

SOUTH AFRICA / JUDGMENT

Botha v Ungerer (2022/045068) [2023] ZAGPJHC 142 (15 February 2023)

[2023] ZAGPJHC 142**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S C Mia

CASE / FILE NUMBER

2022/045068

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA,****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 2022/045068****(1)****REPORTABLE: NO****(2) OF****INTEREST TO OTHER JUDGES: NO****DATE:**

15 February 2023

In

the matter between:BOTH A,
SUSANNA MARGARETHA

Applicant

and

UNGERER,

EMILE, NO

Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 February 2023.)

JUDGMENT

MIA J:

[1] The applicant brought an urgent application before this court for interdictory relief as follows:

1. The forms and service provided for in the Rules of Court, including any non-compliance with Rule 53 is condoned and the matter is treated as one of urgency in terms of the provisions of Rule 6(12);
2. directing the respondent to effect payment to the applicant of the interim spousal maintenance in an amount of R98,844.00 (ninety eight thousand eight hundred and forty four rands) per month pending finalisation of the administration of the estate of the late Leon Botha who died on 23 May 2022(the deceased);
3. directing the respondent to retain the applicant as the main member of Discovery Health Medical Aid Scheme (classic comprehensive) and to timeously pay the monthly contribution in respect of the applicant pending the finalisation of the administration of the estate of the deceased;
4. directing the respondent to make a contribution toward the applicant's total accumulated debt in the amount of R500,000.00 (five hundred thousand rands) within 10 days;
5. directing the respondent to make a contribution towards the legal costs of the applicant in an amount of R300,000.00 (three hundred thousand rands) within ten days;
6. directing the respondent to provide the applicant, care of her attorneys, with the statement and abatement account reflecting the assets and liabilities of the deceased within 10 days;
7. directing the respondent to pay the costs of application from the estate of the deceased;
8. granting the applicant such further an alternative relief as the court deems fit in the circumstances."

The respondent opposed the relief sought above, on the basis that the claim was excipiable. The applicant had not submitted a claim to the executor in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA) in addition there was an action pending relating to an insurance claim which was lis pendens and the respondent submitted much of the matter placed before the court was excipiable but due to the urgency it could not be dealt with.

[2] At the hearing of the urgent application on 1 December 2022, counsel for the applicant and respondent were both afforded the opportunity to make written

submissions in response to issues raised in the course of argument.

- [3] The facts briefly are as follows. The applicant was married to Mr Leon Botha (the deceased), who died on 23 May 2022. Both parties had prior marriages. The applicant had raised the deceased's minor children. The parties married out of community of property with the accrual system. The applicant assisted the deceased in his business with branding and marketing. The company was registered in the deceased's name without reflecting the applicant as a director. When the deceased was diagnosed with pancreatic cancer his children were registered as directors. Upon the deceased's demise, the respondent was appointed as the executor of the deceased's estate on 1 June 2022. The applicant had not submitted a claim to the executor and there was no claim pending when the matter came before me. The applicant moved out of the home she shared with the deceased whilst the deceased's adult son moved into the home.
- [4] According to the applicant she resides with friends who assist her financially. She has two BMW Z4 vehicles which the deceased gifted her but does not have access to the registration documents which are locked in an office at the deceased's business premises that she is denied entry to. She would like to dispose of one or both vehicles to access funds. She is the registered owner of the property her parents reside. The deceased purchased it from her parents. He paid the month rates and utility accounts and then required her to pay it for a while before he resumed the responsibility. She does not have funds to pay this account. She stated she has no income at the time of the application for interim maintenance as she no longer receives an allowance from the deceased after his demise. She requires an amount of R98 844.00 each month to cover her expenses.
- [5] S 2(1) of the MSSA provides:
- '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/her reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings'
- [6] The respondent indicated in an answering affidavit that the applicant did not submit a claim to the estate. She submitted a settlement proposal which he indicated he would consider despite it appearing to be excessive.
- [7] The issue for determination is whether the applicant made out a case for the relief sought in the notice of motion on an urgent basis. The respondent raised various points in opposing the relief including the absence of 1) jurisdictional factors, 2) non-joinder of the Master of the High Court, 3) the interim spousal maintenance in terms of the MSSA and 4) an abatement of the accounts not being possible as they usurp statutory powers reserved to the Master of the High Court.

[8] The respondent had already secured in the interim, an assurance that the applicant's medical aid cover be paid on a monthly basis until her claim is resolved. The respondent however raised the issue of non-joinder of the Master of the High Court whose office has a direct interest.

[9] In *Oshry and Another NNO v Feldman* 2010(6) SA 19 (SCA) at [26] the Court noted that :

[26] The Maintenance of Surviving Spouses Act 27 of 1990 altered the common- law. The preamble sets out the purpose of the Act thus:

'To provide the surviving spouse in certain circumstances with a claim for maintenance against the estate of the deceased spouse; and to provide for incidental matters.'

[10] The Court in *Oshry* above, noted the obligation of the deceased estate to maintain a surviving spouse and the manner in which the executor considers such claims[1]. I have considered that the applicant's request for interim maintenance was not submitted to the executor for consideration in terms of the MSSA and there is no attachment reflecting that it has been. The informal intervention by Mr Booyens does not reflect a discussion in terms of Rule 41A and there was no submission of a claim. The first itemised request appears in the founding affidavit and is not a claim in terms of the MSSA. The executor must be able to assess the claim having regard to section 3 of the MMSA[2]. In the present matter, it is clear that the action instituted by the executor and the deceased children in respect of the Momentum

insurance policy which was ceded to the applicant will delay the applicant's access those funds. This can be considered and if the executor refuses a claim properly submitted in terms of the MSSA, the applicant is justified in approaching this court for relief. There was a duty of support between the spouses and the applicant is entitled to support from the deceased's estate. A proper claim however must be submitted in terms of the MMSA to the executor. There is no indication that this has been submitted.

[11] Whilst reliance was placed on the decision of *Pretorius v Krugel No and Another*, an unreported decision of the High Court, Mpumalanga Division, counsel for the respondent argued that the matter was distinguished

from the present. In the *Pretorius* decision, the claim was in terms of the common law, the Master of the High Court was joined as a party with an interest, and a claim had been properly submitted to the executor which is not the case in the present matter.

[12] Where the applicant has a claim in terms of the MSSA, the applicant must make out a case and submit it to the executor. The jurisdictional facts for a claimant's reasonable maintenance need as required until death or remarriage are informed by s 3 which requires the applicant to prove her own ability to provide maintenance from her own means and earnings under the MSSA. The applicant has made reference to the vehicles she owns but there are no values indicated in relation to what her means are. The respondent avers that from the bank statements that the applicant attached, it is evident that the applicant receives

a rental income which was not disclosed. She did not prove the value of money, property or other financial benefit accruing to her including the value of her potential contingent claim for accrual in terms of the ante-nuptial contract. The respondent suggested she utilise income from a rental property and that she sell the vehicles worth 2 million Rand when she submits her claim for interim maintenance and reference the bond free immovable property in her name. He also referred to her possession of property items removed from the marital home.

- [13] Counsel for the respondent submitted further that the applicant did not indicate how she was able to cover some of her own expenses from her own means before looking to the deceased estate for the shortfall in maintenance whilst she has assets she intends selling. Under the circumstances, the applicant's version was disputed by the respondent. It is not possible to determine with certainty what her claim to the executor is as it has not been submitted and is not set out as a claim fully in the papers.
- [14] The respondent noted however that the applicant had submitted a settlement proposal which the executor indicates he is considering. There is no indication that this settlement will not yield a positive result nor has it been refused. There had been no written request for maintenance made to the executor and the Master has not had the opportunity to approve the request.
- [15] The applicant's request must be considered in terms of the MSSA where she relies on it. The application as placed before this court does not reflect such an application has been submitted. If the relief is to be considered as urgent interdictory relief the right relied upon is in terms of the MSSA and the applicant has not indicated that she will not be afforded relief upon submission of a claim for maintenance to the executor. She has a spoliation order and has not move back into the property. She can obtain the registration documents for the vehicles if she intends selling them to access funds to live on as she avers. The sale of the second vehicle will yield funds which she can utilise to pay some of the expenses. This must be factored into the request for maintenance in terms of the MSSA.
- [16] The request for a contribution in the amount of R500 000.00 toward the interim debt is requested on an urgent basis. It is not clear what the urgency is in this regard, or how this debt is made up. There is no case made out for urgency in respect of the outstanding debt. It maybe that the legal fees can be attended to upon selling the vehicles as the applicant intends doing. Her claims in prayers 4 to 6 are not claims for reasonable maintenance and are demands to pay debt and legal fees in actions and applications between different parties. There is no urgency herein.
- [17] The production of a statement and abatement account to be furnished directly to the applicant's attorney within ten days of the date of this order is opposed. This account will be made available in due course according to the respondent. The request at this stage amounts to the applicant requesting urgent interdictory relief where requirements are not met for urgency. The applicant does not indicate that she will not be afforded relief in due course. I

have noted the submission that the relief requested usurps statutory powers reserved to the Master by the Administration of Estates Act. In *Master of the High Court (North Gauteng High Court) v Motala NO and Others* 2012(3) SA 325 (SCA), the Court stated at [14]

“In my view, as I have demonstrated, Kruger AJ was not empowered to issue and therefore it was incompetent for him to have issued, the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect (Schierhout v Minister of Justice 1926 AD 99 at 109). Being a nullity a pronouncement to the effect was unnecessary. Nor did it first have to be set aside by a court of equal standing.

- [18] There appears to be no urgency for the request for the statement of abatement of the account. The applicant does not indicate why this is required forthwith on an urgent basis. The account will in due course lie open for inspection and it is not clear why this will not afford the applicant redress in due course.
- [19] The dispute is determined having regard to the respondent’s version and what the applicant admits these motion proceedings.[3] The applicant has not made out a case on the founding affidavits for the urgent relief requested in prayers above. There was no claim submitted in terms of the MMSA to enable the executor to make a determination in terms of s3 of the MSSA. The liquidation and distribution accounts of the estate will lie open for inspection. The applicant make no case for urgent access and expedited access to the statement and abatement of the account on truncated time frames and it does not even appear possible on the respondent’s version at present.
- [20] In the premises the application is dismissed with costs including the costs of counsel where so employed.

S C MIA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the applicant: Adv G Olwagen-Meyer

Instructed by: Shaban

Clark Coetzee Attorneys

On behalf of the respondent: Adv. J. P. Snijders

Instructed by: Mills

& Groenewald Attorneys

Date of hearing: 01

December 2022

Date of judgment: 15

February 2023

[1] Oshry v Feldman above

[27] s 293)(b) deals with the order of preference of claims

[2] Oshry v Feldman above [para 28]

[3] Plascon –Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)

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