

SOUTH AFRICA / JUDGMENT

Erasmus and Others v Master of the High Court, Bloemfontein and Others (3255/2022)

[2023] ZAFSHC 166 (26 April 2023)

[2023] ZAFSHC 166

COURT

Free State High Court, Bloemfontein

BEFORE

NG Gusha

CASE / FILE NUMBER

3255/2022

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Policy

IN THE HIGH COURT

OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Case No. 3255/2022

In the matter between:

RIKUS
ERASMUS
1ST APPLICANT
SONIEK
ERASMUS
2ND APPLICANT
CHANTELLE MANTHEY
CILLIERS
3RD APPLICANT
SOPHIA ANNA MAGRIETHA
VILJOEN
4TH APPLICANT
RIKUS ERASMUS
N.O.
5TH APPLICANT
ELSABE

CILLIERS
6TH APPLICANT
And
THE MASTER OF THE HIGH
COURT, BLOEMFONTEIN 1ST
RESPONDENT
CHRISTINA MARIA
ERASMUS
2ND
RESPONDENT
PETRUS JACOBUS
ERASMUS
3RD RESPONDENT
NINA
BRITZ
4TH RESPONDENT
SUPERIOIR QUALITY
TRADING 528 BK
5TH RESPONDENT
(Reg. No.
CK2994/077248/23)
ETIENNE
STONE
6TH RESPONDENT

CORAM: GUSHA, AJ
HEARD

ON: 13 APRIL 2023
DELIVERED

ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 14h00 on 26 April 2023.

JUDGMENT

INTRODUCTION

- [1] Mr Gerhardus Cornelius Erasmus (the deceased) met his untimely death on the 5th August 2021 due to natural causes.
- [2] On the 7th December 2018 the deceased properly executed his last will and testament (the 2018 will). On the 18th April 2021 however, he executed another will (the 2021 will), which is the subject of the dispute between the parties.

THE PARTIES

- [3] The 1st and 2nd applicants are the deceased's adult biological children, the 4th applicant is their biological mother and the deceased's former spouse. The deceased and the 4th applicant's marriage terminated through divorced in 2000.
- [4] The 3rd applicant is an adult female with whom the deceased was, until his untimely death, involved in a romantic relationship.
- [5] The 5th applicant is cited herein in his official capacity as the duly appointed executor[1] of the deceased's estate. The 6th applicant is the deceased's sister.
- [6] The 1st respondent is the Master of the High Court, Bloemfontein, against whom the relief is sought. In its report dated 5 August 2022 the 1st respondent indicated that it is not opposing the relief sought and that the court may, in terms of the provisions of section 2(3) Act 7 of 1953 (the Act), make an order directing it to accept the second will as the deceased's last will and testament.
- [7] The 2nd respondent is also the deceased's former spouse, their marriage also terminating through divorce on the 2nd July 2020. The 3rd respondent is the deceased's brother. The 2nd and 3rd respondents are nominated as executors in terms of the first will.
- [8] The 4th respondent is an adult woman and the 2nd respondent's daughter. The 5th respondent is a close corporation operated by the deceased.
- [9] The 6th respondent is an attorney who assisted the deceased in legal matters and who is nominated in the 2021 will to assist the 1st and 2nd applicants in the execution of the 2021 will.
- [10] No relief is sought from and against the 2nd to the 6th respondents.

FACTUAL BACKGROUND

THE 2018 WILL

- [11] The 2018 will is common cause between the parties. I shall therefore, refer to its contents very concisely. The deceased executed the 2018 will whilst his marriage to the second respondent still subsisted. The contents and validity of this will are not in dispute. In terms thereof the 1st and 2nd applicants as well as the 2nd to the 5th respondents would have benefitted from the bequests made therein.

THE 2021 WILL

- [12] For purposes of this judgment, I find it apposite to refer to the contents of the 2021 will in toto. It is in manuscript and reads thus;

My Persoonlike testament

Hiermee bevestig ek G.C. Erasmus ID 64[....] dat hierdie my waarlike en enigste testament is, en dat dit my hartsbegeerte is dat prok Ettiene Stone dit sal behartig en Rikus en Elsabé sal bystaan met die uitvoer daarvan (083[...] Ettiene se nr).

1. My eiendomme is as volg verdeel op aankoop ware waarvoor ek dit gekoop het!!

My huis

- (a) T[...] st 13 gaan aan my seun Rikus Erasmus ID 95[....]
- (b) T[...] st 11A gaan aan Soniek Erasmus my dogter ID 00[....]
- (c) T[...] st 11B gaan aan Riekie ID 68[...]
- (d) E[...] weg 134 gaan aan Chantelle Manthey ID 75[...]

My besigheid genaamd Superior Pave gaan aan Rikus met 70% aandele aan hom wat ek reeds oorgegee het vir die feit dat hy by my werk, en moet nie onder enige boedel belasting val nie. Chantelle wat my boeke doen het 30% aandele gekry aangesien sy ook hier werk.

Alle voertuie (privaat) gaan aan Rikus Erasmus wat in Super Trans Trust is, en reeds aan hom behoort as ook alle bessigheids voertuie.

Net my dubbel cab Ford behoort aan Chantelle!!

Daar is 'n polis van R6000 000.00 wat al die oordragte moet betaal asook al my boedel belasting.

Oordragte geskiet teen die waarde wat ek betaal het by aankoop waarde

- 1. T[...] 13 is R140000, 1, 4 miljoen
- 2. T[...] 11A is R780000.00
- 3. T[...] 11B is R980000.00
- 4. E[...] Weg R590 000.00

Artificial grass behoort reeds lankal aan Rikus aangesien hy homslef opgebou het.

My Polis van ±R300 00 by Esau 08[...] word gedeel tussen Rikus en Soniek. Al my oorblywende geld wat oor is van die polis by Rampie Le Grange van Upington 08[....] moet gedeed word tussen Rikus en Soniek.

Van my voertuie wat oorbly soos privaat aangekoop kan Rikus besluit wat hy met die geld doen.

Indien daar genoeg geld oor is sal ek dit waardeur as daar uit polisse oor is, dat Elsabe R250 000 kry, sy is my sussie vir haar bystand by Rikus en uitvoering van my testament. Sy is my suster. Baie dankie geniet die lewe verder hy kosbaar en kort. Geteken te Bloemfontein op die 18 April 2021

- [13] It appears from the pleadings that at some point the authenticity of the 2021 will as well as the deceased's signature thereon was placed in dispute by the 2nd respondent. The report by Brigadier Johannes Frederick Hatting, a handwriting expert, put paid to this. In the report he reached the conclusion that the disputed handwriting and the signature in the 2021 will was indeed that of the deceased.
- [14] The deceased had, prior to his demise, informed the 1st applicant where at his residence to locate important documents, in the event of anything befalling him. It was on the basis of this information that the 1st applicant discovered the 2021 will kept in the deceased's safe in a red envelope.
- [15] Upon presenting same to the 1st respondent, the latter, on the 28th February 2022, rejected the aforesaid will as it did not comply with the provisions of section 2(1) (ii) (iv) of the Act.

POINTS IN LIMINE

- [16] The 2nd and 4th respondents raised the following points in limine; that the deceased's children ('kinders') in terms of the 2018 will[2] would have been heirs and as such would have a direct and substantial interest in the application. It was further submitted that the applicants had not made out a case that the 1st and 2nd applicants and the 4th respondent are the only children and descendants of the deceased and such no case was made that there are no other children or descendants whose interests could be affected by the relief sought.
- [17] Nothing turns on this point. Had there been any other children and or descendants of the deceased, the respondents certainly would have taken the court into their confidence. They did not. Clearly there are none, or if there be, both parties are clearly in the dark with regards to their existence. This point in limine is therefore not upheld.
- [18] The second point in limine raised was that "Riekie" (whoever s/he may be) would also have a direct and substantial interest in the relief sought and as such his/her non-joinder meant that the application stood to be dismissed with costs.
- [19] The applicants submitted that this point stood to be dismissed as "Riekie" was in fact the 4th applicant. This proposition is at best unsubstantiated and at worst wrong, for I could find no reference in the papers alluding to the 4th applicant and "Riekie" being the same person.
- [20] The court in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*[3], set out the law relating to joinder as follows:

"It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involve and the order which the Court might make..."

[21] It is generally accepted that what is required is a legal interest in the subject matter which could be prejudicially affected by the judgment of the Court[4]. Consequently in so far as the individual is not the 4th applicant, I hold the view that he/she will not be prejudicially affected by any order this court may make. Should the court find that the 2021 will is valid, then s/he too will benefit from the order made. In such an eventuality, the fact that s/he is not named in full should serve as no hurdle to the executor(s) as the identity number is reflected, “Riekie’s” identity therefore can with relative ease, be ascertained.

[22] In the event that I find otherwise, still no prejudice would arise as “Riekie” is, in any event, not mentioned in the 2018 will. Further, it is improbable that “Riekie” is one of the deceased’s “kinders” as that would mean that the deceased had her/him at the age of 4; the deceased was born in 1964, Riekie as per the identity number indicated in the 2021 will, was born in 1968.

[23] Resultantly, the second point in limine is also not upheld.

ISSUE IN DISPUTE

[24] This court is called upon to adjudicate which of the two wills should obtain, more specifically whether the 2021 will is valid and reflects the intention of the deceased and, if so, whether it represents his last will and testament and thereby revokes the 2018 will.

THE RELIEF SOUGHT

[25] In the notice of motion, the applicants claim the following relief;

25.1. That the First Respondent be ordered to accept the document drafted and signed by the late, Gerhardus Cornelius Erasmus, identity number 64[...], on 18 April 2021, annexure “FA5” to the founding affidavit, for the purposes of the Administration of Estates Act, Act 66 of 1965, as the late Mr Erasmus’ last will and testament.

25.2. That the First Respondent considers appointing and issuing letters of authority to the First and Sixth Applicants as executors in the estate of the late Gerhardus Cornelius Erasmus, identity number 64[...]; alternatively, any other suitable person.

25.3. That the First Respondent withdraw / retract any other letters of authority issued by him in respect of the late Gerhardus Cornelius Erasmus, in contradiction to the appointment to be made in terms of paragraph 2 of this order.

25.4. That the costs of the application be paid by the estate of the late Gerhardus Cornelius Erasmus, except in the event of the respondents opposing the application in which instance the applicants will seek an order to be issued against such respondents opposing the relief.

THE LEGAL FRAMEWORK

[26] In order to properly adjudicate the dispute between the parties, it is apposite to have regard to the following provisions;

THE WILLS ACT

[27] Section 2(1) of the Act provides that for a will to be valid, it must comply with the requirements as stated therein. To comply therefore, a will must be signed[5] by the testator or by someone else in his presence or by his direction, in the presence of two witnesses, who in turn must also sign in the presence of each other and the testator at the same time.

[28] Section 2(3) of the Act provides as follows;

If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall (my own emphasis) order the Master to accept that document, or that document as amended, for the purposes of the Administration of

Estates Act, Act 66 / 1965 as a will, although it does not comply with all the formalities for the execution or amendment of wills

referred to in subsection (1).

[29] It is trite that the provisions of section 2(3) of the Act, were enacted to ameliorate a situation where formalities have not been complied with, but where the true intention of the drafter was self-evident[6]. The aforesaid provisions make it clear that the court is not clothed with a discretion to either grant or refuse the order envisaged therein; once the court is satisfied that the jurisdictional requirements are met, the provisions are peremptory. Differently put, once the court is satisfied that the document was drafted by the deceased then the court must determine whether the deceased intended same to be his last will and testament. In the event that the answer to both is in the affirmative, the court shall grant the order as envisaged.

THE ADMINISTRATION OF ESTATES ACT

[30] Section 14 of the deceased administrations Act provides that;

(1) The Master shall, subject to subsection (2) and sections 16 and 22, on the written application of any person who-

(a). has been nominated as executor by any deceased person by a will which has been registered and accepted in the office of the Master; and

(b). is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act, grant letters of executorship to such person.

SUBMISSIONS BY THE PARTIES

[31] The parties are ad idem that the 2021 will is not compliant with the requirements of the Act. The applicants submit however that albeit this will is non-compliant,

the court must have regard to the intention of the deceased, which intention, it is submitted, appears *ex facie* the document. Reliance was placed on the words “dat hierdie my waarlike en enigste testament is[7]”. Furthermore, the fact that the deceased informed the 1st applicant where to find important documents in the event something befell him, indicates that he intended to revoke all other previous

wills and intended for this document to be his last will and testament.

[32] The 2nd and 4th respondents, initially opposed the relief sought as they disputed that the 2021 will was drafted by the deceased. Their opposition was primarily based on the following; they submitted that the deceased was an astute businessman and had executed a valid will prior to 2021. It was submitted that he knew the requirements of a valid will and would not have drafted not compliant will. In arguments the 2nd and 4th respondents however conceded that the 2021 will was authentic. They submitted further that the 2021 will was, by virtue of its

non-compliance, rejected by the 1st respondent and can therefore never be accepted as a valid will.

APPLICATION

[33] I am satisfied that the first jurisdictional requirement has been met. The 2021 will was drafted by the deceased, this much is evinced by the handwriting expert as well as the 2nd and 4th respondents’ capitulation in this regard. This will as drafted by the deceased clearly does not comply with the requirements of section 2(1) of the Act. Only his signature appears on said document. It follows therefore that in order for the applicants to avail themselves of the remedy contained in the provisions of section 2(3) of the Act, the second jurisdictional requirement as stated therein must be satisfied, i.e. did the deceased intend for the second will to be his last will and testament?

[34] In *Westerhuis and Another v Westerhuis and Others*[8] the court restated the legal position thus;

“The Supreme Court of Appeal has stated repeatedly, that, when applying s 2(3), the real question is whether the decessed intended the document (or any amendment) thereto to be her will. And so, the court is required primarily to ascertain whether at the time of drafting or executing the document, or any amendment thereto, as the case may be, the necessary intention on the part of the testator has been established. Such an enquiry entails an examination of the document in the context of the surrounding facts and circumstances and the party so alleging must show unequivocally that the intention existed concurrently with the execution or drafting of the document”(my own emphasis).

[35] In answering the aforesaid question therefore, I can do no better than have regard to the document itself. In this regard, the title of the document is illuminating; “my persoonlike testament[9]”. The deceased went further, in the very first sentence he wrote “dit is my waarlike en enigste”[10] As if his intention couldn’t be any clearer, he went on to make specific bequests to specific persons. It is particularly

illuminating that in his lifetime, the deceased mended the strained relationship he had with his biological children, such that the 1st applicant worked for him. This becomes all the more so evident in the 2021 will wherein he made his 2 biological children his primary

heirs. There can be no quibble that ex facie the document the intention of the deceased was crystal clear. To hold otherwise would amount to unnecessary nitpicking and defeating the very purpose of section 2(3) of the Act. It is after all trite that in its very essence, section 2(3) of the Act is meant to avoid wills being declared invalid for lack of compliance with the requirements whereas, from the document, the true intention of the testator is self-evident.

[36] Albeit the deceased did not expressly provide that the 2021 will revoked all other previous wills, I hold the considered view that the words “waarlike en enigste” were meant to do exactly just that. It is clear ex facie the 2021 will that the deceased specifically intended for this will to be his last and only testament.

CONCLUSION

[37] Having found that the two jurisdictional requirements have been met, this court is not clothed with any discretion, I have to grant the relief sought in prayer 1 of the notice of motion.

[38] With regards to prayers 2 and 3 the court cannot interfere with the function of the 1st respondent, that function falls within the purview of the Master, section 14 of the Administration of estates Act is clear in this regard.

ORDER

[39] In the result I make the following order;

39.1. The Master of the High Court, Bloemfontein is authorized to accept the will executed by Gerhardus Cornelius Erasmus, on 18 April 2021 as his last will and testament.

39.2. Prayers 2 and 3 of the notice of motion are dismissed.

39.3. The costs of the application to be paid by the estate of the late Gerhardus Cornelius Erasmus.

NG GUSHA, AJ

On behalf of the applicant Adv. J.S. Rautenbach Instructed by: Huggett Retief Inc
BLOEMFONTEIN On behalf of the respondent: Adv. J.L. Olivier Instructed by: Lovius Block Inc
BLOEMFONTEIN

- [1] Letter of executorship dated 28/03/2022: estate 000456/2022.
- [2] Clauses 6.1.3, 6.2 and 7.2 of the 2018 will.
- [3] 1972
- (4) SA 409 (CPD) at 415 E-H
- [4] Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers, 1953 (2) SA 151 (O),
- [5] If the will consists of more than one page, then each page of the will must be so signed.
- [6] Van Wetten and another v Bosch and others 2004 (1) SA 348 (SCA) at para 16.
- [7] In English: This is my true and last testament.
- [8] (A276/2017)[2018]ZAWCHC 84 (27 June 2018) at para 50.
- [9] In English: my personal testament.
- [10] In English: This is my only and true testament.

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