

## CHAPTER 6:03

### DECEASED PERSONS FAMILY MAINTENANCE ACT

*Acts 39/1978, 29/1981, 21/1987, 15/1994; 6/1997 (s. 9); 9/1997 (s. 10), 22/2001 (s. 4).*

#### ARRANGEMENT OF SECTIONS

##### *Section*

1. Short title and application.
2. Interpretation.
3. Application for maintenance.
4. Master or provincial magistrate to report on and submit application to appropriate court.
5. Registrar or clerk of court to set application down for hearing.
6. Power of appropriate court in relation to application.
7. Award of maintenance.
8. Form and substance of awards.
9. Interim orders.
10. Protection of deceased person's family and property.
11. Restrictions on exercise of rights conferred by section ten.
12. Disposition with intent to deprive dependants of maintenance.
13. Variation of award.
14. Effect and duration of awards.
15. Awards to be sent to Master or other official.
16. Appeals.
17. Regulatory powers of Minister.

**AN ACT to make provision for maintenance out of the estate of a deceased person for certain members of his family; and to provide for matters incidental therewith or connected thereto.**

[Date of commencement: 19th January, 1979.]

#### **1 Short title and application**

(1) This Act may be cited as the Deceased Persons Family Maintenance Act [*Chapter 6:03*].

(2) The provisions of this Act shall not be construed as derogating from the rights of any person to maintenance out of a deceased estate which he has in terms of any other law.

#### **2 Interpretation**

(1) In this Act—

“application” means an application in terms of section *three*;

“appropriate court”, in relation to any application, means the High Court or a regional court, as may be decided upon by the Master or a provincial magistrate in terms of paragraph (b) of subsection (1) of section *four*;

“award” means an order made by an appropriate court in terms of this Act;

“child”, in relation to a deceased, includes an adopted and an illegitimate child of the deceased;

“deceased” means a person who has died whether testate or intestate;

“dependant”, in relation to a deceased, means—

(a) a surviving spouse;

(b) a divorced spouse who at the time of the deceased's death was entitled to the payment of maintenance by the deceased in terms of an order of court;

(c) a minor child;

(d) a major child who is, by reason of some mental or physical disability, incapable of maintaining himself and who was being maintained by the deceased at the time of his death;

(e) parent who was being maintained by the deceased at the time of his death;

(f) any other person who—

(i) was being maintained by the deceased at the time of his death; or

(ii) was entitled to the payment of maintenance by the deceased at the time of his death;

[Paragraph inserted by section 9 of Act 6 of 1997]

“disposition” means any transfer or abandonment of rights to property and includes a sale, lease, suretyship, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor but does not include a disposition in compliance with an order of a court;

“Master” means the Master of the High Court and includes the Assistant Master of the High Court;

“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“net estate”, in relation to a deceased, means all the property of his deceased estate which, but for the provisions of this Act, would be available for distribution to his heirs and legatees;

“property” means any right in or to property, whether movable or immovable and whether corporeal or incorporeal;

“regional court” means a court of a regional magistrate appointed in terms of the Magistrates Court Act [Chapter 7:10].

(2) For the purposes of paragraphs (d) and (e) of the definition of “dependant” in subsection (1), a person shall be treated as being maintained by the deceased if the deceased, otherwise than for full value received, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person.

### **3 Application for maintenance**

(1) Any dependant of a person who dies after the 19th January, 1979 may, subject to this Act, make application for an award from the net estate of the deceased.

(2) An application referred to in subsection (1) shall be—

(a) made in the prescribed form, if any; and

(b) lodged with the Master or, where there is no office of the Master in the province where the applicant ordinarily resides, the provincial magistrate of the province—

(i) within three months of the date of the grant of letters of administration to the executor of the deceased estate concerned; or

(ii) in the case where the Master has, in terms of paragraph (b) of subsection (1) of section 32 of the Administration of Estates Act [Chapter 6:01], dispensed with the appointment of an executor *dativo*, within three months of the date of death of the deceased:

Provided that the Master may, on good cause shown, grant an extension of the relevant period referred to in subparagraph (i) or (ii) within which the application shall be made.

(3) On receipt of an application, the Master or the provincial magistrate, as the case may be, shall—

(a) make such initial investigation in connection with the application as he considers necessary; and

(b) take such steps as he considers necessary and practicable in the circumstances to obtain the view of the heirs and legatees and the executor of the deceased estate concerned in regard to the application.

(4) Where an application is made to a provincial magistrate, the provincial magistrate shall report to the Master any steps taken or any directions given by him and shall act in accordance with such directions as the Master may give to him.

(5) For the purposes of subsection (3), the Master or provincial magistrate, as the case may be, may—

(a) direct the executor to take such measures within such period as the Master or provincial magistrate, as the case may be, may specify and, without derogation from the generality of the foregoing, may direct the executor to submit such report or statement to him as the Master or provincial magistrate, as the case may be, may specify;

(b) call upon all or any of the heirs or legatees of the deceased to make to him such representations as they may wish in connection with the application.

(6) An executor shall comply with any directions given to him by the Master or provincial magistrate, as the case may be.

(7) An applicant who is himself the executor of the estate of the deceased concerned and who wishes to make an application shall not be precluded therefrom but, in such event, the regional court may appoint a *curator ad litem* to represent the estate in connection with the application and the expenses incurred in connexion with such appointment shall be defrayed out of the estate.

(8) Where an application has been made in terms of this section no distribution of the net estate of the deceased concerned shall take place until the application is finally determined:

Provided that nothing in this subsection shall be construed as preventing the executor, before the application is finally determined, from disbursing any part of the estate for the purpose of providing maintenance for any person who was totally or partially dependent on the deceased immediately before his death.

### **4 Master or provincial magistrate to report on and submit application to appropriate court**

(1) After acting in terms of subsection (3) of section *three*, the Master or provincial magistrate shall—

(a) prepare a report on the application concerned and attach all relevant documents thereto, including a copy of the will, if any, of the deceased; and

(b) subject to subsection (2), decide whether the application should be determined by the High Court or a regional court; and

(c) submit the application, together with the report and documents referred to in paragraph (a), to the registrar or clerk of the court decided upon by him in terms of paragraph (b).

(2) In deciding which court shall determine any application, the Master or the provincial magistrate, as the case may be, shall take into account—

- (a) the means of the applicant; and
- (b) the nature of the rights or interests involved; and
- (c) the understanding, by the applicant and the majority of beneficiaries or heirs of the deceased, of the provisions of any law that applies to the case; and
- (d) any preference expressed by the applicant, the executor of the deceased estate concerned and any other persons involved in the application; and
- (e) any other relevant circumstance.

## **5 Registrar or clerk of court to set application down for hearing**

On receipt of the papers referred to in section *four*, the registrar or clerk of the appropriate court shall set the matter down for hearing before the appropriate court and shall submit a notice of the date, time and place of the hearing to—

- (a) the executor and the applicant, directing them to attend; and
- (b) the heirs and legatees, if known, advising them of their right to attend.

## **6 Power of appropriate court in relation to application**

(1) For the purposes of determining any application, an appropriate court shall have the powers conferred upon that court in determining any civil case and, without derogation from the generality thereof, the court may—

- (a) subpoena any person whose evidence it considers may assist it in determining the application and may order any such person to produce before the court any document or other paper;
- (b) call for any report from the executor or any further report from the Master or the provincial magistrate concerned, as the case may be;
- (c) direct the executor to take such measures or steps relative to the application as the court may specify;
- (d) administer the oath to and take evidence from any person;
- (e) adjourn the hearing of the application from time to time;
- (f) make any other direction or take any other step it thinks fit.

(2) In the determination of an application, an appropriate court may have regard to any evidence which it considers relevant to the issue whether or not such evidence would be admissible in an action before a court.

## **7 Award of maintenance**

(1) After due inquiry into an application, the appropriate court may, subject to the provisions of this Act, if it considers that a dependant who has made an application is in need of maintenance from the estate of the deceased concerned and that it is just and equitable that an award should be made, make an award against the net estate of the deceased in favour of such dependant.

(2) In the determination of an application, the court shall have regard to—

- (a) whether or not the dependant is in need of maintenance, taking into account, where the deceased died leaving a will, the benefits, if any, to which the dependant will be entitled under the will or, where the deceased died intestate, the benefits, if any, to which the dependant will be entitled on intestacy;
- (b) the period for which maintenance of the dependant is required;
- (c) the ability of the dependant to maintain himself and whether or not it is desirable that he should work;
- (d) the number of persons to be maintained by the estate;
- (e) the general standard of living of the dependant and, during his lifetime, of the deceased;
- (f) the reasons for the deceased failing to make provision for the maintenance of the dependant and, in this connection, whether or not the behaviour of the dependant was responsible in any way for such failure;
- (g) where the deceased died leaving a will, the interests of the beneficiaries in respect of whom provision has been made under the will;
- (h) where the deceased died intestate, the interests of the persons who would normally succeed on intestacy;
- (i) the size and nature of the net estate;
- (j) any other matter which, in the opinion of the appropriate court, is relevant to the determination of the issue.

(3) Without prejudice to the generality of paragraph (j) of subsection (2), in an application by a spouse of the deceased, the appropriate court shall, in addition to the matters specifically mentioned in paragraphs (a) to (i) of that subsection, have regard to—

- (a) the age of the applicant and the nature and duration of the marriage; and
- (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; and
- (c) the provision which the applicant might reasonably have expected to receive if, on the day on which the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

(4) Without prejudice to the generality of paragraph (j) of subsection (2), where an application is made by a child of the deceased, the appropriate court shall, in addition to the matters specifically mentioned in paragraphs (a) to (i) of that subsection, have regard to the manner in which he might expect to be educated or trained.

(5) In considering the matters to which the appropriate court is required to have regard under this section, the court shall take into account the facts as known to it at the date of the hearing.

(6) In considering the ability of any person to maintain himself, the appropriate court shall take into account his earning capacity and, in considering the financial needs of any person, the court shall take into account his financial obligations and responsibilities.

## **8 Form and substance of awards**

(1) In making an award the appropriate court may, subject to this Act, determine that the award shall take such form as it thinks fit.

(2) Without prejudice to the generality of subsection (1), an award in terms of this Act may provide for all or any of the following matters—

- (a) the making of periodical payments to the applicant out of the net estate of the deceased in such amounts and for such definite or indefinite period as the court may specify;
- (b) the payment to the applicant out of the net estate of the deceased of a lump sum in such amount as the court may specify;
- (c) the payment from the net estate of the deceased into the Guardian's Fund referred to in section 97 of the Administration of Estates Act [*Chapter 6:01*], of money for the credit of any person, whether in instalments or as a lump sum or otherwise, as the court may direct;
- (d) the transfer to the applicant of such property comprised in the net estate of the deceased as may be specified by the court;
- (e) the conferring upon any person of a usufruct in any asset of the net estate of the deceased;
- (f) the establishment of a trust or fideicommissum for the benefit of any person in relation to such property comprised in the net estate of the deceased as may be specified by the court;
- (g) the acquisition out of property comprised in the net estate of the deceased of such property as may be specified by the court and for the transfer of the property so acquired to the applicant or for the establishment of a trust or fideicommissum in relation to such property for the benefit of the applicant;
- (h) the variation of any antenuptial contract or any other provision made by parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving spouse to that marriage or any child of that marriage;
- (i) the variation of the disposition of the deceased's estate effected by will or the law relating to intestacy, in such manner as the court thinks fair and reasonable.

(3) An award referred to in paragraph (a) of subsection (2) may provide for—

- (a) payments equal to the whole of the income of the net estate or of such portion thereof as may be specified by the court;
- (b) payments equal to the whole of the income of such part of the net estate as the court may direct to be set aside or appropriated for the making out of the income thereof of payments under this section, or may provide for the amount of the payments or any of them to be determined in any other way the court thinks fit.

(4) Where an award made in terms of paragraph (a) of subsection (2) provides for the making of payments of an amount specified in the award, the appropriate court may direct that such part of the net estate as may be so specified shall be set aside or appropriated for the making out of the income thereof of those payments:

Provided that no larger part of the net estate shall be so set aside or appropriated than is sufficient, at the date of the award, to produce by the income thereof the amount for the making of those payments.

(5) An award made in terms of this section may contain such consequential and supplementary provisions as the court thinks necessary or expedient for the purpose of giving effect to the award or for the purpose of securing that the award operates fairly as between one beneficiary of the estate of the deceased and another and may in particular, but without prejudice to the generality of this subsection—

- (a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the award;
- (b) confer on any trustees of any property which is the subject of the award such powers as appear to the court to be necessary or expedient.

(6) An award made in terms of this section for the payment to a dependant of a lump sum may provide for the payment of that sum by instalments of such amounts as may be specified in the order.

## **9 Interim orders**

(1) Where on an application it appears to the appropriate court—

- (a) that the applicant is in need of immediate financial assistance; and

(b) that property forming part of the net estate of the deceased is or can be made available to meet the needs of the applicant;  
the appropriate court may order that, subject to such conditions as it may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased such sum or sums at such intervals as the court thinks fit.

(2) Subject to this Act, an appropriate court may order that the payments referred to in subsection (1) shall be made until such date as it may specify, not being later than the date on which the court makes a final award in terms of section *seven*, or decides not to exercise its powers under that section.

(3) Subsections (2), (3) and (4) of section *eight* shall apply, *mutatis mutandis*, in relation to an order in terms of this section.

(4) In determining what order, if any, should be made under this section, an appropriate court shall have regard, so far as the urgency of the case admits, to the same matters as those to which the court is required to have regard in terms of section *seven*.

(5) An award in terms of section *seven* may provide that any sum paid to the applicant by virtue of this section shall be treated, to such an extent and in such manner as may be specified in the award, as having been paid on account of any payment provided for by the award.

## **10 Protection of deceased person's family and property**

(1) Notwithstanding any law, including customary law, to the contrary, when any person dies, any surviving spouse or child of such person shall, subject to section *eleven*, have the following rights—

- (a) the right to occupy any immovable property which the deceased had the right to occupy and which such surviving spouse or child was ordinarily occupying immediately before the death of the deceased;
- (b) the right to use any household goods and effects, implements, tools, vehicles or other things which immediately before the death of the deceased the surviving spouse or child was using in relation to such immovable property;
- (c) the right to use and employ any animals which immediately before the death of the deceased were depastured or kept on such immovable property;
- (d) to an extent that is reasonable for the support of such surviving spouse or child, the right to any crops which immediately before the death of the deceased were growing or being produced on such immovable property.

(2) Any person who does an act with the intention of depriving any other person of any right, or interferes with any other person's right, that has accrued to that other person in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Subsection amended by section 4 of Act 22 of 2001]

(3) A court convicting a person of an offence in terms of subsection (1) may order the convicted person or any other person to restore any property or pay any money which he has unlawfully acquired to the person entitled thereto in terms of subsection (1) or to any other person specified by the court, and any such order shall have the same effect and may be executed in the same manner as if the order had been made in a civil action instituted in the court.

## **11 Restrictions on exercise of rights conferred by section *ten***

The rights conferred by section *ten* shall—

- (a) not derogate from or prejudice in any way the rights of any mortgagor, landlord, creditor or any other person whomsoever which existed prior to the date of death of the deceased person;
- (b) terminate upon completion of the administration of that portion of the deceased estate to which those rights relate;
- (c) be subject to the requirement that the surviving spouse or child concerned shall occupy or use the property in question without detriment or neglect, reasonable wear and tear being excepted.

## **12 Disposition with intent to deprive dependants of maintenance**

(1) Subject to this section, every disposition of property by a deceased which was made—

- (a) within the period of two years immediately preceding his death; and
- (b) with the intention of depriving any dependant of maintenance from his estate;

may be wholly or partially set aside by a court of competent jurisdiction if it considers it fair and reasonable to do so.

(2) A person who, in return for any disposition which is liable to be set aside in terms of subsection (1), has parted with any property or security which he held or who has lost any right against any other person shall, if he acted in good faith, not be obliged to restore any property or other benefit received under such disposition unless the executor has indemnified him for parting with such property or security or losing such right.

(3) Subsection (1) shall not affect the rights of any person who acquired property in good faith and for value from any person other than the deceased.

(4) In determining whether or not to set aside, either wholly or partially, any disposition in terms of subsection (1), the court—

(a) shall have regard to—

- (i) the circumstances in which the disposition was made; and
- (ii) the relationship between the deceased and the person in whose favour the disposition was made; and
- (iii) the financial resources of the person in whose favour the disposition was made, the extent to which he has benefited and whether or not any consideration was given in respect of the disposition;

(b) may have regard to any evidence which it considers relevant to the issue, whether or not such evidence would be admissible in an action before the court.

(5) If the court sets aside, whether wholly or partially, any disposition in terms of this section, the court may make such other order as it thinks fit in relation to the disposal of the net estate of the deceased concerned, including an order as to the adjustment of any payment to beneficiaries in terms of the will of the deceased or as to any other consequential alterations in the rights of the beneficiaries.

(6) Proceedings to set aside any disposition in terms of this section may be taken by the executor:

Provided that, if the executor fails to take any such proceedings, they may be taken by any person having an interest in the estate of the deceased concerned in the name of the executor upon his indemnifying the executor against all costs thereof.

(7) Where a court sets aside, whether wholly or partially, any disposition of property in terms of this section, it shall declare the executor entitled to recover so much of the property or its value as may be specified by the court.

(8) Any person who is aggrieved by a decision of a court in terms of this section may appeal against the decision—

- (a) to the Supreme Court, where the decision is one of the High Court; or
- (b) to the High Court, in any other case.

[Subsection substituted by section 10 of Act 9 of 1997]

### **13 Variation of award**

(1) Any person interested in the estate of the deceased concerned may apply in such form, if any, as may be prescribed, to the appropriate court for any award to be varied, suspended or rescinded on the grounds that—

- (a) any material fact was not disclosed when the determination of the application for the award was made; or
- (b) a substantial change has taken place in the circumstances of the dependant in whose favour the award was made.

(2) If the appropriate court, upon an application being made to it in terms of subsection (1), is satisfied as to the matters specified in paragraph (a) or (b) of subsection (1), as the case may be, and that it is just in the circumstances to do so, it may vary, suspend or rescind any award or give such other direction in the matter as it deems fit:

Provided that any such variation, suspension, rescission or direction shall apply only in respect of property to which the award was applicable.

(3) On an application by the person to whom a lump sum is payable in terms of an award, the appropriate court that made the award shall have power to vary the order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable.

### **14 Effect and duration of awards**

(1) An award shall have effect and be deemed to have had effect as from the date of death of the deceased.

(2) Any award in favour of an applicant who was the former spouse of the deceased shall, in so far as it provides for the making of periodical payments, cease to have effect on the remarriage of the applicant, except in relation to arrears due under the award on the date of the remarriage.

### **15 Awards to be sent to Master or other official**

A copy of every award made in terms of this Act shall be sent to the Master or other member of the Public Service responsible for the administration of the estate concerned for entry and filing, and a memorandum of the award shall be permanently annexed to the letters of administration, if any, under which the estate is being administered.

### **16 Appeals**

(1) An appeal shall lie to the Supreme Court from a decision of the High Court in terms of this Act in the same manner as an appeal lies against a decision of the High Court in a civil case.

(2) An appeal shall lie to the High Court from a decision of a regional court in terms of this Act in the same manner as an appeal lies against a decision of a provincial magistrate in a civil case.

[Subsection amended by section 10 of Act 9 of 1997]

## **17 Regulatory powers of Minister**

The Minister may make regulations providing for all or any of the matters which—

- (a) by this Act are required or permitted to be prescribed; or
- (b) in his opinion are convenient or necessary to be prescribed for carrying out or giving effect to the purposes of this Act.