

SOUTH AFRICA / JUDGMENT

Friedrich and Others v Smit N.O. and Others (A1056/2013) [2015] ZAGPPHC 1006; [2015] 4 All SA 805 (GP) (13 October 2015)

[2015] ZAGPPHC 1006

COURT

North Gauteng High Court, Pretoria

BEFORE

Murphy, Molopa-Sethosa, Tlhapi

CASE / FILE NUMBER

A1056/13

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A1056/13

DATE:

13/10/2015

In

the matter between:

MARTINUS

VAN ROOYEN FRIEDRICH

First

Appellant

MARELIZE

FRIEDRICH

Second

Appellant

NICOLENE

FRIEDRICH

Third

Appellant

and

ADRIAAN

LOUW SMIT N.O.

First

Respondent

SUSANNA

MARIA

FRIEDRICH
Second Respondent
THE
MASTER OF THE NORTH GAUTENG
Third
Respondent
HIGH
COURT, PRETORIA

JUDGMENT

MURPHY. J

1. This is an appeal against the judgment of Pretorius J in a matter that came before her on trial in August 2013, in which she set aside a decision of the Master (the third respondent), declared that the second respondent was entitled to reasonable maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990, ("the MSS Act"), dismissed the second respondent's counterclaim, and ordered each party to pay their own costs.
2. At the heart of the matter is a claim for maintenance by the second respondent against the estate of her late husband. The main facts are essentially common cause.
3. Mr Maartin Rudolf Friedrich (the deceased) died on 17 September 2006. His widow, the second respondent, was married to him for about three and a half years at the time of his death. In terms of the deceased's will, the appellants, his children from a previous marriage, were his only heirs. The second respondent accordingly in November 2006 filed a claim against the deceased estate in terms of section 2 of the MSS Act, initially for an amount of R4 454 760, which she subsequently reduced to R4 468 519,24.
4. The second respondent indicated in the claim that she had been unemployed for the previous 4 years and had relied solely on the deceased for income to pay her monthly expenses. She annexed an actuarial report by Quindiem Consulting (Pty) Ltd ("Quindiem")

setting out the basis and the method employed in the calculation of the claim. The actuary took each anticipated expense, projected it forward into the future, allowed for future inflation and determined the present value of each future payment. The present value of a future payment is the amount of money that is required in order to provide the necessary payment at the future date. It is less than the actual future amount required, because the money can be invested between payment of the claim and the future date, earning interest and growing over time. The actuaries relied for the purpose of their calculations upon the second respondent's expenses in the period between April 2006 and November 2006, determined the present value of the capital amount, applied valid mortality assumptions and accordingly valued her claim at R8,5 million.

5. The first respondent ("the Executor") allowed the second respondent's claim in the agreed reduced amount of R4 468 519, 24 and included it in the liquidation and distribution account. Taking the maintenance claim and the other claims of creditors into account, the amount of the estate remaining for distribution among the appellants was R886 785.
6. On 10 December 2009, the appellants lodged an objection to the account in terms of section 35(7) of the Administration of Estate Act 66 of 1965 ("the AE Act") in which they alleged that the second respondent had failed to lay a proper factual basis for the claim for maintenance. It was alleged in particular that the second respondent was then employed as a bookkeeper, had received an insurance policy payment of R139 293,46, had purchased a property valued at R695 000 in September 2008 and was at the age of 46 still able to find alternative means to earn an income. They also objected to the maintenance claim on the grounds that the marriage had been of short duration, the allegedly disproportionate nature of the claim, being more than half of the value of the assets in the estate, and pointed out that the second respondent had formed an intimate relationship with a third party subsequent to the death of the deceased.
7. Section 2 of the MSS Act provides that if a marriage is dissolved by death the survivor shall have a claim against the estate of the deceased spouse for the provision of her reasonable maintenance until her death or remarriage in so far as she is not able to provide therefor from her own means and earnings. The proof and disposal of a claim for maintenance of the survivor is required to be dealt with in accordance with the provisions of the AE Act.
8. Section 35(7) of the AE Act provides that any person interested in the estate may lodge an objection to a liquidation and distribution account: Section 35(9) of the AE Act provides:

"If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of the opinion that such objection is well-founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit."

Section 35(10) of the AE Act provides:

"Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further periods as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit."

9. It should be noted that the Master's powers under section 35(9) of the AE Act are precisely circumscribed. The power to order the executor to amend a liquidation and distribution account or to give any other direction after considering an objection rests upon the existence of either one of two jurisdictional facts or conditions precedent. The Master must either form an opinion that the objection is "well-founded"; or, alternatively, irrespective of any objection, he must form the opinion that the account is "in any respect incorrect and

should be amended". Only once one of those conditions precedent is fulfilled may he order the executor to amend the account or "give such other direction in connection therewith as he may think fit". The power conferred on the court by section 35(10) of the AE Act is clearly an appeal in the wider sense. The court is not limited to a decision whether the decision of the Master is right or wrong. It may consider the matter afresh and make any order it deems fit.

10. On 12 July 2010, the Master handed down a reasoned written ruling in relation to the objection. In it he identified the issue constituting the objection as being: "the amount entitled to be paid to the surviving spouse as maintenance claim" (sic). Referring to section 3 of the MSS Act, he recorded that various factors had to be taken into account in the determination of the reasonable maintenance needs and requirements of the surviving spouse, including: the amount available in the deceased estate for

distribution to heirs and legatees; the existing and expected means, earning capacity, financial needs and obligations of the surviving

spouse; the standard of living of the survivor during the subsistence of the marriage; and the age of the surviving spouse at the death of the deceased spouse.

11. The Master had regard to the report of the actuaries and used it as a baseline when assessing the quantum of the claim and noted that there was no other expert opinion contradicting that of the actuary. With regard to the amount available for distribution to the heirs, he stated:

"The maintenance claim against the estate has a great impact on the amount available for distribution to the beneficiaries, who are the children of the deceased. I do believe the amount available for distribution must be considered. This factor may be used to reduce the maintenance claim of the surviving spouse."

Unfortunately, the Master did not express a view about whether this factor justified a reduction of the second respondent's specific claim for maintenance, and, if so, by how much.

12. The Master's findings in relation to the other relevant considerations are somewhat inconclusive. Thus, in relation to the second respondent's prospects of earning future income, he merely observed:

"She is still able to learn some skills to enable her to earn an income. The possibility that the surviving spouse may find an employment was not considered. This factor may also be used to reduce the amount claimed."

Again he failed to determine an amount which might have been allowed for estimated future income. He also quite correctly noted that the actuarial report did not directly address the question of the age of the second respondent and her prospects of remarriage, factors which also could reduce the claim. He criticized the actuarial report for not giving a clear indication of the second respondent's other assets and for not taking into account the short duration of the

marriage, both factors, in his opinion, justifying a further reduction in the amount claimed for maintenance.

13. The Master concluded his reasons with the following findings:

"7. Having regard to the abovementioned 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 quantum of the maintenance claim, unless, both parties settle on the amount.

8. In terms of section 35(9) of the Administration of Estate Act 66 of 1965 (as amended) the Master may, if he is of the opinion that the objection is well founded, direct the Executor to amend the account upon the quantum being determined."

14. The Master's ultimate ruling is recorded in the part of his written reasons headed "VII Conclusions" as follows:

"The objection lodged against the Liquidation and Distribution Account in the estate of the late (sic) is herewith sustained."

It is evident from the Master's reasoning that he was of the opinion that the appellant's objection to the liquidation and distribution

account was well-founded, but only to the extent that the actuarial determination of the quantum of the claim did not give proper consideration to relevant factors that might appropriately have reduced the amount claimed. He was thus, in terms of section 35(9) of the AE Act, at large either to direct the executor to amend the account or to give such other direction as he thought fit. He chose to do the latter by directing the appellants to seek a determination of a reduced quantum by the court or to reach an agreement on the amount through a process of negotiation with the second respondent. The Master made no attempt himself to determine a reasonable amount of maintenance.

15. The appellants were aggrieved by the limited scope of the finding. They maintained that it was clear from their objection that they had contended that the second respondent was not entitled to any maintenance, and only in the alternative was the objection aimed at quantum.

16. On 11 August 2010 the appellants filed a notice of motion seeking an order reviewing and setting aside the decisions of the Master. The application was brought in terms of section 35(10) of the AE Act. The second respondent brought a counter application also seeking an order setting aside the Master's finding that the objection be sustained, ordering the executor to pay her the reduced amount of maintenance and that the Master be ordered to accept the liquidation and distribution account. On 7 March 2011, Goodey AJ ordered the application and counter-application to be referred to trial, with the notice of motion to stand as a simple summons and the answering affidavit as a notice of intention to defend, with the costs of the application to be reserved for the trial court. Although section 35(10) of the AE

Act requires an aggrieved party to seek relief against the Master's decision by notice of motion, where the court is of the opinion that it cannot decide the matter on affidavit, it may order it to go to trial.¹

17. The appellants filed their declaration on 22 March 2011, citing the executor as first defendant, the second respondent as the second defendant and the Master as the third defendant. The declaration challenges the correctness of the Master's decision rather than its reasonableness or rationality. The appellants in effect appealed against his decision. Paragraphs 17-20 of the declaration set out the cause of action as follows:

"17. The Third Defendant erred in finding that the issue constituting the objection was only in the amount entitled to be paid to the Second Defendant, as the Plaintiff's main objection was that the Second Defendant was not entitled to any maintenance whatsoever.

18. The Second Defendant is not entitled to any maintenance whatsoever, for reasons set out in the Plaintiff's objection

19. The Third Defendant's decision constitutes a refusal to sustain the Plaintiff's objection, and/or constitutes a direction (to approach court to establish the quantum of the Second Respondent's claim) and this decision is wrong in law and fact.

20. The Plaintiffs approached the court by way of the application in terms of section 35(10), which is the application which was referred to trial....."

18. The appellants requested the trial court to make an order in the following terms:

"1. An order setting aside the Third Defendant's findings dated 12 July 2010

2. Substituting for the Third Defendant's decision the following:

2.1 The objection lodged against the liquidation and distribution account in the estate of the late Maartin Rudolph Friedrich is sustained.

2.2 The executors of the estate of the late Maarten Rudolph Friedrich is ordered to amend the liquidation and distribution account by removing the claim (sic) of Susanna Maria Friedrich in toto."

19. It deserves emphasising that the appellants did not approach the court in terms of the Master's direction to determine the quantum of reasonable maintenance payable to the second respondent. They instead resorted to the remedy in section 35(10) of the AE Act to

have the decision of the Master set aside.

20. The second respondent's defence is reflected in paragraph 8 of her plea. Therein she admitted that the Master's limiting of the issue to the question of quantum was incorrect, but pleaded that she was entitled to the maintenance as claimed and awarded to her by the executor, which she had agreed to accept in the lesser amount of R4 468 519,24, and that the Master should have ratified and upheld the decision to pay her such maintenance. In

addition, the second respondent filed a counterclaim against the appellants (the heirs of the deceased) setting out the basis of her claim for maintenance and maintaining that the appellants' objection thereto was entirely without merit.

21. The essence of the second respondent's cause of action is pleaded in the counterclaim as follows:

"14. Pursuant to the Plaintiff's objection, the Third Defendant sustained such objection incorrectly.

15. The Third Defendant's conduct in sustaining the objection in any manner, was incorrect in that:

15.1 the Second Defendant was entitled to the maintenance as aforesaid;

15.2 the Third Defendant's findings were inconclusive; ambiguous and wrong in both fact and law.

16. The Third Defendant failed to properly discharge his duties in that he should have ratified the decision by the First Defendant to accept the Second Defendant's maintenance claim.

17. Consequently, the Second Defendant is entitled to an order which ratifies the First Defendant's decision regarding her spousal

maintenance."

22. The second respondent accordingly prayed in the combined plea and counterclaim for an order in the following terms:

"1. That the Third Defendant's conclusion and finding that "the objection lodged against the liquidation and distribution account in the estate of the late is herewith sustained" be set aside.

2. That the First Defendant be ordered to pay the Second Defendant maintenance in the amount of R4 468 519,24, taking into account any amounts already paid in this regard;

3. That the Third Defendant be ordered to accept the liquidation and distribution account

It is immediately evident that although the counterclaim is directed at the appellants, no relief is in fact sought against them. The second respondent limited the relief sought to orders compelling the executor and the Master to recognise and honour her claim. Taking a robust and common sense approach to the pleadings, the issue for determination was whether the second respondent was entitled to maintenance, and, if so, whether the Master should have accepted the liquidation and distribution account, allowing for the amount of maintenance as claimed by the second respondent.

23. At the trial in the court a quo, the only evidence led was that of the second respondent. The evidence tendered was in relation to her counterclaim. The court ruled that the second respondent had the duty to begin since it was she who was claiming maintenance. The second respondent testified that prior to her marriage with the deceased she was employed,

but gave up work on getting married and is still unemployed. Her evidence did not meaningfully address her need for maintenance or the factors referred to in section 3 of the MSS 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 irregularly 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.

24. The court a quo, on the basis of this incomplete evidence, ordered that the decision of the Master be reviewed and set aside. However, it did not substitute any decision for that of the Master, nor did it refer the matter back to the Master for re-consideration. Even though the second respondent had not included in her counterclaim a specific prayer for such, the court granted a declaratory order that the second respondent is entitled to reasonable maintenance under the MSS Act. To that extent, the court a quo appeared to agree with the Master. It however refused to determine the quantum of the maintenance and dismissed the counterclaim. The counterclaim, it will be recalled, firstly requested the Master's decision to be set aside; secondly sought an order directing the executor to pay the amount; and thirdly asked for an order directing the Master to accept the account. Insofar as the pleadings assert a claim by the second respondent for payment of the amount she alleged was owing to her, the court a quo was seemingly minded to grant absolution from the instance, but did so, perhaps reflexively, by unorthodox means. The learned judge reasoned in her judgment as follows:

"It is clear from the Master's decision that he was of the view that the factors set out in section 3 of Act 27 of 1990 were not properly taken into account by the first defendant when making a determination. This court finds that this court cannot make a determination as to the amount of maintenance to which the second defendant would be entitled, as there is no evidence whereby the court can find the "reasonable maintenance" which the second defendant would be entitled to.

Both counsel were in agreement that the Master's decision should be reviewed and set aside. I must agree that the decisions the Master made are contradictory and ambiguous.

I find that the second defendant 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."

25. The decision of the court a quo to set aside the decision of the Master is problematic in the light of its ultimate ruling. Its reasoning for doing so is sparse, probably because both parties agreed that the decision should be set aside, albeit for different reasons. The learned

judge's only finding in that regard, in paragraph 11 of the judgment, is to the effect that she agreed with both counsel that the Master's decision was contradictory, inconclusive and ambiguous. But it is hard to discern why that is so and doubtful if that constituted a sufficient basis to set the decision aside. The Master's decision might be criticised for seemingly limiting the objection to a determination of the quantum of maintenance, but his decision in that regard was clear: the amount had to be determined in court or by negotiation among the affected parties. The Master proceeded on the assumption that the second respondent was entitled to some maintenance, but questioned

the amount claimed and the failure of the actuarial report to deal with the factors enumerated in section 3 of the MSS Act. The court a quo in effect agreed with the Master that the second respondent was entitled to maintenance. The fact that the court a quo granted a declaratory order that the second respondent was entitled to reasonable maintenance under the MSS Act, despite neither

party praying for such an order in the pleadings, is an explicit indication that it accepted that the second respondent was entitled

to maintenance. That being the case, it needed to direct itself to the issue of quantum and to have asked whether the Master erred, or acted unreasonably or irrationally, in adopting the method he preferred to resolve the issue. If the solution adopted by the Master fell within a reasonable range of options, the court should have directed the appellants to proceed in accordance with the Master's reasonable directive.

26. 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.
27. As discussed, the method selected by the Master for determining the quantum was either that the parties should reach agreement or they should approach a court for a declaratory order. That order might justifiably be criticised on the ground that the Master has passed the buck. The Master is obliged to make a decision with regard to an objection to an admitted claim. Where, as in this case, the focus of an objection is the amount claimed, and the Master holds the view that some amount should be paid, it might be expected that he normally should determine an amount. In *Baard v Estate Baard*,² in relation to earlier legislation in *pari materia*, the court held that the power or discretion vested in the Master to sustain or overrule any objection raised to an account lodged by an executor in a deceased

estate is judicial (or quasi-judicial) and not merely administrative. The Master is obliged to give full consideration to the evidence and arguments of both the claimant and the objector and then to give his decision. He must rule on the extent to which he is prepared to admit the claim by specifying the amount. A failure to do that could conceivably be regarded as an unlawful abdication of power or a failure to exercise a discretion. That case, however, was not made by the parties in the court a quo. No challenge was made to the Master's preferred method for determining the quantum of the claim. In *Broodryk v Die Meester en 'n Ander* 3 it was held that it cannot be expected from the Master to resolve complicated factual disputes, as there are no proper procedures or structures to do so. If that is correct (which to my mind is debatable) then it cannot be said that the Master acted incorrectly,

unreasonably or irrationally in making his ruling, because in the light of that authority the Master opted for a legally acceptable

solution. Accordingly, there was no proper basis for setting aside his decision and the court a quo erred in doing so. The difficulty facing this court on appeal is that neither party has challenged the finding of the court a quo in that regard. There is no appeal or cross-appeal against the setting aside of the Master's decision and thus there is no basis to reverse the order. The order of the court below must stand with the consequence that the ruling of the Master is no longer legally operational.

28. The appellants' principal ground of appeal is that the declaratory order that the second respondent is entitled to maintenance conflicts with the order dismissing the counterclaim. The learned judge would have been correct to dismiss the counterclaim simply on the grounds that no competent relief could have been awarded (or indeed was sought) against the appellants as defendants in reconvention. To recap briefly: what has happened here is that a valid decision by the Master was set aside, primarily on the basis of a supposition shared by both parties and the court a quo that it was invalid, without the court a quo making any order of substitution. In addition, a misdirected counterclaim was dismissed on the grounds of it not being supported by the evidence. And, finally, a general declarator of entitlement was granted in favour of the second respondent, despite her never having sought such an order. The result is less than satisfactory for all concerned. The effect of the orders of the court a quo is that the Master's decisions have been set aside, but the parties remain in limbo on whether the objection to the liquidation and distribution account has been sustained or not.
29. As regards the counterclaim, there is no cross-appeal and for that reason alone this court cannot interfere with the order of the court a quo. Added to that, as stated, the counterclaim was directed at the appellants against whom no relief was sought. The order dismissing the counterclaim, irrespective of the reasoning in support of the order, is correct.
30. The real difficulty facing this court on appeal is that as indicated we are in agreement with the Master and the court a quo that the second respondent is indeed entitled to reasonable maintenance, in respect of which the quantum remains unresolved. The court a quo erred

in making the declaratory order not only because the second respondent never sought such an order but also by not granting consequential relief invoking a mechanism to determine the quantum of that entitlement. It should either have upheld the Master's ruling, referred it back for reconsideration, or substituted a different method. The counterclaim was never aimed at complying with the Master's valid and reasonable direction for determining quantum. It merely sought an alternative to the relief sought by the appellants under section 35(10) of the AE Act. This probably accounts for the fact that the issue of quantum was not pleaded appropriately by either party.

31. The unsatisfactory manner in which this case has been pleaded, argued and adjudicated at trial has consequently led to a conundrum and a stalemate. The appeal grounds are limited to an appeal against the declaratory order and the order that each party should pay their own costs in the trial. To grant the appeal against the declaratory order without further ado could be construed as a finding that the second respondent is not entitled to reasonable maintenance. This court, for the reasons given, is minded to avoid that result. In view of the evidence and the pleadings in the trial and on appeal, the only manner in which the stalemate can be resolved is for the matter to be referred back to the Master for a fresh decision. The essential error

made by the court a quo is that having set aside the Master's decision, despite agreeing with his finding that the second respondent has an entitlement to reasonable maintenance, it neglected to provide a means for determining quantum. The order of this court is aimed at a speedy and practical resolution of the problem. The matter must go back to the Master to decide the question of quantum. The parties will be well advised to place an agreed figure before him. Alternatively, the Master must determine what he considers to be a reasonable figure on the basis of the information provided by the parties and the factors referred to in section 3 of the MSS Act. Once the Master makes his determination, any aggrieved party may challenge his computation in terms of section 35(10) of the AE Act.

32. As regards costs, both parties have had a measure of success at trial and on appeal. There is no basis for interfering with the costs order of Pretorius J and we think each party should likewise bear their own costs on appeal.
33. In the result the appeal should succeed to the limited extent reflected in the order which follows:
 1. The orders of the court a quo are set aside and substituted with the following orders:
 - "a) The decision of the third defendant is reviewed and set aside.
 - b) The matter is remitted to the third defendant on the basis that the second defendant is entitled to reasonable maintenance in terms of section 2 of the Maintenance of Surviving Spouses Act 27 of 1990 and for the purpose of determining the quantum of the maintenance payable to the second defendant.

- c) The counterclaim is dismissed.
 - d) Each party is to pay its own costs."
2. There is no order as to costs in the appeal.

JR MURPHY

JUDGE OF THE HIGH COURT

I agree.

LM MOLOPA-SETHOSA

VV TLHAPI

Heard on: 7 August 2015

For the Appellants: Adv P van den Berg

Instructed by: C Bekker & Associates

For 2nd Respondent: Adv J Vorster

Instructed by: Marius Botha Attorneys

1 Pithey v McQuirk 1923 WLD 41

2 1928 CPD 505

3 1991 (4) SA 825 (C)

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