether an innocent spouse should carry liability for the delict committed by a deceased spouse during the subsistence of their marriage in community of property. This isolated question calls for the interpretation of section 19 of the Property Act. The section reads:

“19. Liability for delicts committed by spouses

When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable from a spouse ..., such damages or contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only in so far as he has no separate property, from the joint estate: Provided that in so far as such damages, contribution or costs have been recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be”. [Own emphasis]

- [9] On the undisputed facts of this case, the deceased, during his lifetime (a spouse at the time) attracted liability to pay damages for reason of a delict (undue enrichment) committed by him. The default position contemplated in section 19 is that those damages are recoverable from the separate property of the guilty spouse, if any exists. According to section 1 of the Property Act, a separate property is property that does not form part of the joint estate. Based on this default position, the claim of the trustees lies against the separate property of the deceased, if any existed. It appears to be common cause that as at the launch of this motion, there existed no separate property of the deceased.

- [10] That being the case, does it then mean that the claim as at the time it existed would lie against the joint estate or not? Before an attempt is made to address this important question, regard must be had to the definition of a joint estate. In terms of section 1 of the Property Act, it means the joint estate of a husband and a wife married in community of property. For purposes of answering the question arising out of this matter, the definition alone is, in my view, unhelpful. The section does not address what I consider to be a corollary yet pertinent question: namely, how is a joint estate formed? To my mind, the section only addresses the “when” part of it. Based on the section, undoubtedly, the joint estate comes into being when a husband and a wife marry in community of property.
- [11] A joint estate is comprised of all assets that a spouse acquired prior to the marriage as well as those assets accumulated during the marriage. This comprise issue agitates the question of what then *comprises* the separate estate? It may not be necessary for the purposes of this judgment to attempt an answer to this question. Could it be that section 18 is the only answer to the “comprise” question? In terms of that section delictual damages form part of the separate property. As such, in order to build up a separate property, a claim for damages is required. In the absence of any, a separate property may not germinate. It is so that assets that may be excluded from the joint estate are those emanating from an inheritance. Thus, an inheritance may form part of a separate property.
- [12] It is common cause in this matter that the widow and the deceased were married to each other in community of property. Undoubtedly, when the deceased attracted the delictual liability there was a joint estate in existence. Since it is common cause that there was no separate property of the deceased, notionally, those damages for the delictual liability were recoverable from the joint estate. A key question then arises: when does the joint estate end? Axiomatically, because the joint estate was begotten by a marriage in community of property, once that marriage ends, so ends the joint estate.
- [13] A marriage may be terminated by death or divorce.² In *Maqubela and Another v The Master of Gauteng Local Division Johannesburg and others*,³ it was

² See *EB (born S) v ER (born B and others; KG v Minister of Home Affairs and Others* [2023] ZACC 32; 2024 (2) SA 1 (CC); 2024 (1) BCLR 16 (CC).

³ 2022 (6) SA 408 (GJ) (“*Maqubela*”).

confirmed that the death of a spouse terminates a marriage in community of property and the consequences thereof. In *Pelser N.O. and Another v Lessing N.O. and Others*,⁴ the learned Prinsloo J interpreted section 19 of the Property Act in the circumstances of a divorce. Having surveyed case law and eminent authors like H.R Hahlo in his masterful work *The South African Law of Husband and Wife* 4th and 5th eds, the erudite Prinsloo J concluded thus:

"[44] Where section 19 is silent on the question of delictual debts not paid during the existence of the marriage in community of property, it seems to me that the correct approach is that a delictual liability which has not been paid during marriage in community of property has to be paid after its dissolution out of the half-share of the guilty spouse." [Own emphasis]

- [14] Observably, the learned Prinsloo J does acknowledge that section 19 is silent on the issue. Thus, the part "*has to be paid after its dissolution*" is the consequence of the mastery of interpretation. Of course, a principle exists that when interpreting a statute, a court is not permitted to cross the divide between interpretation and legislation. Legislation is the preserve of the legislature. To my mind the learned Justice, "read in" the words "*has to be paid after its dissolution*". Reading in is a judicial activist remedial measures that can be taken either to restrict or to extend the scope of a statutory provision to rescue it from invalidity on constitutional grounds.⁵ It is my view that this reading in is impermissible in the absence of any allegation of constitutional invalidity, as such, the very sacred divide, was with considerable regret crossed in my view.
- [15] It is clear to me that the learned Judge did that in order to answer the question raised in the matter, which was what happens to the claims if the joint estate no longer exists? In my view, such pertinent question must be deferred to the Legislature. When interpreting a statute, one must have regard to the language of the legislation, contextually and purposefully in order to emerge with the intention of the Legislature. In my view, if the section is contextually and purposefully interpreted, the intention of the Legislature is that once a joint estate is dissolved, it cannot be reincarnated solely to resolve what could have been. In *Maqubela* it was held, correctly in my view, that the proceeds of life policies do

⁴ [2014] ZAGPPHC 521 (25 July 2014) ("*Pelser*").

⁵ See *National Coalition For Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

not form part of the joint estate after death because after death, there is no joint estate any longer.

- [16] It is indeed so that on application of the *stare decisis* rule, *Pelser* is binding on me. However, I take a view, for reasons advanced above that it is wrong in law when it concludes, after what I consider to be an impermissible interpretative mastery, that the delictual damages are to be paid out of the half share after dissolution. Additionally, the exposed mastery seeks to elevate a half share into a joint estate. It is not. In fact, a half share is the consequence of a dissolution of a joint estate. The section refers to a joint estate in the absence of a separate property. The said joint estate has been given a technical meaning by the Legislature. That meaning ubiquitously excludes a half share in my respectful view. As an additional point, the section refers to recoverable and not liable. To my mind, recoverable simply means regained or retrieved. In other words, once a debt exists, such a debt could be regained or retrieved from the joint estate. Differently put, once the joint estate dissipates, the recoverability against it dissipates too. At that time there is no longer and husband and wife capable of remaining in a marriage in community of property.
- [17] On the other hand, liable means responsible by law or legally answerable. If recoverable meant liable, then what will be required would be only the existence of a joint estate as at the time of the debt. In other words, once a debt exists in an estate where there is no separate property, the joint estate attracts liability from that point until the joint estate may be sued posthumously. This proposition, is in my view, absurd. It seeks to keep a joint estate alive even after its demise. After its demise – division of joint estate (by death or divorce) – what shall remain does not fit the definitional requirements of the phrase joint estate.
- [18] Another way of looking at it is that the learned Judge could be suggesting that a half share then becomes a separate property. Perhaps such a situation may arise in an instance where the joint estate is dissolved by divorce. In terms of section 7 (1) of the Divorce Act,⁶ a court granting a decree of divorce may in accordance with an agreement between the parties make an order with regard to the division of the assets of the parties. It is axiomatic that once division happens, the divorced party become the sole owner of whatever assets is divided to him or

⁶ 70 of 1979.

her. Perhaps under those circumstances there may be a separate property to speak of. I say "may be" because in truth it is "sole" property as opposed to separate property. Separate to what? A separate property only exists where there is a joint estate. In the absence of a joint estate there exists a sole owned property as opposed to a separate property.

- [19] The learned Judge also considered a situation, which may be akin to the present situation, where division is completed in a divorce situation to a point that the joint estate no longer exists. The learned Judge stated that any creditors with contractual claims against the former joint estate, will therefore have to proceed in terms of section 17 (5) of the Property Act. He continued and suggested that if the surviving spouse is sued, she has to pay and thereafter exercise a recourse action. With considerable regret, I do not agree that the situation regulated by section 17 ought to be conflated with the situation regulated by section 19.
- [20] Section 17 is there for litigation by and between spouses. I take a view that where an action lies against the joint estate within the contemplation of section 19, it will be incongruent for a spouse; in seeking to protect her or his half share accept liability of a claim against the joint estate with a hope that he or she will seek refuge from section 17 (5) of the Property Act. Such is in direct conflict with the proviso of section 19 that expressly states that where a joint estate takes a knock for the misdemeanours of the guilty spouse, the innocent spouse is entitled to an adjustment in her favour upon the division of the estate. This simply means that where the joint estate's value is diminished, at the time of division, the reduction shall not fall against the half share of the innocent party, but a favourable adjustment must happen.
- [21] Liability against the joint estate does not magically arise. It happens only if: (a) the guilty party did not have a separate property and (b) a favourable adjustment must happen upon division. The first requirement operates in favour of innocent creditors, who may have no knowledge that the other spouse does not have a separate property. Imagine a situation where access to the joint estate was specifically prohibited, this will operate unfairly against innocent creditors. The second requirement operates in favour of the innocent spouse. As Hahlo felicitously puts it, it is a fundamental principle of the law of delict, as it is of criminal law that no one should be held liable for the wrongs of another, each spouse is liable for his or her own delicts and not for those of the other spouse.

- [22] Having excused the relevant legal principle exposed above, my road to Damascus culminates thus: On proper interpretation of section 19, once the joint estate ends by termination of the marriage in community of property, in this instance by death, no claim is recoverable from the joint estate for a very simple reason that the joint estate does not exist anymore. Section 39 (2) of the Constitution enjoins me, when interpreting any legislation and developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights. Although the widow is not an accused person, I do not think it is out of kilter to align with the fundamental law of delict and accord her the rights contemplated in section 35(h) of the Constitution, that is, the right to be presumed innocent. Thus, she cannot be held responsible for the wrongs of the deceased. She is presumably innocent and cannot take liability in a situation where the joint estate ceased to exist.
- [23] As I conclude, in my view, the situation contemplated in section 19 is only available during the subsistence of a marriage. Once the marriage ends, so ends the joint estate. This Court does share the melancholy of the trustees. They are, like the widow, innocent victims. They trusted the deceased, unfortunately, they hanged their hopes and aspirations on a wrong person. Their only answer to this melancholic situation was the procedure outlined in sections 29 to 35 of the Administration of Estates Act,⁷ or an action instituted against the estate of the deceased in a court with competent jurisdiction. It truly escapes the comprehension of this Court as to why the trustees failed to lodge a claim in terms of the Estates Act and/or institute an action against the deceased estate.
- [24] Looking at the other side of the coin, the deceased estate may be considered to take the stead of a separate property contemplated in the Property Act. However, this Court does not decisively conclude that it is separate property. As indicated above, separate to what, since the joint estate ended by reason of death. Nevertheless, on the available evidence, the L&D account in Estate late J.W.F Basson was approved on 30 March 2022. The present application was in 2019 already launched.
- [25] In opposing the application, the widow unequivocally stated that the trustees must lodge a claim in terms of section 29 of the Estates Act. This she did in an

⁷ 66 of 1965 ("*Estates Act*").

affidavit deposed to in December 2019. The trustees were dismissive of the advice raised as a point *in limine*. The deponent to the replying affidavit simply retorted thus: “*For obvious reasons, the point in limine is not good in law and stands to be dismissed.*” This Court is acutely aware that Mr Jacobs, counsel for the widow and the executrix informed the Court that all points *in limine* were not persisted with.

- [26] However, the advice, although raised as a point *in limine*, is strictly not a point *in limine* but a full defence to this entire application in my view. The fact that the advice was limited to the invocation of the procedure as opposed to an institution of an action is of no moment. The fact remains, the advice is to proceed against the estate of the deceased, which is the legally correct approach in whatever form it takes. The legal position is such that a court is entitled to deal with a point of law even if raised and abandoned by a party.
- [27] I now turn to the issue of costs. In her supplementary opposing papers, the widow prayed for punitive costs, particularly because the present application amounts to an abuse of the Court processes. In particular, she alleged that the route elected by the trustees is misinformed, amounts to negligence and is manifestly bad in law. I fully agree with the contention that this is misguided litigation. The trustees were under legal advice from the inception of this application. On face value, it could be argued that the trustees had hoped that their interpretation of section 19 of the Property Act would find favour from this Court. That said, it was also palpably perspicuous that “the horse had bolted”, there was no longer a joint estate in law. Prudence dictates that unless guided by sheer recklessness, proceeding with the present application needed to depart from a carefully guided premise. Perusal of the heads prepared on behalf of the trustees reveals that the trustees were alive to the factual reality that a deceased estate was involved. It is accepted in the heads that a claim lies against the deceased estate within the purview of the Estates Act, however, on reliance of *Nedbank Limited v Steyn and others*,⁸ the trustees believed they have a choice to proceed against the executrix. The choice they have, which they never lost, is to proceed against the deceased estate, either through the procedure contemplated in the Estates Act

⁸ [2015] ZASCA 30; [2015] 2 All SA 671 (SCA) (“*Steyn*”).

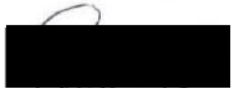
or by way of action in the High Court. They chose neither. Instead, they are barking up the wrong tree.

[28] A proper reading of *Steyn* reveals that the facts are highly distinguishable. In *casu*, the trustees unlike Nedbank in *Steyn* have no contractual claim nor delictual claim against the widow nor the joint estate. The solitary claim they have lies against the deceased estate and before me, they are not proceeding against the deceased estate, as they should, if they wished to emulate *Steyn*. Reliance was also placed on *LAWSA*,⁹ which, if correctly cited in the heads, wrongly concluded, in my considered view, that a shortfall may be claimed from the joint estate in the event of death. Simply put, this litigation forayed by the trustees fall squarely within the realm of "taking chances". Accordingly, this Court takes a view that the trustees proceeded frivolously and vexatiously. The widow should not be left impecunious because of such unguided litigation. Thus, a punitive costs order is warranted.

[29] For all the above reasons, I make the following order:

Order

1. The application is dismissed
2. The applicants are to jointly and severally pay the costs of this application on a scale of attorney and own client, the one paying absolving the other.


GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

⁹ Clark et al "Marriage" in *LAWSA* 3 ed vol 28(2) at para 88. The sub-chapter being referred is: "Proprietary Consequences of Marriage and Liability for debts of joint estate after death".

Counsel for the Applicant: Mr. F.J. Labuschagne
Instructed by: JVK Attorneys, Houghton

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Instructed by: Jonk Attorneys, Johannesburg

Date of Hearing: 20 May 2024

Date of Judgment: 11 June 2024