

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

Case No. **22649/2014**

In the judgment between:

[B.....] [J.....] [D.....] NO

Appellant

And

[E.....] [T.....] NO

First Respondent

[E.....] [V.....]

Second Respondent

[J.....] [J.....] NO

Third Respondent

JUDGMENT DELIVERED ON 3 JUNE 2015

1. The applicant is the testamentary executor in the estate of the late [S.....] [J.....] [W.....] who died on 24 April 2008. The deceased was the father of a minor daughter, who was born of his marriage relationship with the second respondent. The child is currently 15 years old.

2. The first respondent is a magistrate in the district of Riversdale presiding in the maintenance court there. The third respondent is a public prosecutor and the maintenance officer for the Riversdale Magistrate's Court.
3. Both the second respondent and the child are heirs of the deceased and stand to inherit twenty percent of the remainder of the deceased estate should there be one. When the present proceedings were instituted there was an amount of R1 182 260,00 in cash available for distribution to the heirs. This did not take account of any maintenance claim by the minor child. However, the capacity of the deceased estate to pay maintenance at all was in question because of a large potential claim by ABSA Bank which might have wiped out the cash surplus.
4. By the time this matter was argued the claim had fallen away, but the executor had not yet lodged a liquidation and distribution account with the Master.

5. A dispute exists as to whether or not the estate had paid any maintenance to the minor child between December 2011 and April 2014. Applicant has, however, paid an amount of R160 000,00 from the deceased estate to the second respondent, as an advance on the child's inheritance.
6. By 29 July 2014, no order for the maintenance of the child was yet in force. Following an application by the second respondent, the first respondent then ordered the applicant to make certain payments which are now under review: firstly, to pay R10 000,00 per month towards the maintenance of the child, commencing on 7 August 2014, and thereafter on the seventh day of every following month; secondly, to make a once-off payment of R720 000,00; and thirdly, to pay an amount of R7 500,00 on or before 14 August 2014. All of these sums were to be paid into the trust account of second respondent's attorney.
7. According to the judgment the first amount was maintenance that applicant was liable to pay in terms of section 16(1)(a)(i) of the Maintenance Act No. 99 of 1998. The second amount was a sum of money that was payable to the mother of the child in terms of

section 16(1)(a)(ii) thereof, being the amount second respondent was entitled to recover from the applicant in respect of expenses she had previously incurred for seventy two months in connection with the maintenance of the child. The third amount was a contribution towards the fees of an accountant (one Alberto Prins), whose expert report had been relied on to quantify the payment in terms of section 16(1)(a)(ii).

8. No appeal against these orders has been lodged in terms of s.25 of the Act. Therefore the merits of the decision by first respondent are presently not in issue.
9. However, applicant seeks to review and set aside the proceedings in the maintenance court on the ground that the first respondent lacked the jurisdiction to make the aforementioned orders against the deceased estate pursuant to s.16(1)(a) of the Act. Applicant also claims repayment of the sum of R627 500,00, together with interest, arising from the payment he made pursuant to the second order above.

10. The Master has not been joined in these proceedings. Nor is there any indication that he objects to the orders made by first respondent, or the payments made or due in terms thereof.
11. Applicant contends that an executor is not “*a person*” who has a legal duty to maintain any other person; that the provisions of the Maintenance Act do not apply to the obligation of the deceased estate to maintain the minor child; and that the maintenance court was not entitled to make a maintenance order against the applicant. The applicant further contends that the High Court is the proper forum to adjudicate any dispute relating to the maintenance claims in question.
12. The applicant also submits that an interpretation of the Maintenance Act which makes an executor liable to maintain another person is inconsistent with the provisions of the Administration of Estates Act (“the Estates Act”); firstly, because the provisions of sub-sections 16(1)(a)(i) and (ii) of the Maintenance Act are contrary to the processes set out in the Estates Act for establishing rejected claims, and the normal process of paying out claims – only after the account has lain open for inspection – and

objections thereto have been dealt with; and contrary to the requirements for payment and distribution of monies to minors (in terms of s.45 of the Estates Act); and because the requirements that payments of claims for maintenance can, pending the confirmation of the account, only be paid with the consent of the Master in terms of s.26(1A).

13. In support of his submissions the applicant relies on his tendentious interpretation of s.2(1) of the Maintenance Act. The section provides as follows:

“The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty.”

14. This matter concerns a child. When interpreting s.2(1) of the Maintenance Act the Court must promote the spirit purport and objects of s.28(2) of the Constitution,¹ which provides as follows:

¹ See s.39(2) of the Constitution

“A child’s best interests are of paramount importance in every matter concerning the child.”

15. The issues raised also need to be considered in the context of the powers vested in a maintenance court in terms of subsections 16(1)(a)(i) and (ii) of the Act respectively, namely: to *“make a maintenance order against any person proved to be legally liable to maintain any other person”*; and also, *“to make an order against such person, if such other person is a child, for the payment to the mother of the child, of such sum of money, together with interest thereon, as that mother is in opinion of the maintenance court entitled to recover from such person in respect of expenses incurred by the mother in connection with ... expenditure incurred by the mother in connection with the maintenance of the child from the date of the child’s birth to the date of the enquiry.”*

16. The threshold requirements for the applicability of the Maintenance Act to the current dispute are: a) a legal duty; b) resting on a person; c) relating to such person’s maintenance of another person.

17. It has become settled law that the duty of a parent to maintain a child does not cease upon a parent's death, but is transmissible and becomes a debt resting upon the deceased estate.² The correlative right of a child to such maintenance does not arise out of any principle of inheritance, but out of the family relationship between parent and child.³ In the matter of *In re Estate Visser*⁴ OgilvieThompson AJ stated that it was desirable in the interests of certainty to follow the series of cases that followed *Carelse v Estate De Vries*;⁵ and that these decisions are in full agreement with principles of Roman Law set out in the Digest, which make a father responsible, during his lifetime, for maintaining his child.
18. As a testamentary executor the applicant stepped into the shoes of the deceased and became the person chosen by the deceased to represent him.⁶ From the date the applicant received letters of executorship he represented the estate. This included paying,

² See: *Carelse v Estate de Vries* (1906) 25 SC 532; *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 706 H – 707 A

³ See *Van Zyl v Serfontein* 1989 (4) SA 475 (PD) at 477 G – I; and *Hoffman v Herdan NO & Another* 1982 (2) SA at 74 (T) at 275 H

⁴ 1948 (3) SA 1129 (C) at 1133 – 1134

⁵ Supra footnote 1

⁶ See *Ferguson and Huckell v Langerman and Lorentz* 1903 TH 227

under certain circumstances, estate liabilities.⁷ Maintenance of the minor child is one such liability.

19. In section 1 of the Administration of Estate's Act No.66 of 1965 ("the Estates Act") "*executor means any person who is authorised to act under letters of executorship granted or signed and sealed by a Master, or under an endorsement made under s.15.*" An executor is therefore a person in terms of the Estates Act, and may be regarded as one for purposes of the Maintenance Act.

20. In the light of the above it follows that while the deceased estate is intact the child's claim for maintenance will lie against the executor, as it did against her deceased father during the father's lifetime.

21. In terms of s.26(1A) of the Estates Act the executor may, before the executor's liquidation and distribution account has lain open for inspection and with the consent of the Master, release such amount of money and such property out of the estate as in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household. This sub-section was inserted by

⁷ See s.35 of the Administration of Estate Act No.66 of 1965

s.3 of Act 63 of 1990. I respectfully agree with the remark of Stretch J in N B v Maintenance Officer, Butterworth & Others⁸ (“the Butterworth case”), to the effect that section 26(1A) was specifically designed to alleviate family hardship pending the winding up of the estate.

22. The use of the word “may” in section 26(1A) is not intended to confer the executor with a discretion. Instead it suggests that the section is intended to enable an executor to do what he would not otherwise be authorised to do.⁹
23. The construction of the Estates Act suggests that there are two stages at which a child may claim maintenance from the executor; that is, before or after the executor’s account lies open at the office of the Master. For purposes of adjudicating the present dispute it is not necessary to consider whether the Maintenance Act may be employed against an executor during the second stage.
24. In the context of the Estates Act the executor’s power to pay maintenance during the first stage is vested by a section dealing

⁸ 2014 (6) SA 116 ECM para 17

with the executor's duty to take custody and control of property in the estate. An exception to the executor's duty to keep estate assets under control is created. The power to release money or property for the subsistence of the deceased's family is expressed in the Act anterior to and independently of the sections which regulate the separate process of winding up the estate. That process involves notice to lodge claims, the lodging and disputing of claims, the submission to the Master of the liquidation and distribution account, paying creditors and distributing the residue of the estate to heirs and legatees in accordance with the account. Accordingly, the executor is not required to follow these processes before paying subsistence money. The executor may do so spontaneously if he is of the opinion that there are sufficient funds for the subsistence of the deceased's family and household.

25. The maintenance needs of a child with a claim against a deceased estate may either be immediate or temporally more remote. Such needs may require satisfaction either before the liquidation and distribution account lies open for inspection or from that time till the

⁹ Compare **BID Industrial Holdings (Pty) Ltd v Strong** 2008 (3) SA 355 (SCA) at paras [60] and [61] at 370 D-I

estate is finally wound up. The present matter relates to the first stage.

26. The second stage provides a child in need of maintenance with a different remedy to the first. The child (and surviving spouse) of the deceased normally only receive maintenance payments or benefits during the second stage;¹⁰ that is, after the liquidation and distribution account has lain for inspection and during the distribution process. A child's maintenance claim is a debt *sui generis*. It does not compete with the claims of creditors.¹¹ On the other hand such a claim is preferred to the claims of heirs and legatees whose claims in the event of competition would have to abate proportionately. All of this has to be considered before a final distribution of maintenance is made.

27. After the estate has been wound up, if an heir has been overpaid the child could bring a *condictio indebiti* to recover the amount by which the defendant is overpaid.¹² A minor child is therefore not left without a remedy for maintenance at any stage after the

¹⁰ See Law of South Africa, 2nd Ed Vol 31, para [448] relying on Abrie et al Boedels Vol 1 15

¹¹ See Lotz v Boedel Van der Merwe 1958 (2) PH.M16 (O)

¹² Van Zyl v Serfontein 1989 (4) SA 475 (C) 477

passing of a deceased parent. However, the remedies that the law provides at each stage differ from each other.

28. At the first stage a responsibility to alleviate hardship is placed squarely on the executor for the period before his account lies open for inspection.¹³ The requirement of consent by the Master does not detract from the above conclusion. Such consent would serve to protect the executor from personal liability should he make a wrong distribution.¹⁴
29. The functions of the Master are to protect the interests of creditors, heirs, legatees and all other persons having a claim upon the estate,¹⁵ including dependent children. Consent by the Master could only legitimately be refused where the release of estate money or property for maintenance would prejudice creditors. In the absence of such prejudice the Master would be constrained to protect the interests of the dependent child and consent to the payment of maintenance.

¹³ Similarly, s. 12(3) of the Estates Act provides that the Master may specially authorise an interim curator, appointed until letters of executorship have been granted, or a person has been directed to liquidate and distribute the estate to release such money and property out of the estate as in his opinion are sufficient to provide for the deceased's family (or household). The executor's powers in terms of s.26(1A) are expressed in identical terms to those of the interim curator, save that the exercise of the executor's powers are subject to the consent of the Master.

¹⁴ See **Meyerowitz on Administration of Estates and Estate Duty 2007 Ed 12.2A**

30. The decision of the Master to give or withhold consent in terms of s.26(1A) of the Estates Act constitutes administrative action. An unreasonable refusal of consent would be subject to judicial review in terms of s.7 of PAJA. Such refusal is not an insuperable obstacle to maintenance. However, it would create a situation where the maintenance remedy of a child would have to be pursued in a High Court, albeit that the executor's account has not yet lain open.
31. When the Maintenance Act commenced, on 26 November 1999, the Legislature had already vested executors with authority and responsibility in terms of s.26(1A) of the Estates Act. This responsibility must have been within the contemplation of the Legislature when it enacted the Maintenance Act, and the remedial provisions within it. The pre-amble to the Maintenance Act indicates that the intention of the law-maker in amending existing maintenance laws was to meet the State's obligation in terms of Article 27 of the (United Nations) Convention on the Rights of the Child. This obligates state parties to provide maintenance

¹⁵ See Wessels v The Master of the High Court (1892) 9 SC 18

remedies for a minor child by taking all appropriate measures to secure the recovery of maintenance for the child from parents or other persons having financial responsibility for the child.

32. It follows that Legislature must have intended the Maintenance Act to provide a remedy against an executor who fails to carry out responsibility in terms of s.26(1A); and also that the legal duty described in s.2(1) of the Maintenance Act includes a person such as an executor who was already vested with responsibility for the subsistence of a deceased's family in terms of the earlier Estate's Act.¹⁶

33. The establishment of a fair and equitable maintenance system is sourced by the preamble to the Maintenance Act in the social and economic purposes of the Constitution. Had the Act not provided a remedy for children affected by s.26(1A) of the Estates Act children would have been constitutionally entitled to demand one; *inter alia*, to resolve situations such as those which have come to exist in the present matter.

¹⁶ The Administration of Estates Act No. 66 of 1965 commenced on 2 October 1967.

34. Six years after the passing of the deceased the child had allegedly not been paid maintenance. As the executor's account had not been finalised, satisfaction of the child's overall maintenance claim could not be satisfied in the ordinary course of winding up of the estate. This situation demands the same cheap and effective maintenance relief for the child whose parent is deceased as a child with living parents would be entitled to. Failing this, inequality before the law would exist.
35. In Troskie v Troskie¹⁷ Trollip J commented, with reference to the old Maintenance Act, 23 of 1963, on the “*simple, inexpensive and effective procedure*” in the appropriate magistrate's court which was “*obviously designed to expedite and to simplify the procedure relating to maintenance orders, and above all, to avoid the necessity of the parties having to resort to the far more costly procedure of applying to the Supreme Court for relief.*” Children of both living and deceased parents are entitled to this benefit.

¹⁷ 1968 (3) SA 369 (W) at 370 - 371

36. In Bannatyne v Bannatyne (Commissioner for Equality as Amicus Curiae)¹⁸ Mokgoro J observed

“Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by s.28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses, of the system.”

37. In Soller v Maintenance Magistrate, Wynberg & Others¹⁹ Van Zyl stated that:

“... the maintenance court functions as a unique or sui generis court. It exercises its powers in terms of the provisions of the Maintenance Act and it does so subject to the relevant provisions of the Constitution, more specifically s 28(2) thereof. This constitutional provision overrides any real or ostensible limitations relating to the jurisdiction of magistrates’ courts. It would be absurd, and a costly time-wasting exercise, if an applicant for relief in a maintenance court should be compelled to approach the High

¹⁸ 2003 (2) SA 363 (CC) at 377 at para [28]

Court for such relief because of jurisdictional limitations adhering to the magistrates' court. This could never have been the intention of the Legislature in enacting the Maintenance Act with the professed aim of rendering the procedure for determining and recovering maintenance 'sensitive and fair'."

38. In the Butterworth case²⁰ the court stated that clearly defined questions pertaining to the need versus the duty and the ability to pay maintenance are issues clearly falling in the domain of maintenance investigations and enquiries.
39. The payment of maintenance prior to the lying open of the executor's account involves these clearly defined questions.
40. Section 2(2) of the Maintenance Act provides that the Act may not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons. This must have reference to the maintenance responsibility of the executor established in terms of s.26(1A) of the Estate Act.

¹⁹ 2006 (2) SA 66 (CPD) para [30] at 76 B

41. The provisions of the concluding clause in s.2(1) of the Maintenance Act make it clear that the Act is intended to cast a wide jurisdictional net. This goes well beyond relationships by blood. For the reasons stated above it covers an executor exercising the responsibility under s.26(A1) of the Estates Act.
42. The applicant is therefore a person with a legal duty to maintain the minor child of the deceased. He is a person “legally liable to maintain any other person” for purposes of sub-sections 16(1)(a)(i) and (ii) of the Maintenance Act. Before his account lies open he is a person who may be subjected to investigation under s.6(1)(a) of the Maintenance Act arising from any alleged failure to maintain the minor child of the deceased.
43. The applicant contends that the judgment in the *Butterworth case* is of opposite effect to what has been found above. There are three practical distinctions between that case and the present one. Firstly, it is not clear from the facts of that case that the executor had failed or refused to maintain the children, as he has in this case. Secondly, the executor there was not joined before the High

²⁰ See paragraph 28

Court in order to compel him to carry out his duty to maintain the children. Thirdly, counsel for the parties had formulated the issue for decision in the Butterworth case to be whether s.6 of the Maintenance Act applied to the investigation of claims against deceased estates, “which claims are ordinarily regulated by the Administration of Estates Act.”

44. To some extent the question answered itself, because it seems to have proceeded on the basis that claims regulated by the winding up provisions in the Estates Act were subject to adjudication by the Court. A failure to pay maintenance as in the present case, i.e. before the executor’s account lies open, was not pertinently raised for consideration.
45. In any event, in the course of its judgment the Court felt constrained to answer the question whether s.6 applies to executors, and to determine whether the executor is “*a person legally liable*” to maintain dependent children as envisaged in Chapter 3 of the Maintenance Act. The conclusion reached was that “*in these particulars circumstances the executor of the estate and a person legally liable to maintain another person are not, for*

*the purposes of a compulsory investigation in the maintenance court, the same entity.”*²¹ The answer appears only to consider the winding up stage of the administration of the estate, as I have described it above.

46. Insofar as it might have been suggested that an executor is not a person with a legal duty to maintain children of the deceased in need of maintenance before the executor’s account lies open, I respectfully disagree, for the reasons already given.
47. Counsel for the applicant also queries the fact that the executor would be subject to prosecution, and the estate subject to execution, if a maintenance court was allowed to exercise jurisdiction over the executor and the estate. The Master can consent to the release of estate money and property for maintenance purposes anterior to the winding up stage in the administration of an estate. The employment of prosecution of the executor and execution over released money and property in order to compel an executor to provide maintenance, as contemplated in s.26(1A), is therefore not exceptional.

²¹ Judgment: paragraph 29

48. Applicant's other submissions relate to the facts of the case. They should therefore have been the subject of an appeal. By virtue of my conclusion above there is also no reason to consider the other grounds raised by the second respondent; namely, that the applicant consented to the jurisdiction of the maintenance court; or that the court, as the upper guardian of all minor children, has the power to confirm the said orders; or that the applicant failed to launch his review application within a reasonable time.
49. In all the circumstances the application is dismissed with costs.

DONEN AJ