

SOUTH AFRICA / JUDGMENT

Govindasamy and Another v Pillay and Others (D7270/2015) [2020] ZAKZDHC 49 (12 October 2020)

[2020] ZAKZDHC 49

COURT

Kwazulu-Natal High Court, Durban

BEFORE

M R Chetty

CASE / FILE NUMBER

D7270/2015

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IN THE HIGH COURT OF
SOUTH AFRICA,
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
CASE

NO: D7270/2015

In

the matter between:

PRAGASEN
GOVINDASAMY First
Applicant
PRAGASEN
GOVINDASAMY N.O. Second
Applicant
and
SINDY
PILLAY First
Respondent
MASTER
OF THE HIGH COURT, DURBAN Second
Respondent
REGISTRAR
OF DEEDS, KWAZULU-NATAL Third
Respondent
This
judgment was handed down electronically by circulation to the
parties' representative by email, and released to SAFLII.
The

date and time for hand down is deemed to be 10h30 on 12 October 2020.

ORDER

1.

The prohibition against
the selling of the immovable property
described as Erf 1023 Northcroft, Registration Division FT, Province
of KwaZulu-Natal, in
extent 473 m², situated at 129 Avalen
Crescent, Northcroft, Phoenix, without the mutual consent of the
first applicant and
the first respondent, as contained in clause 7 of
the Last Will and Testament dated 6 November 2008 of the late
Soondrarajoo Govindasamy,
be and is hereby set aside;

2.

The second applicant, in
his capacity as the executor in the estate
late Soondrarajoo Govindasamy, Master's Reference No
10686/2013/DBN, be and is
hereby authorised to offer for sale the
property described as Erf 1023 Northcroft, Registration Division FT,
Province of KwaZulu-Natal,
in extent 473 m², situated at 129
Avalen Crescent, Northcroft, Phoenix to the first applicant or the
first respondent, as
testamentary heirs, at a price
not less than R710 000;

3.

The acceptance of any offer
made in pursuance of paragraph 2 above,
must be submitted in writing within thirty (30) days from the date of
this order, to the
executor in the estate of the late Soondrarajoo
Govindasamy;

4.

In the event of the second
applicant being unable to sell the
immovable property in the manner as contemplated in paragraph 2
above, the second applicant,
in his capacity as executor in the
estate of the late Soondrarajoo Govindasamy, Master's Reference
No 10686/2013/DBN, be
and is hereby authorised to offer for sale the
property described as Erf 1023 Northcroft, Registration Division FT,
Province of
KwaZulu-Natal, in extent 473 m², situated at 129
Avalen Crescent, Northcroft, Phoenix by public auction or to conclude
a purchase
and sale agreement with any third party by private treaty,
at a price not less than R710 000;

5.

In the event of the event of the second applicant being unable to sell the immovable property for not less than R710 000 by private treaty or public auction, the second applicant as executor of the estate late Soondrarajoo Govindasamy is authorised to sell the said property at an amount considered to be in the best interests of the testamentary heirs.

6.

The costs of this application to be borne by the estate late Soondrarajoo Govindasamy.

JUDGMENT

Chetty J:

[1] This application has been decided on the papers in the midst of the national lockdown, following a request by the legal representatives of the parties and the consent of the Judge President thereto. The relief sought by the first applicant is the following:

‘a. that the second applicant, in his capacity as executor in the estate of the late Soondrarajoo Govindasamy, Master’s reference number 10686/2013/DBN, be and is hereby authorised to conclude a purchase and sale agreement with any third party, for the sale of property described as Erf 1023 Northcroft, Registration Division FT, Province of KwaZulu- Natal, in extent 473 m², situated at 129 Avalen Crescent, Northcroft, Phoenix;

b. alternatively, that the first applicant, in his capacity as testate heir in the estate of the late Soondrarajoo Govindasamy, Master’s Reference number 10686/2013/DBN, be and is hereby authorised to conclude a purchase and sale agreement with any third party, for the sale of property described as Erf 1023 Northcroft, Registration Division FT, Province of KwaZulu- Natal, in extent 473m², situated at 129 Avalen Crescent, Northcroft, Phoenix;

c. that the prohibition against the selling of immovable property

described as Erf 1023 Northcroft, Registration Division FT, Province of KwaZulu-Natal, in extent 473 m², situated at 129 Avalen

Crescent, Northcroft, Phoenix, without the mutual consent of the first applicant and the first respondent, as contained in clause 7 of the last Will and Testament dated 6 November 2008 of the late Soondrarajoo Govindasamy be and is hereby set aside;

d. that the costs of this application be borne by the estate in the event that this application is not opposed, or alternatively, that the costs be borne by those respondents who oppose this application, jointly and severally;

e. further and/or alternative relief.’

[2] The first applicant is both a testamentary heir and the executor of the estate of his father the late Soondrarajoo Govindasamy, and is cited in such capacity as the second applicant. He is one of two heirs, the other being his sister, the first respondent. The facts of the matter are largely common cause. Soondrarajoo Govindasamy was married to Munniamma Govindasamy, who predeceased her husband. After his death, the executor of her estate did not transfer her half portion to her husband’s estate. The late Soondrarajoo Govindasamy died, declaring in his will that the immovable property in his estate, namely the family home at 129 Avalen Crescent, Northcroft, Phoenix, is to be shared equally between the first applicant and the first respondent. The will stipulated that the house should not be sold, unless mutually agreed to by both the first applicant and the first respondent. The precise terms of the will state that:

‘Sindy Pillay and Pragasen Govindasamy being my first and third born respectively shall be sole inheritors of my house situated at 129 Avalen Crescent, Phoenix. The house shall be shared equally between the two of them. The house shall not be sold unless mutually agreed to by the parties.’

[3] Both the first applicant and the first respondent lived on the property until the first applicant left following his relocation to Gauteng for work purposes. He returned to Durban in 2010 and moved back into the family home but found living alongside the first respondent intolerable. As a result, he and his family moved out of the house in 2011. Since then, the first respondent has lived in the house and benefited exclusively in this regard.

[4] In 2014, the executor of the estate of the late Munniamma Govindasamy, with the concurrence of the second applicant, was authorised to sell the family home pursuant to an agreement which had been reached for the purchase price of R650 000. The estate of the late Mrs Govindasamy is being wound up by Mr Perumal, from the same firm of attorneys representing the applicants herein. The first applicant is desirous of selling the property to a third party as he believes that this would be in the best interests of the heirs. His sister, on the other hand, believes that the property should not be sold. Should this be the position, it would mean that she would remain in the property indefinitely, benefiting exclusively from a property in which the first applicant was to share equally. The first respondent made multiple offers to purchase the first applicant’s half share of the property, which have been rejected as being too low. In March 2015 she offered R140 000 for the first applicant’s half share. As she is unemployed, she sought to secure a loan with the assistance of her children. She then made a further offer of R325 000 which was also rejected.

[5] Prior to the date of set down for the hearing of the matter, the parties continued to engage with each other as to a suitable purchase price for the property. Copies of the correspondence between the respective attorneys have been placed before me. There was an initial suggestion that the property could be sold at a ‘marketable value’ of R1 500 000. This however appeared to be a misstatement of what was conveyed by the applicants’

attorney. Thereafter the first respondent's attorney put forward an offer of R325 000 for the purchase of the first applicant's half share. The offer was rejected. What emanated from the correspondence between

the attorneys, and which is of assistance to the court, is that valuations of the property were obtained from two estate agents, both of whom assessed the current market value of the property at R710

000. Neither of the parties appears to have disputed the correctness of the valuations.

- [6] In light of the present position where the first respondent continues to enjoy the free use and enjoyment of the immovable property to the exclusion of the first applicant, who has been obliged to live in rented accommodation, the first applicant contends that it is proper for the property to be sold to a third party, notwithstanding the prohibition in the will. The first applicant contends that while the status quo remains, the property is at risk of being damaged and alludes to an incident (albeit in 2014) when part of the house caught fire.
- [7] It is evident from the opposing affidavit that the rivalry between the two sibling heirs runs deep. One of the grounds on which the first respondent opposes the relief sought is that Mr Perumal, the executor in the estate of the late Munniamma Govindasamy failed to effect the transfer of the half share of the property of the late Mrs Govindasamy to her husband, the late Soondrarajoo Govindasamy, in terms of section 45(1) of the Deeds Registries Act 47 of 1937. The late Mr and Mrs Govindasamy were married in community of property. The first respondent contends that the attempt by the executor, Mr Perumal, to sell the property without compliance with the provisions of section 45, is irregular. I do not consider the failure of the executor to have attended to the transfer of the half share of the late Munniamma Govindasamy to the estate of her husband, prior to his death, to be an obstacle in the way of the property being sold to a third party. The transfer of the half share of the late Munniamma Govindasamy can be effected simultaneously at the time of the sale and transfer of the property to a third party or to either of the heirs.
- [8] The first respondent also contends that in terms of the will of her late father, both she and the first applicant were appointed as executors. She contends that the appointment of the first applicant as the only executor in the estate 'was disingenuous', however to date and after the issue of letters of acceptance by the Master of the High Court, the first respondent is yet to challenge this alleged irregularity. This court, in the absence of any indication to the contrary, must accept that the appointment of the first applicant as the executor is lawful and consistent with the provisions of the will.
- [9] The parties concluded a joint minute in which they requested that the court make a determination on the following issues:
- (a) Whether the court can exercise a discretion to vary or depart from the terms of the will.
 - (b) Will the sale to a third party be to the benefit of the parties?

(c) The value of the property.

[10] As to the first enquiry, the first applicant submits that the court can, in the exercise of its discretion, vary or depart from the terms of a will where the beneficiaries have no beneficial enjoyment of the property, or where circumstances arise which were not contemplated by the testator. In the present matter, the provisions of the will prohibit the immovable property from being sold to a third party, without the consent of the heirs. At the time the testator inserted clause 7 in his will leaving the immovable property to both his children, he would no doubt have contemplated that they would have lived together in their family home, in an amicable manner. He would not have contemplated the animosity that presently exists between them. The first respondent opposes the sale of the property to a third party, and seeks to buy the first applicant's share in and to the property. The fundamental obstacle facing the first respondent is that she asserts a right to purchase the first applicants share, and contends that the value thereof should be based on the municipal valuation of the property.

[11] It is correct that the order being sought to sell the property to a third party would amount to the variation of the will, which impacts of freedom of testation, which is however not absolute. See *In re BOE Trust Ltd & others* NNO 2013 (3) SA 236 (SCA) paras 27-28 where the court held that:

‘[27] Indeed, not to give due recognition to freedom of testation will, to my mind, also fly in the face of the founding constitutional

principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.

[28] But freedom of testation, and the rights underlying it, are not absolute. The balance to be struck between freedom of testation and its limitations was formulated by Innes ACJ as follows:

“Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule of law from doing so.” (Footnotes omitted.)

[12] In *Ex Parte Jewish Colonial Trust Ltd: In Re Estate Nathan* 1967 (4) SA 397

(N) at 408E-F it was held that a court is not entitled to vary a will:

‘The Court cannot make, or re-make a testator's will for him; it cannot vary the will he has made. It cannot change the devolution of his estate as he has directed it, nor add to or subtract from the benefit he has conferred upon each of the beneficiaries. They must be content to take what they are given, when and on the terms on which it is given. The Court will interpret the will in order to ascertain who are the beneficiaries and the extent to which each benefits and in interpreting it will give consideration to what may properly be implied into the will. The rights of the beneficiaries are determined by the will properly interpreted.’ And in *Jewish Colonial Trust Ltd v*

Estate Nathan 1940 AD 163 at 182-183 it was held that courts do not have a general power to vary a will:

‘... but it has no general discretionary power to modify or supplement rights given under a will or to authorise the property of a testator to be dealt with otherwise than in terms of his will.’

[13] However, courts have allowed the variation of a will in limited instances where the directions in the will are practically impossible or utterly unreasonable due to a change in circumstances. See *Ex Parte Watling & others* 1982 (1) SA 936 (C) at 940H-941A:

‘It is, of course, not every circumstance that will entitle the Court to vary the terms of a will; it will only do so in exceptional

circumstances (see *Ex parte Trustees Estate Loewenthal* (supra at 256)). Indeed, there is considerable weight of authority in favour of the view that a Court's power to authorise a departure from the terms of a will or of a trust deed on this ground is limited to cases where the unforeseen change of circumstances is such as to render the fulfilment of the directions contained in the will or trust “practically impossible or utterly unreasonable”’

[14] The test to determine whether to allow an amendment is whether there has been a change in the circumstances which could not have

been foreseen by the testator, as was held in *Ex Parte Administrators Estate Grusd* 1937 WLD 94 at 97- 98:

‘It is unnecessary for me to decide whether in any conceivable circumstances the Court would have power to sanction a departure from

an investment direction in a will. The possibility that such a jurisdiction exists in extreme cases is suggested by certain decisions (cf. cases cited in *Ex parte Estate Gray* 1920 WLD 116; *Ex parte Bloch* 1936 WLD 48. But it is perfectly clear that in general no such jurisdiction exists, even where obvious benefit would be derived by the beneficiaries from the proposed departure. (In *re Crosbie's Estate* (27 SC 50); *Ex parte Adam's Trustees* 1927 NPD 314; *Ex parte Estate Kalmek* 1934 WLD 1). Assuming that in exceptional cases of unexpected change of circumstances after the testator's death rendering the fulfilment of his directions practically impossible, or utterly unreasonable, a departure might at common law be sanctioned, there is in the present case nothing remotely resembling such a situation.’

[15] These same sentiments were echoed in *Ex Parte Sidelsky* 1983 (4) SA 598

(C) at 601E-F:

‘The general rule is that the Court will not, save in exceptional circumstances, authorise a variation in the provisions of a will

which are capable of being carried out. Nevertheless, the Court does in limited and circumscribed circumstances have the power to vary the provisions of a will. It appears from a series of decisions in our Courts that the Court has jurisdiction to authorise a departure from the terms of a will where there has been a change of circumstances, unforeseen by the testator, which has rendered compliance with his directions "practically impossible or utterly unreasonable".

[16] As alluded to earlier, the animosity between the heirs has reached the point where they cannot live together on the same property, and they cannot agree on the value of the property, in the event of one heir wishing, as the first respondent does, to buy the half share of the first applicant. The strife that presently exists could not have been foreseen by the testator, and in the result I am satisfied that this court, in the exercise of its discretion, is entitled to vary the provisions of the will of the late Soondrarajoo

Govindasamy to permit for the sale of property, despite such sale not being by mutual consent of the heirs.

[17] In light of the conclusion that the property may be sold, the remaining enquiry is whether a sale to a third party would benefit

the heirs, and what price or valuation should be attached to the property. It is common cause that the first respondent, who presently

resides on the property, has attempted to make offers to purchase the first applicant's half share of the property. These offers have been rejected. As stated above, she is unemployed and has attempted with the assistance of her children, to purchase the property, with the last offer being R325 000. The correspondence exchanged between the attorneys indicates that the most recent valuation, conducted in August 2020, suggests that a reasonable market value for the property is R710 000. This begs the question as to which method is to be employed for the sale of property. Section 47 of the Administration of Estates Act 66 of 1965 (the Act) provides as follows:

'47. Sales by executor.— Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that—

- (a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or
- (b) if the said 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.'

[18] In *Essack v Buchner NO & others* 1987 (4) SA 53 (N) at 57C it was held that section 47 only deals with how the asset is to be sold, and not the actual decision to sell:

‘At the outset it should be noted that the section relates to the manner and conditions of sale of estate property by the executor, and not to the decision as to whether or not to sell.’

In *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) at 884H-885A, it was held that there is no method of sale which is better than another:

‘The section - conceived, probably, to prevent the possibility of abuse of a power to sell out of hand - provides no support for the argument that an auction sale is a better test of market value than a sale by private treaty. The question as to which is the better test is, as I have said, a question of fact, to be decided in the light of all relevant circumstances.’

[19] The first applicant submitted, with reference to *Davis & another v Firman NO & others* [2010] JOL 24849 (N), that the immovable property should be sold for the best price, for the benefit of the heirs. In *Davis* at 14, the court said the following:

‘No longer is a sale by public auction the principal and central requirement. The executor may sell property other than shares, bills

of exchange or property sold in the course of any business or undertaking carried on by the executor, in the manner and subject to the conditions which the heirs who have an interest approve in writing. In contrast to section 47, prior to its amendment, the

Master's consent is not required. The executor with the heirs' consent can sell property in any manner whether by public auction,

tender or out of hand.’

[20] Thus, the sale can be made either by public auction or private sale. On how to determine the correct market value of the property,

the court will have to look at the prevailing circumstances of the matter, as was said in *Todd* (supra) at 884G-H:

‘. . .for the question whether a price obtained, or offered, for a property represents the market value thereof is not a legal question,

but a question of fact, to be decided in the light of the circumstances of each particular case.’

[21] As stated earlier, two recent valuations indicate that a reasonable and fair price for the property is R710 000. There is nothing on the papers to suggest that this valuation is unfair or unreasonable. The further enquiry is then to whom the property should be sold. The first applicant has argued for the property to be sold to a third party. It is clear from the papers that the first respondent has expressed a desire to purchase the property, however her offers were rejected by the first applicant as being too low. The position has since been clarified by recent valuations as to the reasonable value of the property.

[22] I am mindful of the provisions of section 47 of the Act which require the executor to seek the assistance of the Master if the beneficiaries do not agree on the manner of the sale of an asset.

This question is implicitly before this court and the Master, who is cited as a party to these proceedings, has not expressed any view as to the merits or as to the procedure to be followed in the disposal of the assets in question. Accordingly, while the court in *Kisten & another v Moodley & another* [2016] ZAKZDHC 31 held that the court cannot usurp the function of the Master who must determine the manner and conditions of sale, I considered the facts in this matter to be distinguishable from that in *Kisten* where the Master was not a party to the proceedings. In any event, neither party before me has raised an objection to having to determine the manner in which the property should be sold. Furthermore, it is imperative that the dispute between the heirs, which has been waging for several years, should be brought to finality. The primary issue in dispute between the parties was whether the property is to be sold, and if so, for what price. The mode of sale was not an issue raised on the papers as one which could delay the finality of this matter.

[23] In the circumstances I am of the view that having regard to the factual background of the matter, the immovable property should first be offered to either of the heirs to purchase, at a price of not less than R710 000. In arriving at this conclusion, I am mindful that the intention of the testator was to have the immovable property remain in the ownership of his two children, and if it were to be sold, this was to be by consent. That, for reasons aforesaid, is no longer possible. However, the intention of the testator can still be achieved by ensuring that either of the heirs would have a right of 'first refusal', in the sense that they could offer to buy the other's half share before the property can be sold to third parties. This would, in my view, be consistent with the intention of the testator. I consider that a period of 30 days from the date of this order, to be a reasonable period for the heirs to submit their offer.

[24] In the event that the heirs fail to purchase the property in the manner referred to above, then I am of the view that the order sought in paragraph 1 of the notice of motion must follow, subject to the reserve price of R710 000 being set for such sale. As set out in the authorities alluded to above, it is not material whether the sale is by public auction or by private treaty. The main objective is to ensure the best beneficial outcome for the heirs. I consider the determination below as being fair and reasonable, in the best interests of the heirs and to be consistent with the wishes of the testator.

[25] Accordingly, I make the following order:

1. The prohibition against the selling of the immovable property

described as Erf 1023 Northcroft, Registration Division FT, Province of KwaZulu-Natal, in extent 473 m², situated at 129 Avalen

Crescent, Northcroft, Phoenix, without the mutual consent of the first applicant and the first respondent, as contained in clause 7 of the Last Will and Testament dated 6 November 2008 of the late Soondrarajoo Govindasamy, be and is hereby set aside;

2. The second applicant, in his capacity as the executor in the estate late Soondrarajoo Govindasamy, Master's Reference No 10686/2013/DBN, be and is hereby authorised to offer for sale the property described as Erf 1023 Northcroft, Registration Division FT, Province of KwaZulu-Natal, in extent 473 m², situated at 129 Avalen Crescent, Northcroft, Phoenix to the first applicant or the first respondent, as testamentary heirs, at a price not less than R710 000;
3. The acceptance of any offer made in pursuance of paragraph 2 above, must be submitted in writing within thirty (30) days from the date of this order, to the executor in the estate of the late Soondrarajoo Govindasamy;
4. In the event of the second applicant being unable to sell the immovable property in the manner as contemplated in paragraph 2 above, the second applicant, in his capacity as executor in the estate of the late Soondrarajoo Govindasamy, Master's Reference No 10686/2013/DBN, be and is hereby authorised to offer for sale the property described as Erf 1023 Northcroft, Registration Division FT, Province of KwaZulu-Natal, in extent 473 m², situated at 129 Avalen Crescent, Northcroft, Phoenix by public auction or to conclude a purchase and sale agreement with any third party by private treaty, at a price not less than R710 000;
5. In the event of the event of the second applicant being unable to sell the immovable property for not less R710 000 by private treaty or public auction, the second applicant as executor of the estate late Soondrarajoo Govindasamy, is authorised to sell the said property at an amount considered to be in the best interests of the testamentary heirs
6. The costs of this application to be borne by the estate late Soondrarajoo Govindasamy.

M R CHETTY

Appearances

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