

SOUTH AFRICA / JUDGMENT

Freidrich and Others v Smit NO and Others (1028/2015) [2017] ZASCA 19; 2017 (4) SA 144 (SCA) (23 March 2017) [2017] ZASCA 19

COURT

Supreme Court of Appeal

BEFORE

Tshiqi, Petse, Mbha, Fourie, Molemela

CASE / FILE NUMBER

1028/2015

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1028/2015

In the matter between:

MARTHINUS VAN ROOYEN FRIEDRICH

FIRST APPELLANT

MARELIZE FRIEDRICH

SECOND APPELLANT

NICOLENE FRIEDRICH

THIRD APPELLANT

and

ADRIAAN LOUW SMIT N O

FIRST RESPONDENT

IN HIS CAPACITY AS THE NOMINEE OF

STABILITAS BOARD OF EXECUTORS (PTY) LTD

SUSANNA MARIA FRIEDRICH

SECOND RESPONDENT

THE MASTER OF THE NORTH GAUTENG

THIRD RESPONDENT

HIGH COURT, PRETORIA

Neutral Citation: Van Rooyen Friedrich & others v Louw Smit NO & others 1028/2015 [2017]
ZASCA 19 (23 March 2017)

Coram:

Tshiqi, Petse and Mbha JJA and Fourie and Molemela AJJA

Heard:

02 March 2017

Delivered: 23 March 2017

Summary:

Maintenance of surviving spouse : ss 2 and 3 of the Maintenance of Surviving Spouses Act 27 of 1990 : requisites of Act not satisfied : special leave to appeal in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 : appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Murphy, Molopa-Sethosa and Tlhapi JJ sitting as court of appeal):

1 The appeal is upheld and the second respondent is ordered to pay the costs, including the costs of the condonation application brought by the second respondent.

2 The order of the full court is set aside and in its stead is substituted:

‘2.1 The appeal is upheld with costs and the second respondent is ordered to pay these costs.

2.2 The order of the court a quo is set aside and substituted with the following –

2.2.1 “The decision of the Master of the high court dated 12 July 2010 is set aside and substituted as follows:

- (a) The objection lodged against the Liquidation and Distribution account in the estate of the late Maartin Rudolf Friedrich is sustained.
- (b) The executor of the estate of the late Maartin Rudolf Friedrich is ordered to amend the Liquidation and Distribution account by removing the claim of Susanna Maria Friedrich in toto.”

2.3 The second defendant is ordered to pay the costs of the action, including the reserved costs of the application issued by the plaintiffs under the same case number on 11 August 2010.

2.4 The second defendant's counterclaim is dismissed with costs.'

Tshiqi JA (Petse and Mbha JJA and Fourie and Molemela AJJA concurring)

- [1] This is an application for special leave to appeal referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013, and if granted, the determination of the appeal itself. At the hearing of the matter, counsel for the second respondent, the only respondent who opposed the appeal, conceded that the matter deserved the attention of this court and special leave to appeal was granted. The parties proceeded to argue the merits of the appeal.
- [2] The issues to be determined arise from the estate of the late Maartin Rudolph Friedrich (the deceased). The appellants are Mr Marthinus van Rooyen Friedrich, Miss Marelize Friedrich, and Miss Nicolene Friedrich, all adult children of the deceased from a previous marriage. The second respondent, Mrs Susanna Maria Friedrich was married to the deceased on 26 April 2003 out of community of property without accrual, and their marriage still subsisted at the time of his death in September 2006. The deceased left a will in which he appointed the appellants as his only heirs. He nominated the Stabilitas Board of Executors (Pty) Ltd to be his executors and it in turn nominated the first respondent, Mr Adriaan Louw Smit, in terms of s 16 of the Administration of Estates Act 66 of 1965 (the Estates Act), as the Executor of the deceased's estate.
- [3] In November 2006 Mrs Friedrich filed a claim with the Executor against the deceased's estate in terms of s 2 of Maintenance of Surviving Spouses Act 27 of 1990 (the Surviving Spouses Act) in the amount of R8 454 760, which she subsequently reduced to R 4 468 519. 24.
- [4] The Executor allowed Mrs Friedrich's claim in the amount of R4 468 519.24 and included it in the Liquidation and Distribution account, (the L and D account). It is common cause that after the amount allocated to Mrs Friedrich in the L and D account, and the other claims of the creditors had been allowed, the remaining amount for distribution among the appellants would be R886 785.
- [5] The appellants, through their attorneys, lodged an objection to the L and D account with the Master of the High Court, Pretoria stating that Mrs Friedrich could only claim reasonable maintenance if she could not support herself through her own income and means. They alleged:

'3.1 Mrs Friedrich is currently employed as a bookkeeper and earns an income;

3.2 Mrs Friedrich has already received payment in the amount of R139 293.46 for a life insurance policy of which she was the beneficiary;

3.3 On 29 September 2008 Mrs Friedrich bought an Erf in Selcourt Extension 3 for the amount of R695 000 which property was registered

[in] her name on 10 February 2009;

3.4 Mrs Friedrich is currently 46 years of age and was 43 years old at the time of Mr Friedrich's demise. She is still able to learn new skills to enable herself to earn a higher income.

4. In light of the above, it is clear that Mrs Friedrich does not have a factual basis for claiming maintenance from Mr Friedrich's

estate.

5. In as much as the claim for maintenance will be allowed, our clients object to the magnitude thereof:

5.1 Mr and Mrs Friedrich were married during 2003 and the marriage lasted a mere 3 years until the demise of Mr Friedrich. The short duration of the marriage does not justify the amount claimed;

5.2 The amount claimed by Mrs Friedrich is disproportionate to the amount payable to other beneficiaries. The amount of R4 468 519.24 claimed is more than half the value of the assets being R7 013 658.00;

5.3 Subsequent to Mr Friedrich's demise, Mrs Friedrich entered into a relationship with a Mr Fourie and has been in a permanent life partnership with him for about a year. Our clients believe that her only reason for not marrying Mr Fourie is the fact that such marriage would result in Mrs Friedrich losing any possible claim for maintenance against Mr Friedrich's estate.

6. It is our instructions to request that the executor of the estate late M R Friedrich remove Mrs Friedrich's claim from the Liquidation and Distribution Account, alternatively the claim should be considerably reduced . . . '

[6] On 12 July 2010 the Master responded :

' . . . Decision

1. The objection regarding the maintenance claim lodged against the Liquidation and Distribution Account in the estate of the late Maartin Rudolph Friedrich is herewith sustained.
2. The quantum of the maintenance claim may either be agreed upon by both parties or the relevant court should be approached to determine same . . . '

In para 7 the Master concluded:

'Having regard to the above mentioned factors and the Actuary report it will be difficult for the Master to determine the quantum of the claim, the writer respectfully submits that the parties should approach the relevant court to determine the quantum of the maintenance claim, unless both parties settle on the amount . . . '

- [7] The appellants approached the Gauteng Division of the High Court, Pretoria and brought an application in terms of s 35(10) of the

Estates Act for an order setting aside the Master's findings and substituting it with an order sustaining the objection. They also prayed for an order that the Executor of the estate of Mr Friedrich amend the L and D account by removing the claim of Mrs Friedrich in toto. Mrs Friedrich brought a counter-application seeking an order setting aside the Master's finding that the objection be sustained. She also prayed for an order that the Executor pay her the amount of R4 468 519.24 awarded to her in accordance with the Executor's findings, and that the Master be ordered to accept the L and D account. The high court ordered the application and counter-application to be referred to trial, with the notice of motion to stand as simple summons, and the answering affidavit as a notice of intention to defend, with costs of the application to be reserved for the trial court.

- [8] The appellants filed their declaration in compliance with the court order. They challenged the correctness of the Master's decision mainly on the basis that Mrs Friedrich was not entitled to any maintenance. They also sought an order for the amendment of the L and D account by the removal of Mrs Friedrich's claim. Mrs Friedrich filed a plea in which she alleged that she was entitled to maintenance as claimed and awarded to her by the Executor in the lesser amount of R4 468 519.24. She simultaneously filed a counterclaim seeking an order against the Executor and the Master to the effect that the Executor be ordered to pay the amount awarded to her. She also sought an order to the effect that the finding by the Master sustaining the objection by the appellants be set aside.

- [9] The trial proceeded before Pretorius J, who ruled that Mrs Friedrich had a duty to begin since she was the one claiming maintenance. She testified, and stated that she was still married to the deceased at the time of his death, and that she had separated from him for three to eight weeks during the course of the marriage but had again reconciled with him before his death. She confirmed that she was 50 years old, was a qualified estate agent but that she was at the time unemployed because she had given up this career in 2004 at the deceased's request. She stated that apart from the house she was occupying, which had not been transferred into her name, she had also received an amount of R3 million from the Executor. This amount was according to her, proceeds of the sale of a house that was sold after the deceased's death. She said that she used approximately R1.9 million of the amount to pay for a house in the amount of R720 000, that she incurred expenses in the amount of R350 000 concerning a biltong business which she had to close, and also incurred miscellaneous expenses in the amount of R400 000. She could not account for the balance in the amount of approximately R1.4 million.

[10] Mrs Friedrich also sought to place reliance on an actuarial report prepared by Quindiem Consulting. This report had been sent to the Executor and the Master and had concluded that ‘the total value of the expenses that she will incur over her expected lifetime to maintain her current standard of living is R8.45 million’. She did not call any further witnesses and the appellants closed their case without leading any evidence. In its judgment the trial court said at para 25:

‘Botha v Botha 2009(3) SA 89 (W) dealt with maintenance after divorce and the plaintiff in that matter gave evidence regarding her financial position and needs for maintenance, contrary to the present case where no evidence in this regard was presented . . .’

It continued at para 26:

‘In the present case the second defendant chose not to give evidence as to how the amount of R4 468 519.24 was calculated and why it was necessary for her to receive 83% of the estate after three years of marriage. The only evidence was a “valuation of claim against the estate of the deceased spouse” by Quindiem Consulting. This cannot be considered as evidence as it is hearsay evidence. Consequently I cannot use it to calculate any maintenance for the second respondent, should I find that she is entitled to maintenance.’

The court then said:

‘. . . there is no evidence whereby the court can find the “reasonable maintenance” which the second defendant [Mrs Frederich] would be entitled to.’

However, despite the finding by the trial court that there was no evidence upon which the court could find ‘reasonable maintenance which the second defendant [Mrs Friederich] would be entitled to’ it surprisingly concluded:

‘I find that the second defendant [Mrs Friedrich] is entitled to reasonable maintenance as set out in Act 27 of 1990, although I

cannot make a determination as to the amount due to the paucity of information before me.’

[11] The appellants appealed to the Full Court of the Gauteng Division, Pretoria. That court also echoed the views of the trial court to the effect that Mrs Friedrich did not prove that she was entitled to maintenance. It said:

‘At the trial in the court a quo, the only evidence led was that of the second respondent [Mrs Friedrich]. The evidence tendered was in relation to her counterclaim. ...Her evidence did not meaningfully address her need for maintenance or the factors referred to in section 3 of the MMS Act. Apart from the actuarial report, there was no evidence regarding her on-going expenses or pertinently addressing the issues raised by the Master. There was much ado about the manner in which she had used an amount of R3 million paid to her by the executor, possibly irregular in light of the objection. Although perhaps not without consequence, this evidence is of limited relevance to the issues of whether the second respondent is entitled to maintenance and the amount to which she is entitled. The evidence indicates that the second respondent has not been

conscientious in her efforts to seek employment. However, our view in relation to the counterclaim, set out below, means that there is no need to evaluate this evidence in any detail.'

[12] Having made these observations, the court concluded:

'This court is similarly of the view on the inchoate evidence that the second respondent is entitled to reasonable maintenance from the estate. The evidence establishes that the second respondent, a middle aged woman with some prospect of employment, though limited by her relative lack of skills and experience, as well as her non-participation in the labour market for some years, is at the very least entitled to some level of maintenance from the estate. She gave up her career after marrying the deceased, and after his death found herself in precarious circumstances. The fact that she appears to have been irresponsible with the amount which the executor may have irregularly given her is not relevant to her actual entitlement. That being the case, the Master and the court a quo were right in their effective conclusions that only quantum needed to be determined.'

[13] The Full Court concluded that Mrs Friedrich was entitled to reasonable maintenance. It made an order setting aside the order of the trial court, and substituted it with an order that the decision of the Master be reviewed and set aside; that the matter be remitted to the Master for the purpose of determining the quantum of maintenance payable to Mrs Friedrich; and that her counterclaim be dismissed.

[14] Both the trial court and the full court erred in their approach to the matter. The power conferred by s 35(10) of the Estates Act on the Court is, as the court a quo stated, an appeal in the wide sense in that 'the Court can consider the matter afresh and may make any order it deems fit'. (See *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 725I.) The decision of the Master referring the matter to court for the determination of quantum did not mean that the court was confined to the determination of the quantum. It had to apply its mind to the matter afresh. Once it was found that Mrs Friedrich did not lead any evidence to show that she was entitled to reasonable maintenance, that should have been the end of the matter. It is not clear what caused the two courts below, to suddenly somersault and make an order that Mrs Friedrich was entitled to reasonable maintenance. During argument in this court Mrs Friedrich's counsel was constrained to concede that there was no basis for such an order as no evidence had been led in that regard.

[15] In terms of our common law, a surviving spouse has no claim against the estate of the deceased spouse merely by reason of the marriage. (See *Botha v Botha* 2009 (3) SA 89 (W) para 32.) Section 2 of the Surviving Spouses Act provides that if a marriage is dissolved by death, the surviving spouse shall have a claim against the deceased's estate for the provision of reasonable maintenance until death or remarriage, to the extent that the surviving spouse is not able to provide for his or her own maintenance, from his or her own means and earnings. The claim should be lodged with the executor of the Estate and it is required to be dealt with in terms of the Estates Act. (See also s 2(3)(a) of the Surviving Spouses Act.)

[16] Section 3 of the Surviving Spouses Act provides:

‘Determination of reasonable maintenance needs

In the determination of the reasonable needs of the survivor the following factors shall be taken into account in addition to any

other factor which should be taken into account:

- a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;
- b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and
- c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.’

[17] The provisions of ss 2 and 3 of the Surviving Spouses Act specifically provide that the surviving spouse is only entitled to reasonable

maintenance, and that the estate of the deceased is liable only to the extent to which the surviving spouse is not able to provide for it from his or her own means and earnings.

Reasonable maintenance must exclude extravagant demands of maintenance and a surviving

spouse who cannot show that he or she is not able to maintain him or herself is not eligible for maintenance from the deceased’s

estate. In order to meet the threshold set by the Surviving Spouses Act, Mrs Friedrich was required to show that she was in need of reasonable maintenance and was unable to maintain herself. In this determination, the factors listed in s 3 of the Surviving Spouses Act should be taken into account but as the Act stipulates, these are not exhaustive: any other factor may be taken into account.

[18] Mrs Friedrich’s evidence failed to address the factors listed in ss 3(b) and (c) of the Surviving Spouses Act. She did not testify that she could not make ends meet and was therefore in need of maintenance. She did not provide any documentary proof to show her expenditure, accounts and bank records. The trial court was kept in the dark about her lifestyle and standard of living during the subsistence of the marriage and after the death of the deceased.

[19] Mrs Friedrich’s reasons why she was unemployed were unconvincing. In trying to explain why she could not resume her career as an estate agent, she stated that it was no longer safe to do so because she was hijacked in the past whilst she was working in that capacity. She has not worked since the deceased’s death and she stated that she applied for approximately 10-12 jobs. Incredibly, however, not a single one of the job applications was in writing. According to her, she was unemployable because of her age, however, no documentary evidence was provided to show that she had indeed applied for employment and was turned

down.

[20] She also offered no explanation on what she meant to do or had done with the amount of approximately R1.4 million left from the R3 million she had received from the executor. There was also no documentary evidence to substantiate how the amount of R1.9 million was spent. The report compiled on her behalf by Quindiem Consulting was, as found by the trial court, inadmissible hearsay evidence.

[21] For all those reasons, Mrs Friedrich did not prove that she was entitled to reasonable maintenance. It is not necessary to deal with Mrs Friedrich's counterclaim, as it was dismissed by the trial court and there was no cross appeal to the Full Court.

[22] Accordingly, I make the following order:

ZLL Tshiqi

Judge of Appeal

Appearances

For Appellants:

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Instructed by:

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