THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 603/08

FRED KRUGER NO Appellant

and

DENISE EMMERENTIA GOSS First Respondent

MASTER OF THE HIGH COURT Second Respondent

Neutral citation: *Kruger v Goss and another* (603/08) [2009] ZASCA 105 (21 September 2009)

CORAM: NAVSA, BRAND and PONNAN JJA

HEARD: **14 September 2009**

DELIVERED: **21 September 2009**

CORRECTED:

SUMMARY: Rehabilitative maintenance order – claim against deceased estate – s 7(2) of the Divorce Act 70 of 1979 and the common law discussed – claim held not to be enforceable.

ORDER

On appeal from: High Court, Pretoria (Hartzenberg J sitting as court of first instance).

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:

'The application is dismissed with costs.'

JUDGMENT

NAVSA JA (BRAND and PONNAN JJA concurring):

[1] The question in this appeal is whether an order for rehabilitative maintenance, pursuant to a decree of divorce, is enforceable by a spouse against her former husband's deceased estate.

Background

[2] The respondent, Ms Denise Emmerentia Goss, and Mr Fred Loll Stephanus Kruger married each other on 23 March 1988. The marriage was out of community of property with the exclusion of the accrual system as contemplated in Chapter 1 of the Matrimonial Property Act 88 of 1984.

[3] Approximately three and a half years later they were divorced by order of the Pretoria High Court (Hartzenberg J). The divorce order was granted after a trial lasting a week. The respondent had no capital claim against her former husband and had restricted her claim to one for rehabilitative maintenance. The relevant part of the order reads as follows:

' "2. THAT the Plaintiff is to pay rehabilitative maintenance to the Defendant as follows:

2.1 R8 000-00 per month for the months of October, November and December 2003;

2.2 R6 000-00 per month for the next 57 months;

2.3 All payments are to be paid on or before the 3rd day of each month;

2.4 If the Defendant becomes employed and earns an income, the Plaintiff will not be entitled to advance that income as changed circumstances for purposes of an alteration of the maintenance order." '

[4] Subsequent to the divorce proceedings and the order referred to above, Mr Kruger, to whom I shall hereafter refer as the deceased, duly and punctually paid rehabilitative maintenance to the first respondent until 31 August 2006. He passed away on 29 September 2006 due to natural causes. By this time the deceased had paid 33 of the envisaged 57 monthly instalments.

[5] On 13 February 2007 the deceased's son, Mr Fred Kruger, was appointed executor of the latter's estate. The first respondent lodged a claim against the deceased's estate for the remainder of the rehabilitative maintenance, which she considered due to her. This amounted to R144 000, which was calculated as follows: 24 months x R6 000. The executor, after taking legal advice, rejected the claim.

[6] Not surprisingly, this led to the litigation culminating in the present appeal. During March 2008 the first respondent launched application proceedings in the Pretoria High Court against Mr Kruger, in his capacity as executor of the deceased's estate. She sought an order declaring that the estate was liable to pay her rehabilitative maintenance. More specifically, she sought an order for payment of the amount of R144 000, with interest *a tempore morae*.

[7] As fate would have it the matter once again came before Hartzenberg J, who granted the relief sought by the first respondent and ordered the executor, the appellant herein, to pay her costs.

[8] It is against that order, with the leave of the court below, that the present appeal is directed.

Conclusions

[9] Section 7 of the Divorce Act 70 of 1979 provides for the division of assets and the maintenance of parties. The relevant part of s 7(2) provides that a court, in the absence of an agreement, may, 'having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, … and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the *death or remarriage of the party in whose favour the order is given, whichever event may first occur*.' (My emphasis).

[10] As can be seen, the power to grant maintenance is confined not to the duration of the life of the spouse liable to pay, but rather to the life of the beneficiary spouse. This legislative provision should, however, not be viewed in isolation. The common law viewed the duty of support which spouses owed each other, and consequently the liability for maintenance, as incidents of their matrimonial relationship. Termination of the relationship by death brought that duty to an end.[1]

[11] The Maintenance of Surviving Spouses Act 27 of 1990 (the MSSA) allowed widows and widowers, in specified circumstances, to be maintained from the estates of their late partners.[2] Up until the promulgation of the MSSA there was no such entitlement. The MSSA was limited legislative intervention, altering

[1] See *Glazer v Glazer NO* 1963 (4) SA 694 (A).
[2] Section 2(1) provides:
'If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.'

the common law to the extent set out therein. The common law rule remained otherwise untouched.

[12] It can hardly be argued that before the MSSA came into being, divorced persons, whose erstwhile spouses had died, were in a more favourable position than widowed ones, giving them 'rights against the estates of people no longer married to them at the time of death which widowed spouses did not enjoy against the estates of those to whom they were then still married.'[3]

[13] I agree with the conclusion reached by Didcott J in *Hodges v Coubrough*,[4] that s 7(2) of the Divorce Act cannot be construed so as to alter the common law position reflected in para 10 above. The following passage from that case (at 64E-F) is worth noting:

'Had [the legislature] meant something so surprising, something so startling, it would surely have spelt out the meaning. It would hardly have left such to be conveyed by the sidewind of generally worded provisions which, while accommodating the idea linguistically, dealt with it obliquely and elliptically.'

[14] The court below held that s 7(2) was inapplicable, in that, rehabilitative maintenance is 'an animal of its own', and if ordered in the terms referred to in para 3, the estate of 'the maintaining spouse' is liable to pay the outstanding maintenance. On that basis the court below granted the first respondent the relief sought.

[15] Counsel on behalf of the first respondent rightly conceded before us that if rehabilitative maintenance is to be regarded as a species of maintenance the appeal should succeed. Rehabilitative maintenance is most certainly a species of maintenance. I cannot imagine how rehabilitative maintenance can be maintenance of a kind that does not fall within the ambit of s 7(2) of the Divorce Act. For this reason alone the appeal should succeed. There are further

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[3] Per Didcott J in *Hodges v Coubrough* 1991 (3) SA 58 (D & CLD) at 64B-E.
[4] *Op cit* 64E-G.

considerations that militate against the conclusion reached by the court below, which are alluded to hereafter.

[16] Of course a spouse is free to agree to bind his/her estate to pay maintenance after death. That is not what occurred in the present case. To allow maintenance claims of the kind encountered here against deceased estates might have all sorts of undesirable consequences. The legitimate claims to maintenance of minor children might be diminished or excluded. And, the rights of beneficiaries might be implicated. Section 3*(b)* of the MSSA provides that a claim for maintenance of a surviving spouse shall have the same order of preference against the estate of the deceased spouse as a claim for maintenance of a dependant child of such deceased person and that in the event of competing claims, each shall, if necessary be reduced proportionately. Theoretically, a claim for maintenance such as the present one could compete with the claim of a surviving spouse and with claims by dependant children and beneficiaries. In the absence of legislative regulation the permutations and uncertainties abound.

[17] Furthermore, maintenance is always relative to the means and needs of the respective spouses. In the present case the earning capacity of the first respondent was held not to be a changed circumstance on which the deceased could rely to seek a variation of the maintenance order. The propriety of that aspect of the order appears to be doubtful. But that issue is not before us. In any event, that portion of the order did not preclude the deceased from approaching a maintenance court to seek a variation based on a diminution in or lack of means. Remarriage was not excluded. To subject a deceased estate to assessments of this kind is not only undesirable but appears to me to offend against first principles.

[18] If there is to be intervention of any kind it should be by the legislature on an informed and well-considered basis. For the moment the legislature is content with s 7(2) of the Divorce Act. So too, should we be.

[19] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:

'The application is dismissed with costs.'

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M C Erasmus SC
	Instructed by Du Plessis Attorneys Sandton Symington & De Kok Bloemfontein
For Respondent:	L C Matthysen
	Instructed by Chris Kotzé & Partners c/o Hendriëtte Müller Attorneys Pretoria McIntyre & Van Der Post Bloemfontein