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

Case Number: 22013/2015

In the matter between:

L[...] B[...]

First Plaintiff

L[...] B[...] N.O.

Second Plaintiff

and

CHRISTINE MARGUERITE KENNEDY N.O.

First Defendant

(The executrix of the deceased estate of
M[...] N[...] B[...] estate no: 106[...])

N[...] J[...] N.O.

Second Defendant

(The executrix of the deceased estate of
N[...] B[...] with estate no: (012[...])

MASTER OF THE HIGH COURT, WESTERN CAPE

Third Defendant

Date of hearing: 30 October 2023

Date of Judgment: 10 November 2023

Before: The Honourable Ms Justice Meer

JUDGMENT: SPECIAL PLEA DELIVERED THIS 10th DAY OF NOVEMBER 2023

MEER, J

Introduction

[1] This judgment is concerned with a special plea of prescription that has been raised by the Second Defendant against the First Plaintiff's (the Plaintiff) claim for maintenance in terms of section 2 of the Maintenance or Surviving Spouses Act 27 of 1990 ("the MSSA"). The claim is against the estate ("the estate") of the late M[...] N[...] B[...] ("the Deceased").

[2] The Plaintiff was the first wife of the Deceased. The Second Defendant is his step daughter, being the daughter of his second wife, N[...] B [...], now deceased. The Second Defendant is the executrix of her late mother's estate. The First Defendant is the executor of the estate of the Deceased and the Third Defendant, the Master, is cited in official capacity. The Deceased had been married to both his wives simultaneously according to Islamic law. The Plaintiff's maintenance claim is opposed by the Second Defendant on the grounds that the Plaintiff was not married to the Deceased at the time of his death and is accordingly not a surviving spouse in terms of the MSSA.

[3] The special plea, as amended is based on two grounds:

3.1 The period from the date of appointment of the executor until the date of issuance of summons was in excess of three years. During that period plaintiff could not have and did not lodge a valid claim in terms of the MSSA.

3.2 There was no service of process on the executor in terms of section 15(1) of the Prescription Act 68 of 1969 ("the Prescription Act") and accordingly, the summons was not effective to interrupt prescription.

Chronology

[4] The Plaintiff issued summons on 13 November 2015, in which she sought *inter alia*:

4.1 A declaration that she was the wife of the late M[...] N[...] B[...] at the time of his death and accordingly, a survivor in terms of section 1 of the MSSA.

4.2 Judgment in the amount of R21 847 205-00 in respect of her maintenance duly escalated from 2013 values by the Consumer Price Index to date of judgment.

[5] On 23 November 2015, the Muslim Judicial Council (“the MJC”) to whom a dispute concerning the validity of the Plaintiff’s marriage had been referred, issued a religious edict that the Plaintiff’s marriage subsisted at the time of the death of the Deceased.

[6] The Second Defendant pleaded to the merits of the claim in March 2017, while the First Defendant filed a notice of intention to abide. A trial for the duration of some 19 days between 27 October 2021 and 29 August 2022, followed. By agreement the declarator concerning the merits of the Plaintiff’s claim and the quantum of her claim were separated. Before the conclusion of evidence, in March 2022, some five years after filing the plea on the merits, the Second Defendant raised a special plea in which she belatedly alleged that the Plaintiff’s claim had prescribed.

[7] On 27 September 2022, I handed down a judgment and order on the declaratory relief referred to in paragraph 4.1 above. My order in relevant part stated as follows:

“It is declared that the Plaintiff was the wife of the Deceased N[...] B[...], at the time of his death and is accordingly a surviving spouse in terms of section 1 of the Maintenance of Surviving Spouses Act 27 of 1990.”

My judgment endorsed the finding of the Muslim Judicial Council.

[8] An application for leave to appeal against my judgment and order of 27 September 2022 was filed. The application has been postponed sine die.

Amendments to the Special Plea

The first ground of the Special Plea (paragraph 3.1 above)

[9] The special plea has been amended several times. In respect of the current first ground that the Plaintiff did not lodge a valid claim in terms of the MSSA timeously, in her first special plea of prescription as amended the second defendant inter alia pleaded that:

9.1 The First Plaintiff filed a claim against the deceased estate on 26 March 2014 and that the running of prescription was delayed in terms of section 13 (1) (g) of the Administration of Estates Act 66 of 1965;

9.2 Demari Phister on behalf of the First Defendant on 1 October 2013 in writing notified the first plaintiff's attorney that any claim for maintenance as a surviving spouse will not be entertained.

[10] An exception taken by the Plaintiff to what was pleaded above was upheld by me in a judgment of 10 August 2022. At paragraph 18 of my judgment I found:

“Section 33 of the Administration of Estates Act does not give an executor powers to exclude a party from submitting a claim or stating a claim cannot be entertained, as occurred in the letter of 2013 to the First Plaintiff.”

[11] Following my judgment the Second Defendant further amended the special plea on 30 June 2023 to the effect that a purported claim was lodged by the Plaintiff, rejected in terms of ss 33 of the Administration of Estates Act 66 of 1965 (“the Estates Act”), and resubmitted.

[12] The special plea on this issue was further amended on 29 August 2023 to the effect that if the notification in September and October 2013 does not constitute a rejection for purposes of ss 33 (1) of the Estates Act, it gave unequivocal notice to the plaintiff that she was not a surviving spouse. As the plaintiff had no entitlement to claim, the first defendant did not entertain the purported claim and was not required to take any step in terms of the Estate Act.

[13] In the Second Defendant's heads of argument of 16 October 2023, she abandoned the special plea based on the contention that the executor rejected the Plaintiff's claim in September/October 2013.

[14] The Second Defendant in raising prescription, has thus changed her mind several times from her initial stance that a claim was not lodged timeously to her current stance that no valid claim was lodged at all.

The second ground of the Special Plea (paragraph 3.2 above)

[15] The initial special plea stated that the summons was served upon the First Defendant in November 2015. It took issue with the fact that the First Defendant was cited as a juristic person and executor, and that in terms of the Estates Act, a juristic entity is barred from acting as an executor. It was contended that an amendment to the citation in February 2022 was not made timeously, and hence the claim had prescribed. In my judgment of 10 August 2022 I upheld an exception to these averments in the initial special plea.

[16] The August 2022 judgment states at paragraphs 11 and 12 (applying the principles established in *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*¹, *Foxlane Investments v Ultimate Raft Foundation Design*², *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd*³):

“[11] I agree with Mr Hathorn that the principle stated in *Blaauwberg*, *Foxlake* and *Macsteel* is directly applicable in the present matter, and dispositive of the question whether the special plea discloses a defence. The citation in the November 2015 summons leaves no doubt that the claim was directed against FNB (Trust Services). It was clear from the particulars of claim that the entity the First Plaintiff sought to hold liable was the executor of the

¹ 2004 (3) SA 160 (SCA)

² (144/15) [2016] ZASCA 54 (01 April 2016)

³ (680/2020) [2021] ZASCA 178 (17 December 2021)

deceased estate of the late N[...] B[...]. The details of the creditor and the claims against it were clear as was stated in Blaauwberg;

[12] Consequently, the 11 February 2022 amendment which was granted, correcting the citation, amounts to no more than the correcting of a misnomer. I accept that the summons and particulars of claim were not so defective that the shortcoming could not be corrected by an amendment, which I note was unopposed. There can be no doubt that the Defendants recognized their connection with the claim given their filing of a plea in March 2017, participation in a lengthy trial before the Special Plea was filed in March 2022, and the First Defendant filing a notice to abide at the outset of the proceedings.”

[17] The above factual findings do not appear to be disputed in the Second Defendant’s submissions in this application. I note also that my judgment stated that in the event of the exceptions to the two special pleas being upheld, as they were, those special pleas stood to be dismissed.

[18] As aforementioned, following the judgment of 10 August 2022 upholding the exceptions, the Second Defendant filed an amended special plea on 30 June 2023, where, in an about turn she stated there had been no service in terms of Section 15(1) of the Prescription Act on the First Defendant executor of the deceased estate. She also averred that in terms of Section 16 (a) of the Estates Act, a juristic person is barred from acting as an executor in a deceased estate.

Evidence

[19] Evidence on aspects raised in the special plea was heard on 24; 29 and 30 August 2023, whereafter the hearing was postponed for argument to 30 October 2023. The Second Defendant called Ms Leandri Spies who oversees the First Defendant’s estate management team, and Ms Demari Pfister who had responsibility for the First Defendant’s executors at the relevant time. For the Plaintiff, Mr Rahin Joseph, the Plaintiff’s attorney, and the Plaintiff herself testified.

[20] In respect of the first ground of the special plea, the evidence of Leandri Spies and Demari Pfister was to the effect that no claim was entertained by the First Defendant on behalf of the Plaintiff. This was because the First Defendant was in possession of a marriage annulment certificate on the basis whereof it was concluded that the Plaintiff could not be a surviving spouse. That conclusion had been informed by the First Defendant's Sharia law specialist. On 1 October 2013, Ms Pfister wrote to the Plaintiff's attorney Mr Joseph attaching the annulment certificate, and stating:

"We fail to see on what basis your client claims to be a surviving spouse and will therefore not entertain a claim for maintenance in this regard"

[21] The First Defendant's stance accordingly, was that there was no valid claim to investigate, not even a disputed one.

[22] On 25 October 2013 Mr Joseph informed Ms Pfister that they were "formulating our claim for maintenance on behalf of our client." Ms Pfister responded on the same day expressing confusion about this statement, and reiterated that a maintenance claim on behalf of the Plaintiff would not be entertained. She asked Mr Joseph to confirm if the Plaintiff was going to persist in her claim. She did not receive a response. Had there been a positive response, she said, she would have made a note on the file about pending litigation and there would have been a halt in the finalization of the liquidation and distribution account. She would have also called for more information and the Plaintiff would have been put to terms regarding the time period for providing information.

[23] Mr Joseph conceded that he had not informed Ms Pfister on 25 October 2013 that steps were being taken to challenge the annulment certificate before the MJC. He had not received a reply from the MJC at that stage. His request had been made on 10 October 2013 to the MJC.

[24] Mr Joseph testified that on 26 March 2014 he lodged maintenance claims with the executor on behalf of the children born of the marriage and on behalf of the Plaintiff. He submitted an actuarial report in support of her claim. By that stage there

had been notification from the MJC expressing doubts about the marriage annulment certificate. Mr Joseph was unable to explain why he had not informed Ms Pfister of the challenge before the MJC.

[25] In respect of service of the summons, the subject of the second ground of the special plea, Mr Joseph testified the address on which service took place was an address on the letter of Ms Spies to the Master, which was the last correspondence he had received, and for such reason he had used such address for service. He conceded that this was neither the *domicilium* of the executor nor the registered address of the nominee company as required by the Rules.

[26] He pointed out that the First Defendant was described on the face of the summons as “FNB Trust Services (Pty) Ltd NO (The executor of the Deceased Estate of M[...] N[...] B[...]) [with estate no 106[...]]”. In paragraph 3 of the particulars of claim the description of FNB Trust Services was repeated, as was its status as executor.

[27] On 21 January 2016, the First Respondent’s attorney, Mr Lang wrote to Mr Joseph, with regard to the action instituted on behalf of the Plaintiff and confirmed that he acted on behalf of FNB Trust Services (Pty) Ltd and the Executor, Mr Francois De Jager. Mr Lang raised no concerns about the manner of service or the matter not coming to the attention of his client, but requested that the citation of his client should be corrected. Ms Spies and Ms Pfister testified that the First Defendant underwent several name changes in the period under consideration. Mr Joseph’s testimony on these facts pertaining to service was not disputed, this being common cause.

[28] Whilst Mr Joseph conceded in chief that there had not been effective service, he qualified in re-examination that there had not been service in terms of the rules. When asked by the Court what he understood by effective service, he said he understood it as whether the executor received the summons, and for him they did receive the summons as per the January 2016 letter from the First Defendant’s attorneys. He had not attended to correcting the citation on the summons earlier as he hoped the matter could be settled out of court.

[29] The Plaintiff testified that she had not personally informed the First Defendant about steps taken before the MJC, nor was she aware that her attorneys had done so. She has not remarried.

Res Judicata

[30] From the above it is clear that in the judgment of August 2022 upholding the exceptions, findings have already been made on both grounds of the special plea. I have already found that the Estates Act does not give the executor the power to refuse to entertain a claim, that the Plaintiff did lodge a claim, and that there was service on the First Defendant. In addition, my judgment of 22 September has declared the Plaintiff to be a surviving spouse.

[31] The Second Defendant contends that the evidence led with regards to the special plea, and the amendments to the pleadings since the delivery of my judgment on the exception in August 2022, renders the judgment no longer applicable. I do not agree. The finding on the first ground, that the Estates Act does not confer the power on an executor to refuse to entertain a claim is a legal finding which stands irrespective of the subsequent evidence and amendments to the special plea. The evidence of Ms Spies and Ms Pfister does not unsettle my legal finding that the Estates Act does not confer the power on an executor to refuse to entertain a claim.

[32] In respect of the second ground of the special plea, notwithstanding the amendment thereto and the subsequent evidence, the essential facts which are not in dispute, were the same at both the exception and special plea hearings. These were, as stated above, service on an entity cited as executor both in the summons and particulars of claim, and receipt of the summons by the executor's attorney, who took no issue with the manner of service and who was fully appraised of the nature of the claim. In short the substance of both special pleas were before me when the exceptions were argued and were adjudicated upon in my August 2022 judgment. The subsequent amendments and evidence take the matter no further.

[33] The Plaintiff contends that both grounds of the special plea are accordingly hit by *res judicata*. I agree. The findings in my judgments of August and September 2022 stand by virtue of the principles of *res judicata* in terms of which judicial decisions are presumed to be correct and effect must be given to a final judgment even if it is erroneous. The enquiry is not whether the prior judgment is right or wrong, but simply whether there is a judgment. This presumption is irrebutable. See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) 564. The fact that applications for leave to appeal may have been filed against those judgments does not detract from this. Whilst the effect of the applications for leave to appeal is that my judgments are suspended, the judgments stand until set aside by a competent court⁴.

[34] As was contended by Mr Hathorn for the Plaintiff, even if *res judicata* were not applicable, the argument that an executor has the power to refuse to entertain a claim is without merit. Ms Mc Curdie for the Second Defendant did not refer to any authority, nor to any provisions of the Estates Act in support of her stance to the contrary.

[35] In *Faro v Bingham N.O. and others*⁵ in which a dispute about whether the applicant was married to her deceased husband at the time of his death and accordingly entitled to maintenance in terms of the MSSA, her claim was dealt with as a disputed claim and not as an invalid claim that could not be entertained. Rogers, J stated at paragraph 28:

“It must be remembered that the primary duty to assess disputed claims lies with the executor . . . An executor is, among other things, required to make due and proper enquiries and to obtain as much information as possible in identifying the beneficiaries.”

[36] The Plaintiff's claim was a disputed one and should have been investigated as such. The discrepancy between the Plaintiff's assertion that she was a surviving

⁴ Municipal Manager OR Tambo District Municipality and Another v Ndabeni(CCT 45/21 [2022]ZACC3 at para 24; Ntlemenza v Helen Suzman Foundation [2017] ZASCA 93

⁵ (4466/2013)[2013] ZAWCHC 159 25 October 2013

spouse and the contents of the annulment certificate, suggested a dispute. The letter from Mr Joseph informing that he was formulating his client's claim conveyed that despite the annulment certificate a claim was being formulated. The submission of the actuarial report on 26 March 2014 was further confirmation. All of this should have conveyed that there was a disputed claim without more. At the very latest the executor ought to have investigated the claim by 26 March 2014.

[37] The fact that Mr Joseph did not inform Ms Pfister of the challenge to the MJC, does not convert the claim into an undisputed one. Nor does the mere possession by the First Defendant of an annulment certificate as suggested in the testimony of Pfister and Spies. The consequences of the unauthorized stance of the First Defendant is exacerbated by the subsequent findings of the MJC and this Court that the Plaintiff was indeed a surviving spouse, and the estate being put on hold.

[38] In failing to assess the Plaintiff's claim as a disputed one in accordance with the procedures provided for in the Estates Act, and in failing to make due and proper enquiries, the First Defendant did not discharge her duty as she was required to do. Instead, in refusing to entertain the Plaintiff's claim and in effect summarily dismissing it she exercised powers that were not conferred upon her, contrary to the principle of legality⁶.

[39] With regard to the second ground of the special plea too, even if *res judicata* were not applicable, the argument that there was no service on the Second Defendant, is devoid of merit.

[40] The essential facts on the service of the summons as testified by Mr Joseph, the aforementioned, are not in dispute.

[41] The Second Defendant's argument that a juristic entity is barred from acting as an executor in a deceased estate, is without merit. In terms of section 16 (a) of the Estates Act, if the appointed executor is a corporation the letters of executorship are to be granted to an officer or a director of the corporation nominated by the

⁶ *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* 2021(1) SA 15 (SCA) paras 21 to 23

testator or the corporation. This occurred in the present matter. What also clearly occurred is that the First Defendant received the summons and knew the case against her.

[42] The crux of the issue, as contended by Mr Hathorn is whether the service on the First Defendant was effective. In this regard he aptly pointed to the importance of distinguishing between substantive and procedural law requirements, and emphasized that the rules of court do not lay down substantive law, but are concerned with the procedure by which substantive rights are enforced⁷

[43] In *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and Others*⁸ it was stated:

“Insofar as the substantive law is concerned the requirement is that a person who is being sued, should receive notice of the fact that he is being sued by way of delivery to him of the relevant documents initiating proceedings. If this purpose is achieved, then albeit not in terms of the rules, there has been proper service.”

This purpose certainly was achieved in the present matter. The First Defendant received the summons and particulars of claim and entered a notice of intention to abide. There was thus proper and effective service.⁹

[44] Our Courts have found that non-compliance with the rules with regard to service becomes irrelevant if the purpose of the substantive law has been achieved¹⁰, and that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits¹¹. For, as was stated in

⁷ CT v MT and others 2020 (3) SA 409 (WCC) para 19; Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and others 2012 (5) SA 267 (GSJ) (Prism) para 21.

⁸ 2012(5) SA 267 (GSJ) paragraph 13.

⁹ Investec Property Fund Limited v Viker X (Pty) Limited and Another (2016/07492) [2016] ZAGPJHC 108 paragraphs 12-13; Prism supra paragraph 20.

¹⁰ Consani Engineering v Anton Steinebecker Maschinenfabrik GmbH 1991 (1) SA 823 (T) at 824F-G.

¹¹ Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278F-G; Motlaung and another v Sheriff, Pretoria East and others 2020 (5) SA 123 (SCA) para 27.

Prism *supra*¹², great injustice may follow if service is set aside on the basis of irregularity without applying the effectiveness test.

[45] The last word on the issue of service, is to note the unusual, somewhat astonishing fact, as alluded to by Mr Hathorn, that after more than seven years of protracted litigation, the Second Defendant in a complete about turn from the position she had previously adopted, is seeking to defeat the Plaintiff's claim on the basis there was no service on another party who is not opposing the Plaintiff's claim and who filed a notice of intention to abide more than six years ago.

Plaintiff's complete defences to the Special Plea

[46] The Plaintiff has raised a further five defences, which are substantially the same with regard to both grounds of the special plea and are complete defences. If any one of them is successful, they will defeat the special plea of prescription. The complete defences turn primarily on questions of law and the evidence led is of little relevance to them. In the interests of hopefully bringing finality to this protracted and much contested matter, I elect to deal with each of these defences in turn.

[47] The five complete defences are as follows:

47.1 The plaintiff's maintenance claim in terms of the MSSA is not a debt for purposes of the Prescription Act;

47.2 The plaintiff's maintenance claim is not due in that it is not immediately enforceable or claimable, and prescription has not commenced running in terms of section 12(1) of the Prescription Act.

47.3 The declaratory order sought and granted by this Court that the plaintiff was married to the deceased at the time of his death is not subject to prescription;

¹² at paragraph 24.

47.4 A husband's duty of support to his spouse is an ongoing or continuous obligation with the result that the Plaintiff's claim for present and future maintenance had not prescribed.

47.5 The impediment to the running of prescription in terms of sections 13(1)(g) read with ss 13(1)(i) of the Prescription Act, have not ceased to exist.

Plaintiff's First Defence: Is the Plaintiff's maintenance claim a debt for purposes of the Prescription Act?

[48] Section 11 (d) of The Prescription Act provides for a period of prescription of three years for a claim in the present matter, were it to be classified as a debt.¹³ The Plaintiff's stance is that a purposive interpretation of the term debt as guided by the Constitutional Court in *Makate v Vodacom Ltd* 2016(4) SA 121 (CC), and *Cool Ideas 1186 v Hubbard and Another* 2014 (4) SA 474 (CC), discussed below, Section 39 (2) of the Constitution, and the broad and equitable objective of the MSSA to save surviving spouses from destitution, renders the result that a surviving spouse's claim is not a debt for purposes of the Prescription Act.

[49] The Second Defendant counters:

49.1. Despite the fact that surviving spouses may form part of a vulnerable group of society, their claims are qualified by the MSSA being only available

¹³" **11 Periods of prescription of debts**

The period of prescription of debts shall be the following:

- (a) thirty years in respect of-
 - (i) any debts secured by mortgage bond;
 - (ii) any judgment debt;
 - (iii) any debt in respect of any taxation imposed or levied by or under any law;
 - (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
- (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) and (i);
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

to surviving spouses who are unable to support themselves. Their claims are also subject to strict timelines and requirements by the MSSA and are not open ended. Nor is there an unqualified obligation on an estate to maintain a surviving spouse. By specifically stipulating that claims in terms of the MSSA must be pursued in accordance with the Estates Act, the legislature envisaged that surviving spouses should comply with such time periods. If these restrictions were not applicable, the principle that legal certainty is required in matters pertaining to deceased estates would be undermined. There is no basis in principle or policy to further narrow the meaning of debt nor, on the basis of *Makate* to interpret debt in a manner that is constrained.

49.2. The fact that the claim in terms of the MSSA is a debt is consistent with *inter alia* the fact that a child's claim for maintenance prescribes and that a spousal maintenance order is a judgment debt and susceptible to prescription. Plaintiff's contention that a claim under the MSSA is not susceptible of prescription would place such claims in a category distinct from any other maintenance claims and would be in contradiction of the limitation placed on such claims in terms of the MSSA itself.

Discussion and Finding on Plaintiff's First Defence

[50] The mandatory constitutional canon of statutory interpretation prescribed in section 39 (2) of the Constitution, is to promote the spirit purport and objects of the Bill of Rights in interpreting legislation. In *Makate supra* it was stated¹⁴ that where a right in the Bill of Rights is implicated every Court is required to read legislation through the prism of the Constitution. In this regard it has been noted that in giving effect to Section 39 (2) judicial officers in interpreting legislation must promote the Bill of Rights¹⁵, are obliged to prefer an interpretation of legislation which is constitutionally compliant over one which is not where it is reasonably possible to do so,¹⁶ and where faced with two interpretations which do not limit fundamental rights,

¹⁴ At paras 87 to 88

¹⁵ Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and others 2020 (2) SA 325 (CC) at para 2

¹⁶ Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others; In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others 2000 (10) BCLR 1079 (2000)

they are obliged to prefer the interpretation which better promotes the objects of the Bill of Rights¹⁷

[51] In this matter one of the rights in the Bill of Rights that is implicated is the right of access to courts in Section 34 of the Constitution and the reciprocal obligation in respect thereof. It has been recognized that the right of access to court is an aspect of the rule of law, which is one of the foundational values upon which our Constitutional democracy has been established.¹⁸In my judgment of 10 August 2022¹⁹ upholding the exceptions I acknowledged the principle that prescriptive provisions limit litigant's constitutional rights as a claimant who fails to meet a prescription deadline is denied the right of access to court.

[52] In *Makate supra* the above principles of interpretation were applied by the Constitutional Court in the context of the Prescription Act²⁰. The pre-Constitutional approach of our courts that the word “debt” must be given a wide and general meaning,²¹ was overruled in favour of an interpretation of the word “debt” which is least intrusive of the right of access to court and which promotes the purport, spirit and objects of the Bill of Right.

[53] Prior to *Makate*, in *Njongi v MEC Department of Welfare Eastern Cape*²², doubt was expressed by the Constitutional Court about whether an obligation that arises from the Constitution can be susceptible to prescription. In *Njongi* the Provincial Government had raised a plea of prescription against a claim for the payment of a social grant. The claimant argued that such an obligation can never prescribe and that debts which arise from fundamental constitutional rights are in a genre different to that envisaged by our pre-constitutional prescription legislation. Whilst doubt was expressed whether such debts could prescribe, the question was

(1) SA 545 (CC) paras 22-26. In *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2016 (6) SA596 (CC) at para 135, Cameron J, writing on behalf of the majority of the Court, referred to this principle as “*gold-plate doctrine*” in the Constitutional Court

¹⁷ *Makate*, at para 89, read together with *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009

¹⁸ *Rikhotso v Premier Limpopo Province and others* 2021(4) BCLR 436 (CC) at paragraph 16

¹⁹ At para 7

²⁰ At paras 85 -92

²¹ *Desai N.O. v Desai and others* 1996(1) SA141(A) at 1461

²² 2008(4) SA237(CC) at para 42

23 at para 42

not decided as the question was not considered in the court a quo, and the court opined that injustice could be averted without deciding whether the State could successfully raise prescription. The Court however noted:

“This case is decidedly not a precedent for the proposition that the defence of prescription is available to the State in these circumstances”²³

[54] Plaintiff’s claim is based on Section 2 (1) of the MSSA.

“2. Claim for maintenance against estate of deceased spouse.-

(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he 20 is not able to provide therefor from his own means and earnings.”

[55] The Constitutional Court has acknowledged that the purpose of section 2(1) of the MSSA is to protect surviving spouses from destitution.²⁴ In *Volks N.O. v Robinson*²⁵ it was stated:

“The legislation is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of parties to a marriage cease upon death. The obligation to maintain that exists during marriage passes to the estate.”

[56] In *Daniel v Campbell N.O.*²⁶ the Constitutional Court held that an important purpose of the MSSA was to provide relief to widows who are a particularly vulnerable group in society. This Court in *SA v JHA* in recognizing that the obligation

²⁴ Bwanya v Master of the High Court, Cape Town and others 2022(3) SA 250 (CC) at paragraph 74.

²⁵ 2005(5) BCLR 446 (CC).

²⁶ 2004(5) SA 331 (CC) at paragraph 22.

to pay maintenance cannot be characterized as a normal debtor-creditor obligation, went on to state²⁷ :

“(b) The gendered nature of the maintenance system is undeniable. In Bannatyne v Bannatyne (Commission of Gender Equality as Amicus Curiae) Mokgoro J, speaking for a unanimous court, stated as follows:

‘The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.’”

These comments apply equally to destitute surviving spouses, the protectees of the MSSA.

[57] A parallel can, I believe be drawn between a claim for a social grant as in *Njongi supra* and a claim by a vulnerable surviving spouse who the MSSA seeks to protect. Both claims are for support for the necessities of life, to put food on the table as it were, and resonate with the rights and obligations at Section 27 (1) (c) of the Constitution²⁸ in respect of food and social security. The doubt expressed in *Njongi* as to whether a claim for a social grant can ever prescribe, applies also in my view to a surviving spouse’s claim for maintenance in terms of the MSSA.

²⁷ SA v JHA 2021(1) SA 541 (WCC) (JHA) at paragraph 30.

²⁸ 27. Health care, food, water and social security.-

(1) Everyone has the right to have access to-

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

[58] Judicial notice can be taken of the fact that it is invariably a battle, often time consuming, for indigent vulnerable widow litigants to garner the know-how and then the funds either from state legal aid or elsewhere, to access their rights and the courts, if needs be. The argument that the Prescription Act should not render their claims, which often in essence are, to put food on the table, extinct by exclusion, is a compelling one, which I accept. The fact that other categories of maintenance claims have not been subjected to a similar analysis and interpretation, does not detract from this.

[59] I note also that were such a claim to be excluded from a debt under the Prescription Act, it would not mean the finalization of estates would be subjected to uncertainty, or that legal certainty would be undermined, as contended on behalf of the Second Defendant. Section 2 (3) of the MSSA states that the “proof and disposal” of claims shall “be dealt with in accordance with the provisions of the Administration of Estates Act. That Act provides clear timelines and late claims would be hit by *inter alia* Section 29 which requires claims to be submitted within 30 days of the executor’s publication of the deceased’s passing.

[60] In view of the above, applying the principles of interpretation in *Makate supra*, and the finding in favour of an interpretation of the word “debt” in the Prescription Act which is least intrusive of the right of access to court, I find that the term “debt” in the Prescription Act does not apply to a claim for maintenance by a surviving spouse in terms of the MSSA. To find otherwise would be contrary both to the broad and equitable objectives of the MSSA of ensuring that surviving spouses are saved from destitution, and contrary to the spirit and purport of the Bill of Rights.

Plaintiff’s Second Defence: The Plaintiff’s maintenance claim is not due in that it is not immediately enforceable or claimable, and prescription has not commenced running in terms of section 12(1) of the Prescription Act.

[61] The principle that a claim is not due until it is enforceable and prescription has thus not commenced running in terms of section 12(1) of the Prescription Act, was

stated as follows in *Deloitte Haskins and Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch*²⁹:

“Section 12 (1) of the Prescription Act 68 of 1969 provides that ‘prescription shall commence to run as soon as the debt is due.’ This means that there has to be a debt immediately claimable by the debtor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately..... It follows that prescription cannot run against a creditor until his cause of action is fully accrued, i.e. before he is able to pursue his claim”

[62] The principle was endorsed in *Farocean Marine (Pty) Ltd v Minister of Trade and Industry* ³⁰ where the issue was whether a claim by the Minister of Trade and Industry for the repayment of benefits paid in terms of an export incentive scheme had prescribed. The Court found at paragraphs 12 to 14 that it had not as the claim/debt only became due after an investigation had been conducted by the Director General to verify the information furnished and he had decided to disallow the benefits. In acting as aforesaid the Director General was acting in an administrative capacity. The Court noted that the Director General’s power of disallowance is exercised subject to the presence of certain jurisdictional facts. This was a reference to the investigation.

[63] I agree that the present case is directly analogous to *Farocean*. Here, the jurisdictional facts which would have to be satisfied, include that the Plaintiff’s claim would have to be dealt with and investigated in terms of Section 35 (12) of the Estates Act, and the estate would have to become distributable. The Plaintiff’s claim for maintenance thus will only become due, in the sense that it is immediately recoverable, from the time that the estate becomes distributable. Until then, as contended on behalf of the Plaintiff, she has no claim that is immediately recoverable and prescription does not start running in terms of ss 12 (1) of the Prescription Act.

²⁹ 1991 (1) SA 525 at 532 G-I.

³⁰ 2007 (2) SA 334 SCA.

[64] The Second Defendant's reliance on *Reynolds N.O.v Smith*³¹ for her contention that the debt was immediately due upon the death of the deceased, is misplaced. Reynolds pertained to an application by an executor of a deceased estate to compel the Respondent to whom the deceased was married to furnish information to determine if the deceased estate had a distinguishable once off accrual claim, against the respondent. Unlike in the present case, there were no jurisdictional facts and investigations that had to be conducted before the accrual debt became due.

[65] To the extent that the Second Defendant relies on the evidence of Ms Pfister for the contention that the debt was immediately due upon the death of the Deceased, this Court cannot be bound by what a witness understands about when a debt is due. It must be noted that Pfister also testified in contrary vein, that a claim could not be paid out prior to the point when distribution occurred.

Plaintiff's Third Defence: The declaratory order sought and granted by this court that the Plaintiff was married to the deceased at the time of his death, is not subject to prescription;

[66] In *Off-Beat Holiday Club v Sonbonani Holiday Spa Shareblock Ltd*³² it was held that a claim for declaratory relief does not constitute a debt which is subject to prescription. The Plaintiff's claim for the declaratory relief in prayer (a) of her particulars of claim thus does not prescribe. In accordance with the principles established in *Farocean supra*, where it was stated that the debt was due after the Director General had conducted an investigation, I accept that the Plaintiff's claim for the payment of maintenance in prayer (b) of her particulars of claim, is contingent, and only comes into effect upon the determination of prayer (a). Her claim has accordingly not prescribed.

[67] Plaintiff's claim, I note, is also distinguishable from that in *Cape Town Municipality and Ano v Alliance Insurance Company Limited* 1991(1) SA 311 (C), relied upon by the Second Defendant. There, it was stated in distinguishing between

³¹ 2021 JDR1119 (WCC) at [11].

³² 2017(5) SA 9 (CC) at paras 31 -34.

a declarator and a claim for payment of money, that the crux was the defendant's liability to pay money. In that case, unlike the present, the debt becoming due was not contingent upon jurisdictional facts and investigations being satisfied.

Plaintiff's Fourth Defence: A husband's duty of support to his spouse is an ongoing or continuous obligation with the result that the plaintiff's claim for present and future maintenance had not prescribed.

[68] In respect of the fourth defence, the provision in the MSSAA that the obligation to provide maintenance by the estate of a deceased spouse continues until the death or remarriage of the surviving spouse, means that such obligation is ongoing or continuous. I accept that it must follow from this, that the Plaintiff's claim for present and future maintenance has not prescribed. There is support for this proposition in the findings of the SCA in *Barnett and Others v Minister of Land Affairs and Others*³³ and the Constitutional Court in *Makate supra* that a continuous wrong leads to a series of debts from moment to moment and does not prescribe.³⁴ Likewise, although the Plaintiff's claim is based not on a continuing wrong but on a continuing obligation on the part of the deceased estate to support her, the obligation to pay present and future maintenance, does not prescribe.

[69] In *Oshry and Another NNO v Feldman*³⁵ the continuing and ongoing nature of maintenance was accepted, and in *Volks NO v Robinson* 2005 (5) BCLR446 (CC) at paragraph 39 it was acknowledged that the estate will continue to have maintenance obligations to surviving spouses. Given the ongoing maintenance obligation I agree with the Plaintiff's submission that the special plea of prescription cannot defeat the Plaintiff's claim. At best for the Second Defendant, as the Plaintiff contends, if all Plaintiff's other defences are unsuccessful, prescription would limit the Plaintiff's claims for past maintenance, but she would still be entitled to present and future maintenance together with that part of her past maintenance which has not prescribed. Given the ongoing nature of a surviving spouse's maintenance claim, it

³³ 2007 (6) SA313 SCA at paras 19 to 21

³⁴ Makate supra at para 192

³⁵ 2010 (6) SA 19 (SCA)

cannot be a claim at one point in time as contended on behalf of the Second Defendant.

Plaintiff's Fifth Defence : The impediment to the running of prescription in terms of sections 13(1)(g) read with ss 13(1)(i) of the Prescription Act, has not ceased to exist.

[70] The sections state:

“13 Completion of prescription delayed in certain circumstances

(1) If-

(g)the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, of 1966, or

(h)the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and

(i)the relevant period of prescription would, but for the provision of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

The period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).”

[71] The Plaintiff contends that the impediment contemplated in section 13 (1) (g)³⁶ of the Prescription Act would cease to exist for purposes of section 13 (1) (i), upon the final rejection of the First Plaintiff's claim, or, if the claim were accepted, upon the confirmation of the final liquidation and distribution account by the Master, or alternatively upon the withdrawal of the claim.

[72] In *Nedcor Bank v Rindle* 2008 (1) SA 415 SCA the Court approved a line of cases holding that the impediment contemplated in section 13 (1) (g) ceases to exist only once the Master confirms the final liquidation and distribution account. I accept that as this has not happened the Plaintiff's maintenance claim has not prescribed. Similarly, the impediment would cease to exist were the claim to be finally rejected or withdrawn.

[73] In view of the above all of the Plaintiff's defences to the special plea succeed. The special Plea accordingly stands to be dismissed.

Costs:

[74] I am inclined to grant the punitive costs order on the attorney-client scale sought by the Plaintiff. Such an order is appropriate given the Second Defendant's conduct in persisting with both grounds of the special plea of prescription in circumstances where there was no realistic prospect of success³⁷, given my judgment upholding the exceptions, and my judgment on the merits. I agree that this was vexatious in effect. To have advanced a special plea, after more than seven years of protracted litigation, the success of which depended on "setting aside" the findings in those two judgments, which are presumed to be correct even if erroneous

³⁶ "13 Completion of prescription delayed in certain circumstances

(1) If-

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, of 1966, or

(h)

(i) . . .

The period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)

³⁷ See *Wingate-Pierce v SARS* 2019(6) SA 196 (GJ) paragraph 81-84.

or suspended, was an exercise in futility. The Second Defendant's remedy ought instead to have been to pursue the appeals against those findings.

[75] I grant the following order:

The special plea is dismissed with costs such costs to be on the scale as between attorney and client, and to include the costs of two counsel.

MEER, J

Advocate for Plaintiff: P Hathorn (SC)

Y Abass

Instructed by: Rahin Joseph Attorneys

Advocate for Respondent: J McCurdie (SC)

J Williams

Instructed by: Tim du Toit Attorneys