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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBERS: 15817/2020 & 15818/2020

REPORTABLE

In the matter between

N[...] N[...] NO

PLAINTIFF

and

YULANDE AKTASH NO

FIRST DEFENDANT

THE MASTER OF THE HIGH COURT

SECOND DEFENDANT

and

N[...] N[...]

PLAINTIFF

and

YULANDE AKTASH NO

FIRST DEFENDANT

THE MASTER OF THE HIGH COURT

SECOND DEFENDANT

JUDGMENT

Dates of hearing: 25, 26, 27 February, and 20 March 2025

Date of judgment: 22 April 2025

BHOOPCHAND AJ:

1. The Court is asked to adjudicate two cases, consolidated for trial. The First is a standalone claim, and the second has three claims, all against the estate of the late J[...] D[...] W[...] N[...]. J[...] N[...] ('J[...]') took his life together with that of his son on 8 September 2019. The specifics of the tragic event are not relevant to the adjudication of the claims instituted by N[...] N[...] ('the Plaintiff') in her representative capacity and in her personal capacity. The Plaintiff was J[...]’s wife for about eight years. She instituted a divorce action against him on 30 July 2019. The couple’s son was the late D[...] N[...] ('D[...]'), who died at the age of 7 years.

2. The claim under case number 15817/2020 concerns the ownership of R1 712 000 (one million, seven hundred and twelve thousand rand). The Plaintiff asserts that the money was gifted to D[...] as an investment in his education but was unlawfully transferred by J[...] from D[...]’s bank account. She asserts that the amount rightfully belongs to D[...]’s estate.

3. There are three claims under case number 15818/2020. The first relates to the Plaintiff’s maintenance claim against J[...]’s estate, the second to the recovery of an amount of R142 518.21 which the Plaintiff claims belonged to her and was removed fraudulently and wrongfully from her Capitec bank account (the Capitec claim’), and the third, a claim for either the return or the equivalent value of a motor vehicle the Plaintiff alleges belongs to her, of which she was forcefully dispossessed. The Plaintiff abandoned other claims she instituted in both cases.

D[...]’S INVESTMENT CLAIM

4. In case number 15817/2020, the Plaintiff acts in her representative capacity as the appointed Executor of the estate of D[...] N[...] (estate number: 017302/2019). The Defendant, Yulande Aktash ('the Defendant'), is a 48-year-old female who is the daughter of J[...] N[...]. The Defendant resides in Dubai, United Arab Emirates. The Defendant is cited in her representative capacity as the Executor of the Estate of Late J[...] N[...] (019334/2019). The Second Defendant is cited as an interested party, and no relief is sought against them. Both deceased were residents of the Western Cape.

5. The Plaintiff and J[...] were D[...]’s biological parents. He was born on 15 July 2012. He died at the age of 7 years. J[...] opened a savings account in D[...]’s name with Standard Bank on 30 May 2017, when the minor was a month and a half short of his fifth birthday. The Plaintiff accompanied J[...] to the bank when the account was opened. J[...] had transferred an amount deposited the previous day of R1 522 185.86 from a Bidvest call account in the name of D N[...] into the Standard Bank account. The Standard Bank statement reflects a balance of R1 712 437 in D[...]’s account on 9 July 2017. R1 712 000 was transferred in an inter-bank transaction on 20 July 2019 to a third-party transfer account. The Court can infer from the documentary evidence that the Standard Bank account in D[...]’s name held amounts for over two years before it was emptied, two months before D[...]’s death.

6. The Defendant admitted that J[...] had transferred the sum of R1 712 000 out of the Standard Bank account. She denied that D[...] had any right to the amount, although J[...] opened it in D[...]’s name and held nominally by the minor. Defendant admitted that the amount was transferred to one of J[...]’s accounts on 20 July 2019, and was in her possession.¹ The deceased had opened several accounts in D[...]’s name at Capitec, Nedbank and Standard Bank. The funds were deposited into these accounts for J[...]’s personal use and to pay the family’s expenses. The Plaintiff purchased two erven in Mossel Bay from funds in D[...]’s Capitec account.

7. The Plaintiff testified that J[...] controlled the account, and she did not have access to it. The amount was intended for D[...]’s education. It constituted an asset in

¹ The Court notes that the transfer of the amount occurred days after D[...]’s 7th birthday and around the time the Plaintiff left the marital home

D[...]’s estate. J[...] realised the amount from the sale of his father’s property. The Plaintiff asserted that it was common cause that J[...]’s estate held the amount of R1 712 000. The Defendant, as Executor, was liable for the return of the amount to D[...]’s estate. The Plaintiff alleged in her particulars of claim that J[...] had, without cause, unlawfully, wrongfully, and fraudulently transferred the amount out of D[...]’s account and was unjustly enriched at the expense of D[...]’s estate.

8. The Plaintiff relied upon the provisions of paragraphs 1, 1.1 and 1.5 of J[...]’s revoked will of 2 January and 2 June 2019. The testaments provided for D[...] to inherit 52% of the proceeds of the sale of J[...]’s house. Paragraph 1.5 appointed Plaintiff and Defendant in their capacities as joint guardians of D[...]. The funds allocated to D[...] were to be used if he wished to study or for other reasons; otherwise, they would be handed over to him at age 21. The testaments refer to D[...] having investments he can use for studies, or as the Plaintiff specifies in her will. The Plaintiff’s will was not placed before the Court. The interpretation of paragraph 1 of the will does not support a contention that the amount in the Standard Bank account was intended for D[...]’s education, as it refers to the proceeds of the sale of the house as the source for that purpose. The unnumbered narrative of the testaments refers to investments made on behalf of D[...].

9. In paragraph 3 of the 2 January 2019 testament, reference is made to D[...]’s investments at Capitec, Nedbank and Standard Bank. It cross-references the Plaintiff’s testament for the details of those accounts. It also refers to an investment of R1 522 000 in a Standard Bank account with the number 0[...]. Among the documents included in Plaintiff’s bundles is the manual electronic fund transfer on 30 May 2017, which reflects this account as the third-party beneficiary to which the R1 522 000 from Bidvest was transferred. It is unclear how the Standard Bank account with the number 1[...] eventuated.

10. The Defendant’s bundle of documents clarified the movement of monies between the accounts controlled by J[...]. He applied to open a Bidvest account on 28 May 2015. R1 450 000 was transferred to a Bidvest fixed deposit account from Nedbank on 25 May 2015. R1 522 185.86 was deposited into a Bidvest call account on 29 May 2017. It was referenced as a settlement of a deal. The amount was

subsequently transferred to the Standard Bank savings account with the number 0[...]. This amount was then transferred to another account. The Defendant intended to use the information in the cross-examination of the Plaintiff.

11. Under cross-examination, Plaintiff accepted that J[...] had many accounts. The Plaintiff was unaware that J[...] had applied to open a Bidvest fixed deposit account in May 2015. She knew J[...] had a Nedbank account, as she knew of a Nedbank credit card. R1 4 million was transferred to the Bidvest account from Nedbank. The Plaintiff testified that the R1 4 million was the proceeds of selling J[...]’s father’s house. J[...]’s father was not alive when D[...] was born. The Plaintiff was not aware of the Bidvest account. She testified that she was only aware of the Standard Bank account.

12. The Plaintiff confirmed that she accompanied J[...] to open D[...]’s account at Standard Bank. She had to provide her cellphone number, but could not explain why she accompanied J[...] to open the account. J[...] told her he was opening the account to cater to D[...]’s education. Although she had never seen the grandfather’s will, J[...] had indicated that the amount he deposited into D[...]’s account was an inheritance from his father. J[...] held a bank card from the Standard Bank account. The card was in D[...]’s name. Although D[...] was in school, none of the funds were used for his school fees, as J[...] had successfully applied to be exempted from paying D[...]’s school fees.

13. The Plaintiff was referred to her summons, commencing her divorce action against J[...], which was filed on 30 July 2019. The Plaintiff sought the costs of D[...]’s education from J[...] until she began working. She alleged further in her particulars that she would contribute 50% of the costs of D[...]’s studies once she obtained employment. The Plaintiff was asked why she sought the costs of D[...]’s education if she knew of a significant amount deposited into the Standard Bank account for this purpose. The plaintiff was referred to the exemption that J[...] obtained regarding the payment of school fees and asked why she sought an order that J[...] pay half the school fees. The Plaintiff was unable to provide an answer. It was put to the Plaintiff that it was improbable that she considered the funds in the Standard Bank account for educational purposes.

14. The bank transactions showed a pattern of amounts entering and leaving J[...]’s accounts. The Plaintiff denied knowledge of how J[...] conducted his financial transactions. He did not tell her about moving money between accounts. There was reference made to eight bank accounts held in J[...]’s name. The Plaintiff knew of the Nedbank, Capitec, Bidvest, and Standard Bank accounts. The Plaintiff was referred to her testimony in chief, when she stated that she knew of the Standard Bank account alone. The Plaintiff surmised that J[...] had moved the money around to benefit from the interest paid on those accounts. It was suggested to the Plaintiff that J[...] had moved the money from account to account as he considered it his money. Plaintiff insisted that J[...] had said he opened the Standard Bank account for D[...]’s studies. It was suggested further that J[...] had changed his mind about investing for D[...]. It was put to the Plaintiff that J[...] had not told her about the accounts as he considered it his money. The Plaintiff remained resolute in her contention that the amount was for D[...]’s studies. The Plaintiff was then asked whether the money was a gift to D[...] and whether J[...] had declared these in his tax returns or paid donations tax. The Plaintiff was unable to answer these questions.

15. The Defendant confronted the Plaintiff about the contents of a box of documents she had forwarded to the Plaintiff after J[...]’s death. The Defendant had found the box in the couple’s common home and on opening it, found, among others, certain documents relating to J[...]’s financial transactions and which were intended for her information. The Plaintiff denied any knowledge of the documents the Defendant had found in the marital home and had allegedly forwarded to her. The Defendant then dealt with the purchase of two Mossel Bay properties. The Plaintiff was confronted about the source of the money used to conclude the transactions. The purchase price came from D[...]’s account. It was suggested to the Plaintiff that she should pay the proceeds back into this account. The Plaintiff responded that she did not know the money for those plots came from D[...]’s account, nor did J[...] indicate that he would remove the money from D[...]’s account. She was aware of a Capitec account. She knew that if she got the money returned, the Defendant would be entitled to 50% of D[...]’s net estate in her personal capacity. It was also suggested to the Plaintiff, which she denied, that the Defendant would be entitled to half of the proceeds of the sale of the Mossel Bay plots.

16. The Plaintiff was also referred to R40 000 in a Capitec account and was asked why she was not claiming that amount. The Plaintiff had no answer but said she would let that amount go. She was asked about the logic of letting one amount go and insisting that the other be returned. The Plaintiff was unable to provide an answer. The Plaintiff was referred to the will of 2 January 2019. It was typed by a layperson and not by a bank or attorney. She was also referred to another revoked will dated 2 June 2019. In both wills, J[...] embarked upon a narrative praising and criticising the Plaintiff and referencing his two children, the Defendant and D[...].

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17. The Plaintiff argued that nothing in law prevented a minor from entering into agreements or from opening a bank account with the assistance of his parent or guardian. The Standard Bank account was opened with both parents being present.

18. The Defendant argued that holding or possessing funds deposited by a third party into one's bank account does not transfer ownership of the funds. Ownership requires both delivery of the item (in this case, the funds) and the intention of the owner (J[...]) to transfer ownership to the recipient (D[...]), as well as the recipient's intention to accept ownership. The Defendant submitted that the principle is part of the abstract property transfer system, where the transfer's validity is independent of the underlying transaction or contract.²

19. Ownership in a movable thing passes to another when the owner delivers it to another with the intention of transferring ownership to them, and the other takes the thing with the intention of acquiring ownership thereof. The validity of the transfer of ownership is independent of the validity of any underlying contract. The passing of ownership requires, among other things, a transferee being capable of acquiring ownership. Children under the age of seven cannot acquire ownership in movables and immovables without the assistance of their legal representatives.

² Commissioner of Customs and Excise v Randles Bros and Hudson Ltd 1941 AD 369, Trust Bank van Afrika Bpk v Western Bank Bpk 1978 (4) SA 281 (A)

20. The Defendant then relied upon the difference between possession and ownership, stating that possession refers to physically holding or controlling an item. In contrast, ownership is the legal right to that item. The Defendant submitted that if J[...] deposited funds into D[...]’s account without the intention of transferring ownership, such as for safekeeping, tax avoidance, or a better interest rate, D[...] did not become the owner of those funds.

21. The Defendant then argued that in terms of the principle of *commixio*, once money is deposited into a bank account, it becomes the bank's property, irrespective of who made the deposit or the circumstances surrounding it. The account holder then holds a personal right against the bank to repay that amount, but does not own the specific funds.³ When money is deposited into a trust bank account, ownership is vested with the bank, and the depositor acquires certain rights against the bank. This, it was submitted, reinforces the notion that depositing funds into another’s account does not transfer ownership to the account holder.

22. The Defendant argued that, based on all the evidence before the Court about how the deceased managed his money, it was improbable that he intended to transfer ownership of the funds to D[...] for his education. D[...] was four years old and incapable of acquiring ownership. Moreover, during his lifetime, he did not have the requisite intention to acquire funds. There was no agreement between the parties, as the Plaintiff’s evidence was that the deceased told her he had deposited the funds into D[...]’s account. Any agreement between the parties that the funds were to be so used is irrelevant given the law of transfer of ownership.

23. The Defendant submitted in response to the Plaintiff’s persistence that the funds were earmarked for D[...]’s education, the divorce summons sought orders from the Court that post-divorce, both the Plaintiff and the deceased contribute towards D[...]’s education costs, including the costs of his tertiary education. The Plaintiff could not explain why she sought these orders, given that D[...] allegedly had access to funds over R1.5 million in the Standard Bank account. Her reply that she did not know was unsatisfactory, more so as she claimed to have told her attorney

³ Lurie v Finkelstein and Others [2016] ZAGPPHC 417

about the existence of the funds. J[...]’s revoked will specifically provided for D[...] to receive 52% of the proceeds of the sale of the marital home, which was earmarked for D[...]’s education if he were inclined to pursue further studies. The will was executed before the funds were transferred from the account held in D[...]’s name. A similar provision was included in the revoked will of June 2019 and was executed before the funds were transferred from the account held in D[...]’s name. Given the estate’s net value, it was improbable that J[...] would have transferred ownership of R1.7 million to D[...] and that D[...] would inherit 52% of the sale proceeds of his property to fund his education.

24. The Defendant submitted that the deceased never intended to transfer ownership of any funds he deposited into any accounts he opened in D[...]’s name. Nine different bank accounts were opened in J[...]’s name during the short tenure of D[...]’s life. J[...] always had total and unfettered control over those accounts, and Plaintiff was unaware of some. The funds in those accounts were deposited by J[...] and belonged to him. From time to time, J[...] utilised funds in D[...]’s accounts, withdrew cash, and paid money into the account to be a conduit for payments out of the account. These transactions included purchases at Checkers, a deposit of R600,000 to fund the purchase of land in Mossel Bay, a withdrawal of R40 000 and regular deposits varying between R3500 and R3800 over six months. The deceased never advised the Plaintiff about most of the accounts or any of the transactions within the accounts. There was no evidence that D[...] ever transacted from any of the accounts, was even aware of the existence of the accounts or that funds were used for D[...]’s maintenance, education, or the purchase of luxury items or his school fees.

25. Defendant submitted that Plaintiff’s inconsistent attitude to D[...]’s accounts indicates that she could never have considered, her view in any event being irrelevant, that the funds in a bank account held in D[...]’s name were his property and thus claimable from the Defendant. Defendant submitted that Plaintiff was aware that the two erven in Mossel Bay, which were registered in her name, were purchased with funds from a Capitec account held in D[...]’s name.

26. The Defendant provided the Plaintiff with the documents, which reflected that the payments for the two erven in Mossel Bay were made from D[...]’s account. Both documents clearly state that D[...] N[...] made a payment to the Plaintiff’s account. Defendant testified that she provided the Plaintiff with a brown envelope, which had been left for her by J[...], which contained a letter from J[...] and the two Capitec bank letters. The plaintiff denied receiving the letters. Defendant's recall of this was not challenged in cross-examination. The defendant submits that her evidence is to be preferred.

27. Soon after D[...] and J[...]’s death, Plaintiff was aware that the land she owned was bought with what should have been considered D[...]’s money. Plaintiff proceeded to sell the two plots and used the sale proceeds to loan an amount to her brother, bought a car, paid for some courses, and bought furniture. The Defendant submitted that the Plaintiff’s views about accounts in D[...]’s name are inconsistent. The Plaintiff expediently held a view about one account but not in respect of the other accounts held by D[...]. She had not claimed payment of the R40 000 the deceased withdrew from the Capitec account held in D[...]’s name.

28. The Defendant submitted that the Plaintiff had not made a case for the return or repayment of R1.712 million from J[...]’s estate. The Defendant sought that the claim be dismissed.

29. The Court is required to make a factual determination about the ownership of the Standard Bank funds and whether the R1 712 000 that was transferred from it by J[...] was unlawful. The Plaintiff provided the necessary bank statements that reflected the account in D[...]’s name. The account was opened in July 2017 and remained extant for two years before it was emptied. The Court has noticed that R1 712 000 was transferred contemporaneously when the Plaintiff left the marital home. J[...]’s two testaments refer to the investment of R1 522 000 in the Standard Bank account for D[...]’s benefit. The funds were set aside for a specific purpose, i.e., an investment for D[...]. The Court accepts the testimony that this fund grew to the amount transferred from it.

30. The Plaintiff remained resolute about two aspects of this claim: that the account was opened for D[...] and that the money belonged to his estate. The Plaintiff testified that the amount in the account was intended for D[...]’s education. This aspect of her testimony is not corroborated by the will's wording, which catered for D[...]’s education from the proceeds of the sale of the marital home. It does not change Johaan's written intention, though, that the account held an investment for D[...].

31. The Defendant did not seriously dispute the ownership of these funds, raising peripheral arguments about it. The Defendant pointed to a pattern of financial transactions suggesting these were nominal accounts used by J[...] for household expenses, growth and tax purposes. The Defendant sought to suggest that ownership had not passed to D[...] as he was a minor and required a parent or guardian to accept the transfer of ownership. The Defendant could have only meant that the Plaintiff had not accepted the transfer on D[...]’s behalf, as she had no control over these accounts. The Defendant lost sight of the fact that J[...] would have accepted the account transfer on D[...]’s behalf. Defendant could not provide any countervailing evidence to support the propositions put to the Plaintiff that the account was used for his purpose, nor could she dispute the stated intention of the account, i.e., that it was intended as an investment for D[...].

32. The purchase, sale, and proceeds of the Mossel Bay properties and whether the Defendant in her personal capacity is entitled to those proceeds have no bearing on this claim. No counterclaim addresses this relief, and therefore, the Court ignores all propositions put to the Plaintiff about those properties. To the extent that the Defendant relies upon the use of D[...]’s Capitec account to purchase the Mossel Bay properties to illustrate that J[...] used the accounts for his purposes, the response is that it does not displace the Plaintiff’s case that D[...] was the intended beneficiary of the account that is the subject of this claim.

33. The Court is cognisant of the content of the two revoked testaments, which refer to D[...] having an investment in a Standard Bank account number 0[...] of R1 522 000. The evidence before the Court was that this amount grew to the amount claimed by the Plaintiff in her representative capacity. While J[...]’s will made

provisions for D[...]’s education and other needs from the sale of the marital home, it is clear that the investment in the Standard Bank account was made for D[...]’s benefit and correctly belonged to D[...]’s estate. The Court is satisfied that the Defendant should pay this amount to D[...]’s estate and shall make the necessary order that follows.

THE MAINTENANCE CLAIM

34. The Plaintiff’s claim for maintenance is the first of the three claims under case number 15818/2020. The Plaintiff claims loss of support from the First Defendant in her capacity as Executor of J[...]’s estate under the Maintenance of Surviving Spouses Act 27 of 1990. The Act allows the Plaintiff to claim her reasonable maintenance needs until her death or remarriage to the extent that she cannot do so from her own means and earnings. The Act defines ‘own means’ to include any money, property, or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse. The definition casts a wide net on what must be included in the basket of means available to the surviving spouse’s benefit, except for amounts gratuitously made.⁴

35. Section 3 of the Act provides guidelines for assessing the reasonable maintenance needs of the survivor and identifies three factors in addition to any others that should be considered. The three factors are the amount in the estate of the deceased spouse available for distribution to heirs and legatees, the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage, and the standard of living of the survivor during the subsistence of the marriage and her age at the death of the deceased spouse.

36. Plaintiff and J[...] were married on 28 May 2011 out of community of property and remained married until J[...] died. The Plaintiff was born on 29 January 1981. She married J[...] on 28 May 2011. Johan was 60 years old, and she was 30 when

⁴ *Oshry NO and Another v Feldman* (401/09) [2010] ZASCA 95; 2010 (6) SA 19 (SCA) ; [2011] 1 All SA 124 (SCA) (19 August 2010) at paras 33-36, *Feldman v Oshry NO and Another* (6752/20007) [2009] ZAKZDHC 8; 2009 (6) SA 454 (KZD) (14 April 2009), at paras 16-17

they married. The marriage endured for 8 years and three months. D[...] was born during the marriage. The Plaintiff was 38 years and eight months old at the time of J[...]’s death. J[...] was the household's sole breadwinner and was responsible for the Plaintiff’s maintenance. Apart from generating a small income from selling beauty products, the proceeds of which were deposited into J[...]’s account, the Plaintiff depended entirely on him for her financial needs. The common household was a large three-bedroomed home with a kitchen, a living area and two garages in Panorama.

37. The Plaintiff left the marital home with her son on 19 July 2019. J[...] thereafter contributed R1000 per week towards the son’s maintenance, but nothing towards her needs. In his final will, J[...] excluded the Plaintiff from receiving any benefit from his estate, although he had made provisions for her in his revoked wills. The evidence revealed that her standard of living during the marriage was restrained by J[...]’s overarching control of the household finances, meaning that she could not have been accustomed to an extravagant lifestyle.

38. It is common cause that approximately R4 200 000 is available in J[...]’s estate for distribution. The Plaintiff claimed she has no existing means as she had exhausted what she had. The Plaintiff has claimed past maintenance from the date of J[...]’s death to the date of judgment.⁵ The Defendant sought to show that the Plaintiff had disposed of two properties in Mossel Bay registered in her name for R656 000. The Plaintiff purchased a vehicle even though she had access to another car, which is the subject of a further claim in this case. She loaned R200 000 from the property sales to her brother, who had settled the amount owed to her before the trial. The Plaintiff had to replace the car she bought because of mechanical problems. She was initially unemployed after her separation from J[...], but secured income from a home-based beauty business and then, from her current employment since 2021.

39. The Plaintiff earns an income of R7200 from her formal employment and an additional R800 per month from selling a line of beauty products. The evidence

⁵ The Plaintiff-appointed Actuary calculated past maintenance from the date of Johann’s death to the date of the calculation on 1 September 2019

confirmed that she receives a thirteenth cheque equal to a month's salary from her employer. Thus, her monthly income would be R8600. Her job entails driving children to an aftercare facility and performing general duties. She has no medical ailments.

40. The Plaintiff claims R18 995 monthly maintenance from J[...]’s estate. The amount was compiled in a schedule and comprises R7300 for rent, R5000 for groceries, R1000 for electricity, R292 for her cellphone, R340 for vehicle insurance, R1000 for clothing, R500 for vehicle maintenance and servicing, R1000 for fuel, R40 for motor vehicle licence, R1000 for medical expenses, R400 for audiovisual streaming services, R200 for replacement of household items, R200 for gifts, R25 for television licence, R300 for D[...]’s pet, and R400 for entertainment per month. An actuarial calculation performed on 9 July 2020, based on maintenance of R16 400 per month and no income, yielded R4 679 200 in maintenance needs over her lifetime. Payment of that amount would have exhausted the total value of J[...]’s estate.

41. The Plaintiff’s partner contributes R9100 per month for the rent, electricity, streaming services, and entertainment. If these amounts were deducted from the Plaintiff’s itemised expenses, she would require R9895 monthly to maintain herself, and that has been the case for some time. The plaintiff’s stated need of R18,995 is inconsistent with her actual needs.

42. The Plaintiff argued that a surviving spouse in a romantic relationship with a new partner in a joint household who shares expenses would not automatically be entitled to support from the partner.⁶ The submission finds support in the Act, allowing maintenance needs until remarriage. Plaintiff’s evidence in chief was that a person shares her flat and pays rent. The identity of that person emerged on further questioning. He was her new partner. Plaintiff’s partner is paying for accommodation, utilities, and amenities that he would have paid for if he had lived alone. Furthermore, the Plaintiff testified that the relationship was serious, meaning she would obtain this contribution for some time. The relationship between the

⁶ *EW v VH* 2023 (4) SA 123 (WCC)

Plaintiff and her partner is not one where a question of reciprocal support or maintenance arises. The contributions made by the Plaintiff's partner are distinguishable from the financial support the Plaintiff received from her sons in the *Oshry* matter.⁷

43. To the extent that Plaintiff's Counsel relies on *EW v VH* as authority for the proposition that a surviving spouse in a romantic relationship would not automatically be entitled to support from the partner, he is incorrect, as that issue was not before the Court. The Court was asked to develop the common law, which it concluded did not need to be developed. The question before the full bench of this division was whether life partners could claim maintenance from one another following the termination of their partnership. The majority of the full bench declined the invitation to develop the common law as the application was not properly motivated and the relief sought was unclear. The majority declined to consider interim relief for maintenance as it was ancillary to a finding in her favour on final declaratory relief.

44. Under cross-examination, the Plaintiff agreed that she claimed R4000 monthly for six months when she instituted divorce proceedings against J[...] on 30 July 2019. The Plaintiff underwent rigorous cross-examination about her capacity to earn income in addition to her current employment and additional earnings from selling a line of beauty products. She was also interrogated about her reasons for leaving the common household before J[...]’s death and her long-term romantic relationship with her current partner, who contributes to her monthly expenses. The transcript will not capture Plaintiff’s bewilderment or periods of silence as she struggled to comprehend the propositions put to her, even though she had the benefit of testifying in her home language at the Court's behest. The overall impression of the Plaintiff is that she was truthful and made the concessions sought from her fairly, even though they, at times, were to the detriment of her formulated case.

45. The Defendant managed to elicit from the Plaintiff that her monthly living expenses would at best amount to R10 292. These concessions were obtained after factoring in the contributions made by the Plaintiff's current partner. The Plaintiff

⁷ *Oshry* supra at para 12

conceded that she required living expenses of R9 592 per month. The Defendant generously added the full item for medical expenses of R1000 per month and obtained the further concession reflected in the first sentence of this paragraph. There was no agreement between the Plaintiff and her partner that she would have to repay him any shortfall, and he did not have any legal obligation to maintain her. The Defendant accordingly argued that the Plaintiff's shortfall between her expenses and income is R1 709.

46. The Defendant pursued the issue of the Plaintiff's earning capacity, suggesting that she could do babysitting and beauty therapy sessions to supplement her income to meet her current shortfall. The Plaintiff began work at midday and did not work weekends. Plaintiff resisted these propositions, protesting that she needed time for herself. The Defendant argued that if the Plaintiff supplemented her income by babysitting over weekends or doing a few beauty treatments, she could meet her current shortfall. The Defendant submitted that the Plaintiff had not established any need for rehabilitative or lifelong maintenance. If the Court found otherwise, then the Defendant argued that the actuarial claim should be based on a need of R1 709 per month.

47. The Plaintiff submitted a report from a consulting psychologist and human resources consultant. The expert considered the Plaintiff's interest in health and beauty, personal grooming, and fashion, but concluded that the Plaintiff was not particularly risk-embracing as an entrepreneur. The Plaintiff's sojourn into a home-based beauty-oriented business had a short-lived tenure. The expert considered the psychological impact of D[...]s death on the Plaintiff. Although the Plaintiff exhibited no psychological sequelae, she remained vulnerable to future ailments that could impact her working capacity. The Plaintiff functions best in a support role without supervisory or managerial responsibilities, but is sufficiently independent to pursue self-employment.

48. The Plaintiff completed dental technology and nail care courses, including manicures, pedicures, and acrylic nails. The expert suggested that the Plaintiff may benefit from a course in early childhood development to complement her current employment. The Plaintiff has a reliable work ethic and is responsible. She is well-

suited to her current employment or could secure work in the retail sector or as an *au pair*. The Plaintiff would need to enrol for further courses to enable her to pursue a competitive career as a beauty therapist. The expert concluded that the Plaintiff's earning capacity ranges between R7000 and R8500 per month.

49. The Court has heeded the concessions elicited from the Plaintiff during cross-examination. The Court is not persuaded that it should consider any potential earnings from work beyond what the Plaintiff currently does. The Plaintiff's evidence was that her brother had repaid the loan she had forwarded to him. The partner's contribution to the Plaintiff's living expenses is a misnomer. They are sharing the living expenses incurred by both of them. It would be unfair and beyond the provisions of the Act for J[...]’s estate to shoulder expenses that the Plaintiff shares with her partner. The Court has considered the proceeds Plaintiff earned from selling the two Mossel Bay properties, which have tided her over since her separation from J[...]. The Court accepts that Plaintiff has no means beyond her salary and income from selling beauty products.

50. As the Plaintiff had access to the proceeds from the sale of her properties in Mossel Bay as well as a small amount in her bank, the Court finds that it would be just and equitable not to make any award for past maintenance needs as the Plaintiff would have had access to sufficient means and an income subsequently to tide her over the period from J[...]’s death to the date of this judgment. The Plaintiff's earnings are insufficient to support her future needs, and she requires maintenance from J[...]’s estate.

51. The Court exercises a discretion in determining the amount of maintenance granted to a surviving spouse under the Act. It has to balance the Plaintiff's maintenance needs with the estate's ability to afford them without unfairly prejudicing its heirs. The Court is cognisant of the Defendant's position. She has a conflict of interest as she is the largest beneficiary of J[...]’s estate, and it would not be unexpected of her to limit the Plaintiff's claim against the estate.

52. Plaintiff's Counsel argued that the Plaintiff was entitled to lifelong maintenance support based on J[...]’s rationing and control of her financial needs

during their marriage. He relied on unspecified content of the expert's report to support this notion. The relationship between restrictive behaviour and the need for lifelong maintenance is not mutually exclusive. It is unclear how the two are related in this case. The estate has realised an insubstantial amount for a person in the position of J[...]. With the benefit of hindsight, his control over his finances may have been rational; there simply wasn't enough to splurge. The Defendant's Counsel argued that Plaintiff had failed to establish that she needed maintenance for any period, but if the Court accepted that she had prevailed, then her maintenance claim should be based on a need of only R1 709 per month. The Plaintiff persisted that her needs were R18 995 per month less her monthly income.

53. Any amount awarded to the Plaintiff would depend upon the capacity or means of J[...]'s estate to pay. The estate will be diminished by R1 700 000 once the claim under case number 15817 is settled. The arithmetic indicates that the estate could afford the Plaintiff's reasonable maintenance needs, provided that it is not computed based on the original actuarial report, which was based on the Plaintiff earning no income. The Plaintiff has since increased her living expenses by about R2000 per month. Still, her income will materially offset the lump-sum actuarial calculation of maintenance needs.

54. The evidence led and its scrutiny under cross-examination necessitated a new actuarial calculation to be obtained. The Court raised the issue of whether an actuarial calculation could be avoided and whether the Court could award a lump sum, as is done in damages claims for loss of earnings. The assessment is unpredictable as the Court forecasts the future on the strength of many variables. The Court can either make a fair and reasonable estimate or resort to actuarial calculations based on assumptions arising from the evidence.⁸ Plaintiff's Counsel submitted that a lump sum award is permissible and referred the Court to the *Oshry* matter.

55. In *Oshry*, the issue was whether the Act permitted maintenance to be paid in a lump sum instead of the usual method of periodic payments. The Supreme Court

⁸ *Southern Insurance Association v Baily* NO 1984 (1) SA 98 (A)

of Appeal (SCA) examined the provisions of the Act and concluded that the Act permitted lump sum payments as opposed to periodic payments. It is unclear whether the Court envisaged an assessment based on a 'blind plunge into the dark', as is the basis of the lump sum awards made in damages cases. A holistic view of the judgment would suggest that it did not. The SCA considered the evolution of the Maintenance Act from its 1963 incarnation to the 1998 version. In the 1963 Act, maintenance was defined as a periodic payment. The 1998 Act defined a maintenance order as "any order for the periodical payment of sums of money towards the maintenance of any person..." The 1998 Maintenance Act does not refer to lump sum payments, but it does not exclude them.⁹

56. The arguments against lump sum payments were that policy considerations militated against granting it. A single lump sum payment would expose the estate to risk. The accuracy of the assumptions made in calculating a lump sum could not be assured. The claimant for maintenance could die earlier than expected or predicted by life expectancy tables, or could remarry sooner than expected. The estate would be prejudiced by granting maintenance in a lump sum. Conversely, a surviving spouse might outlive her life expectancy, leaving a claimant who accepted a lump sum award destitute. An order for periodical maintenance payments over a long or indefinite period would cause difficulties in administering and finalising a deceased estate. This would cause delay and uncertainty concerning how much of the estate's assets had to be retained to discharge future maintenance obligations. The legislature enacted s 2(3)(d) of the Act, providing a negotiated settlement. The SCA in *Oshry* referred to loss of support claims in delictual matters where total accuracy can never be assured. Courts do the best they can. This does not mean that a court assessing a claim for maintenance should not take these factors into account in the totality of the presented circumstances in deciding an appropriate award

57. The SCA reversed the Court *a quo*'s refusal to order the costs of the Actuary, meaning that it acknowledged that an actuarial calculation based on prescribed assumptions would be the basis to determine the lump sum payment. This Court raised the issue of a lump sum payment that obviates the need for an actuarial

⁹ *Oshry* supra at para 53-54

calculation in the sense that a Judge gets a feel for the amount that should be awarded from the evidence placed before it. The amount the Court intends to award is not made arbitrarily but is judicially defensible. There is a wide chasm between the needs the Plaintiff identified and what the Defendant elicited fairly under cross-examination. Suppose the Court accepts the Defendant's submission that the Plaintiff's net needs amount to R1 709 per month after her income of R8 583 per month is deducted. An arithmetical calculation would mean that the Plaintiff would receive R20 508 per year or R205 080 over ten years. The Defendant elicited from the Plaintiff that she had premised her divorce action against J[...] for the payment of R4000 per month, limited to six months, and that under cross-examination, she conceded, or more properly volunteered, that she required assistance for ten years.

58. The evidence clearly shows that the Plaintiff, at 43, is relatively young, has a strong work ethic, and began earning an income soon after J[...]’s death. She is in a serious long-term relationship and would probably not require additional support from J[...]’s estate over her lifetime. The Defendant has made a compelling case for the Court to accept the calculation of the Plaintiff’s needs based on the concessions elicited under cross-examination. Yet, the Court is not satisfied that the amount relied upon by the Defendant would be fair and just to make up the shortfall experienced by the Plaintiff.

59. In *Oshry*, the SCA emphasised the need to apply the norms and values of the Constitution to the relevant provisions of the Act and to respect the dignity of the vulnerable. Despite offering to look after the Plaintiff after J[...]’s death, the Defendant has steadfastly resisted her claim for maintenance. There is no provision for the Plaintiff’s maintenance in the final liquidation and distribution account. Yet, the Defendant persisted with her promise to assist the Plaintiff in her testimony. The Plaintiff instituted this claim in October 2020 and has had to realise her assets to survive financially.

60. The Actuary has not identified the Plaintiff’s life expectancy, and this aspect was not addressed in evidence. The Plaintiff is 44 years old. According to Stats SA, the life expectancy for South African females is 71.3 years, meaning that the Plaintiff would have needed maintenance for approximately another 27 years if the Court

were inclined to grant her lifetime maintenance support. The Court has already indicated that the evidence suggests the Plaintiff will not require assistance with her maintenance needs for the rest of her life. Other variables have to be considered, e.g., the probability of remarriage, the psychological vulnerability, the shared expenses, the Plaintiff's entrepreneurial pursuits, and the scope for her to improve her earning capacity. It would be difficult to integrate these factors into a single contingency percentage. The Plaintiff contends that the normal 15% contingency deduction applies. If the Court uses the figure elicited by the Defendant, the Plaintiff will face a situation where the inflationary adjustments to her earnings would quickly outstrip her maintenance needs. The Court would have to add further percentage points to adjust for the variables identified in this paragraph, reducing any amount she would be entitled to. Then, there is the contingency for remarriage. How does a Court apply a remarriage contingency amounting to about 13% in the Plaintiff's case, when it could be argued that the chance of remarriage is 100%?

61. This type of case calls for a lump-sum award, like that made in damages claims. Once the law recognises that a lump sum award is competent, then it should not matter whether the amount is actuarially calculated or estimated, provided that the latter option is motivated. The Court accepts that the Plaintiff requires financial support for her living expenses. The law requires the Executor of J[...]’s estate to provide her with reasonable support. The Plaintiff has displayed remarkable resilience and moved on from her marriage, which ended in tragedy. Her situation has improved since 2019, and her prospects continue improving. The Court has to focus on the Plaintiff's reasonable needs. The snapshot of her needs is that her partner covers half or more. The relationship is serious. The difficulties of applying contingencies to a situation like this have been covered.

62. The Court has considered Plaintiff's needs schedule and the concessions obtained under cross-examination. The Court does not have to reconsider each item of living expense, the duration for which the Plaintiff requires support, or her chances of remarriage. The Court has opted to take a holistic view and award an amount it considers fair and equitable to the Plaintiff, J[...]’s estate, and the designated heirs. The net needs of the Plaintiff are not substantial, and the estate is not complex enough to justify another actuarial calculation. An actuarial calculation applying

contingencies for the normal vicissitudes of life and remarriage unnecessarily complicates the matter.

63. The Court has decided to award the Plaintiff a sum of R600 000, after considering the issues identified in the preceding paragraphs.

THE PLAINTIFF'S CAPITTEC CLAIM

64. The Plaintiff alleged that on or about 30 January 2018, J[...] fraudulently and wrongfully transferred the sum of R142 518.21 from her Capitec bank account into his account. The transaction was not done with the Plaintiff's knowledge, consent, or authority. J[...] controlled this account. He informed her that he withdrew the amount as there were rumours that the bank would close. He promised to put the money back. He did not seek her permission to withdraw the money. This was money that her brother had borrowed from J[...]. This was her money. The assertion that an amount J[...] lent to the Plaintiff's brother, who repaid it, could be the Plaintiff's money was not elaborated upon and does not make sense. The Plaintiff testified that Johann had opened this account in 2013 for the Plaintiff and D[...] to use.

65. The Defendant reminded the Plaintiff that she was married out of community of property to J[...]. In the negotiations between the parties' legal representatives after they separated, there was no reference to the Capitec account or the amount of R142 518.21. The Plaintiff was also asked why she did not claim the amount in her divorce action, given that she was in financial difficulties after she had moved out of the marital home. The Plaintiff was unable to answer these questions. She was examined on the amount that one of J[...]’s friends had paid into this account. The friend had borrowed a sum from J[...]. The Plaintiff had heard J[...] talk about this loan repayment when he spoke about his finances at the dinner table. The Defendant suggested to the Plaintiff that this was yet another account that J[...] used to perform his financial transactions. The Plaintiff insisted that the account was hers as it was in her name.

66. The Plaintiff testified that she had accompanied J[...] to the bank when he withdrew the money. The Plaintiff testified that J[...] had no right to withdraw the

money. She discovered J[...] had withdrawn the money when she received the bank statement. It was put to the Plaintiff that the withdrawal could never have been unlawful, as J[...] controlled the account. The Plaintiff knew that J[...] intended to withdraw the amount from her account. Under cross-examination, it emerged that the Plaintiff accompanied J[...] to the bank when the withdrawal occurred. The Plaintiff has failed to prove that the amount of R142 518.21 was withdrawn unlawfully or fraudulently.

67. Plaintiff's Counsel argued that the Plaintiff's testimony that the funds were hers went uncontested. The Defendant submitted that the Court should scrutinise the Plaintiff's evidence carefully. It had to be sufficiently cogent to satisfy the caution which the Court is required to exercise in circumstances where the stated intention of J[...] cannot be verified.¹⁰ Courts should be suspicious of claims made against deceased persons, as they cannot defend themselves. In the case cited by the Defendant, the English Court in *Thomas* did not impose an undue burden of corroboration on the evidence of living witnesses.¹¹ Courts follow the principles of probative value, admissibility and judicial scrutiny when assessing the reliability of evidence.¹²

68. Defendant relied on the Plaintiff's concession that this claim was opportunistic. Defendant submitted that the latter alone warranted the dismissal of the claim. The claim is dismissed as the Plaintiff could not prove that the money was hers or that the money was fraudulently and wrongfully removed from her account.

THE CLAIM FOR THE RETURN OF A VEHICLE

69. J[...] allegedly gifted the Plaintiff a Nissan Livina motor vehicle in 2012. The Plaintiff relied upon an oral agreement, the terms of which were that the vehicle was a gift to her, she would become the owner, and the vehicle would be transferred to her within a reasonable time frame. Plaintiff alleged that J[...] breached the terms of

¹⁰ *Wood v Estate Thompson* 1949 (1) SA 607 (N),

¹¹ *Thomas v Times Book Co Ltd* [1966] 1 All ER 241

¹² Relevance, Admissibility and Probative Value in a Rational System of Evidence: A South African Perspective, Potchefstroom Electronic Law Journal (PELJ), PER vol.25 n.1 Potchefstroom 2022, <https://doi.org/10.17159/1727-3781/2022/v25ia11966>

the agreement by failing to transfer the vehicle into her name. The Plaintiff alleged that the First Defendant had also breached the agreement by forcing her to return the vehicle. The Plaintiff sought the return of the vehicle or the payment of R90 000.

70. During the post-separation negotiations in August 2019, J[...] offered to hand over the vehicle to her. He agreed to sign the transfer documents. In September 2019, J[...] had undertaken to give the transfer documents to her. The Plaintiff handed the vehicle over to the South African Police on 26 March 2020 as it was alleged that she had stolen the vehicles he was threatened that she had stolen the vehicle. The vehicle devolved to J[...]’s sister’s daughter, Carmen Pieterse. The liquidation and distribution account valued the vehicle at R99 600 in November 2020. The First Defendant promised to hand over the vehicle to her at J[...]’s funeral, but did not.

71. The Defendant could not unsettle the Plaintiff’s evidence. The Court warned the Plaintiff’s Counsel that the Plaintiff’s claim in the alternative for R90,000 was unsustainable as the Plaintiff had not placed a current valuation of the car before the Court. Plaintiff’s Counsel informed the Court that it should make an order to return the vehicle. The Court shall order accordingly.

CONCLUSIONS

72. Plaintiff instituted various claims in her representative and personal capacities against the Executor of her late husband’s estate. As executor of D[...]’s estate, Plaintiff has proven that the amount of R1 712 000 in a Standard Bank account was an investment made on his behalf in 2017 and that it had grown to its value when J[...] withdrew it. The First Respondent is to return that amount to D[...]’s estate.

73. Of the three claims instituted by the Plaintiff in her personal capacity, she has prevailed with her claim for maintenance support and the return of her motor vehicle. The Plaintiff has been largely successful and is entitled to her costs, except for the claim relating to the alleged unlawful withdrawal of R142 518.21 from her Capitec account. In the premises, the Court makes the order that follows.

ORDER:

1. Under case number 15817/2020, the Defendant shall pay the estate of D N[...], estate number: 017302/2019, the sum of R1 712 000 (one million, seven hundred and twelve thousand rand) within seven days of this order,
2. Under case number 15818/2020, the Defendant shall pay N[...] N[...] the sum of R600 000 (six hundred thousand rand) within seven days of the order,
3. Under case number 15818/2020, the Plaintiff's claim for the return of R142 518.21 is dismissed with costs,
4. The Defendant shall return the Nisan Livina motor vehicle with engine number H[...] to the Plaintiff within fourteen days of this order. If the return of the vehicle is not possible, then the Defendant shall pay the Plaintiff the market value of the vehicle, as determined by the Automobile Association of South Africa, within thirty days of this order.
5. The Plaintiff is entitled, apart from order 3 above, to her party and party costs as taxed or agreed, and Counsel's fees as taxed or agreed on scale B.

Bhoopchand AJ

Judgment was handed down and delivered to the parties by e-mail on 22 April 2025

Plaintiff's Counsel: L J Smit

Instructed by Bellingan Muller Hanekom

Defendant's Counsel: M Bartman

Instructed by DOMS Attorneys