

SOUTH AFRICA / JUDGMENT

# Elmarie Bierman Attorneys and Another v Kutu and Others (6114/2018, HCAA11/2019) [2020] ZALMPPHC 67 (19 August 2020)

[2020] ZALMPPHC 67

## COURT

Limpopo High Court, Polokwane

## BEFORE

E.M. Makgoba, M.F. Kganyago, M. Naude

## CASE / FILE NUMBER

HCAA12/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

COURT

A QUO CASE

NO: 8141/2017

APPEAL

CASE NO: HCAA12/2019

In

the matter between:

ELMARIE  
BIERMAN ATTORNEYS  
FIRST APPELLANT  
TSHIDI  
LISHEN MOKOBANE  
SECOND APPELLANT  
and  
THOMAS  
MAFENE KUTU  
FIRST RESPONDENT  
PHINEAS  
MAFENE KUTO  
SECOND RESPONDENT  
ELIZABETH  
TENDANI KOTO  
THIRD RESPONDENT  
MARGARETTSHUNKIMANYELO  
FOURTH RESPONDENT  
MAPULA  
ANNA MACHOBANE  
FIFTH RESPONDENT

## JUDGMENT

### THE COURT:

- [1] This is an appeal against the judgment and order by a single Judge (Muller J) of this Division in terms whereby the last will and testament of the late Meita Johanna Keto was declared invalid and the letters of executorship issued to the First Appellant was also declared invalid from date of its issue. This appeal is with leave of the Court a quo .
- [2] The Master of the High Court, Polokwane was cited as the First Respondent in the Court a quo but did not take part in the proceedings. The Appellants in this appeal were the Second and Third Respondents respectively. The First Appellant is the appointed executor in terms of the last will and testament in issue and the Second Appellant is the sole beneficiary in terms of the said will.
- [3] All the Respondents in the present appeal, together with the Second Appellant, are the surviving children of the late Meita Johanna Keto ("the deceased").
- [4] The late Meita Johanna Keto ("the deceased") had six children. All six children lived and grew up with the deceased at Stand 2362 Zone B Seshego.
- [5] The deceased was allegedly uneducated and could not read or write. Due to the deceased's alleged inability to read and write, the deceased was unable to notice that the surnames of the children were misspelt and as a result the six siblings surnames are spelled differently.

- [6] During 2014 the deceased became very ill and called all the children (whom were all at that stage already majors) to a meeting. It was agreed at the meeting that the deceased will be placed in an old age home. The deceased was taken by all six children to Kwena Moloto Old Age Home. After approximately 6 (six) months, the deceased was moved to Martha Hoffmeyer Old Age Home. The deceased became very ill and passed away on the 1st of April 2015 whilst living in Martha Hoffmeyer Old Age Home.
- [7] A dispute arose during 2017 as to whom the family house situated at Stand 2362 Zone B Seshego belonged. The Respondents aver that the house belongs to all six of the deceased's children, whilst the Appellants aver that the house was inherited by the 2nd Appellant as sole heir of the estate of the deceased in terms of a valid last will and testament of the deceased dated 5 April
2011. It is this dispute as to who the lawful owners of the property are, that gave rise to the Respondents bringing an application in the Court a quo on or about 4 December 2017.
- [8] The Respondents prayed for the following relief in their Notice of Motion:-
1. That the document titled "Last Will and Testament" dated 5th of April 2011, be declared invalid and not the Last Will and Testament of the late Meita Johanna Koto.
  2. That the letter of authority issued by the First Respondent on 1 August 2017 to the Second Respondent be declared invalid from date of issue.
  3. That the Second and Third Respondents be ordered to pay the cost of this Application.
- [9] Attached to the Respondents Notice of Motion was a founding affidavit in support of the application. The Respondents served their application on the Appellants on the offices of Elmarie Bierman Attorneys on 4 December 2017.
- [10] The Appellants served their Answering Affidavit on the Respondents attorneys of record on the 17th of October 2018 and filed their Answering Affidavit at Court on 18 October 2018. Except for the points in limine raised, the Appellants' Answering Affidavit constitutes a bare denial of the allegations made by the Respondents.
- [11] This court does not intend to deal with the points in limine raised except for the third point in limine. The third point in limine raised by the Appellants were raised on the basis that the Respondents founding affidavit had no attachments attached to it.
- [12] The Appellants stated as follows in paragraph 5.1, 5.2 and 5.3 of their Answering Affidavit:-
- "5.1 Applicants depose in paragraphs 20, 21 and 23 of their Founding Affidavit that there are the following: a Protection Order, a Will, Letter of Authority all of which are not attached or reasons furnished for such non-attachment as required.

5.2 Applicants further depose in paragraph 24 of their Founding Affidavit that letters were written to both Elmarie Bierman Attorneys and Master of the High Court, 2nd and 3rd Respondents herein, which letter or letters are not attached, all of which are expected to be in their possession.

5.3 The Applicants failed to attach required proof to the confidence of this Honourable Court in order to assist the Court to properly assess and therefore adjudicate their matter fairly and adequately base on its papers."

[13] No reply was filed by the Respondents to the Appellants Answering Affidavit. The application was set down for hearing on the 20th of February 2019 before the court a quo.

[14] The points in limine were not entertained in the court a quo. During the hearing of the matter the Appellants attempted to raise an issue with the fact that no attachments were attached to the Respondents Founding Affidavit in support of their application.

[15] At the outset of the matter Mr. Mokgotho, who appeared for the Appellants in the court a quo, raised a point in limine that no case for relief was made out in the founding affidavit.

[16] The approach to be taken in such matters has been set out in *Bowman N.O. v De Souza Roldao* 1988 (4) SA 326 Tat 327.

"In limine Mr Zeiss, who appears for the respondent, argued that the applicant has not made out a case in the founding affidavit to entitle him to any relief in terms of the notice of motion; he submits that there is a material and fatal lacuna in the founding affidavit which cannot be cured.

Generally speaking, an applicant must stand or fall by his founding affidavit; he is not allowed to make out his case or rely upon new grounds in the replying affidavit. See, for example, *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 in fin - 636 where Diemont JA said the following:

'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases

"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged

"it is not permissible to make out new grounds for the application in the replying affidavit".

What should be set out in the founding affidavit and the particularity required has been dealt with in a number of cases; see, for example, *Joseph and Jeans v Spitz and Others* 1931 WLD 48; *Victor v Victor* 1938 WLD 16 at 17 and *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974

- (4) SA 362 (T) at 3698. Each case will depend on its own facts. The correct approach is set out in the *Titty's Bar* case supra as follows:

'It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.'

This type of objection must be considered on the basis of an exception to a declaration or a combined summons.

The relevant considerations are:

- (a) the founding affidavit alone is to be taken into account;
- (b) the allegations in the founding affidavit must be accepted as established facts;
- (c) are these allegations, if proved, sufficient to warrant a finding in favour of the applicant?"

See also *Business Partners Ltd v World Focus* 754 CC 2015 (5) SA 525 (KZD).

[17] The court a quo did not entertain this complaint and argument as the court a quo was in possession of a Notice of Motion and Founding Affidavit with Annexures attached thereto and as a result proceeded to hear the matter and grant an order in terms of the prayers of the Notice of Motion in favour of the Respondents on 20 February 2020, as the court, having read the papers filed and on record before it, and after having heard counsel for the respective parties was satisfied that the Appellants failed to set out a bona fide defence in their Answering Affidavit.

[18] Only at the hearing of the matter did the Appellants realise that the Respondents filed a different Founding Affidavit with Annexures thereto than what was served on the Appellants.

[19] The Founding Affidavit served on the Appellants (the original founding affidavit) differs in material respects from the Founding Affidavit (secondary founding affidavit) on the court file in the following respects:-

- a) Paragraph 15 of the Founding Affidavit

The said paragraph of the original founding affidavit reads as follows:-

"During her stay in Martha Hoffmeyer my mother's became very sick and died on the 1st of April 2015."

The said paragraph of the secondary founding affidavit reads as follows:-

" During her stay in Martha Hoffmeyer my mother's became very sick and died on the 1st of April 2015. (ANNEXURE TK-1)"

b) Paragraph 21 of the Founding Affidavit

"The order was not granted and TSHIOI LISHEN MOKOBANE called for a meeting on 05 August 2017. At the meeting TSHIDI LISHEN MOKOBANE all of a sudden produced a will and testament purportedly drawn up and signed by my late mother."

"The order was not granted and TSHIOI LISHEN MOKOBANE called for a meeting on 05 August 2017. At the meeting TSHIDI LISHEN MOKOBANE all of a sudden produced a will and testament purportedly drawn up and signed by my late mother.

(ANNEXURE TK-2 and TK-3"

[20] This court is of the view that had the court a quo had to adjudicate on the original founding affidavit, and having applied the relevant considerations as set out in Titty's Bar case supra, the court a quo in all likelihood would not have granted the order it did.

[21] The Appellants furthermore argued that had the secondary founding affidavit been served on them, the Appellants would have not answered to the allegations made by the Respondents as they did, which constituted a bare denial.

[22] Unfortunately this court does not have any reply or explanation before it by the Respondents and the Respondents legal representatives in respect of the two different sets of Founding Affidavits.

[23] The amendment of the founding affidavit by inserting and attaching annexures thereto in support of the Respondents application without following the correct court procedure and without having served the correct founding affidavit on the Appellants, alternatively by having removed certain pages of the original founding affidavit and substituting them with amended pages is questionable and leaves much to be desired.

[24] In order to succeed on a claim that a judgment be set aside on the ground of fraud it is necessary for the applicant to allege and prove (a) that the successful litigant was a party to the fraud, (b) that the evidence was in fact incorrect, (c) that it was made fraudulently and with the intent to mislead, (d) that it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than which it was induced by the incorrect evidence to give.

[25] In Moraitis Investments (Pty) Ltd v Montie Dairy (Pty) Ltd (799/2016) [2017] ZASCA 54 (18 May

2017) the Supreme Court of Appeal at paragraph 12 held :

"[12] The issue is far more nuanced than the arguments suggest. The approach differs depending on whether the judgment is a default judgment or one given in the course of contested proceedings. In the former case it may be rescinded in terms of either rule 31(2)(b) or rule 42 of the Uniform Rules, or under the common law on good cause shown. In contested proceedings the test is more stringent. A judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party. As the cases show, it is only where the fraud - usually in the form of perjured evidence or concealed documents - can be brought home to the successful party that restitutio in integrum is granted and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. That is a clear indication that once a Judgment has been given it is not lightly set aside, and De Villiers JA said as much in Schierhout."

[26] It was further held in paragraph 13 of the Moraitis Investments (Pty) Ltd case supra:-

"Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is justus error. In Childerley, where this was discussed in detail, De Villiers JP said that 'non-fraudulent misrepresentation is not a ground for setting aside a judgment' and that its only relevance might be to explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract, it does not provide a ground for rescission of a judgment. The scope for error as a ground for vitiating a contract is narrow and the position is the same in regard to setting aside a court order. Cases of justus error were said to be 'relatively rare and exceptional'. Childerley was considered and discussed by this court in De Wet without any suggestion that the principles it laid down were incorrect."

[27] From the face value of the documents filed in this Appeal and the discrepancies thereto, in this court's view, amounts to fraudulent misrepresentation.

[28] The question however remains whether the mere fact that a wrong judgment has been given on the basis of perjured evidence in this case will constitute a sufficient basis for setting aside the judgment.

[29] As referred to by the court a quo in *Katz and Another v Katz and Others* [2004] 4 All SA 545 (CC) the court made the following observation:-

"There is a legal presumption in favour of the validity of the will bearing the outward marks of genuineness. This is based on probability and the philosophy of life. Because human experience shows that in the vast majority of cases wills which in a matter of form exhibit no [omitted] defect prove to be what they purport to be. That is genuine documents."

[30] Given that a will, which is regular and complete on the face of it, is presumed to be valid until its invalidity has been established, the onus is on the person alleging invalidity to prove such allegation (see *Kunzs v Swart and Others* 1924 AD 618). The standard of proof is the same as that which applies in all civil cases - proof on a balance of probabilities.

- [31] The Respondents failed to set out a prima facie case in the original founding affidavit and failed to prove their case on a balance of probabilities. By removing and/or replacing the original founding affidavit with a second version thereof, the Respondents, knowing that they failed to make out a case, cured the defect by attaching Annexure's thereto.
- [32] The Appellants have been deprived of their right to a fair trial and to a great extent to the audi alteram partem principle. The conduct of the Respondents and/or their legal representatives are unjustifiable and not in the interest of justice.
- [33] The declaration of the Last Will and Testament dated 5 April 2011 to be invalid and not the Last will and Testament of the Late Meita Johanna Keto is extremely prejudicial to the Appellants, which prejudice cannot be cured at a later stage.
- [34] This court is of the view that the mere fact that a wrong judgment has been given on the basis of perjured evidence in this case will indeed constitute a sufficient basis for setting aside the judgment and as a result the appeal must succeed.
- [35] Now, this court will deal with the conduct of the Respondents and/or their legal representatives.
- [36] Legal practitioners must maintain the highest standards of honesty and integrity. They must treat the interest of their clients as paramount, provided that their conduct shall be subject always to:-
- a) Their duty to court;
  - b) The interest of justice;
  - c) The observation of the law; and
  - d) The maintenance of the ethical standards prescribed by any code of Conduct, or other code of ethics applicable to them and any ethical standards generally recognised by the profession.
- [37] This court is of the view that the Respondents and/or their legal representatives have conducted themselves in an unethical and unprofessional manner which constitutes a serious breach of the code of conduct for legal practitioners, candidate legal practitioners and juristic entities and which conduct causes the legal profession and the justice system of South Africa an embarrassment and grave harm.
- [38] This court is therefore of the view that in protecting the high standards of the legal profession and the interest of justice, that the attorney and counsel for the Respondents be reported to the Legal Practice Council and their respective other governing body councils and that their conduct be investigated and if necessary steps be taken against the legal representatives.

[39] The only issue that now remains is the issue of costs. As a general principle costs should follow the result. The manner in which the Respondents and/or legal representatives for the Respondents conducted themselves, leaves much to be desired. This Court's displeasure should be marked by an appropriate cost order and there is no reason why a punitive cost order on an attorney and own client scale should not include a cost order de bonis propriis.

Order

[40] The following order is made:-

1. The appeal is upheld with costs.
2. The order granted on 20 February 2019 by the court a quo is set aside in its entirety.
3. The application is referred to the Court a quo for hearing de novo.
4. The Respondents to file and serve within 10 days from date of this order the Notice of Motion and Founding Affidavit in the application on the Appellants.
5. The Appellants to file and serve within 15 days after having been served with the Notice of Motion and Founding Affidavit, an Answering affidavit.
6. The Respondents to file a reply, if any, within 10 days after receipt of the Answering Affidavit.
7. The matter is referred to the Legal Practice Council, Limpopo for investigation and possible further steps to be taken against the attorney and/or counsel for the Respondents (Applicants in the court a quo)..
8. The Respondents to pay 50% (fifty percent) of the costs of the application and the costs of this appeal, and the Respondent's legal representatives, Adv. P.J. Van Eeden and Pheladi Molepo Attorneys, to pay the other 50% of the costs of the application and of this appeal de bonis propriis, jointly and severally, the one to pay the other to be absolved, on a punitive cost scale as between attorney and own client.

E.M. MAKGOBA

JUDGE PRESIDENT

LIMPOPO DIVISION

M.F. KGANYAGO

JUDGE OF THE

HIGH COURT

M. NAUDE

ACTING JUDGE OF

THE HIGH COURT

APPEARANCES:

HEARD ON:

14 AUGUST 2020

**JUDGMENT**

DELIVERED ON: 19 AUGUST 2020

For the Appellants: Adv. K.S.D. Mohoto

Instructed by:

S. Rangoanasha Inc. Attorneys

For the Respondent:

Adv. P.J. Van Eeden

Instructed by:

Pheladi Molepo Attorneys

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