REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO

CASE NO: HCA30/2017

In the matter between:

MANKOPANE OTHARNIA MOGOLA	**APPELLANT**
IDENTITY NUMBER: […]	
and	
MAHLOGONOLO MOGOLA	**FIRST RESPONDENT**
IDENTITY NUMBER; […]	
NEDBANK	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT (LIMPOPO HIGH COURT, POLOKWANE)	**THIRD RESPONDENT**

JUDGMENT

Order

On Appeal: Appeal against the judgment of Semenya J sitting as court of first instance.

The appeal is upheld with costs.

Coram:

M.G Phatudi J: (Kganyago J, concurring)

A. INTRODUCTION:

[1] This is an appeal against the Judgment and order of Semenya J sitting as court of first instance. The appeal, in the main, orbits around the correct interpretation of the provisions of Section 15 (2) (c) of the Matrimonial property Act, 1984[1] ("the Act"). The matter came on appeal with leave of the *court a quo.*

B. FACTUAL BACKGROUND:

[2] The Appellant on 26 October 2016 (applicant in the *court a quo)* launched an urgent application against the present Respondents for a Rule nisi interdicting the Second Respondent from paying out

[1] Act 88 of 1984, as amended

the proceeds of a fixed deposit otherwise alleged to be a donation investments, ([…] held at Nedbank) which fixed deposit was invested by one **Shemy Abram Makawa**, now deceased ("the deceased") in the name of the First Respondent pending finalization of the relief sought in Part B.

2.1. The Appellant in Part B sought a declaratory order in terms of which the fixed deposit or donation investment referred to above, be declared null and void, and further that, the relevant investment be paid by the First Respondent into the deceased estate reported to the Third Respondent under Estate No: 7132/2015. The Appellant also prayed for costs of application on party and party scale.

2.2. The relief sought in Part A of the application be granted provisionally pending the return day of the *Rule nisi*.

2.3. The *Court a quo* in its judgment delivered on 19 May 2017, discharged the provisional order granted on 03 November 2016, and dismissed the application with costs.[2]

[2] Paginated Index, P28, Vol I, Record.

2.4. It was the order and the judgment of Semenya J that gave rise to the issues of proper interpretation of Section 15 (2) (c) of the Act which appears to be *res nova* in our legal literature. I consider it apposite therefore to set out a rubric in order to throw light on the matter.

C. THE FACTS:

[2] The Appellant averred in her founding affidavit that she and the deceased were lawfully married to each other in community of property on 11 April 1986. Their marriage was, however, dissolved upon the deceased's death on 25 September 2015.

[3] Prior to his demise and during the currency of their marriage, the deceased invested as a donation an amount of Eight Hundred Thousand rand (R800 000.00) in the name of the First Respondent, his niece. The said investment was initially made at First National Bank ("FNB') and as it generated a minute interest, the deceased subsequently transferred it to the Second Respondent. This transaction, according to the First Respondent's

answering affidavit, happed when the Appellant and the deceased were extra – judicially estranged from each other.

[4] The Appellant, in support of Part A of the application contended that the said donation investment which was fixed as a deposit at FNB, was made and transacted without her knowledge and consent in contravention of Section 15 (2) (c) of the Act. I propose to revert to the provisions of this section in the course of this judgment.

[5] It was submitted further that after the deceased's death, and on 29 January 2016, the Appellant was appointed an executrix by the Third Respondent to administer her late husband's estate. Her appointment as executrix of the deceased's estate was effected in terms of Letters of Executorship annexed to the founding affidavit.[3]

[6] According to her, she only became aware of the existence of the investment referred to after she has had sight into the deceased's banking statements for which he received monthly interest in the amount of R5 343.00 from the Second Respondent. Possessed

[3] Annexure "MOM" Paginated Index, P49, Record.

with these statements, and after certain enquiries, the Appellant was furnished with a copy initiating the investment account better described as “donation investment” in the amount of R800 000.00 which was in a form of a fixed deposit product. Its maturity date as computed from its inception date on 01 November 2010 was 01 November 2011. The beneficiary of the investment is the First Respondent, who then was 14 years old.

[7] I hasten to remark that when the deceased initiated the investment in favour of the First Respondent as a beneficiary, the parties’ civil marriage was still *in esse*, but for their extra-judicial separation during February 2011.

[8] Prior to the parties’ estrangement, the Appellant alleged that she assisted the deceased with “the administration side of the business” as well as in his taxi and used vehicle sale business”. Furthermore, in 2004, the parties jointly invested an amount of R500 000.00 with the Second Respondent, which was made in the deceased’s name.

D. COMMON CAUSE FACTS:

[9] The following brief facts are common cause :-

9.1 The Appellant and her deceased husband were civilly married to each other in community of property on 11 April 1986, which marriage was dissolved upon his death on 25 September 2015.

9.2. Before their separation and while cohabiting as husband and wife, both parties invested an amount of R800 000.00 with the Second Respondent, (the people's bank) a banking institution of which the Appellant was an employee from 1998 until June 2016, when she resigned. This fact is not denied by the First Respondent in her Answering affidavit.

9.3 The Appellant was duly appointed Executrix of the deceased's estate on 29 January 2016.

9.4 The deceased died on 25 September 2015 after he was allegedly shot and killed.

9.5 The parties became estranged in February 2011.

9.6 Out of this wedlock, 2 children were born.

9.7. The First Respondent does not deny that the subsequent transferred investment account in dispute had been opened by the deceased in her favour.

E. LEGAL FRAMEWORK:

[10] I consider it plausible to mention although orbiter that Chapter II of the Act contains provisions abolishing marital power previously located in the common law. Section 11 (1), in particular, provides as follows:-

Section 11 (1):

"*The common law rule in terms of which a husband obtains the marital power over the person and property of his wife is hereby abolished*."

[11] Chapter III, which is relevant in the instant matter, provides for equal powers of spouses married in community of property. The

provisions of Chapter III apply to every marriage in community of property regardless of the date on which such marriage was solemnized.

That said, it follows that both spouses whose matrimonial regime is one in community of property enjoys the **same powers with regard to the disposal of assets of the communal estate, debt and other contractual matters that might bind the joint estate, and its general management.[4].** This power is, however, not entirely unfettered so as to curb one spouse from making profligate decisions.

[12] Furthermore, Section 15, empower a spouse within a marriage in community of property to perform **any juristic act** pertaining to the communal estate **without the consent of the other spouse**, subject of course, to the limitations of subsection 15 (2); (3) and (7) of Section 15. It is with one of the limitations in Section 15(2) (c) that this matter is concerned.

[4] Section 14 of the Act. See, also Strydom v Engen Petroleum 2013 (2) SA 187. Para: [5] on effect of abolition of the husband's mamus over his wife married in community of property.

[13] The important exception or proviso *in casu* to the aforementioned empowering Section 15 (1) is that "such a spouse shall not without the written consent of the other spouse – (own underlining)

(a)…….

(b)…….

(c) "Alienate, cede, or pledge any shares, stock, debentures bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate"[5]

[14] I must mention, as a point of departure, that many of past case law, did not authoratively pronounce specifically on the proper interpretation of this provision, in particular, on the power if any of a spouse to alienate or otherwise encumber those investments or perform any juristic act specified in section 15(2) (c), "**by or on behalf of the spouse**" in a financial institution, which investments **forming part of the joint estate.**

[5] Section 15 (2) (c) - It is the interpretation of these provisions that forms the hardcore of the present – appeal.

It is the words “any investment by or on behalf of the other spouse,” in a financial institution “forming part of the joint estate,” that require closer scrutiny as the notion present not only juridical interpretational difficulty, but also raise a legal novelty on this aspect of the law.

[15] It is trite law, that “when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”[6] In other words, the spirit, purport and objects of the phrase denotes the values which underpin the constitution and its objectives as a whole. What therefore Section 39 (2) seeks to potray, is that all statutory enactments must be interpreted through the prism of the Bill of Rights enshrined in the constitution.

[16] Section 15 (2), properly construed, clearly attach a proviso to Section 15 (1) and the powers it confers on a spouse when perfoming certain juristic acts. Section 15 (2) accordingly requires that the caveat set out be examined as to what its true function and effect is. The proper approach to the interpretation of a rider is

[6] Section 39 (2), The Constitution of the RSA, 1996 (Act 106 of 1996)

"the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the proceeding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it, and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.[7]

[17] Turning to the facts in the present matter, as already indicated, the First Respondent does not deny the fact that while the Appellant and her late husband cohabited together under the same roof, they in 2004 jointly invested and made as a capital injection of an amount of R800 000.00 into a financial institution, the second Respondent. This investment was made **in the decease's name by the parties** jointly, nor was it deposited "on behalf of the other spouse," either. It, therefore, becomes necessary to trace the primary source of this investment as jointly made by the parties.

[18] The primary source of the initially invested fixed deposit made in 2004 derived, in my view, from the joint estate of the parties. It was

[7] Passage quoted from Botha JA in Mphosi V Central Board for Co-operative Insurance Ltd 1974 (4) SA . 633 (A) at 645E

only on 01 November 2010 that the deceased without the knowledge or written consent of the Appellant, that the initial fixed deposit was transformed into a “donation investment” in favour of the First Respondent with an interest rate of 5.30% per annum, with maturity date on 01 November 2011, subject to further re-investment guaranteed on 05 November 2016 for payment.

[19] It was this alienation by the deceased of the fixed deposit made by the parties jointly in 2004, that offends the proviso contained in Section 15 (2) (c). The deceased in performing this juristic act by alienating the fixed deposit from the joint estate in November 2010, without express written consent in favour of the First Respondent was, in my view, a flagrant violation of Section 15 (2) (c). Such a transaction, needless to say, was intended to undermine the parties’ equal entitlement to the future regulation or disposal of the investment as an asset they both deposited by way of fixed deposit forming part of the joint estate. By the same token, whether the deceased framed it a “donation investment”, is neither here nor there. What remains is that such a donation falls within the prohibited ambit of Section 15 (3) (c). The navigation from the parties’ fixed deposit, albeit in the deceased’s name, but made

jointly by the spouses within the context of their marriage to the names of the First Respondent, was in my opinion made probably to unreasonably prejudice the (financial) interest of the other spouse in the joint estate…"[8]) (Insertion is own emphasis)

[20] That said, I am of the view that the finding made by the court *a quo* in paragraph 17 of the judgment that:-

"*Subsection (7) of Section 15 permits one spouse to alienate a deposit in one's name at a building society or banking institution without the written consent of the other spouse"* was a misconstruction of the relevant section and therefore misdirection.

20.1 What Section 15 (7) permits is not alienation of fixed deposits but alienation, cession or pledge of a "deposit" held in his/her name at a building society or banking institution which could without consent of either spouse so alienated or encumbered. There is therefore a marked difference between alienation of a fixed deposit without written spousal consent and an ordinary deposit which requires no spousal consent, the legal

[8] Section 15 (3) (c)

consequences of which should be differentiated for the purposes of proper interpretation of Section 15 (2) (c).

[21] Furthermore, Semenya J's finding that 'the applicant's reliance on Subsection 2 (c) is misplaced in that the money was deposited by the deceased on behalf of the First Respondent and not by or on behalf of the applicant[9] and proffered as a reason to have rejected the Appellant's claim was, once again, an error in law. This is particularly so in that the Learned Judge failed to have probed into the primary source of the initial fixed deposit before it was without written consent navigated into a "donation investment". As already shown, the fixed deposit which in any event was not countervailed by the First Respondent, was sourced out of the spouse's joint estate therefore it was not far to seek it fell within the prohibited provisions in Section 15 (2) (c).

In consequence, this court is at large to intervene and come to the Appellant's rescue in the appeal before us.

F. CONCLUSION:

[9] Paragraph [22] of the judgment of the *court a quo*

[22] Having considered the facts in this instance, and having reviewed the authorities which otherwise did not settle the interpretation of Section 15 (2) (c) under consideration before us, and further that, we did not come across any caselaw that specifically dealt with and laid down precedent on the matter, it is our view that the proper interpretation ought to be one laid down in Paragraph [19] of this judgment.

In consequence, if I may propose and order, I would deem the following order appropriate:-

(a) The appeal is upheld with costs.

(b) The judgment and order of the court *a quo* is set aside and is substituted with the following Order:-

(i) The fixed/donation investment with investment/investor No.: […] made by the deceased (Mr Shemy Abram Makuwa) in the name of the First Respondent with the Second Respondent is declared null and void;

(ii) The said fixed deposit/donation investment be and is ordered to be paid into the Estate late Shemy Abram Makuwa No.: 7132/2015, with immediate effect.

(iii) That the costs of the application be paid by the First Respondent.

_____

M.G PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

I agree

_____

M.F KGANYAGO

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

Muller J:

[23] I have had the privilege of reading the judgment prepared by MG Phatudi J in this matter. I regret that I do not agree with his interpretation of or the applicability of section 15(2)(c) of the Matrimonial Property Act.[10]

[24] The appellant instituted an urgent application in two parts against the first respondent in whose name a fixed deposit of R800 000.00 was held at the second respondent (Nedbank). The first respondent opposed the application. In Part A the appellant claimed an interim interdict restraining the second respondent from paying out the proceeds of the fixed deposit which was taken out by the spouse[11] of the appellant pending finalization of the main application as set out in Part B of the notice of motion which was granted by Ndlokovane AJ on 1 November 2016.

In Part B of the notice of motion the appellant sought an order in the following terms:

> "1. That the fixed deposit/donation investment with investment/investor number […] made by the late Shemy Abram Makuwa in the name of the first respondent with the second respondent be declared null and void
>
> 2 That the said fixed deposit/donation investment be paid to the deceased estate of Shemy Abram Makuwa estate number 7123/2015.
>
> 3. That the costs of this application be paid by the first respondent on party and party scale."

[10] Act 88 of 1984 as amended (hereinafter referred to as "the Act").
[11] Hereinafter called "the deceased".

[25] On 19 May 2017 Semenya J dismissed the application under Part B and discharged the interim order with costs. Leave to appeal was granted by the learned Judge to the full court on 29 June 2017.

[26] The salient background facts are that appellant and the deceased married each other on 11 April 1996 in community of property. The marriage was dissolved as a result of the untimely death of the deceased on 25 September 2015. The appellant was duly appointed as the executrix in the deceased estate on 29 January 2016. There are three major children born of the marriage.

[27] The deceased and the appellant invested an amount of R500 000.00 in 2004 with the second respondent in a fixed deposit account. The marriage relationship became strained which caused the appellant to move out of the marital home during 2011.

[28] After the burial of the deceased the appellant obtained copies of his bank statements as well as a Nedbank application form for a fixed deposit of R800 000.00 in the name of Mahlogonolo Mogola (ID […]) (the first respondent) in a "Donation Investments –NMCF" account for a term of 12 months from 1 November 2010. The maturity date of the fixed deposit was 1 November 2011. The interest earned over the twelve month period is payable on date of expiry The appellant is of the opinion that the investment matured during 2009 and that the deceased invested the proceeds of the investment to which he added an additional amount of money to have enabled him to investment an amount of R800 000.00 in a fixed deposit account in the name of the first respondent. The deceased signed the application form and also supplied his contact details *ex facie* the application document.

[29] The proceeds of the fixed deposit of 2010 after it matured in 2011 were again re-invested in a fixed deposit account in the name of the first respondent for a period of five years with a maturity date of 5 November 2016.

[30] The entries in the bank statement attached to the papers indicate that the bank account[12] of the deceased which is held by the second respondent were credited with the amounts of R5 343.44 on 5 September 2015 and the amount of R5 171.07 on 5 October 2015. His account was credited with funds described as:

> "INT EASYACCESS […]"

[31] I pause here to add that there is no dispute that the second respondent confirmed that the money invested in the "Donation Investment" fixed deposit account was re-invested for a period of five years in 2011 and that the deceased had received monthly payment from the latter investment.

[32] The first respondent did not dispute that the parties were married in community of property and admitted receipt of an amount R800 000.00 which she claimed the deceased bequeathed to her and which was invested in her name with the consent of the appellant for her future education. The first respondent stated that she was the niece of the deceased and that it was common knowledge that the deceased intended to donate the amount of R800 000.00 to her. It was contended by the first respondent because the deceased intended to exclude the amount from the joint estate the said fixed deposit does not form part of the joint estate.

[33] In reply the appellant denied that she had any knowledge of the investment in the name of the first respondent until after the death of the

[12] Account number 2671066899 held at second respondent.

deceased. The appellant contended that the investment falls foul of the provisions of section 15(2)(c) and 15(3) of the Act.

[34] The Act introduced a new legal regime in terms whereof both spouses in a marriage in community of property were granted the same powers which previously vested in the husband alone with regard to acquiring, and disposal of assets and the management, generally, of the joint estate. In the previous dispensation the husband had the marital power to deal with assets forming part of the joint estate and was able to dispose and donate assets belonging to the joint estate to third parties to the prejudice of the wife. Notwithstanding the powers afforded to both spouses in terms of the Act, the power of the spouses is limited by section 15(2) and (3). The existing law, as governed by the Act, was explained in *Strydom v Engen Petroleum Ltd*[13] as follows:

> "The starting point under section 15(1) is that either spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse. That right is however made subject to the limitations of contained in ss 15(2) and (3), which impose the requirement of the consent of the other spouse, written in the cases described in s 15(2), but not in the cases described in s 15(3), in order to undertake certain financial transactions." [14]

[35] It must be accepted as a starting point, therefore, that the deceased was perfectly entitled to utilize money of the joint estate to make a fixed deposit in his name at a banking institution with or without the prior approval of the appellant. The first fixed deposit was made in 2004 with the concurrence of the appellant. However, when the term of that fixed deposit expired, the deceased without the consent of the appellant utilized the proceeds together

[13] 2013 (2) SA 187 SCA par 6.
[14] *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* 1997 (4) SA 66 (HHA) at 74B-E.

with an additional amount and invested the money in further fixed deposit for a period of twelve months but on this occasion in the name of the first respondent.

[36] I do agree with MG Phatudi J that the money invested in the fixed deposit in 2004 was the primary source for the fixed deposit in the name of the first respondent in 2010. However I do not agree, with respect, that the 2010 fixed deposit transformed the initial fixed deposit into a donation investment in contravention of section 15(2)(c) and 15(3)(c) of the Act. He held that the deceased alienated the fixed deposit in the name of the first respondent from the joint estate in November 2010 without the consent of the appellant.

[37] A fixed deposit during it currency cannot be transformed from a loan into a different contract or be transformed to the extent that one party is substituted by another unless the parties to the contract performed some juristic act to bring such a change about.[15] There is no evidence that the deceased at any time approached the second respondent to bring such a transformation about or that the second respondent has done so.[16]

[38] There is, in my mind no doubt whatsoever that the fixed deposit contract concluded in the name of the deceased came to an end when it expired and debt was discharged by the second respondent. The proceeds of the expired fixed deposit were then re-invested in another fixed deposit in the name of the first respondent. Put differently: it is the money received the fixed deposit when it expired that is re-invested on each occasion, not the fixed deposit as such.

[39] Section 15(2)(c) reads:

---

[15] The bank should play a part in so doing.
[16] Exactly how the transformation was brought about is unclear.

"2 Such a spouse shall not without the written consent of the other spouse-

(a)….

(b)….

(c) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar asserts, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;"

[40] Section 15(2)(c) is directed at a spouse who wishes to alienate, cede or pledge a current fixed deposit in the name of the other spouse without his/her consent. The deceased, on the evidence, never on any occasion, alienated, ceded or pledged, to the first respondent, a fixed deposit held in the name of the appellant. The first deposit was in the name of the deceased. It was the proceeds of that fixed deposit, which were used to make two further successive fixed deposits in the name of the first respondent. Section 15(2)(c) on the evidence presented cannot come to the assistance of that appellant.

[41] However, section 15(7)(b)(i) provides:

"Notwithstanding the provisions of subsection (2) (c), a spouse may without the consent of the other spouse –

(b) alienate, cede or pledge –

(i) a deposit held in his name at a building society or banking institution."

[42] Neither the appellant nor the second respondent adduced any evidence that the deceased alienated ceded or pledged a fixed deposit held in his name

to the first respondent or anyone else.[17] Indeed the proceeds of the fixed deposit were used to enter into contracts of loan subsequent to the second respondent discharging the debts in terms of those fixed deposits. It follows, therefore, that section 15(7)(b)(i) similarly, cannot find application in the present circumstances.

[43] The first respondent, as stated earlier, contended that the deceased donated the amount of R800 000.00 to her to pay for her future education and also that the deceased intended that the amount so donated be excluded from the joint estate.

[44] Section 15(3)(a) and (c) states:

> "A spouse shall not without the consent of the other spouse-
>
> (a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint household.
>
> (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, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this section".

[45] A spouse may, with the acquired consent, donate or alienate assets from the joint estate which do not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate and which is not an alienation of a mortgage, burden with a servitude or conferral of any real right in any immovable property forming part of the joint estate contrary to the provisions

[17] None of the parties during argument suggested that he had done so.

of section 15(2)(a). However, terms of the proviso contained in section 15(3)(c) consent from the other spouse is not necessary in respect of assets that are excluded from the joint estate.

[46] The Act contains no definition of the concepts “alienate” and “donate.” The word “alienate” generally refers to an act in terms of which ownership is transferred.[18] *The Collins Concise Dictionary* defines “alienate” “to transfer the ownership of (property etc.) to another person”.[19]

[47] Section 15(3)(c) refers donations of assets of the joint estate to third parties or the alienation of such assets to third parties without any value.

[48] A donation can be described as an agreement which has been induced solely by beneficence whereby a person under no legal obligation undertakes to give something (either directly or indirectly) in return for which the donor receives no counter-performance nor expects any future advantage.[20] Any payment purporting to be made in discharge of an existing obligation is in effect a donation if no obligation exist to make such payment.[21]

[49] There is no reason to give section 15(3)(c) a narrower interpretation than the ordinary meaning of the words “donation to another person… or alienate such asset without value” The section should be given a generous interpretation. In the context of section 15(2) and (3) “alienate” should be

---

[18] *Cronje NO v Paul Els Investments (Pty) Ltd supra* 188A.
[19] In *Cronje NO v Paul Els Investments (Pty) Ltd* 1982 (2) SA 179 (TPA) at 187F-G the court referred to the *Shorter Oxford Dictionary* description of alienate as “the action of transferring ownership to another”.
[20] Owens PR “Donation” in Joubert WA Ed *The Law of South Africa* Vol 8 (Butterworths 1979) 148 par 116. In *Avis v Verseput* 1943 AD 331 348 Watermeyer ACJ with reference to Savigny‘s treatise on Roman Law stated “that a donation to which the rules and restrictions apply is a transaction *inter vivos* between donor and donee whereby the donee is enriched and the donor correspondingly impoverished, such transaction being accompanied by an intention on the part of the donor at his expense to enrich the donee.”
[21] *Estate De Jager v Whittaker and Another* 1944 AD 246 250-251.

interpreted to refer to every act in terms whereof a spouse parts with assets of the joint estate whether corpus, a sum of money, or a right of action.[22]

[50] Section 15(8) comes into play if it has been established that an asset belonging to the joint estate has been donated or alienated without consent. It provides:

> "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."

[51] The court is tasked with the duty to determine whether the donation or alienation does not or will not prejudice the interest of the other spouse by taking into account the factors mention in section 15(8). The court is vested with a wide discretion and may take any other factor into account which in the opinion of the court is relevant.

[52] In my judgment the money used to make a fixed deposit in 2010 by means of the application attached to the papers in the name of the first respondent was money which belonged to the joint estate and as such was an asset of the joint estate. It is the evidence of the first respondent that a fixed deposit was made as a consequence of a donation in an amount of R800 000.00 to the first respondent as a gift to pay for her future education. The

---

[22] *Grobler v Trustee Estate De Beer* 1915 AD 265 272. It seems to me that the word "alienate" as used in section 15(3)(a) is restricted to the alienation of movables assets such as furniture and other effects which are part of the common household.

application form is not evidence of the donation but is evidence a fixed deposit in the amount of R800 000.00 in the name of the first respondent.

[53] Despite the *prima facie* evidence of the fixed deposit *ex facie* the application, I am nevertheless unconvinced that a donation of the amount of R800 000.00 to the first respondent was intended or that the deceased indeed donated the money to the first respondent. It has been established that the deceased received monthly interest payments into his bank account from the Easyacess account each month. If the deceased indeed donated such a large sum of money to the first respondent for her future education she, not the deceased, would have been entitled to the interest that accrued from the fixed deposit. The first respondent also stated that the said amount was bequeathed to her by the deceased.[23] That statement cannot be accepted as correct simply because the deceased was alive at the time the fixed deposits were made. The probabilities point to the deceased using an asset of the joint estate to fraudulently making a fixed deposit in the name of the first respondent with the intention to deprive the appellant and the joint estate of an asset of considerable value for his own benefit, using his young niece, who was a minor at the time, to cover in his fraudulent scheme.

[54] Her evidence that the deceased donated such a large sum of money to her (who was a minor) for her education and that the appellant was aware of the donation together with her acquiescence, when the appellant had her own family to consider, is in my view totally improbable, false and is rejected.

[55] For this reason the fraudulent donation of the amount of R800 000.00 to the first respondent was for an unlawful purpose and is null and void.

[23] There is no evidence that the deceased executed a will with the first respondent named as a beneficiary.

[56] In the event that I am wrong in my assessment of the evidence as stated above, the provisions of section 15(8) must be considered to establish whether the asset of the joint estate which was donated or alienated was excluded from consent from the appellant.

[57] For that purpose the parties were estranged for a lengthy period of time and a divorce in the near future was a reality. It is not an uncommon occurrence that spouses endeavour in anticipation of divorce proceedings being instituted to hide certain assets of the joint estate. The deceased resorted to fraud to hide a large amount of money from the appellant, and would in all probability have succeeded had he not met an untimely death. Both parties were gainfully employed at the time and no doubt maintained a reasonable standard of living. The loss of such a large amount from the joint of money unduly prejudiced the interest of the appellant in the joint estate. The deceased estate is also prejudiced. In conclusion, it is my view that the deceased alienated an asset of the joint estate without consent which unduly prejudiced the interest of the appellant in the joint estate which rendered the alienation null and void.

[58] The court *a quo* held that the evidence of the appellant that the first fixed deposit in the name of the deceased of R500 000.00 contradicted the evidence of the appellant that she discovered after the death of the deceased that he had made a deposit in the name of the first respondent in the amount of R800 000.00. I disagree. The appellant simply explained that she was aware that the deceased had made a fixed deposit in his own name and that she discovered after his death that when that fixed deposit expired that he had made a fixed deposit in the amount of R800 000.00 in the name of the first respondent.

[59] I am in agreement with the court *a quo* that any reliance by the appellant on section 15(2)(c was misplaced. The enquiry does not end there. The provisions of section 15(3)(c) could not be overlooked as it was contended that the deceased donated a large sum of money to the first respondent which by all accounts belonged to the joint estate and by doing so expressed his intention to exclude the amount from the joint estate. The court *a quo* took too a narrow view of the facts which, as a consequence, brought about a failure to apply the provisions of section 15(3)(c) to determine whether the deceased made a valid donation or alienation, or whether requirements of section 15(8) were met.

[60] I agree that appeal should be upheld with costs payable by the First Respondent.

_____

G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

REPRESENTATIONS:

1. For the appellant : Ms M de Klerk

c/o DDKK Attorneys Inc

POLOKWANE

2. For the 1st Respondent : Adv H.C Choma

   Instructed by B Maluleke Attorneys

   SIBASA

3. For 02nd and 03rd Respondent No appearance
4. Date heard : 10 August 20
5. Date delivered : 19 October 2018