IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2020/21215

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

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L.J. DU BRUYN **15 JUNE 2022**

In the matter between:

MAJAKE, TUMANE OPHINIAS Applicant

and

JONES, RACHEL SESINYANA First Respondent

JONES, RACHEL SESINYANA N.O. Second Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG Third Respondent

JUDGMENT

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[1] This is an opposed application that relates to a payment that was made from the joint estate of the Applicant ("Mr Majake") and his deceased wife, Ms Eva Matsediso Majake ("the deceased"). The payment was made by the deceased to her sister, the First Respondent ("Ms Jones").

Relief sought

[2] Mr Majake seeks the following relief in his notice of motion:

> "1. That the payment of the sum of R455,000-00 made by the late, Eva Matsediso Majake to First Respondent on 16th May 2015 to be declared null and void;
>
> 2. That the said payment of the amount of R455,000-00 be paid to the deceased estate of the late, Eva Matshediso Majake, the said sum to be dealt with as part of the administration of the estate.
>
> 3. *Alternatively*, the First Respondent's share in terms of the will of the late, Eva Matsediso Majake be adjusted in terms of Section 15(9)(b) of the Matrimonial Property Act 88 of 1989, so that the Applicant's 50% share of the sum of R455,000-00 in the amount of R227,500-00 be deducted from First Respondent's portion of inheritance from the deceased estate of the late, Eva Matsediso Majake.
>
> 4. That the costs of this application be paid by the First Respondent on a party and party scale"
>
> (Quoted verbatim)

[3] This application is only opposed by Ms Jones in her capacity as the First and Second Respondents. The Third Respondent has played no part in this application.

Common cause facts

[4] The relevant common cause facts are uncomplicated.

[5] Mr Majake and the deceased were married to each other in community of property. To Mr Majake's knowledge, the deceased was diagnosed with diabetes before they got married.

[6] Both Mr Majake and the deceased used to be employed by the Gauteng Department of Education ("the Department"). Mr Majake resigned as an employee of the Department in or about July 2012. The deceased's medical condition deteriorated during or about 2013

as a result of her diabetes. She resigned as an employee of the Department during the first half of 2015, apparently due to her ailing health. Upon her resignation, the deceased received a pension payout.

[7] The deceased's resignation roughly coincided with two events. The one event was Mr Majake's appointment by Transnet as a Chief Administrative Officer. The other event was that the deceased left her and Mr Majake's matrimonial home to move in with Ms Jones. I deal further with this living arrangement as part of the disputed facts.

[8] On 16 May 2015, the deceased made an electronic payment ("the payment") in the amount of R455 000 into the bank account of Ms Jones.

[9] The deceased executed a will on 11 April 2016. In her will, the deceased bequeathed her entire estate to Ms Jones. The deceased also appointed Ms Jones as the executrix of her estate.

[10] The deceased passed away on 16 September 2017. On 9 November 2017, Ms Jones was appointed as the executrix of the deceased's estates.

Disputed facts

[11] I now set out the most significant facts that are in dispute between Mr Majake and Ms Jones.

[12] According to Mr Majake, his work as Chief Administrative Officer with Transnet required him to travel to all the provinces of South Africa. The deceased would be left alone at their matrimonial home when Mr Majake was out of the province. Mr Majake states that the deceased was not in a position to stay alone because, when her blood sugar levels were too high or too low, the deceased would be confused, she would have blurred vision, her body would shake and she would even lose consciousness. Mr Majake asserts that he could not afford to hire somebody to look after the deceased. For this reason, according to Mr Majake, he and the deceased agreed that it would be in the deceased's best interests to stay with Ms Jones whenever Mr Majake was out of the province.

[13] Mr Majake states in his founding affidavit that he discovered the payment on 30 September 2017. He contends that he had no knowledge of the payment when it was

made and that he did not consent to it. Mr Majake claims that the payment constituted a donation or an alienation as contemplated in s 15(3)(*c*) of the Matrimonial Property Act 88 of 1984 ("the Act").

[14] According to Ms Jones, Mr Majake allowed the deceased to come and stay with her. In the alternative, Ms Jones contends that Mr Majake placed the deceased in her care. Ms Jones asserts that Mr Majake allowed her and the deceased to use the deceased's money for purposes of the latter's medical care and general wellbeing. Ms Jones explains that she and the deceased agreed that the latter would make the payment and that Ms Jones would use the money to take care of the deceased's needs while her health was deteriorating, which needs included food, accommodation and driving the deceased from one hospital to another. Ms Jones describes how she used her own money to pay for some of the deceased's medical expenses. She states that Mr Majake abandoned the deceased and did not contribute to her medical expenses. Ms Jones also states that the deceased told her that Mr Majake knew about the payment.

[15] Ms Jones raises a point *in limine* of prescription in her answering affidavit. She also contends that she has claims against Mr Majake and the deceased's estate for medical and funeral expenses incurred by her. I was informed at the hearing that Ms Jones no longer pursues either the point *in limine* or the said claims.

[16] Mr Majake attached a copy of a letter ("the letter") from Mudzusi Molobela Incorporated dated 24 April 2018 to his replying affidavit. Mudzusi Molobela Incorporated apparently represented Ms Jones. The second paragraph of the letter reads:

> "Kindly take note that the amount paid to our client Mrs. R.S. Jones was used by the deceased on herself and also on building a house of the deceased …"

[17] Mudzusi Molobela Incorporated asserted in the letter that the payment was used for two purposes, namely by the deceased on herself and for building a house of the deceased. The latter purpose, i.e. building a house of the deceased, is not dealt with by Ms Jones in her answering affidavit. Mr Majake contends that the difference between what was asserted by Mudzusi Molobela Incorporated in the letter and what is contended for by Ms Jones in her answering affidavit, is an indication that the payment was a donation. I do not agree. While it might be that the assertion in the letter differs from what is contended for by Ms Jones, it is not an indication that the payment was a donation. According to the letter, the payment was used by the deceased, not Ms Jones. The letter clearly states that the deceased used the R455 000 on herself and on building a house

of hers. This indicates that the deceased used the R455 000 herself instead of donating it to Ms Jones. In any event, Mr Majake only attached the letter to his replying affidavit, which means that Ms Jones did not have an opportunity of dealing with Mr Majake's contentions on the latter in her answering affidavit.

Relevant provisions of the Matrimonial Property Act 88 of 1984

[18] Section 15 of the Act provides as follows in relevant part:

> "(3) A spouse shall not without the consent of the other spouse—
>
> (*a*) …
>
> (*b*) …
>
> (*c*) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate … .
>
> …
>
> (8) In determining whether a donation or alienation contemplated in subsection (3)(*c*) does not or probably will not unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account.
>
> (9) When a spouse enters into a transaction with a person contrary to the provisions of subsection … (3) of this section … and—
>
> (*a*) …
>
> (*b*) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection … (3) …, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate."

Did the payment constitute a donation or an alienation without value as contemplated in s 15(3)(*c*) of the Act?

[19] Having regard to the common cause facts, the disputed facts and the above-quoted provisions of the Act, it must be determined whether or not the payment constituted a donation or an alienation as contemplated in s 15(3)(*c*) of the Act.

[20] As stated, Mr Majake claims that the payment constituted a donation or an alienation as contemplated in s 15(3)(*c*) of the Act. As such, he bears the onus of proving this claim. Thus, Mr Majake's evidence in this regard should be considered.

[21] Mr Majake states that the R455 000 paid by the deceased to Ms Jones was an asset of his and the deceased's joint estate. This does not prove that the payment was a donation or an alienation as contemplated in s 15(3)(*c*). It merely means that the deceased could not donate the R455 000 to another person or alienate it without the consent of Mr Majake as contemplated in s 15(3)(*c*).

[22] It is stated by Mr Majake that the payment prejudiced his interest in the joint estate. This also does not prove that the payment was a donation or an alienation as contemplated in s 15(3)(*c*). This fact, on the assumption of its truth, merely relates to the test provided for in s 15(8) to determine whether a donation or alienation contemplated in s 15(3)(*c*) does not or probably will not unreasonably prejudice the interest of the other spouse in the joint estate.

[23] Mr Majake goes on to state that the payment was made without his knowledge and consent, and that he only discovered the payment after the deceased's death. These facts, again on the assumption that they are true, do not prove that the payment was a donation or an alienation as contemplated in s 15(3)(*c*). The high-water mark of Mr Majake's case seems to be that the payment must have been a donation or an alienation as contemplated in s 15(3)(*c*) because it was made without his knowledge and consent, and because he only discovered it after the deceased's death. This contention is without merit. Even if the payment was made without Mr Majake's knowledge and consent, it does not follow without more that it was a donation or an alienation as contemplated in s 15(3)(*c*). Similarly, even if Mr Majake only discovered the payment after the deceased's death, it does not follow without more that it was a donation or an alienation as contemplated in s 15(3)(*c*).

[24] No evidence has been placed before this court by Mr Majake upon which a finding can be made that the payment constituted a donation or an alienation as contemplated in section 15(3)(*c*) of the Act.

[25] Significantly, Mr Majake contends at paragraph 13 of his founding affidavit that the deceased made the payment with the intention of depriving him and their joint estate of the R455 000. He repeats this contention at paragraph 15 of his founding affidavit, stating that the deceased made the payment –

> "with the intention to deprive myself and the joint estate of an asset of considerable value for her own benefit, using First Respondent to cover her conduct."

[26] Mr Majake contends that the deceased made the payment with the intention of depriving him and their joint estate of the R455 000. According to him, the deceased's intention was to benefit herself at his and their joint estate's expense. Mr Majake further contends that the deceased merely used the payment to Ms Jones as a cover for the deceased's stated intentions. Mr Majake provided no proof in support of his contentions in this regard. However, if Mr Majake is correct that these were the intentions of the deceased, the payment could not have constituted a donation as contemplated in s 15(3)(*c*).

[27] In South African law, a donation may fall into one of two categories. It may either be a donation properly so called (*propria* or *mera*) or a donation improperly so called (*impropria* or *non mera*). See *Avis v Verseput* 1943 AD 331 at 350 and *Commissioner for Inland Revenue v Estate Hulett* 1990 (2) SA 786 (A) at 793F–G.

[28] Only a donation prompted by sheer liberation or inspired solely by a disinterested benevolence on the part of the donor can be described as a donation *propria*. See *Avis supra* and *Hulett supra* 793G–H. The Appellate Division in *Hulett supra* at 794I held that the word "donation" (when used in the context of a donation *propria*) has acquired under the South African law the meaning of a gratuitous disposal of property prompted by motives of sheer liberality or disinterested benevolence. If the deceased's intention was to benefit herself and she merely used the payment to Ms Jones as a cover for this intention (as contended for by Mr Majake), then the payment was not prompted by motives of sheer liberality or inspired solely by a disinterested benevolence on the part of the deceased. As a result, the payment would not constitute a donation properly so called.

[29] The Appellate Division held as follows in *Avis supra* at 353 regarding donations improperly so called (*impropria* or *non mera*):

> "[T]hey are not inspired solely by a disinterested benevolence but are, as a rule, made in recognition of, or in recompense for, benefits or services received, and therefore are akin to an exchange or discharge of a moral obligation."

[30] If the deceased's intention was to benefit herself and she merely used the payment to Ms Jones as a cover for this intention (as contended for by Mr Majake), then the payment was not made in recognition of, or in recompense for, benefits or services received. As a result, the payment would not constitute a donation improperly so called.

[31] In my view, the payment could not have constituted an alienation without value. I respectfully agree with the finding by Koen J in *Govender NO and Others v Gounden and Others* 2019 (2) SA 262 (KZD) at paragraph [47] (273H–I) that it seems that the phrase "alienate such an asset without value" might have been included in s 15(3)(*c*) to cater for the situation where the spouse who is alleged to have alienated an asset of a joint estate without value is an insolvent heir and the issue arises whether a renunciation might amount to a disposition without value in terms of s 26 of the Insolvency Act 24 of 1936. This situation and the issue relating to the repudiation of an inheritance do not arise on the facts of this matter.

The provisions of s 15(9) of the Act

[32] In his notice of motion, Mr Majake seeks alternative relief in terms of s 15(9)(*b*) of the Act. In light of my findings set out above, it is not necessary to determine whether the deceased knew or ought reasonably to have known that she would probably not have obtained Mr Majake's consent for the payment as contemplated in s 15(9)(*b*). It is also not necessary to determine whether the joint estate of Mr Majake and the deceased suffered a loss as contemplated in s 15(9)(*b*). It would only have been necessary to determine these issues if the payment constituted a donation or an alienation as contemplated in s 15(3)(*c*). The provisions of s 15(9)(*b*) would only become relevant to this matter if the payment was made contrary to the provisions of s 15(3)(*c*), i.e. if the payment constituted a donation or an alienation as contemplated in s 15(3)(*c*).

Order

[33] In the result, the following order is made:

1. The application is dismissed.

2. The Applicant shall pay the First and Second Respondents' costs of the application.

This judgment is handed down electronically by uploading it on CaseLines.

L.J. du Bruyn
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date heard:	25 April 2022
Judgment delivered:	15 June 2022
For the Applicant:	Mr N. Zwane Briefed by Rasegoete & Associates Inc.
For the First and Second Respondents:	Mr N. Ralikhuvhana Briefed by Mudzusi Molobela Attorneys