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From the Editor

This is the Fifth electronic edition of the **Judicial Officer**. In this edition there are 3 articles which cover areas of criminal procedure and maintenance law. I wish to place on record my gratitude to Ron Laue who assisted with the editing. Opinions expressed by authors are their own and do not necessarily reflect those of the *Judicial Officers' Association of South Africa.*

Gerhard van Rooyen
Magistrate/Greytown

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THE JUDICIAL OFFICER – GUIDELINES FOR AUTHORS

1. Readers are invited to submit articles, notes, reviews of cases and correspondence to the editor with a view to publication. In general we welcome contributions of 1 000 to 3 000 words. Pages should be numbered. Titles and headings should be kept as short as possible.

   We wish to publish articles of practical interest for magistrates that include the several aspects of public law and private law that magistrates encounter every day.

2. Submissions should be in English and all submissions should be submitted by e-mail in MS Word to the editor at: gvanrooyen@justice.gov.za

3. Footnotes should be kept to a minimum and numbered consecutively with Arabic numerals.

4. Cases and statutes should be cited accurately and fully.

5. It is assumed that contributions are original and have not been submitted for publication elsewhere.

The Payment of Money for Maintenance into the Guardian's Fund

Marlene Lamprecht
Magistrate,Justice College

In recent years several decisions have been made regarding the attachment of lump sums in order to secure claims for future maintenance. As a result of these decisions it is now well established that pension and provident funds can be attached for this purpose.[1]

The courts have taken this further and have instructed the funds to make periodic maintenance payments to the custodial parent.[2]

In Government Employees Pension Fund v Bezuidenhout and another[3], the court took a further step and ordered the applicant to deposit the money owing to the second respondent into the Guardian's Fund. The court further authorised the Master of the High Court to use this money to pay the arrear maintenance owing to the first respondent as well as the future maintenance arising from an order of the maintenance court.

The matter came before the court as an appeal. The appeal was lodged by the pension fund against an order of the maintenance court. The maintenance court had ordered it to pay the monthly maintenance payable by the second respondent to the first respondent.

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1 *Magewu v Zozo and others 2004(4) SA 578 (C); Mgnadi v Beacon Sweets and Chocolates Provident Fund and others* 2004 (5) 388 (D&CLD); *Soller v The Maintenance Magistrate of Wynberg and others* 2006 (2) SA 66 (C).

2 *Soller v The Maintenance Magistrate of Wynberg and others*, 2006 (2) SA 66 (C).

3 Unreported judgment of the Transvaal Provincial Division, Appeal No 2113/04.

The administrator of the pension fund contended that it had fulfilled its role. It had determined the amount of the benefit due to the second respondent and now all that remained was for it to pay over this amount to the second respondent.

The appellant contended further that it was not a party to the maintenance court proceedings and that it was unwilling to take on administrative duties that did not form part of its normal activities.

The court accepted the objections of the appellant and in an attempt to resolve the dilemma of the administration of the lump sum of money ordered the applicant to deposit the money owing to the second respondent into the Guardian's Fund. The court further authorised the Master of the High Court to use this money to pay the arrear maintenance owing to the first respondent as well as the future maintenance arising from an order of the maintenance court.

The court formulated its order to indicate how the maintenance court order should have looked, as follows:

i. The court orders the ………………………………………………….. Fund to determine the net amount owing to ……………………………………………………………………………… ……………………………………………………………….…. (ID) as his withdrawal benefit.

ii. The …………………………………………………………..………………….. Fund is ordered to pay the aforesaid net amount to the Master of the High Court.

iii. The Master of the High Court is authorised to receive the aforesaid amount and to deposit it in the Guardian's Fund in the name of……………………………………………………………………… for the benefit of the aforesaid………………………………………………………….. and of

the……………………………….minor children born of the marriage between him and………………………………………………………………………………

iv. The Master of the High Court is ordered to make payments out of the deposit according to orders issued by a competent court, which may be a maintenance court or a high court. Orders immediately applicable are:

(a) The arrear maintenance in an amount of R………………… for the period…………………….......to…………………………………. may immediately be paid to……………………………………………………………………………..

And

(b) monthly maintenance payments of R……………….per month per child are to be paid to……………………………………………………………….. as from……………………………………………and thereafter on the last day of each succeeding month, which order shall remain in force until amended by order of the maintenance court or the high court.

v. When………………………………………………………………………’s duty to support the aforesaid two children ceases, he shall be entitled to such sum, if any, which still stands to his credit in the Guardian’s Fund.

This judgment appears to be an ideal solution to the problem of dealing with lump sums of money and has been followed in many magistrates’ courts, but it is a decision that needs to be closely studied as instead of resolving problems it creates even bigger problems.

The Guardian’s Fund falls under the administration of the Master of the High Court. It consists of all money received by the Master under:

- The Administration of Estates Act,[4]
- Any law[5]
- In pursuant to any order of court[6], and
- Money accepted by the Master in trust.[7]

The only way the pension money could be paid into the Guardian's Fund is pursuant to an order of court. This is where the first problem arises as the Administration of Estates Acts defines "Court" as "High Court having jurisdiction, or any judge thereof".[8]

A maintenance court is a Magistrate's court [9] and, therefore, the Master of the High Court is not empowered to receive money pursuant to an order of the Magistrate's Court. The corollary is that a Magistrate's Court is not empowered to order money to be paid into the Guardian's Fund.in terms of the Administration of Estates Act

Several questions are raised by this decision:

- Does Government Employees Pension Fund v Bezuidenhout overrule the Administration of Estates Act?
- Is Government Employees Pension Fund v Bezuidenhout, a full bench decision, binding on the lower courts?
- What about the constitutional imperative: "A child's best interests are of paramount importance in every matter concerning a child"[10]?
- What should the Masters of the High Court do?

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[4] S 86(1) (b) of the Administration of Estates Act, 66 of 1965.

[5] S 86(1) (b) of the Administration of Estates Act, 66 of 1965.

[6] S 86(1) (b) of the Administration of Estates Act, 66 of 1965.

[7] S 86(1) (c) of the Administration of Estates Act, 66 of 1965.

[8] S 1 (v) of the Administration of Estates Act, 66 of 1965.

[9] S3 of the Maintenance Act 99 of 1998.

[10] S28 (2).

Does Government Employees Pension Fund v Bezuidenhout overrule the Administration of Estates Act?

No.

It is evident from the judgment that the court did not consider the definition of “court”. The court assumed, incorrectly, that “court” had its ordinary grammatical meaning, viz., the place where judicial decisions are made.

Is Government Employees Pension Fund v Bezuidenhout binding on the lower courts?

No.

A court is not be bound by the decision of a higher court if, in granting the decision, the court overlooked the governing legislation.[11] Such a decision is regarded as having been arrived at *per incuriam (oversight*).

The decision is not binding because it directs the magistrates to perform acts that are *ultra vires.* Magistrates do not have legislative authority to order the Master of the High Court to deposit funds in the Guardian’s Fund.

The effect of such an order is that it transgresses one of the basic principles of granting a court order, viz., that the order must be able to be implemented.

What about the constitutional imperative: “A child’s best interests are of paramount importance in every matter concerning a child”?

It may be argued that the child’s best interests are so great that the magistrate’s court ought to follow the Bezuidenhout judgment and override the limitations of the Administration of Estates Act.

The court accepted the finding of the van Zyl J in Soller v The Maintenance

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[11] Hahlo and Kahn, *The South African Legal System and its Background* P253; *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA) paragraph [28].

Magistrate of Wynberg and others,[12] that the Section 28(2) of the Constitution overrides any limitations of jurisdiction of the maintenance court:

Viz.,

"*[30]….the maintenance court functions as a unique or sui generis court. It exercises its powers in terms of the provisions of the Maintenance Act and it does so subject to the relevant provisions of the Constitution, more specifically s 28(2) thereof. This constitutional provision overrides any real or ostensible limitation relating to the jurisdiction of magistrates' courts*."

The Court in Bezuidenhout also approved[13] of the dictum in Fose v Minister of Safety and Security [14] that:

> "…*there must be effective remedies to safeguard the entrenched rights of individuals and that if need be that the courts are to 'forge new tools and shape innovative remedies*".
>
> (*Ed note: the judgment would nevertheless seem, by implication, to suggest that the court was alive to the limitation on magistrates' courts jurisdiction and to have extended the definition of "court" to include them.*)

Unfortunately in the circumstances of the case these arguments compound the problems.

One of the reasons why the court in the Bezuidenhout case believed that paying the pension money into the Guardian's Fund would be that "… the monies will lie in the Guardian's Fund and earn interest….".[15] Unfortunately the court was also mistaken in this regard.

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[12] 2006 (2) SA 66 (C).

[13] Para [9].

[14] 1997 (3) SA 786 (CC).

[15] Para [24] Employees Pension Fund v Bezuidenhout and another, Appeal No 2113/04.

The proposed court order in the Bezuidenhout case directs the money to be paid into an account bearing the name of the father of the minor children and it is from this account that the funds are to be paid to the minor child.

Accounts in the Guardian's Fund in the name of majors do not earn interest. Only accounts in the names of minors, lunatics, unborn heirs and persons having an interest in a usufruct of fideicommissum, attract interest.[16]

It could never be argued that it is in the best interests of a child for funds to lie for years in an account earning no interest and rapidly declining in value through the ravages of inflation.

What should the Masters of the High Court do?

The Masters of the High Court should refer any such order back to the Magistrate's Court and direct the attention of the magistrates to the fact that in terms of section 86(1) (b) read together with section 1 (v) of the Administration of Estates Act 66 of 1965 Masters of the High Court are not empowered to receive money in pursuance of a Magistrate's Court order.

Masters of the High Court might, due to fear of being held in contempt of court, feel obliged to comply with the order. This fear is groundless, as failing to obey such order of the maintenance court will not be an offence.

In Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) Cameron JA explained the test for contempt of Court as follows:

> "*[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide '. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way*

[16] S 88(1) of the Administration of Estates Act.

claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

[10] These requirements - that the refusal to obey should be both wilful and mala fide , and that unreasonable non-compliance, provided it is bona fide , does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

It is therefore clear the Masters of the High Court relying on section 86(1) (b) read together with section 1 (v) of the Administration of Estates Act will not be guilty of the offence of disobeying a court order.

One further aspect of the case which deserves attention is that court disregarded its own directive set out in paragraph [10] of the judgment, viz.

"*I am not aware of a principle in terms of which a court can order an outsider to perform some or other duty for the benefit of someone else, and certainly not without it having considered an opportunity to indicate whether it is willing and able to do so. It is absolutely necessary that a fund like the appellant must have an opportunity to indicate to the court whether it is willing and able to administer the fund for the benefit of the dependents. Ideally it must be joined as a party before the court makes an order. If it is not joined as a party the court cannot grant a final order. The court must issue a rule nisi calling upon the fund to give reasons why an order must not be made. This will give the fund an opportunity to explain its position before a final order is made*".

The Master of the High Court was never afforded an opportunity to explain:

- That it could not lawfully receive money pursuant to an order of a maintenance court.
- That no interest would be paid on the money.

APPLICATIONS FOR BAIL IN THE REGIONAL COURT: APPLICATIONS BASED ON NEW FACTS OR ORIGINAL SUBSTANTIVE APPLICATIONS? †

M F T Botha*

Regional Magistrate Middelburg, Mpumalanga

Lawyers are fond of saying '*quot homines tot sententiae*',[17] meaning there are as many opinions as there are people, but in this debate that does not seem to be the case. On this topic it seems as if I am, in the Magistracy at least, a lone voice, crying in the wilderness. The arguments in this debate form part of a dispute that has been raging for a few years now regarding the interaction between the District Courts and the Regional Courts. It goes without saying that everything said here is also applicable to an accused that has been transferred from the Lower Courts to the High Court. Studying the law on the matter makes one realise just how many dimensions there really are to the prism of the trilogy of leading judgments on this matter.

At first it was thought by many that an accused that has been transferred from a lower court to a higher court, cannot bring a second bail application in the higher court in which the case is pending, if he or she was unsuccessful in the lower court, but must base a second bail application on new facts only before the lower court. That part of the dispute has been settled by the judgments in *S v Makola,*[18]

† I wrote this article hastily over a weekend at the request of the President of JOASA, to get it ready for publication in this edition of the journal. If there are any grammatical errors in it please accept my apology and excuse them.

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[17] I am using this saying knowing very well that an esteemed and well respected judge and friend of mine despises it. His opinion that it is a sexist saying rests however, in my opinion, on the sometimes improper translation of the word '*homines'* into English. *Homines*, as used in this saying, does not mean the plural of 'man'; properly translated it means 'humans'. In Latin if one wants to refer to 'man' you use the word '*vir*', and if you refer to more than one man it is '*viri*'. If, therefore, the saying was '*quot viri, tot sententiae*', I would have agreed with him.

[18] *S v Makola* 1994 (2) SACR 32 (A).

Director of Public Prosecutions v Louw NO: In re S v Makinana,[19] and *S v Mzatho and Others*.[20]

In the last case in this trilogy, *Mzatho,* the Court for example, said:

> '*In Makola the Appellate Division (as it then was) held that, where an accused has been refused bail in a magistrate's court on a charge justiciable in a superior court, by having elected to bring such application in the magistrate" court, he is not thereby precluded from making a further application in the supreme court when the matter comes before that court for trial.*'[21]

The dispute addressed in this paper concerns another facet of the prism of these judgments. It concerns the question whether an accused who brought an unsuccessful bail application in the District Court, and who has subsequently been transferred from the District Court to the Regional Court, must of necessity by law, base a further application for bail in that court on new facts or whether he or she can bring a substantive original application, not necessarily based on new facts. Practically it means that if the second application must of necessity be based on new facts in the higher forum, the record of proceedings of the lower court must first be obtained and placed before the judicial officer in the higher forum, before he or she can even entertain the second application. The delay caused by that is self-evident to those of us who have waited ages, usually not less than six months, for a transcript of the proceedings. By the time the transcript finally arrives, if ever, the trial would probably be finished, making the right to bring a second application for bail in the higher forum illusionary. If, however, the application is a substantive original application there is no need for such and no reason for delay. The question whether a substantive original application can be brought in the higher forum in which the case is pending,

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[19] *Director of Public Prosecutions v Louw NO: In re S v Makinana* 2004 (2) SACR 46 (ECD).
[20] *S v Mzatho and Others* 2007 (2) SACR 309 (T).
[21] *S v Mzatho and Others* 2007 (2) SACR 309 (T) at p317.

without necessarily basing it on new facts, is therefore not of mere academic concern. The answer to the question depends on the interpretation and application of sections 60(1) and 65(2) of the Criminal Procedure Act 51 of 1977, as well as the relevant case law. Prior to the substantive amendment of section 60 of the Criminal Procedure Act, section 60 (1) stated;

> '*An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that Court, to be released on bail in respect of such offence, and any such court may, subject to the provisions of s 61, release the accused on bail in respect of such offence on condition. . .*'[22]

The first important judgment that we should deal with is *S v Baleka*.[23] The Court in *Baleka* said with regard to an application for bail in a higher forum, where the case was pending in that forum, and where bail was denied in the lower forum that,

> '*Thirdly, if a bail application is refused by a lower court, and if, after such refusal, new facts arise or are discovered, provision is implicitly made by s 65 (2) for the renewal of the bail application in order to place the new facts before the lower court. The lower court is implicitly empowered to reconsider its refusal of bail in the light of the new facts and, if it is satisfied in the relevant respects, to release the accused on bail. If the lower court is not satisfied in the relevant respects by the new facts, it will, of course, decline to alter its prior refusal of bail.*'[24]

And,

> *'The scheme of chap 9 is clearly to provide the accused with a sufficient opportunity to apply for bail once; and, if such application is made to a*

[22] Emphasis added.
[23] *S v Baleka and Others* 1986 (1) SA 361 (T).
[24] *S v Baleka and Others* 1986 (1) SA 361 (T) at 375.

lower court and is refused, provision is made for the renewal of the application if new facts come into existence or are discovered, and in any event to appeal against the refusal of bail by a lower court. The scheme does not envisage that the accused should otherwise be free to trouble a court with one or more additional applications for bail when his initial application has been refused.'[25]

Furthermore,

'The mere fact that the trial date in the Supreme Court has now been fixed and the accused remanded for trial in the Supreme Court on that date in no way affects the jurisdiction of the magistrate to deal with the facts which may arise and be relevant to the question of bail. If such new facts do so arise, the substance of s 65 (2) is that the magistrate's court which refused to admit the applicants to bail is the only court with jurisdiction to deal with such new facts at first instance. Until that court has considered the new facts and decided whether they point to the need to revoke the refusal of bail, the new facts cannot be advanced before any other court.'[26]

The basis of this judgment clearly rests on an application of section 65(2) of the Criminal Procedure Act. It is mainly because of sentiments like those set out in this judgment that most of my colleagues, if not all, hold the opinion that *all* bail applications, brought after an unsuccessful application in a lower court, including applications brought in a new forum where the matter is pending for trial, must, of necessity and by law, be based on new facts. As long as I can remember, I always had a problem with this interpretation of the law. Let me state straightaway that I have no doubt, and can say without hesitation, that the right to bring an original bail application in a new forum where the case is pending, has its roots in section 60(1) and not section 65(2), as the court in *Balek*a, and many

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[25] *S v Baleka and Others* 1986 (1) SA 361 (T) at 377.
[26] *S v Baleka and Others* 1986 (1) SA 361 (T) at 379.

magistrates would want to have it. Section 65(2) really has nothing to do with the right to bring an original bail application in a new forum where the trial is pending, after it was refused in a lower forum. It has to do with the issue whether *an appeal* can be based on new facts that were not before the court of first instance, and only that. The fact that the negative logical consequence of that is that an accused who wants to adduce new evidence before a court of appeal cannot do so unless he or she has first taken that new matter to the court against whose judgment he or she wants to appeal, does not mean that it also covers our situation. Consequently the section cannot be, and in fact is not, applicable to our situation. I am not traversing virgin territory when saying this nor am I sucking this out of my thumb. In *S v Vermaas*[27] the judge made this abundantly clear when he said,

> '*Section 65 (2) does not deal with fresh applications for bail, like the present. It precludes the right of appeal on new facts not before the court a quo without referral of the matter to that Court.'*

Of course this is based on what the Supreme Court of Appeal said in *S v Makola (supra)*. It said,

> '*Section 65(2) makes provision for a particular case, viz where new facts are discovered before an appeal is heard. The legislature could never have intended that s 65(2) should also govern all renewed applications. In my judgment such new applications may indeed be brought under s 60(1) of the Act.*'[28]

[27] *S v Vermaas* 1996 (1) SACR 528 (T) at 531*d-e*.
[28] *S v Makola* 1994 (2) SACR 32 (A) at p35.

Du Toit *et al,*[29] also make this statement with regard to *Vermaas* in their commentary on section 65(2) where they say,

> '*Section 65 does not deal with **fresh** **or** **renewed applications** for bail, but merely precludes the right of appeal on new facts not before the court a quo without referral of the matter to that Court.*'

As can be seen, this statement accords verbatim with that in *Vermaas*, but the authors expand on the statement in *Vermaas* to accommodate the reference to *renewed applications* in *Makola*. Why are they doing it? They do it because of the confusion caused by terminology such as 'new', 'fresh', or 'renewed'. In this paper the term '*original*' application is used because, as will be seen, it is the term used by the Supreme Court of Appeal in *Makola*. The application in *Vermaas* was clearly an original substantive application, brought in the same forum (the High Court) as the matter was on trial in that court, but it was not brought before the same presiding officer (because he or she was busy with the trial). Clearly it was not an application brought on new facts, but an original substantive application where matters dealt with before the previous judge as well as new matters were dealt with and the court ruled on it afresh. This was the reason why the State argued that those aspects already dealt with before the previous judge were *res judicata*. The Court correctly rejected the argument.
Although *Vermaas* is not as clear on the fact that it was an original application, as I would want it to be, the case of *S v Acheson*[30] leaves no doubt in this regard.
Acheson was without any doubt a substantive *original* application and not one based on new facts. Interestingly enough the judge in *Acheson* was Mahomed AJ (as he then was) and of course the same Mahomed who argued, without success, in *Baleka* that an accused has a right to bring an original application in the higher forum if the matter is pending there.

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[29] Du Toit *et al Commentary on the Criminal Procedure Act* Service 42-2009 at 9-74A (emphasis added).
[30] *S v Acheson* 1991 (2) SA 805 (NmHC).

I can already hear cries going up, that the court in *Makola* never dealt with this matter explicitly. Yes it did not do so explicitly, but the terminology it used indicates what it wanted to convey. The Supreme Court of Appeal used the words '*an original application*' in *Makola*. It said,

> '*In my judgment s 60(1) gives both 'the lower court' and the 'superior Court' jurisdiction to release an accused on bail. As far as the lower court is concerned the section provides that*
>
> > *'[a]n accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court…to be released on bail in respect of such offence…'*
>
> *The Supreme Court, on the other hand will have the jurisdiction to entertain an original application for bail, as opposed to an appeal, at any stage, provided 'the proceedings against the accused are pending' in such Court.*'[31]

It should be obvious that the words *'original application'* cannot mean an application based on new facts, because if it does mean that, I would honestly be bewildered by the English language. I am quite aware of the fact that the Court in *Makola* also referred to an accused who wants to bring an application based on new facts, in its reference to the facts of the specific case, but that does not detract from the fact that when it stated the *general* principle it used the words '*original application*'. It is also clear that this jurisdiction of the High Court, to entertain an original bail application, (as a new forum) has nothing to do with its inherent or common law jurisdiction; its jurisdiction, in terms of this statement in *Makola*, is clearly founded in section 60(1) of the Criminal Procedure Act 51 of 1977.

Since the right to bring such an original bail application is governed by section 60(1) and not 65(2) it is worth noting that section 60(1) only makes mention that

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[31] *S v Makola* 1994 (2) SACR 32 (A) at p34 (emphasis added).

an accused can bring an application and does not state that such an application *must* of necessity be based on new facts. Section 60(1) and 65(2) can also not be read together to settle this dispute as they deal with different subject matters. The proviso for an accused to bring an original application in the higher forum is that the matter must be 'pending' in that court. Therefore, the mere fact that an accused appears in a new forum where the case is then pending entitles him or her in terms of section 60(1) and the *Makola* judgment's interpretation thereof, to bring an original bail application and section 65(2) does not affect the exercise of that right. The *Makola* judgment, because it is a Supreme Court of Appeal judgment, is the leading case on this matter and the court in *Makinana* made it clear that it makes no difference to the matter that section 60(1) now reads differently from what it used to read when the *Makola* judgment was delivered.[32] I share that sentiment.

Of course an accused cannot be allowed to bring bail applications, day after day, (as was said in *Vermaas)* on the same facts, but that does not prohibit him or her from bringing an original substantive application, whether based on new facts or not, once he or she appears in a new forum, where the matter is *pending*. That court then deals with the matter on the basis of what has been placed before it and it is obviously not bound or influenced by the decision or reasons for decision of the court *a quo*. If the application is however based on new facts, the higher court will be bound by that decision if it finds no new facts. *Van der Berg*[33] says with regard to this matter,

> '*The approach adopted in De Villiers differs from that in Vermaas, where the Court held that s 65(2) does not deal with renewed applications for bail, but merely precluded the right of appeal on*

[32] *Director of Public Prosecutions v Louw NO: In re S v Makinana* 2004 (2) SACR 46 (ECD) at p55. Section 60(1) does not refer to 'pending' in the higher forum anymore, as it used to do when the judgment in *Makola* was delivered.

[33] Van der Berg *Bail - A Practitioner's Guide* 2 ed. (2001) at p55.

> *new facts which were not before the Court of first instance without the referral of the new matter to that court. It is submitted however, that in practice, nothing turns on the distinction: a renewed application for bail should be made before the Court of first instance…*'

It is respectfully submitted that the last part of this statement is clearly wrong. It is wrong because it contradicts the *Makola* judgment. It also brings to the fore the confusion caused by terms such as 'renewed application' and what is intended to be conveyed by it. ***Van der Berg*** states in the very same paragraph though, correctly it is submitted, that,

> '*There is nothing to preclude an accused person from bringing a renewed application for bail, **not on new facts as such**, but pursuant to the prior withdrawal of bail owing to a breach of condition*.'

Here he clearly uses 'renewed application' to indicate what the Supreme Court of Appeal, and myself, refer to as an original application. This statement is, as already said, correct. The implications of it are however disastrous for the previous statement because in essence and principle it stands in contradiction to the previous statement. If the last statement is correct, the question then automatically and logically arises on what basis this application, which is not based on new facts, is brought, if it is brought in terms of section 60(1), and how it differs from other applications also brought in terms of this section, and also not brought on new facts? The answer is quite simple; such application is brought in terms of section 60(1) and section 60(1) does not require that a second application be based on new facts. Why then should it be the case where the application is brought in a new forum? I know very well that my interpretation of the matter differs radically from many, if not all of my colleagues, but that is no

reason why it should be regarded as incorrect. Some colleagues that oppose my views in this regard strongly rely on decisions such as *Shefer v Director of Public Prosecutions, Transvaal*,[34] and *S v Baleka*[35] as authority for their view that an original application cannot be brought in the new forum. Time and again I am told that *Shefer* prohibits this. Let me then lay the ghost of *Shefer* to rest, once and for all. In *Shefer* the Court said,

> '*Where the applicant is aggrieved by the decision of the court below in declining to amend any one or more conditions of bail, then he is free to appeal against that decision in terms of s 65. If he considers that the magistrate committed a reviewable irregularity then he is free to approach the High Court in the manner provided by Rule 53 to review the lower court's decision. However Stegmann J, in S v Baleka (supra at 376F-G) warned:*
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> > *"What the applicants were not free to do was simply to ignore the magistrate's decision, to treat it as if it had never been made, and institute a new application for bail in the Supreme Court."*
>
> *[29] Simply, in this instant case, the applicant ignored the regional court's decision and proceeded to initiate a new application.*'[36]

First of all *Shefer* has, with the greatest respect to my colleagues who rely on it, nothing to do with this matter. Anyone who reads *Shefer* will appreciate this, because *Shefer* dealt with an accused that was aggrieved by a refusal by a Regional Magistrate to amend a condition of bail. Shefer then, without appealing or even reviewing that order, wanted the High Court, *before which the matter was not even pending*, to merely overrule the magistrate, which was ridiculously un-procedural, and rightly rejected. That clearly has nothing to do with an accused

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[34] *Shefer v Director of Public Prosecutions* 2004 (2) SACR 92 (T).

[35] *S v Baleka and Others* 1986 (1) SA 361 (T).

[36] *Shefer v Director of Public Prosecutions* 2004 (2) SACR 92 (T) at 100*e-f.*

that is transferred from a lower forum where bail was refused and appears in a higher forum where his or her case is then pending and wants to apply for bail. The Regional Magistrate in *Shefer* did in fact exercise jurisdiction over the matter in question because he or she did amend some of the conditions but refused to amend the specific condition. *Shefer* is a case where the accused was not transferred to, and his or her case was not pending in, the High Court when they brought the application there; hence the correct refusal to hear the application for amendment of the condition in that forum. *Shefer* also was not an application for bail but an application for amendment of a condition of bail, for which explicit provision is made in section 62 and 63(1) of the Criminal Procedure Act, so *Shefer* takes us no further. *Baleka,* on the other hand, is definitely a case in point and is clearly stating the opposite of what *Makola* says. *Baleka* was decided before *Makola* and was expressly overruled in *Makola*, as such it cannot be regarded as good law after *Makola*, because once the accused was transferred to the High Court, his case was pending there and thus the accused was entitled, in terms of *Makola*, to bring *an original application* in the High Court - meaning without even basing it on new facts - because if that is not so, it is senseless to call it an original application. The same judge that decided *Baleka*, namely Stegmann J, decided *Makola* in the High Court on the same basis. FA Grosskopf JA said in the Supreme Court of Appeal, when overruling the High Court, that,

> '*Stegmann J applied the same reasoning in the present case. I respectfully disagree with the construction which the learned Judge has placed on s 60(1) in both these cases.'*[37]

[37] *S v Makola* 1994 (2) SACR 32 (A) at p34.

So *Baleka* is also no authority on this argument. If the accused indicates that he only wants to adduce new facts and not launch an original application, he need not even go back to the court that refused bail in the first instance in terms of *Makinana*, and in addition to that even if he or she wants to bring an original application, the new forum has jurisdiction in terms of *Makola*, to hear the application.

In conclusion then, it is respectfully submitted that an accused that brought an unsuccessful bail application in the District Court, and who has been transferred to the Regional Court, can bring an original bail application in the Regional Court, not based on new facts, merely because the matter is then pending in a different forum.

Liability of a Deceased Estate for Maintenance.

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An aspect which confronts magistrates from time to time is: What is the effect of the death of the respondent on a maintenance claim ? :

- Does the executor of the deceased estate step into the shoes of the deceased?
- Does a maintenance court order come to an end?
- Is there a claim against the deceased estate?

Substitution of the executor for the deceased.

The executor of the deceased estate does not automatically become a party to maintenance court proceedings.

A maintenance court is a magistrates' court[38]. This means that unless the Maintenance Act, 99 of 1998, specifically determines the procedure, the Magistrates' Court Act 32 of 1944 and its rules are still applicable.

The maintenance Act does not deal with the death of one of the parties to a maintenance court action but Rule 52 (3) of the Magistrates' Court Act does so. According to this rule the proceedings will be stayed until an executor to the deceased estate has been substituted for the deceased. The Rule provdes:

> *If a party dies or becomes incompetent to continue an action the action shall thereby be stayed until such time as an executor, trustee, guardian or other competent person has been appointed in his place or until such incompetence shall cease to exist.* [*My emphasis]*

[38] S 3 of the Maintenance Court Act, 99 of 1998

The substitution of the executor does not take place automatically, it can only happen as a result of a court order made in terms of Rule 52 (3) of Magistrates' Court Act. It provides:

> *Where an executor, trustee, guardian or other competent person has been so appointed, the court may, on application, order that he be substituted in the place of the party who has so died or become incompetent.* [*My emphasis]*

"On application"

According to Rule 2(1) (b) of the Magistrates' Court Act "apply" means a formal application made in writing. Rule 55 of the Magistrates' Court Act sets out the procedure for the bringing of formal applications in the magistrates' court.

Should either the applicant in the maintenance claim or the executor wish the executor to become a party to the proceeding then:

- The applicant must serve the respondent with a notice of motion supported by an affidavit setting out the grounds for the substitution.
- The respondent will have an opportunity to file an answering affidavit and the applicant may then file a replying affidavit.
- Argument, on the papers, will then be presented to the magistrate.
- The magistrate will then make a ruling as to whether or not the substitution may take place.
- The magistrate's decision will be based on the balance of convenience and the possible prejudice that may result should the application be granted or not as the case may be.

It is only if the application is successful that the executor will have *locus standi* to appear in the maintenance court.

There are several reasons why substitution does not take place automatically and includes the need for the executor to finalise the deceased estate as soon as possible.

The duty of the executor is to wind up the deceased estate as soon as possible by taking control of the assets, preparing liquidation and distribution accounts, paying the creditors and finally by distributing the assets to the heirs and beneficiaries. This duty does not include continuing with the periodic payments for maintenance as set out in a maintenance court order.

A claim for maintenance is a debt against the deceased estate and must be paid at the same time as the claims of other creditors.

There are, however, several advantages in having the executor as a party in a maintenance action. This is particularly so where the claim has been rejected or is disputed and the executor is hostile towards the claimants or where a conflict of interest exists, e.g. the executor is the sole heir and the claimants are the children from a previous marriage or relationship.

The maintenance court is ideally suited for this purpose. The process in the court is geared towards assisting persons with limited legal knowledge. The court may call upon the services of the maintenance investigator and subpoena witnesses to determine the duty of support owed by the surviving parent, if any, and to ascertain the needs of the children and ultimately to establish the extent of the claim that should be lodged against the deceased estate.

A finding by a court that maintenance is due will not only help the executor with the quantification of the claim but will resolve the problem of a disputed claim.

Another major benefit of having the executor as a party is that the maintenance court will be able to monitor the progress of claims made in terms of section 26(1)A of the Administration of Estates Act. This section empowers the Master, in specific circumstances, to release funds from the estate before the finalisation of the estate accounts. The purpose of the early release of funds is to provide for the "subsistence of the deceased's family or household". *See below* "Claims against the Deceased Estate".

Does a maintenance court order come to an end on death of the respondent?

Children

A maintenance court order in favour of a child does not automatically terminate on death of the respondent.

The claimant may elect to continue with an existing maintenance court order but it will be necessary for the executor to be substituted for the deceased. (*See above"* Substitution of the Executor for the Deceased".)

The claimant may elect to claim directly from the estate as on the death of a parent the duty of maintaining a child is transmitted to the estate of the deceased parent.[39] (*See below* "Claims against the Deceased Estate").

Spouse of Deceased

A maintenance court order in respect of a spouse ceases on the death of the respondent as death ends the matrimonial relationship and consequently the common law reciprocal duty of support between spouses also comes to an end.

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[39] *Carelse v Estate de Vries,*(1906) 23 S.C. 532, *Davis' Tutor v Estate Davis,* 1925 W.L.D. 168. *In re Estate Visser*, 1948 (3) SA 1129 (C), and *Christie, N.O v Estate Christie and Another*, 1956 (3) SA 659 (N)

However the Maintenance of Surviving Spouses Act, 27 of 1990 enables widows and widowers in some circumstances to claim against the estate of the deceased.

> *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.* [40][*My emphasis]*

Divorced Spouses

A maintenance order in favour of a divorced spouse will have it's origin in a court order made in terms of either sections 7(1) or 7(2) of the Divorce Act, 70 of 1979. The difference between the two orders is that the former is regarded as having a contractual nature whereas the latter is not based on contract.

The importance of this distinction is that a contractual claim may survive the death of the maintaining party. A court order, which is not of a contractual nature, comes to an end on the death of either the maintaining or maintained party.

Section 7(1) of the Divorce Act

In terms of section 7(1) of the Divorce Act, an agreement between the spouses for the payment of maintenance may be made an order of court. It provides:

> *A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.* [My emphasis]

[40] S 2 (1) of the Maintenance of Surviving Spouses Act

Although it is a court order it retains its contractual nature. This means that the terms of the agreement will determine when the right to claim maintenance comes to an end. For example, an agreement that maintenance will be payable until the "death or re-marriage" of the party in whose favour it is made, will allow the survivor to claim from the estate.

Contractual claims for maintenance must be lodged against the deceased estate.

Section 7(2) of the Divorce Act

In divorce actions where parties do not enter into an agreement of settlement it is still possible for the court to order the defendant to pay maintenance to the plaintiff. This is done in terms of section 7(2) of the Divorce Act,

> *In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court 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, an order in terms of subsection (3) 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]

In *Hodges v Coubrough NO*[41] Didcott J held that section 7(2) of the Divorce Act, 70 of 1979, does not empower the Court to grant an order for the payment of

[41] 1991 (3) SA 58 (D)

maintenance which survives the death of the maintaining party and which binds his/her estate.

It is therefore settled law that orders made in terms of section 7(2) of the Divorce Act, cease to have any effect after the death of either the party that is being maintained or the maintaining party.

Claims against the Deceased Estate.

The following persons have a claim of maintenance against the deceased estate:

Who may lodge claims	**Grounds**
Children of the deceased	Common law
Surviving spouse/s of the deceased	S 2(1) of Maintenance of Surviving Spouses Act
Ex-spouse	Contract
Deceased's household or family	S 26(1) A of Administration of Estates Act

A claim by a minor for maintenance against his deceased father's estate is a debt *sui generis*, which, though preferent to inheritances and legacies, ranks after the claims of normal creditors of the estate.[42]

A claim for maintenance by a surviving spouse ranks the same as that of a dependant child.[43]

> *The claim for maintenance of the survivor shall have the* <u>*same order of preference*</u> *in respect of other claims against the estate of the deceased spouse* <u>*as a claim for maintenance of a dependent child*</u> *of the*

[42] In re Estate Visser *supra* Ogilvie Thompson J at 1135A
[43] S2(3) (b) of Maintenance of Surviving Spouses Act

> *deceased spouse has or would have against the estate if there were such a claim, and, if the claim of the survivor and that of a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately*. [My emphasis]

The claim of a divorced spouse will rank higher than either a claim of a child or a surviving spouse as it is regarded as the claim of a concurrent creditor.

Generally the claims for maintenance will be paid out only when the final liquidation and distribution accounts have been accepted but in certain instances it is possible that money for maintenance will be paid out earlier.

In terms of section 26 (1A) of the Administration of Estates Act, 66 of 1965 an executor may, with the permission of the Master of the High Court, release money from the estate for the use of the deceased's family.

> *The executor may before the account has lain open for inspection in terms of section 35 (4), with the consent of the Master release such amount of money and such property out of the estate as in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household.* [My emphasis]

The steps are as follows:

- The executor must be appointed.
- The liquidation and distribution accounts must not yet have lain for inspection.
- A request for maintenance must be made to the executor.
- The executor must, in writing, notify the Master of the High Court of this request and provide recommendations as to whether or not the request should be granted.

- The Master of the High Court must consider the request and recommendation and then make a decision as to whether or not money should be released from the estate.

The master of the High Court will only accede to the request if it is clear that there are sufficient assets to meet the all the claims of the deceased estate.