

SOUTH AFRICA / JUDGMENT

Britt and Others v Gil N.O and Others (21865/2022) [2024]

ZAGPJHC 1096 (28 October 2024)

[2024] ZAGPJHC 1096

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

21865/2022

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FLYNOTES:

WILLS AND ESTATES – Executor – Removal
– Conflict
of interest – Alleges executor has an interest in securing
low price on property – Outstanding amounts
regarding rental
and other expenses arising out of tenancy of company which are due
to deceased estate – Executor refuses
to pursue claim
because of his interest in company – Lack of confidence –
Lack of adherence to basic legal principles
– Real cause for
concern – Application succeeds – Removed as executor –
Administration of Estate
Act 66 of 1965, s 54(1)(a).
SAFLII
Note: Certain
personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII
Policy
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
Number: 21865/2022

In the matter between:

BERNARDETTE FATIMA
BRITT (NEE GIL)
1st Applicant
MARIA
DA CONCEICAO COELHO (NEE GIL)
2nd Applicant
ASHNA RAMESHUR
N.O.
3rd Applicant
CARLOS MANUEL CORDEIRO
N.O.
4th Applicant
And
LUIZ ALBERTO GONCALVES
GIL N.O.
1st Respondent
FEDGROUP TRUST
ADMINISTRATORS (PTY) LTD 2nd Respondent
MASTER OF THE HIGH
COURT JOHANNESBURG 3rd Respondent
AGOSTINHO VENANCIO
GONCALVES
GIL
4th Respondent
LUIZ ALBERTO GONCALVES
GIL
5th Respondent

JUDGMENT

FISHER J

Introduction

[1] This case involves a testamentary dispute between seven siblings in relation to the will of their late mother. The application is brought by three of the siblings and the deceased estates of two of the siblings who have died since the death of their mother. They apply to remove their sibling and co-heir from office as executor to the deceased estate of their mother, Rosa da Conceicao

Gil (the deceased).

[2] The deceased died leaving a will that nominated the fifth respondent as executor to her estate. In his capacity as executor, he is cited as the first respondent and in his personal capacity as the fifth respondent. I will refer to him as Mr Gil. The fourth respondent, the other sibling, does not join with the applicant siblings in bringing the application. He is cited by them for his interest only.

- [3] The second respondent Fedgroup Trust Administration (Pty) Ltd (Fedgroup) who administers the deceased estate as agent of and on the instruction of Mr Gil is also cited for its interest.
- [4] All seven children are to inherit equally. The only issue in relation to the will is Mr Gil's executorship.
- [5] The applicants will be referred to collectively as "the applicants" and separately, where necessary, by their first names. The applicant deceased estates are those of daughters Olinda and Maria. They are represented by their executors who are the fourth and fifth applicants respectively.
- [6] In short, of the seven siblings five (or their deceased estates) complain about the executorship of their brother.
- [7] I was addressed in this matter on behalf of Mr Gil in both of his capacities by Mr Maritz SC and on behalf of the applicants by Mr Cilliers SC .

Relief

- [8] The applicants seek to have Mr Gil declared disqualified from receiving the benefit of executorship on the basis of section 4A of the Wills Act 7 of 1953 (the Wills Act) and, in the alternative, that he be removed as executors under section 54 of the Administration of Estates Act 66 of 1965 (the Estates Act).
- .
- [9] Mr Gil brings a counter-application in terms of which he seeks to be declared competent to receive the benefit which accrued to him under the will in terms of section 4A(2)(a) and (b) of the Wills Act. The benefit in issue is his right to be executor.
- [10] I move now to the factual background to the dispute that has given rise to these competing claims.

Background Facts

- [11] The deceased died aged 95 (born 1925) on 11 August 2020. Her first language was Portuguese and it is not materially in dispute that she could neither read nor write English to a high standard.
- [12] The will in issue which revoked all prior wills was signed by the deceased on 16 March 2013. The deceased had a previous will dated 2008.
- [13] The only difference between the two wills is that, in terms of the 2008 will, the deceased nominated two executors being Mr Gil and her daughter Olinda. Both wills bequeath the estate to all seven children in equal shares.

- [14] During 2009 the deceased fell ill and required daily care. She moved into the home of Olinda so that Olinda could care for her. Olinda took care of the deceased until 2019 when Olinda herself fell ill.
- [15] It is not disputed that on 15 March 2013, the day before the signature of the will in issue, Mr Gil received a email correspondence from Mr Arnold Shapiro of Routledge Modise inc confirming that Mr Shapiro had drafted the will and a power of attorney for the deceased to sign.
- [16] In the email Mr Shapiro made mention of the fact that, in relation to the operation of bank accounts, the bank would generally require its own power of attorney form to be completed.
- [17] The documents were sent under cover of the letter. Both documents were prepared in English which, as I have said, was not a language in which the deceased was proficient.
- [18] The applicants allege they were not told about this will at the time.
- [19] In 2015 the immovable property which comprises the bulk of the South African estate of the deceased was sub- divided . There is also a foreign estate in Portugal and Madeira which is not implicated in this matter.
- [20] The property was previously known as Portion 8[...] of the Farm Klipfontein no.8[...] Registration Division I.R Gauteng Province. The subdivision resulted in six portions known as erven 1[...]1[...],1[...],1[...], 1[...] and 1[...] Eveleigh. The erven are valuable and are zoned for commercial use. It is these properties which are the main subject matter of the applicants' complaints.
- [21] Mr Gil has variously expressed the wish personally to purchase certain or all of the erven.
- [22] The gravamen of the impasse which has arisen between Mr Gil and the applicant heirs is this – the applicants wish to market the properties and sell same at the highest price which can thus be achieved on the open market whilst Mr Gil wishes the properties to be sold by way of public auction and without a reserve price.
- [23] The applicants allege that there is method in Mr Gil's approach to the mechanism of the sale. They contend that he is financially able to bid at the auction and that he wishes to do so. They are concerned that an auction without reserve would result in lower prices being obtained and that Mr Gil would, qua executor, have some insight into the auction process.
- [24] Mr Gil has been involved in conducting business operations at the properties for some years. He is a 25% interest holder in Meatnet cc which has been a tenant of the property since May 1998, i.e. prior to and after the subdivision.
- [25] The applicants contend that, because of the interest of Mr Gil in Meatnet, it has, over the years, paid rental at below the market related rental.

- [26] There are also amounts which are outstanding as to the rental and other expenses arising out of the tenancy of Meatnet which are due by Meatnet to the deceased estate. The applicants have expressed a lack of confidence in the willingness of Mr Gil to pursue this claim because of his interest in Meatnet. There is also the dismay expressed that Mr Gil, who acted as both landlord and tenant of the properties allowed Meatnet to fall into significant arrears. The arrears are alleged to be almost R 1 million.
- [27] Meatnet has since been placed in liquidation. Mr Gil simply says that the best that the estate (and hence its heirs) can thus hope for is to make a claim in the insolvent estate.
- [28] A further concern expressed by the applicants is that Mr Gil did not heed their request that he execute the Landlord's Hypothec over the movables of Meatnet. They contend that he failed to do this because of his personal interest in Meatnet.
- [29] It is common cause that there was a cash amount of R519 000 which was in the possession of Gil and not banked until more than two months after his appointment.
- [30] The applicants also allege that there has been a lack of transparency in that they have not been kept up to date with the administration of the estate. Mr Gil makes the point that he has no obligation to keep them up to date but only a duty to account to the Master.
- [31] The will was signed by the deceased at Mr Gil's residence on 16 March 2013. The deceased was taken there from the Olida's home where she resided. At that stage, the deceased was almost 88 years of age, frail, in poor health, and illiterate in the English Language. As a result, the deceased would have had to rely solely on Mr Gil's translation.
- [32] Mr Gil was advised in the letter of 15 March by Mr Shapiro that the will should be signed in the presence of two completely independent witnesses.
- [33] Instead, the will was signed, at the Gil residence, in the presence of Mr Gil, and witnessed by his wife and son.

Interlocutory Application

- [34] A major part of the argument was taken up by an application brought by Mr Gil for the right to file a further affidavit. This affidavit was to serve as a further answering affidavit in the main application and further founding affidavit in the counter- application. The application was opposed.
- [35] I refused the application to file the further affidavit. The reasons for such refusal need only be briefly stated.
- [36] The legal principles governing the receipt of further affidavits are well trodden. Further affidavits will only be received exceptionally and on the basis of adequate and compelling reasons as to why the interests of justice will be served by admitting the further matter.

- [37] Mr Gil's explanation for the failure to provide the averments which now seek to be introduced are merely this. Mr Gil suggests that his legal representatives did not "ask the right questions" of him when the initial affidavit was prepared. He thus fears that the averments made are not sufficient and he wishes to bolster the evidence put forward originally.
- [38] Mr Gil counters the complaint of the applicants to the effect that the supplementary affidavit is sought to be filed at the eleventh hour with the excuse that he believed the matter would become settled.
- [39] Clearly Mr Gil, having taken further advice, came to understand that the case made out by him in the application and counter-application needed bolstering. What is sought to be done by this supplementation is to provide a more detailed and directed narrative of the facts attested to in the first place. There is no basis for such a rehashing.
- [40] The further information sought to be introduced was available at the time of the making of the first affidavit. This is not disputed.
- [41] I am not persuaded that it is in the interests of justice to allow Mr Gil to advance further facts in the circumstances. The further delay which will be caused by acceding to such a request would be untenable. The applicants are elderly. Two of the siblings have already passed away. The winding up of the deceased estate needs to be finalised.
- [42] I now move on to the merits. I will deal with each claim with reference to the legal principles which have application.

Disqualification of Mr Gil under section 4A and his counter-application for a declaration of competency to inherit in terms of section 4A(2)(a) and (b).

- [43] Section 4A of the Wills Act 7 of 1953 (the Wills Act), provides that any person who signs a will as a witness and the spouse of such person shall be disqualified from receiving any benefit from that will.
- [44] However, in terms of section 4A(2)(a) a court may declare such a person or his spouse be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will.
- [45] Furthermore, in terms of section 4A(2)(b) if such person would have been entitled to inherit were the testator to have died intestate, he is not disqualified from receiving a benefit from the will provided that that the value of such benefit shall not exceed the value of the share to which that person would have been entitled to inherit intestate.
- [46] The nomination in a will of a person as executor is regarded as a benefit[1]
- [47] The complaint of the applicants, in addition to the fact that the will was signed in the presence of Mr Gil and witnessed by his wife, is that the will was drafted by Mr Shapiro who is Mr Gil's lawyer on the instruction of Mr Gil.

- [48] This, they say, is evidenced by the letter from Mr Shapiro dated 15 March 2013 which is addressed to Mr Gil and refers to a discussion with him.
- [49] Mr Gil latterly brought an application in terms of section 4A(2)(a) to declare him competent to be the executor under the will despite the fact that the will was signed by his wife.
- [50] The sum total of his submissions relating to the lack of influence are that he denies that Mr Shapiro is his mother's attorney and states that the will was drawn on his mother's instructions which he merely conveyed. He says furthermore that the letter is inadmissible for being hearsay.
- [51] As to the hearsay contention, the letter is not received on any basis other than that it was sent and received and that it is what it purports to be – a letter addressed to Mr Gil enclosing the will with instructions as to how it should be signed.
- [52] The contents of the letter does not, in and of itself, evidence that there was any undue influence.
- [53] Why Mr shapiro's instructions as to signature were ignored is not explained. Neither is it explained why a new will was thought necessary under circumstances where the existing will made the same bequests other than the appointment of Mr Gil as sole executor.
- [54] Clearly Mr Gil wished to control the winding up of the estate. He has remained adamant that he will continue in this position against the stringent objections of his siblings.
- [55] Mr Gil provided no facts in his counter-application which were helpful in determining the deceased's motivations for the signing of the new will.
- [56] It is correct that it is the onus of Mr Gil in the circumstances to satisfy the court that he did not unduly influence the deceased.
- [57] The following aspects trouble me in relation to Mr Gil's counter- application:
- a. The changing of a will which was not strictly speaking necessary other than to give Mr Gil the sole executorship over the estate where he and Olinda had in terms of the prior will been nominated as joint executors;
 - b. that it is not disputed that there was a language barrier;
 - c. that the deceased was elderly and frail at the time of execution; and
 - d. that the instructions for proper signature of the will by what Mr Gil alleges was the deceased's attorney were pointedly ignored.
- [58] There is no indication as to why the deceased would have changed her will for the sole reason that she wished to take the benefit of co-executorship away from Olinda. By all accounts the deceased and Olinda were close and Olinda was her primary carer.

- [59] In the circumstances, I find that Mr Gil has not gone far enough in his application to satisfy this court that there was not undue influence over the deceased. The default position provided for in section 4A(1) of the Wills Act i.e. that Mr Gil is disqualified from receiving the benefit of executorship, must thus prevail.
- [60] Having said this and in light of the family conflicts, it is important to clarify that there is no finding of fraud or dishonesty made against Mr Gil. The undue influence over his mother to further his own requirements does not reach this threshold. It is nevertheless regrettable.
- [61] However, even if the inferences which I have drawn go too far, it seems to me that, in any event, a case is made out by the applicants for Mr Gil's removal.

Removal of Mr Gil

- [62] Section 54(1)(a) of the Estates Act provides for the removal of an executor, inter alia, if the court is satisfied that it is undesirable that he should act as executor.
- [63] What is particularly troubling is Mr Gil's refusal to take the views of the applicants into account in relation to the disposal of the properties. This is unusual in that the wishes and interests of the heirs usually play an overriding role in relation to the realisation of property.
- [64] This principle is espoused in section 47 of the Estates Act which provides that, unless it is contrary to the will of the deceased, an executor shall sell property in the manner and subject to the conditions which the heirs who have an interest therein approve in writing, provided that, if the heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve.
- [65] The executor has refused to entertain the applicants' proposal of a sale by way of private treaty. The disagreeing heir as to method of sale is Mr Gil himself. Mr Gil has not sought the approval of the Master as to the method of sale.
- [66] This involves a central conflict of interest which to my mind meets the requirements of section 54(1).
- [67] There are also the further conflicts of interest relating to the rental and other amounts owed by Meatnet in respect of the properties.
- [68] There are allegations of misappropriation by Mr Gil of rentals from another tenant which dates back many years. These allegations are denied and they are not taken into account.
- [69] The fact that the relationship between the heirs and Mr Gil has broken down to a point of litigation is regrettable. This litigation informs the sense of distrust which is prevailing as to Mr Gil's ability to bring an open mind to bear on the process of administration of the estate.

[70] This coupled with the lack of adherence to basic legal principles which were known to him at the time that he orchestrated the signature of the will creates, to my mind, a valid basis for the breakdown in trust which has come about.

Conclusion

[71] It seems to me that the applicants have made out a case as to their inherent mistrust of Mr Gill. To my mind Mr Gil has given them real cause for concern. Mr Gil should, to my mind, have been sensitive to the conflicts of interest which have arisen regardless of whether he believes them to be perceived or real. There is no doubt that, in the circumstances, he should have resigned as executor.

[72] The fact that he appointed an agent to assist him does not serve to assuage the position. Clearly the agent acts on his instruction.

[73] I am particularly concerned about the failure of Mr Gil to recognise that he must consult with, inform, and take account of the views and sentiments of the applicants in accordance with his duties as executor but also as a brother to the heirs.

Costs

[74] There can be no doubt that the opposition of Mr Gil has been unreasonable and has caused the applicants much prejudice and anguish.

[75] There is no basis on which the costs should be paid out of the deceased estate. The person responsible for the necessity to launch the application and the continued prosecution thereof against the odds of success is Mr Gil

Order

[76] I make the following order:

- a. The application succeeds and the first / fifth respondent is disqualified from occupying the position as and is removed as executor of the deceased estate of Rosa da Conceicao Gil.
- b. The first/ fifth respondents counter – application is dismissed.
- c. The application to introduce a supplementary affidavit is dismissed.
- d. The fifth respondent (i.e. Mr Gil in his personal capacity) is to pay the costs of all three applications on the C scale including the cost of two counsel where employed.

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 28 October 2024.

Heard:

28 August 2024

Delivered:

28 October 2024

APPEARANCES:

Applicant's counsel:

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[1] Section 4A(3)

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Prepared on 9 October 2026 · Esheria