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

Case No: 22726/2017

In the matter between:

MICHAEL JOHN REYNOLDS N.O. **Applicant**

and

HENDRIK JOHANN SMITH **Respondent**

Coram: Justice J Cloete

Heard: 11 March 2021, supplementary notes delivered 26 March and 6 April 2021

Delivered electronically: 7 May 2021

JUDGMENT

CLOETE J:

[1] This is an application by the executor of the deceased estate of the late Mareze Smith ("the deceased") to compel the respondent to furnish wide-ranging information and documentation purportedly for the purpose of determining whether the deceased estate has an accrual claim against the

respondent (or his estate) and, if so, the amount thereof,[1] although in seeking this relief the applicant does not rely on PAIA[2] (it does not apply to the respondent in his personal capacity, but it does apply to the various entities in respect of which information and documentation is also sought) or uniform rule 35, nor any specific provision in the Administration of Estates Act[3] or the Matrimonial Property Act ("MPA").[4]

[2] The deceased and respondent were married to each other out of community of property by antenuptial contract incorporating the accrual system as provided in Chapter 1 of the MPA at the time of her death on 25 January 2010, although they were in the process of divorcing and had already concluded a deed of settlement (on 7 December 2009) in contemplation thereof. It is correctly not suggested by either party that the deed of settlement remains binding. It is also not in dispute that there has been no accrual in the estate of the deceased.

[3] Upon his appointment as executor on 23 April 2010 the applicant assumed the duty to recover all assets of the deceased's estate.[5] He alleges that during its winding-up it appeared that her estate *'may have an accrual claim'* against the respondent.

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1 Founding Affidavit para 56.
2 Promotion of Access to Information Act 2 of 2000.
3 66 of 1965.
4 88 of 1984.
5 Meyerowitz: The Law and Practice of Administration of Estates 5ed at 127.

[4] On 8 July 2010 the respondent was thus requested to provide valuations at date of the deceased's death of all properties registered in his name or any entity in which he held an interest, as well as his motor vehicles, furniture and any other assets (save for those excluded in the antenuptial contract), together with details of his liabilities and proof thereof. On 18 November 2010 the respondent's erstwhile attorney provided a detailed schedule reflecting these dated 31 August 2008 ("particulars schedule"), together with various supporting documents and a letter from the respondent's auditor pertaining to his 33% shareholding in a property owning company, Clifton B-Three (Pty) Ltd. The respondent also provided details of claims which he allegedly had against the deceased estate totalling R1.43 million.

[5] In the particulars schedule the respondent had placed a value of R2 million on his shareholding in Clifton B-Three (Pty) Ltd. In the letter, which is dated 15 November 2010, the respondent's auditor advised that for the reasons set out therein, it would be appropriate to rather take the book value thereof at 28 February 2010 of R1 081 144. Subsequently on 7 March 2011 the respondent alleged that his shareholding in Clifton B-Three (Pty) Ltd was mistakenly not excluded from the accrual when the antenuptial contract was drawn up.

[6] The information provided did not satisfy the applicant who proceeded to request further documents to support some of the particulars furnished by the respondent, and also raised a number of queries. The respondent replied

through his attorney, furnishing more documentation and providing explanations in response to the further queries raised.

[7] Still the applicant was not satisfied and yet further information and documentation was requested. This to-ing and fro-ing continued on and off until some 6 years later, when on 23 November 2016 the respondent's erstwhile attorney informed the applicant's attorney *inter alia* as follows:

> *'7. We understand the duties of an executor but it is clear to us from the background of the matter and the contents of this letter that the executor must now make a judgment call, whether to pursue Mr Smith, given the collateral evidence and indications by collateral parties. It is our submission that it would be a waste of substantial legal costs to pursue the matter against Mr Smith. It is further our submission that serious consideration should also be given to the fact that any claim against Mr Smith has prescribed.*
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> *8. In the premises it is therefore our instructions not to supply you with any further documentation or other information as this process is also a huge inconvenience for Mr Smith, who does not understand your sporadic and/or delayed attempts to pursue him.*
>
> *9. Please note that it is our instructions that we receive any and all legal notices on behalf of Mr Smith and that our offices can be used as a service address so that we may act and reply in the appropriate manner.'*

[8] This did not deter the applicant whose attorneys addressed a further letter in similar vein to the respondent's attorneys on 18 January 2017, to which the latter did not reply. It was 11 months later, on 12 December 2017, that the applicant launched this application.

[9] The respondent raised two defences to the relief sought. First, the applicant's claim has prescribed. Second, what the applicant in truth seeks are orders amounting to pre-litigation discovery and a response to pre-litigation interrogatories which include "explanations" from third parties who are not joined in these proceedings as well as the creation of documents. I deal with each in turn.

[10] The relevant sections of the MPA are s 3 and s 7 which read as follows:

> *'**3. Accrual system.**---(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.*
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> *(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage…*
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> [S 8 (1) is not relevant for present purposes].
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> ***7. Obligation to furnish particulars of value of estate.**--- When it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.'*

[11] Section 3(1) of the MPA makes clear that the claim is one sounding in money since it is for *'an amount'*. In terms of s 11 of the Prescription Act[6] the accrual claim would prescribe upon the expiration of 3 years after prescription began

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[6] 68 of 1969.

to run. Although in the answering affidavit the respondent appears to have relied on a prescription period of 6 years on the basis that the debt arose from a notarial contract, it is my view that the claim did not arise from such a contract but rather as a result of the deceased's death, which is when the deceased estate became vested with a legally enforceable right to the accrual: *NCO and Another v Stellenbosch Municipality*.[7]

[12] Section 12 of the Prescription Act provides as follows:

> *'**12. When prescription begins to run.**---(1) Subject to the provisions of subsections (2), (3), … prescription shall commence to run as soon as the debt is due.*
>
> *(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care…'*

[13] The respondent bears the evidentiary burden of proving that the applicant's claim has prescribed. Moreover:[8]

> *'In order to successfully invoke s 12(3) of the Prescription Act either actual or constructive knowledge must be proved. Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the*

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7 (A244/2019) [2020] ZAWCHC 35 (12 May 2020) at para [78].

8 *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) at paras [9] to [10]. See also *Minister of Finance v Gore N.O.* 2007 (1) SA 111 (SCA) at para [17].

> *debtor… Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. The test is what a reasonable person in his position would have done, meaning that there is an expectation to act reasonably and with the diligence of a reasonable person. A creditor cannot simply sit back and by supine inaction arbitrarily and at will postpone the commencement of prescription. What is required is merely the knowledge of the minimum facts that are necessary to institute action and not all the evidence that would ensure the ability of the creditor to prove its case comfortably.'*

[14] Although the evidentiary burden rests upon the respondent, it is convenient to first summarise why the applicant maintained in argument that the debt (i.e. the accrual claim) has not prescribed. It was submitted by *Mr Grobbelaar* who appeared on his behalf that there are two reasons. First, the applicant cannot establish whether such a claim exists without the information and documentation sought from the respondent in this application. Second, the purpose of the relief is not to establish the quantum of the claim but rather whether there is a claim at all.

[15] However the second reason is not supported by the case made out in the founding papers, which is that the relief is directed at establishing both the debt's existence and if so, its quantum. I will thus focus on the first reason, which in turn involves some scrutiny of the antenuptial contract, the particulars schedule and the subsequent exchange of correspondence.

[16] The deceased and respondent had been married for just over 2 years at the time of her death. In their antenuptial contract entered into on 17 November

2007, each declared the commencement value of their respective estates as R200 000. Both also excluded certain assets from the operation of the accrual. In the respondent's case these were 13 identified immovable properties and his members interest in Smith & Smith Architects CC. The deceased excluded an immovable property and her members interest in Jetvest 1137 CC.

[17] The particulars schedule furnished on 18 November 2010 lists each asset and attendant liability in a clearly identifiable manner, accompanied by values. In addition the assets are separately categorised in respect of those owned by the respondent personally and those held in other entities in which he had an interest. He also updated the schedule in accordance with the antenuptial contract by identifying those which on his version were now excluded from the accrual.

[18] It is apparent that the respondent held a substantial property portfolio either personally or through other entities. In terms of s 4(1)(b)(ii) of the MPA any asset acquired by virtue of an excluded asset is similarly not taken into account for purposes of calculating the accrual.

[19] That the applicant must have applied his mind to the provisions of the antenuptial contract and particulars schedule is evident from the exchange of correspondence that followed. He appears to have accepted the respondent's position that the assets reflected as excluded in the particulars schedule did not form part of the accrual, since he requested valuations of assets *'with the*

exception of the assets excluded'. The applicant also accepted that any assets held in trusts (including shareholdings by these trusts in any entities) were similarly excluded. Particulars of these shareholdings were provided to the applicant by the respondent's erstwhile attorney on 7 March 2011, as was a summary of the respondent's liabilities at date of the deceased's death.

[20] On 13 October 2011 the applicant's current attorney advised the respondent's erstwhile attorney that *'We are now handling the administration on behalf of… the executor… all of the documentation in connection with the estate has been handed to us and we have had the opportunity… to familiarise ourselves with all relevant issues, in particular the issue of the accrual claim…'.*

[21] In a subsequent letter dated 10 February 2012 the financial statements of the excluded entities were requested in order to establish the value of any credit loan account held therein by the respondent. Most of the respondent's explanations were accepted but he was requested to provide proof that he owned the furniture and that one of the vehicles, a Toyota Prado, was indeed registered in Smith & Smith Architects CC.

[22] In a letter dated 20 January 2013 the applicant's attorney expressed concern as to the sufficiency of the financial statements subsequently provided to her by the respondent's auditor. Further queries were raised, including in relation to other entities in which the respondent might have an interest.

[23] On 15 October 2013 the respondent was advised that should the further information requested not be forthcoming by 31 October 2013 *'the executor reserves the right to approach the court for an order compelling you to do so'.* The respondent did not reply but the threatened application did not materialise either.

[24] Nothing more happened until 3 years later when on 12 October 2016 the applicant's attorney again addressed the respondent's erstwhile attorney. The telling portion of this letter reads as follows:

> *'We advise that the below mentioned information/documentation is still required by the estate in order to finalise the accrual claim which the estate has against… your client'.*
>
> [emphasis supplied]

[25] To my mind, the exchange of correspondence leads one to accept that upon receipt of the particulars schedule as far back as 18 November 2010 the applicant must have formed the view (for whatever reason) that it contained sufficient information for him to conclude that the deceased estate indeed had an accrual claim against the respondent.

[26] This is because all of the further documents and information sought thereafter were aimed at establishing the quantum of that claim. If the applicant's understanding of the particulars schedule was that there was, prima facie, no accrual in the respondent's estate, the queries subsequently raised would

surely have been directed at attempting to establish whether or not there was indeed an accrual.

[27] That the applicant must have approached the matter thereafter on the basis of establishing only the quantum of the accrual claim is supported by his subsequent requests for valuations and queries directed at establishing the existence and values of possibly undisclosed further assets, seemingly not reflected in the particulars schedule. Any doubt that this was in truth his approach was clarified by the plain wording of his attorney's letter dated 12 October 2016, namely that the outstanding information and documentation was required to finalise an *existing* accrual claim.

[28] Accordingly, on the applicant's version, he must have had knowledge of the minimum facts necessary to institute an action based on an accrual claim after applying his mind to the particulars schedule after its receipt on 18 November 2010 or, at the latest, 7 March 2011, when he received particulars of the respondent's shareholdings, became aware of the latter's stance that his shareholding in Clifton B-Three (Pty) Ltd should have been excluded from the accrual, and was placed in possession of a summary of the respondent's liabilities at date of the deceased's death.

[29] Had the applicant wished to pursue an accrual claim on behalf of the deceased estate he should therefore have instituted an action during February 2014 at the latest. He did not require all of the evidence that would ensure his ability to prove his case comfortably in order to do so.

[30] It happens routinely in divorce actions that a spouse alleges there has been no accrual in her estate but an accrual in the estate of the other spouse, and seeks an order in terms of s 3 of the MPA. This is an acceptable manner of pleading and it is not necessary to plead how the accrual is calculated. The applicant's position is thus no different, and this was all he needed to have done, which in turn would have interrupted prescription.

[31] In addition, by instituting a s 3 action, during the usual process of discovery and the furnishing of trial particulars he would presumably have been placed in a position to prove the quantum of that claim against the respondent.

[32] I thus conclude that the applicant's claim on behalf of the deceased estate against the respondent has prescribed. However if I am wrong in reaching this conclusion, I deal with the second defence of pre-litigation discovery, etc. To an extent what follows overlaps with what I have considered in reaching my conclusion on prescription.

[33] At the outset it is important to repeat that the relief sought by the applicant is not premised on s 7 of the MPA, namely the respondent's obligation to furnish full particulars of the value of his estate. Put differently, there is no allegation in the founding papers that the particulars provided by the respondent did not meet the requirements of that section.

[34] In *ST v CT*[9] the Supreme Court of Appeal described the s 7 obligation as one of *'full disclosure of relevant information'*,[10] and went on to state that a failure to make full disclosure may warrant the drawing of an adverse inference that a party has concealed assets *'where it is reasonable in the circumstances to do so'*.[11]

[35] In that case the Supreme Court of Appeal was dealing with an opposed divorce action, but there is no reason why what was stated should not also apply to situations such as the present, since s 7 draws no distinction between marriages dissolved by divorce and those dissolved by death.

[36] The importance of the description by the Supreme Court of Appeal of the s 7 obligation is that it plainly refers to "information" and does not go so far as to require a party to make full discovery at the same time.

[37] This makes sense since the discovery procedure contained in uniform rule 35, which applies irrespective of the nature of the litigation, would otherwise be rendered nugatory solely in cases involving s 3 claims. There is moreover no indication in the MPA either that *'full particulars'* include the requirement that all supporting or source documents must simultaneously be furnished.

[38] This being the extent of the s 7 obligation there is no basis upon which the applicant should be entitled to more. In the notice of motion he seeks orders

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9 2018 (5) SA 479 (SCA).
10 At para [33].
11 At para [36].

that the respondent furnishes financial statements for the year ending 28 February 2009 in respect of 20 separate entities in which third parties also have interests; certificates of balance in respect of any amount owing by these entities to the respondent at date of death of the deceased *'issued by the accountant who prepared the financial statements and certificates of balance'*; an explanation from the *'said accountant'* if there is a difference between the financial statements for the 28 February 2009 tax year and such certificates of balance; values of shareholdings in 19 of the 20 entities which include trusts which the applicant already accepted were excluded from the accrual; audited financial statements of Clifton B-Three (Pty) Ltd for the tax year ending 28 February 2009 (despite the applicant having taken no steps to dispute the respondent's claim that this should have been excluded from the accrual) and various calculations pertaining thereto; proof that furniture in the erstwhile marital home was owned by a particular trust; various details regarding a BMW motor vehicle which according to the applicant's attorney in fact was the property of the deceased; proof of registration of the Toyota Prado in Smith & Smith Architects CC; and a *'spreadsheet'* of the respondent's net worth on date of the deceased's death, alternatively as at 28 February 2009 (i.e. 11 months before she died).

[39] I agree with *Mr Bremridge SC* who appeared with *Mr De Vries* for the respondent, that this is nothing more than an attempt to obtain pre-litigation discovery and/or impermissible pre-litigation responses to interrogatories. In a comparable context, dealing with an application in terms of PAIA, the

Supreme Court of Appeal in *Unitas Hospital v Van Wyk and Another*[12] approved the following formulation articulated in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*:[13]

> *'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information… an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required, and how that information would assist him in exercising or protecting that right.'*

[40] On the established facts the applicant does not require the documentation and information sought in this application to assist him in the exercise or protection of what he considers to be the right of the deceased estate, namely the accrual claim. All that he requires, at least allegedly, is documentation and/or information to establish the full extent of the quantum of that claim. The appropriate manner in which to procure these is by way of discovery and/or trial particulars once action has been instituted. It follows that, in my view, the application in any event cannot succeed.

[41] As far as costs are concerned, this is a matter of considerable importance to the respondent, who has had this sword of Damocles hanging over his head for the past 11 years. This factor, taken together with the manner in which the application was brought, in my view justified the employment of two counsel.

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[12] 2006 (4) SA 436 (SCA) at para [16].
[13] 2001 (3) SA 1013 (SCA) at para [28].

[42] **In the result the following order is made:**

1. **The application is dismissed.**
2. **The applicant, in his representative capacity, shall bear the costs of this application on the scale as between party and party as taxed or agreed, including the costs of two counsel where employed as well as any reserved costs orders.**

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J I CLOETE