

SOUTH AFRICA / JUDGMENT

Geza and Others v Standard Trust Limited and Others (3534/2021) [2023] ZAECQBHC 15 (14 March 2023) [2023] ZAECQBHC 15

COURT

Eastern Cape High Court, Gqeberha

BEFORE

J W Eksteen, R E Griffiths

CASE / FILE NUMBER

3534/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GQEBERHA)

Case

No: 3534/2021

Date

Heard: 2 March 2023

Date

Delivered: 14 March 2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

In

the matter between:

LUTHO
GEZA
First Applicant
AMANDA
NYONI (born MNYAZI)
Second Applicant
AYABONGA
GEZA
Third Applicant
and
STANDARD
TRUST LIMITED
First
Respondent
VUYOLEWTHU
JOHN
Second Respondent
THE
MASTER OF THE HIGH COURT,
GQEBERHA
Third Respondent

JUDGMENT

EKSTEEN J:

- [1] This matter concerns the interpretation of a joint will executed by Patience Nonthemba Geza (the testatrix) and Mzimkhulu Wellington Geza (the testator), to whom I shall refer jointly as “the testators”. The first applicant, Mr Lutho Geza, and the third applicant, Mr Ayabonga Geza are the children born of the marriage between the testatrix and testator. The second applicant, Ms Amanda Nyoni is the daughter of the testatrix born out of wedlock prior to her marriage. The second respondent, Mr Voyolwethu John, is the biological son of the testator, born out of wedlock before his marriage to the testatrix. The first respondent is the executor of the testators’ estate and the third respondent is the Master of the High Court, Gqeberha.
- [2] As I said, the testators executed a joint will on 3 June 2008. Prior to the execution of the will they completed a will application to nominate an executor for their estate (the will application). The will application form sought several personal particulars of the testators. It requested the testators to state the “full names of children from (their) present marriage”. The names of three applicants were inserted. It proceeded to seek the “full names of children from (their) previous marriages” and the testators left this section blank. The will application provided no instruction in respect of any bequests to any of the children. At the conclusion of the application form, immediately prior to the signatures of the two testators, the form recorded:

“Your signature to this application does not constitute a will and merely represents an application for the drafting of one.”

- [3] The will was duly executed on the same day, 3 June 2008. It provided in the first paragraph for the appointment of the beneficiaries and recorded:

“1.1 If one of us survives the other for 10 calendar days, the survivor will be the sole heir of the residue of the estate of the first dying of us. Should neither of us survive the other for 10 full calendar days or should the survivor die without leaving a further valid will, we bequeath the residue of our estates or that of the survivor, as the case may be, to our children, each child to receive an equal share. Should any of our children die before the survivor of us, his/her share of the residue will devolve on his/her descendants by representation. If there are no descendants, his/her share will accrue to our remaining children or their descendants per stirpes.”

- [4] It is common ground that the testatrix died on 28 October 2020 and the testator passed away on 9 November 2020, eleven clear days after the testatrix. He had left no further valid will and, accordingly, the residue of the estates of the testators was bequeathed to their children. The bequest led to a dispute as to the intended meaning of “our children” in clause 1.1 of the will. The applicants contended that they are the only beneficiaries under the will, while the respondents argued

that Mr John was included in the term “our children”. Hence the application in which the applicants sought a declaratory order that the words “our children” in clause 1.1 of the will dated 3 June 2008 should be interpreted to refer only to them.

- [5] Mr John filed a counter application in which he sought a declarator that the term “our children” includes him as a beneficiary in the estate of the testators. He also sought an order, in the alternative, that the will be declared invalid for want of identifying the heirs, by name, and he contended for a material non-joinder in that the “estate” of the testators had not been joined. The latter two arguments were not pursued.
- [6] The evidence presented on behalf of the applicants rests on three pillars. Firstly, the will application which, as I have explained, lists the three applicants as the children born from the marriage of the testatrix and the testator. Secondly, they alleged that the testator had had a bad relationship with Mr John and had effectively disowned him, and, thirdly, that Mr John was arrested in 2016 in connection with an armed robbery and that he has been incarcerated ever since. This, it was contended, constituted the final break in the relationship between the testators and Mr John. A supporting affidavit by one Sikiwe, an attorney of this court and a long-standing friend of the testator, was delivered in which he explained that the testator was so deeply affected by the arrest of Mr John that he had said that he intended to disinherit him entirely as a result thereof. I shall revert to the evidence later.

[7] In the present case we are concerned merely with the interpretation of the testators' will and not with its rectification and therefore we need not refer to the principles set out in cases such as Botha and Others[1] and Ex Parte Van der Spuy[2]. In the interpretation of a will the object is not to ascertain what the testator meant to do, but his intention as expressed in the will.[3] Thus, the "question is not what any words might mean apart from the testator's intention, but what the testator meant by using them. That does not mean of course that effect can be given to an intention or a possible intention on the part of the testator which has not been embodied in words employed by him in his will".[4]

[8] Thus, Voet[5] declared:

"Some wishes of testators are clear and transparent, others are vague and doubtful. If there is no doubtfulness in the words, no question must be raised as to the wish either."

[9] This, of course, does not mean that the will could be interpreted in isolation. As in the case of the interpretation of any other document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its

production.[6] This accords with the well-established rule in the interpretation of wills articulated by Blackburn J in Allgood[7] where it was said that "in construing a will, the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were ... in the mind of the testator when he used those words".

[10] This general formulation has become known in succession matters as the "armchair rule". However, in Lello[8] the Supreme Court of Appeal stressed that the armchair rule does not imply that "the intention of the testator may be sought by reasoning or conjecture not founded upon the scheme and terms of the will. ... It is in the will itself that the indications and pointers must be sought, but it is permissible and sometimes essential to read and interpret the will in the light of the relevant circumstances existing at the time of its making."

[11] This brings me to the question of admissibility of extrinsic evidence. The approach was authoritatively articulated by Corbett J in Allen[9] as follows:

"There was some debate at the Bar regarding the extent to which the Court could look to the evidence of background facts and surrounding

circumstances in the interpretation of the bequest in issue. ... Briefly, the position is as follows: Basically the duty of the Court is to ascertain not what the testator meant to do when he made his will but what his intention is, as expressed in his will. Consequently, where his intention appears clearly from the words of the will, it is not permissible to use evidence of surrounding

circumstances or other external facts to show that the testator must have had some different intention. At the same time no will can be analysed in vacuo. In interpreting a will the Court is entitled to have regard to the material facts and circumstances known to the testator when he made it: it puts itself in the testator's armchair. Moreover, the process of interpretation invariably involves the ascertainment of the association between the words and external objects and evidence is admissible in order to identify these objects. This process of applying the words of the will to external objects through the medium of extrinsic evidence may reveal what is termed a latent ambiguity in that the words, though intended to apply to one object, are in fact equally capable of applying to two or more objects (known technically as an 'equivocation') or in that the words do not apply clearly to any specific object, as where they do not describe the object or do not describe it accurately. In both these instances additional extrinsic evidence is admissible in order to determine, if possible, the true object of the bequest, but, except in the case of an equivocation, such evidence may not include extrinsic declarations of the testator's intention."

[12] I revert to the bequest in issue. As I have said, the first and third applicants are the children born of the union between the testators. Ms Nyoni and Mr John are children born out of wedlock to the testatrix and the testator, respectively, prior to their marriage. Section 2D of the Wills Act[10] provides that:

"(1) In the interpretation of a will, unless the context otherwise indicates-

- (a) ...
- (b) the fact that any person was born out of wedlock shall be ignored in determining his relationship to the testator or another person for the purposes of a will."

[13] Aided by this legislative injunction the ineluctable consequence is that both Ms Nyoni and Mr John are, unless the context indicates

otherwise, included in the term "our children". There is no doubtfulness in the words and, as Voet said, no question should be raised as to the wish of the testators. "Context" referred to in s 2D of the Wills Act must be sought in the scheme and terms of the will,[11] not in extrinsic evidence which seeks to change the clear intention expressed in the will.[12]

[14] I revert to the evidence upon which the applicants rely, as adumbrated earlier. As I have said, the testators undeniably misunderstood

the question posed in the will application as is demonstrated by their reflecting the second applicant as a child born of their

marriage. The evidence presented in this application casts no light on how they in fact understood the question and the form makes no provision for the listing of children born out of wedlock. The evidence leaves no doubt that it was known to the testators when the will was executed that Mr John was the testator's son. If they had wanted to exclude him, it is inconceivable that they would not have said so. The testators were guided in the preparation of the will by first respondent, who must have known that there is, in law, a presumption against

disinherison in favour of equal treatment of children in the interpretation of a will.[13]

- [15] In respect of the alleged poor relationship which the testator had with Mr John there is a clear and extensive dispute of fact on the papers. Mr John did not meet the allegations with a bald denial, but set out a clear version of his relationship with the testator in which he has addressed the individual assertions of applicants, supported by detailed confirmatory affidavits by two other members of the direct family.
- [16] It is common cause that Mr John had resided with the testators at some stage, as a child. On either version there clearly was friction between them which led to Mr John leaving them to live with his maternal family and dropping out of school. These events were a disappointment to the testator, and Mr John, but Mr John says that his father remained actively involved in his life and continued to support him financially. This account accords with the affidavit of Mr Sikiwe (filed on behalf of the applicants) which suggests that it was only after the arrest of Mr John that the testator had raised his intention to disinherit Mr John. To the extent that this evidence may be admissible, it seems to me to be destructive of the applicants' argument that the testators had already disinherited him in 2008. The dispute of fact is real and cannot be resolved on the papers.
- [17] The applicants did not request for these issues to be referred to oral evidence and the approach articulated in *Plascon-Evans Paints*[14] finds application. For purposes of the resolution of the present application, the version of Mr John must therefore prevail.
- [18] Finally, much was made in the papers of the testator's grave disappointment with the conduct of his son who had become engaged in criminal activity in 2016. These events and the testators' response thereto are entirely irrelevant to the interpretation of the will executed in 2008 and they must be disregarded for purposes of the adjudication of the application.
- [19] The question which must therefore be considered is whether the will application form, on its own, can give rise to a latent ambiguity as described in *Allen*. Ms Ellis, on behalf of the applicants, acknowledged, correctly in my view, that no equivocation arises from the words used in the will. I do not think that a latent ambiguity of the second kind described by Corbett J in *Allen* arises either. "Our children" refers clearly to all their children and describes the heirs accurately. As a result, the application must be dismissed and the main relief claimed in the counter-application must follow.
- [20] There remain two further issues. When the matter was called before us on 2 March 2023 Mr Ngqeza, acting on behalf of Mr John, moved an application for the postponement of the matter. The application was dismissed and I

indicated that I would provide reasons for the dismissal together with the judgment on the merits. The facts material to the dismissal of the application are also material to the costs order which I intend to make. I shall accordingly consider the two issues together herein.

[21] The court file reflects that on 19 January 2023 the parties were advised that the matter would be set down for hearing as an opposed

application on 2 March 2023, subject to compliance with paragraphs 8(e) and 15A of the Joint Rules of the Eastern Cape Division (the joint rules).[15] The applicants duly filed their heads of argument on 8 February 2023 in compliance with paragraph 8(e) of the joint rules and a joint practice note pursuant to paragraph 15A of the joint rules was delivered on 20 February 2023. The joint practice note recorded that Mr John had not yet filed heads of argument.

[22] Mr John's heads of argument were due in terms of paragraph 8(e) of the joint rules, on 16 February 2023. At 12h37 on 16 February 2023, Mr John's attorneys of record addressed an email communication to the registrar of the Deputy Judge President in which they advised that they had sought an extension from the applicants' attorneys for the filing of their heads of argument. The communication proceeded:

"It is therefore by agreement by both parties that we file our Heads of Argument before the end of business day of 20 February 2023 (monday). (Sic)

This email is to request indulgence from the DJP for an extension for the filing of our Heads of Argument at court."

[23] The Deputy Judge President granted them an extension. However, notwithstanding the undertaking, heads of argument were not

forthcoming. Rather, at 14h45 on 20 February 2023 Mr John's attorneys addressed a further communication to the clerk of the civil court at the High Court, Gqeberha. It recorded:

"Our Counsel has also advised us this morning that she has not finalised her heads and by the look of it they will not be finalised by the end of business today and as such, we humbly request for a further extension for filing our heads till end of business day wednesday (sic), 22/02/2023.

We have written to the other parties and they responded that they cannot give us an extension but they will take no points and that we must write to the DJP asking for such an extension.

We await your response herein."

[24] The Deputy Judge President again granted them a further indulgence to file heads of argument by 22 February 2023. Again heads of argument were not forthcoming, no explanation was proffered and no further extension was sought.

[25] When the matter was called on 2 March 2023 Mr Ngqeza advised that he had been instructed to move an application for a postponement. The founding affidavit in the application for a postponement, which was handed to us on the morning of the hearing, recorded that Adv Masiza had been instructed on behalf of Mr John and attended at a case flow management meeting before the Deputy Judge President on 15 February 2023. There she gave an undertaking that the heads of argument would be ready for delivery on 17 February

2023. However, on 16 February she advised Mr Ngqeza that she will not proceed to draft heads of argument without financial instructions. Hence the first request for an extension of time.

[26] On 19 February 2023, Mr Ngqeza obtained an acknowledgement of debt from Mr John's aunt to cover the expenses in respect of the opposed application. However, counsel advised that an acknowledgment of debt was insufficient and that she required that Mr Ngqeza be placed in funds before she would proceed. She, accordingly withdrew on 28 February 2023. None of these financial

difficulties were disclosed to the Deputy Judge President when the repeated undertakings were given, knowing that they may not be met.

[27] In moving the application for a postponement Mr Ngqeza acknowledged that he had been involved in the application from its inception as Mr John's attorney of record but, in his view, although he had extensive knowledge of the facts and the issues involved, it was desirable to instruct counsel to argue the matter. He confirmed that Ms Masiza had acted on his instructions in giving the undertakings to the Deputy Judge President and acknowledged that he had not been placed in funds at the time when she was instructed.

[28] The principles applicable to an application for a postponement of an application were considered by Plasket J in Persadh[16] as follows:

"First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has (sic) been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs."

[29] As I have said, Mr Ngqeza has confirmed that he has been involved in the matter from its inception. He is an attorney with right of audience in the high court and was fully acquainted with the issues in the application. He was available to attend to the matter himself, as evidenced by his appearance. When the application for a postponement was dismissed Mr Ngqeza immediately produced heads of argument prepared in advance. The reasons advanced for the failure to file heads of argument in accordance with the specific undertakings given to the Deputy Judge President, pre-existed the undertakings and no new circumstances

arose. Mr Ngqeza had never been placed in funds. In the circumstances, I do not consider that good cause has been shown to interfere with the applicants' procedural rights to proceed. Mr John has not shown an inability to proceed but merely contends that it would be desirable for counsel to be employed. That is not a reason for a postponement. In the circumstances I did not consider that justice demanded that further time had to be afforded for the presentation of his

case. For these reasons the application for a postponement was refused and it is appropriate that Mr John pay the costs occasioned by the application.

[30] That brings me to the costs of the main application and the counter application. As I have said the matter was subjected to case flow management, which is intended to promote the efficient, effective, and expeditious disposal of opposed proceedings. The remarks of Peter AJ in Venmop 275,[17] although in the context of trial proceedings, are appropriate in this matter. There he observed:

“[7] The efficient conduct of litigation has as its object the judicial resolution of disputes, optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. ... The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and, secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute, in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.”

[31] The delivery of heads of argument is not a mere formality and has an important role in the administration of justice. The importance and function of heads of argument were conveniently summarised in *S v Ntuli*[18] where Marcus AJ explained:

“Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage

fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard.”

The time frames set out in the joint rules are intended to provide the presiding judges an adequate opportunity to consider the arguments to engage sensibly with counsel on the issues.

[32] As I have said, the set down of the matter was subject to compliance with the joint rules which required Mr John to file his heads of argument timeously. His representatives failed to do so and gave repeated undertakings to the Deputy Judge President that it would be done. One undertaking after another was dishonoured and ultimately no explanation was forthcoming whilst the true reasons for the failure were not disclosed. In this respect, the legal representatives on behalf of Mr John neglected their roles in the process and did not perform their duty scrupulously as required in the legal profession. As a token of our disapproval of the conduct of the matter, notwithstanding the outcome of the main application and the counter application, I intend to make no order as to costs.

[33] In the result:

1. The application is dismissed.
2. It is declared that the words “our children” in clause 1.1 of the written Joint Will of Patience Nothemba Geza and Mzimkhulu Wellington Geza, dated 3 June 2008 includes Vuyolwethu John (identity number 8[...]).
3. The second respondent is ordered to pay the wasted costs occasioned by the application to postpone on 2 March 2023.

J W EKSTEEN

JUDGE OF THE HIGH COURT

GRIFFITHS J:

I agree.

R E GRIFFITHS

Appearances:

For Applicants: Adv L Ellis instructed by BLC Attorneys, Gqeberha

For 2nd Respondent: Mr Z Ngqeza instructed by Zolile Ngqeza Attorneys, Gqeberha

- [1] Botha and Others v The Master and Others 1976 (3) SA 597 (E)
- [2] Ex Parte Van der Spuy, NO 1966
- (3) SA 169 (T)
- [3] Per Sutton J, in Ex Parte Estate Stephens 1943 CPD 397 at 402, quoted with approval by Corbett J in Audrey-Smith v Hofmeyr NO 1973
- (1) SA 655 (C) at 657G-H
- [4] Per Faure Williamson J in Leiman v Ostroff and Others 1954 (4) SA 457 (W) at 461E-F. See also Cumming v Cumming 1945 AD 201 at 206.
- [5] 35.5.1 (Gane’s translation)
- [6] Natal Joint Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)
- [7] Allgood v Blake (1873) LR 8 Exch 160 at 163 (referred to with approval in Cumming v Cumming 1945 AD 201)
- [8] Lello and Others v Dales NO 1971 (2) SA 330 (A) at 335D-E
- [9] Allen and Another, NNO v Estate Bloch and Others 1970 (2) SA 376 (C) at 380A-E
- [10] Wills Act, 7 of 1953

[11] Lello, at 335D-E

[12] Leiman, fn 4 at 461F

[13] Executor of A Neveling v Executor of P Neveling and Others

(1909) 26 SC 196; Ex Parte Godden NO [1962] 2 All SA 482 (SR); 1962 (2) SA 360 (SR); Thom v Worthmann, NO and Another [1962] 4 All SA 28 (N); 1962 (4) SA 83 (N)

[14] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[15] Paragraph 8(e) provided that in the case of all opposed motions, heads of argument for the applicants are to be filed at least 15 days prior to the hearing, and on behalf of the respondent, at least 10 days before the hearing of the application. Paragraph 15A(a) requires that parties to an opposed motion are to file a practice note, not later than 8 days before the hearing, setting out various particulars listed in the joint rules.

[15] Paragraph 8(e) provided that in the case of all opposed motions, heads of argument for the applicants are to be filed at least 15 days prior to the hearing, and on behalf of the respondent, at least 10 days before the hearing of the application.

Paragraph 15A(a) requires that parties to an opposed motion are to file a practice note, not later than 8 days before the hearing, setting out various particulars listed in the joint rules.

[16] Persadh and Another v General Motors South Africa (Pty) Ltd 2006 (1) SA 455 (SE) at 459E-G

[17] Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) Ltd and Another 2016 (1) SA 78 (GJ) para [7]

[18] 2003

(4) SA 258 (W) at para [16]

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