

THE SUPREME COURT
AFRICA



OF APPEAL OF SOUTH

JUDGMENT

Not Reportable

Case no: 635/15

In the matter between:

BAREND JACOBUS DU TOIT NO

APPELLANT

and

ERROL THOMAS NO

FIRST RESPONDENT

ELSABE VERMEULEN

SECOND RESPONDENT

JEROME JOSEPHS NO

THIRD RESPONDENT

Neutral citation: *Du Toit NO v Errol Thomas NO* (635/15) [2016] ZASCA 94

(1 June 2016)

Coram: Ponnann, Majiedt and Mathopo JJA and Fourie and Victor AJJA

Heard: 20 May 2016

Delivered: 1 June 2016

Summary: Maintenance Court jurisdiction - claim for maintenance on behalf of minor child against an executor of her deceased father's estate – executor participating in the proceedings and not objecting to the jurisdiction of the maintenance court – thereafter challenging jurisdiction on review to the high court – refusing to pay maintenance for child on an unduly technical basis –

executor's conduct unconscionable - ordered to pay costs *de bonis propriis* on attorney and client scale.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town
(Donen AJ sitting as court of first instance):

1. The appeal is dismissed.
2. The appellant is ordered to pay the second respondent's costs of the appeal *de bonis propriis* on the attorney and client scale and failing payment by the appellant such costs shall be borne by the estate of the deceased on the party and party scale.

JUDGMENT

Victor AJA (Ponnan, Majiedt, Mathopo JJA and Fourie AJA concurring)

[1] The primary question for determination in this appeal is whether, having acquiesced, participated in and partly complied with an order of the maintenance court, it is open to the appellant, the executor of a deceased's estate (the executor), to thereafter challenge the jurisdiction of that court.

Background facts

[2] The appellant is the testamentary executor of the estate of Sebastian Jacobus Wessels. The deceased died on 24 April 2008. The second respondent, the surviving spouse of the deceased, successfully instituted maintenance proceedings on behalf of their minor child (the minor child) in the Riversdale Magistrate's Court (the maintenance court) against the appellant in his representative capacity as the executor of the deceased's estate.

[3] After having partially complied with the order of the maintenance court, the executor sought to review the decision of the maintenance court before the Western Cape High Court, Cape Town on the sole basis that the maintenance

court did not have jurisdiction to hear the matter. The review application was dismissed with costs, but leave was granted to the appellant to appeal to this court.

[4] The executor had been a family friend of the deceased and was the auditor to the deceased's various business enterprises and also served as a trustee of a family trust. Upon the death of the deceased he promised the second respondent that he would ensure that the minor child received maintenance. By mid-2008 when no maintenance was forthcoming the second respondent made her first request to the executor for maintenance for the minor child. He asked her to produce a list of expenses. She did so by 23 July 2008. A year later there was still no payment. The executor kept promising to look into the matter. Some three years later the second respondent made a formal written request for maintenance for the child, which he simply ignored.

[5] The executor contended that the minor child was a beneficiary in a family trust which was obliged to pay maintenance. He also contended that the second respondent had received the proceeds of the deceased's life policy and retirement annuity and therefore the estate did not have to pay maintenance. In addition he asserted that the child was an heir in the deceased estate and her inheritance had to cover her maintenance. He effected payment of R160 000 but only as an advance payment on her inheritance.

[6] In terms of the Maintenance Act No 99 of 1998, the maintenance court ordered monthly maintenance in the amount of R10 000 for the child in terms of s 16(1)(a)(i), a once off payment of R720 000 in terms of s 16(1)(a)(ii) in

respect of arrear maintenance and an amount of R7 500 for an expert report which was used to quantify the claim at the hearing in accordance with s 16(1)(a)(ii). The executor effected payment for the months of September and October 2014 and then ceased paying.

Legislative framework

[7] The executor contended that the maintenance court did not have the necessary jurisdiction to make an order against a deceased estate in terms of s 16 (1)(a) of the Maintenance Act.¹ The executor asserted that the office of executor cannot be a ‘person’ as defined in s 2(1) of the Maintenance Act² and therefore the Maintenance Act did not apply to maintenance claims against a deceased estate.

[8] In this case the cause of action is a claim for maintenance – a cause of action over which the maintenance court has jurisdiction. It likewise has jurisdiction over the person of the second respondent who claims maintenance on behalf of the minor child. The only issue therefore is whether it had jurisdiction over the executor. A decisive consideration is the fact that the

¹Section 16 of the Maintenance Act defines the powers a maintenance court has in relation to maintenance and ancillary orders :

‘(1) After consideration of the evidence adduced at the enquiry, the maintenance court may-

(a) in the case where no maintenance order is in force-

(i) make a maintenance order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times...’

²**Application of Act** – (1) 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 the duty.

(2) This Act shall not be interpreted so as to derogate from the law relating to the liability of *persons* to maintain other *persons*.(my emphasis)

executor participated fully at the maintenance hearing and did not raise an objection to jurisdiction at the hearing.

[9] The executor contends that in this case any claim for maintenance must be advanced by the second respondent in terms of the provisions of the Administration of Estates Act No 66 of 1965 (the Administration of Estates Act) and not the Maintenance Act.

[10] In *Purser v Sales; Purser & another v Sales & another* [2000] ZASCA 46; 2001 (3) SA 445 (SCA) Mpati AJA referred with approval to *Lubbe v Bosman* 1948 (3) SA 909 (O) and *William Spilhaus & Co (MB) (Pty) Ltd v Marx* 1963 (4) SA 994 (C). In *Lubbe* at 914 Van der Heever JP referred to *Voet* and several other authorities that:

'It was a general principle of the common law that where a defendant without having excepted to the jurisdiction, joins issue with a plaintiff in a Court which has material jurisdiction, but has no jurisdiction over defendant because he resides outside the jurisdiction of that Court, the defendant is deemed to have waived his objection and so as it were conferred jurisdiction upon the Court.'

[11] In *Purser*, Mpati AJA (para 17) referred to:

'*Voet* at 2.1.18, once *litis contestatio* has taken place the jurisdiction of him before whom the proceeding was in this way started can no longer be declined by one of the litigants.'... And further that an objection to jurisdiction "must be put forward before *litis contestatio* at the origin and among the very preliminaries of the suit". (*Gane's* translation.) It does not matter, says *Voet* at 2.1.19 (*Gane's* translation), whether or not *litis contestatio* took place in error (of either party) the result is the same.'

Mpati AJA (para 18) also approved the reasoning of Theron J in *William Spilhaus* (above) who stated at 1001H:

' . . . I can see no reason for thinking that our courts in general would fail to give effect to the rule of the common law as it is to be gathered from *Voet* 2.1.20, as read with 2.1.18, 26 and 27, that a defendant who has pleaded to the plaintiff's main claim without objecting to the jurisdiction must, at any rate after the stage of *litis contestatio* has been reached, be considered to have bound himself irrevocably to accept the jurisdiction of the court - and this even in a case where his failure to raise the question of the jurisdiction might have been due to some mistake on his part.'

Here not only did the appellant acquiesce in the jurisdiction of the maintenance court, he fully participated in its proceedings. Moreover he thereafter complied in part with the order of that court. It follows that his subsequent challenge to the jurisdiction of that court had to fail.

The executor's conduct relevant to the question of costs.

[12] The appellant accepted that the minor child was entitled to maintenance and that in law the estate had an obligation to maintain her. That notwithstanding, he contended that the second respondent had to proceed in terms of the Administration of Estates Act and not the Maintenance Act. Thus although not disputing the validity of the claim, the attitude of the appellant was that the second respondent had to be burdened with a high court application instead of the more expeditious remedy provided by the Maintenance Act. In adopting such an unduly technical stance the appellant has put both the second respondent and the estate to the cost of this litigation. In this court a concession was made on behalf of the executor that if the High Court had ordered the same amount of maintenance as the maintenance court he would have paid it.

[13] Given the unconscionable stance adopted by the appellant, there can be no justification for the deceased estate to bear the costs of this appeal. The

appeal was pursued with no regard to the child's best interests or its prospects of success.

[14] The following order is made:

1 The appeal is dismissed.

2 The appellant is ordered to pay the second respondent's costs of the appeal *de bonis propriis* on the attorney and client scale and failing payment by the appellant such costs shall be borne by the estate of the deceased on the party and party scale.

M Victor

Acting Judge of Appeal

Appearances:

For the Applicant:

H F Oosthuizen SC

Instructed by:

Froneman Roux & Streicher c/o Tim Du Toit &
Co Inc, Cape Town

Honey & Partners Inc, Bloemfontein

For the Respondent:

T D Potgieter SC (with him R J Steyn)

Instructed by:

Saunders Venter Van Der Watt c/o Fairbridges
Wertheim Becker, Cape Town

Hill McHardy & Herbst, Bloemfontein