

SOUTH AFRICA / JUDGMENT

Heinze v Burger and Others (1202/2012) [2018] ZANCHC 79 (2 November 2018)

[2018] ZANCHC 79**COURT**

Northern Cape High Court, Kimberley

BEFORE

C J Olivier

CASE / FILE NUMBER

1202/2012

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(Northern****Cape High Court, Kimberley)****Case No****: 1202/2012****Date of****Hearing : 23 OCTOBER 2018****Date****Delivered : 02 NOVEMBER 2018****Not****Reportable****In**

the matter between:

HEINZE,
BERNARD
WILLIAM
Applicant
and
BURGER,
JACOBUS
ADRIAAN
1st
Respondent
BURGER
NO, ENGELA
SUSANNA
2nd
Respondent

ABSA
BANK
3rd
Respondent
REGISTRAR
OF
DEEDS
4th
Respondent
DUNCAN
& ROTHMAN
INC.
5th
Respondent
MASTER
OF THE HIGH
COURT
6th
Respondent
SENEKAL
NO, FREDERIK
JACOBUS
7th
Respondent
HEINZE,
KURT
JOCHEN
8th
Respondent
CROZIER,
ANTHONY DONALD
WOOD
9th
Respondent
HEINZE,
KLAUS
10th
Respondent

Coram:

Olivier
ADJP

JUDGMENT

Olivier ADJP:

[1.] Mr W R Heinze (“the testator”) died on 22 July 2004. In terms of his will all property in his estate was bequeathed to a testamentary trust. The fixed property concerned in this matter was registered in the name of the testator.

[2.] An agreement of sale was subsequently concluded between the erstwhile executor in the deceased estate, Mr Kurt Jochen Heinze, at the time represented by Mr A D W Crozier, on the one hand, and the So-Ane Boerdery Trust, represented by the trustees of that trust, Mr J A Burger and Mrs E S Burger, on the other hand, and the property was indeed subsequently transferred from the deceased estate to the So-Ane Boerdery Trust.

[3.] During 2012 Mr Heinze lodged an application claiming, inter alia, that the deed of sale be declared null and void and that the Registrar of Deeds be ordered “to restore the property ... to the deceased estate”.

[4.] Mr and Mrs Burger were cited in their representative capacities as trustees of the So-Ane Boerdery Trust, as respectively the first and second respondents. ABSA Bank Ltd was cited as third respondent, because of the fact that a mortgage bond had in the process been registered in its favour over the fixed property concerned.

[5.] The Registrar of Deeds was cited as the fourth respondent.

[6.] Duncan & Rothman attorneys, who were involved in the sale and the transfer of the property, were cited as the fifth respondent.

[7.] The Master was cited as the sixth respondent.

[8.] Mr F J Senekal was cited as the seventh respondent, in his capacity as the executor at that stage in the deceased estate. It appears that he had in the meantime been appointed as executor, when Mr K J Heinze, who was cited as the eighth respondent, was removed as executor.

[9.] Mr Crozier was cited as the ninth respondent and Mr Klaus Heinze, a brother of the applicant, as the tenth respondent.

[10.] The application (which will in what follows be referred to as “the main application”) was opposed by only the first and second respondents, and the ninth respondent, but an answering affidavit was filed on behalf of the fifth respondent, in order to answer to some very serious allegations by the applicant against them.

[11.] On 16 May 2014 the now retired Lacock J dismissed the main application with costs, after having concluded:

11.1 that the applicant lacked the legal standing to apply for the relief;

11.2 that, contrary to what was in essence the applicant's case, the Master had issued a certificate as required by section 42(1) of the Administration of Estates Act[1]; and

11.3 that in any event, as "There (was) no indication that either the executor or the purchasers ... did not intend the transfer of the domicilium in the property ... to the purchasers", the transfer of the property would be unassailable because of the abstract theory of passing ownership of, inter alia, immovable property, in terms of which theory a defect in the sale agreement would not have affected the subsequent transfer of the property.

[12.] The applicant now applies for leave to appeal. It is common cause that his application for leave to appeal was filed late, and he is therefore also applying for condonation thereof.

[13.] In *United Plant Hire (Pty) Ltd v Hills and Others*[2] the principles upon which a court exercises its discretion in respect of applications for condonation in circumstances like these were explained as follows:

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant

considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

[14.] The applicant has not filed a substantive application for condonation, in the sense of a notice that is supported by an affidavit as envisaged in Uniform Rule 6. His application for condonation is contained in a document styled "APPLICATION FOR CONDONATION OF A LATE APPLICATION FOR LEAVE TO APPEAL". In the document the applicant has set out his reasons or explanation for the delay in filing the application for leave to appeal as follows:

14.1 He stated that, because he had no legal representation, he had to "research the entire matter", which according to him "consists of some very difficult legal principles and entails lots of case law and various branches of South African law".

14.2 The applicant furthermore explained that he was a student "and was busy with exams and studies for same up to the mid of June and again this semester".

14.3 He claimed that condonation would not prejudice the respondents and advanced, as a reason for this submission, the fact that the respondents had been late in filing their answering affidavits in the main application.

[15.] The applicant has not, importantly, therefore claimed to have been unaware of the time restriction for the filing of an application for leave to appeal.

[16.] The document was on the face of it signed by the applicant, but it was not commissioned and it is therefore not an affidavit.

[17.] Although the absence of legal assistance is obviously a relevant factor, it is not a decisive consideration and will not necessarily entitle an unrepresented party to condonation[3].

[18.] It is not entirely correct, furthermore, to say that the granting of condonation could not prejudice the respondents. It would

entitle the applicant to proceed with his application for leave to appeal which, if successful, would obviously lead to a further delay in this already protracted matter.

[19.] It is also important to bear in mind the extremely long delay from 23 January 2006, when the property was transferred, to the date when the applicant lodged the main application.

[20.] The respondents, like all parties in litigation, have a right to finality. A further delay would result in prolonging the

uncertainty regarding the title of the So-Ane Boerdery Trust.

[21.] Even if regard is had to the applicant's non-commissioned explanation for the delay in filing the application for leave to appeal, it is far from satisfactory.

[22.] As regards the fact that the applicant prepared the application for leave to appeal as a lay person, he has not explained why he did not obtain legal assistance, if that could have expedited the preparation of the application for leave to appeal.

[23.] In any event, he also appeared in person at the hearing of the main application, and the issues would therefore not have been new to him.

[24.] While the period from the judgment until "mid June" could arguably be said to have been explained, the same cannot be said for the more than three months thereafter when the application for leave to appeal was still not filed. It is unclear whether the applicant is contending that he was equally busy with "exams and studies" in the period between the two semesters, and during all of the second semester up until he eventually filed the application for leave to appeal.

[25.] In argument Mr Heinze claimed also to have been part-time employed during that period. Apart from the fact that his "statement" is silent on this, Mr Heinze was relatively vague about this even in argument, claiming to have been more of a student than a part-time employee.

[26.] However, in view of the fact that the applicant has had no legal assistance, and he is still appearing in person, and in the interests of justice, I have decided to adopt "a robust attitude" as far as the application for condonation is concerned[4] and to proceed to consider the merits of the application for leave to appeal.

[27.] In my view the appeal does not have a prospect of success, as required by section 17(1)(a) of the Superior Courts Act[5], and the issue of the applicant's legal standing is decisive for purposes of considering this requirement.

[28.] It is trite that an applicant in motion proceedings must make out its case in the founding papers[6]. This would also be the case as regards the requirement that an applicant must have legal standing in respect of the issue/s

concerned, and for purposes of the relief claimed, and the applicant bore the onus to prove this[7].

[29.] The only allegation that the applicant had made in his founding affidavit[8] in this regard was that the fact that the testator had been his father, gave him standing in the matter. Not surprisingly this allegation was denied by the first and second respondents. The mere fact that the applicant had been the biological son, but born out of wedlock, of the testator would quite clearly not have given him legal standing in circumstances where he was not an heir in terms of the will of the testator.

[30.] The court a quo based its conclusion that the applicant lacked locus standi on findings that the applicant was not an heir in the deceased estate and had also not been a party to the impugned agreement of sale. The court a quo considered these possible grounds for legal standing despite the fact that the applicant had not in his founding affidavit made any reference thereto as grounds for him having legal standing.

[31.] The applicant has not, in his application for leave to appeal, taken issue with the finding that he was not an heir in the deceased

estate. In his heads of argument he appears to contend, however, that it would have been up to the executor in the deceased

estate to determine whether he was an heir in the deceased estate or not. This contention is a complete fallacy, as the applicant

has himself conceded that the testamentary trust was the sole heir in terms of the will.

[32.] The applicant has, however, in his application for leave to appeal now claimed to have been a party to the agreement of sale. He bases this argument, apparently, on rights which he would according to him have had to take decisions of the Master on review or appeal and to object to directions and decisions by the Master. In this regard he has referred to sections 35(1), 42(2), 47 and 95 of the Administration of Estates Act.

[33.] Save to point out that the provisions of section 47 apply to only heirs, which the applicant, as already mentioned, is and was not, and that the applicant was also not on this case a creditor in the deceased estate, I am not going to deal with the other provisions referred to by the applicant in any detail. The fact is that the applicant did not, in his founding affidavit, make out a case that he would, on the basis of any of these provisions, have the required legal standing.

[34.] The court a quo went on to consider whether the applicant would have had legal standing if he was an income beneficiary of the testamentary trust and had brought the main application on behalf of that trust, and the court a quo concluded, with reference to *Gross & Others v Pentz*[9], that the applicant would not have had legal standing on this basis, and merely because there had not at that time been a trustee for the testamentary trust. It was found that the applicant should under such circumstances have taken steps to have a trustee appointed.

[35.] In this regard the applicant now says, in his application for leave to appeal:

33.1 that he had attempted to have a trustee appointed, and he relies on the “Beningfield principle” referred to in the *Gross* judgment, which would entitle trust beneficiaries to act on behalf of a trust in circumstances where the trustee/s cannot or will not take steps; and

33.2 that the fact “that our common law limits beneficiaries to sue on behalf of trusts” is not “in terms of section 36 of the Bill of Rights ... reasonable (or) justifiable” and “infringes on (his) fundamental right to equality”.

[36.] The applicant has also now, in his application for leave to appeal, made reference to his rights in terms of the Constitution, and more specifically in terms of sections 9, 34 and 38 thereof, and he now states that his standing “is supported by the Constitution”.

[37.] In the first place, the applicant did not in his founding affidavit claim to have standing as a beneficiary in terms of the testamentary trust. He did not in fact even make out a case that he was a beneficiary of the trust. In the will, which would in the circumstances be the trust deed, he is not by name indicated as a beneficiary.

[38.] In clause 3.6 of the will only the testator’s sons Christian Heinze and Wolfgang Heinze are named as capital beneficiaries.

[39.] Even if the applicant was an income beneficiary who would have been entitled to approach the court in a representative capacity on behalf of the trust, he had in his notice of motion claimed that the property be restored to the estate, and not to the trust. He would not, as an income beneficiary in the trust, have had the right to claim this relief on behalf of the deceased estate. The sole heir in the estate was the trust, not its beneficiaries, and his capacity as an income beneficiary would not have clothed him with the status of an heir in the deceased estate.

[40.] In his heads of argument the applicant now submits that only the trustee of a testamentary trust could “determine who the trust beneficiaries are”. This submission has not been explained and there is no indication in the will that the trustee would have had any discretion in this regard. In the circumstances the will, as effectively the trust deed, would be the sole source of this information.

[41.] In any event, on the applicant's own submission he could then not have had legal standing in the capacity of a trust beneficiary, because he goes on to state that "At the date of the application and the date of the hearing there was no trustee to determine whether the applicant (was) an income beneficiary only or a capital beneficiary". On his own argument, therefore, he could not have been identified as a beneficiary at that stage and could therefore not have had legal standing in such capacity.

[42.] In his heads of argument the applicant now says that what the court a quo remarked as regards the possibility of locus standi on the basis of the applicant being a beneficiary, was "quite premature", apparently because there had according to the applicant not yet at that stage been a determination by a trustee of who the beneficiaries in the testamentary trust were. Once again, this possibility was considered as an indulgence to the applicant, and not because he had made out any case whatsoever in his founding affidavit that he had, or could in the future have, legal standing in the capacity of a trust beneficiary.

[43.] The applicant is also not entitled to raise constitutional issues at this stage that he never referred to or relied upon his founding

affidavit, or in the court a quo. In *Prince v President, Cape Law Society and Others*[10] the principle was affirmed that a party who intends raising constitutional issues should do so "at the time they institute legal proceedings" and that in such a case "information relevant to the determination of the constitutionality ... must be placed before the Court of first instance"[11]. The opposing respondents were never given the opportunity of addressing this in their answering affidavits, and in the main

application, and it would in my view not be in the interests of justice to consider these arguments at this stage and under the

present circumstances.

[44.] The fact that the applicant may have prepared his affidavits in the main application himself cannot, in these circumstances, justify an approach whereby this court would now have regard to new issues like these.

[45.] In my view, therefore, there is no reasonable prospect of success with an appeal against the finding that the applicant lacked legal standing. In the circumstances it is not necessary to consider the prospects of success in respect of the other findings of the court a quo, because the applicant would not be entitled to pursue an appeal in respect thereof without legal standing.

[46.] It has also not been argued that leave to appeal should nevertheless be granted on any other ground in terms of section 17(1) of the Superior Courts Act.

[47.] As regards the fact that the court a quo awarded costs against him, the applicant has, in his application for leave to appeal, pointed out that he had not been legally represented in the main application and that Lacock J had at that hearing agreed with his submission that such an order would be "detrimental" to him.

[48.] The fact that the costs order would be “detrimental” to the applicant could not have been a decisive consideration. His application resulted in legal costs for the opposing respondents, and the fact that an award of costs against the applicant would impose a financial burden on him could not in itself have detracted from the general and trite principle that costs follow the result. The applicant simply has not shown that the court a quo misdirected itself in making the costs order.

[49.] In his heads of argument the applicant now contends that the opposing respondents had themselves brought about their legal costs in the main application, by “(choosing) deception over honesty” in the course of the events that were the basis of the main application. This submission really misses the point.

Whether there had been deception and dishonesty was, in the first place, in dispute and never found to have been proven.

Furthermore, the fact would in any event remain that the applicant had lacked the legal standing to raise those allegations in his quest for the relief claimed in the notice of motion.

[50.] There is absolutely no basis upon which it could be said that the court a quo had not exercised its discretion in this regard properly.

[51.] This brings me to the costs of the present applications.

[52.] None of the opposing respondents are to blame for the delay that necessitated the application for condonation, and it was the applicant that was obliged to bring that application in order to seek the indulgence of this court. The opposition of this application can most certainly not be said to have been unreasonable, when regard is had to the above.

[53.] The costs concerned in the application for condonation are in any even inextricably linked to the costs in the application for leave to appeal, and should in my view for all practical purposes be treated as part thereof.

[54.] As far as the application for leave to appeal is concerned, the applicant has not pointed out anything that would justify a deviation from the general rule already referred to.

[55.] In the premises the following orders are made:

1. THE LATE FILING OF THE APPLICATION FOR LEAVE TO APPEAL IS CONDONED.
2. THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED.
3. THE APPLICANT IS ORDERED TO PAY THE COSTS IN BOTH THESE APPLICATIONS.

JUDGE C J OLIVIER

ACTING DEPUTY JUDGE PRESIDENT

NORTHERN CAPE DIVISION

For the applicant: IN PERSON

For the 1st and 2nd ADV. D C JANKOWITZ

respondents:

(Instructed by Haarhoffs Inc.)

For the 5th respondent: ADV. I GREEN SC

(Instructed by Duncan & Rothman Inc.)

For the 9th respondent: MS J SNYDERS

(Engelsman Magabane Inc.)

[1] 66 of 1965

[2] 1976 (1) SA 171 (A) at 720E - G

[3] See Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 757

[4] Compare High School Ermelo & another v HOD Mpumalanga Dept of Education & others [2007] JOL 20474 (T) para [9]; Viljoen v Federated Trust Ltd, supra

[5] 10 of 2013

[6] Compare Democratic Alliance v Kouga Municipality and others

[2014] 1 All SA 281 (SCA) para [18]

[7] Compare Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567 (A) at 575H – I; Kommissaris van Binnelandse Inkomste v Van Der Heever 1999 (3) SA 1051 (SCA) para [10]

[8] Paragraph 12 thereof

[9]

[1996] 4 All SA 63 (A)

[10] 2001 (2) SA 388 (CC)

[11] Ibid, para [22]; See also Manqele v Durban Transitional Metropolitan Council 2002 (6) SA 423 (D) at 427

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Prepared on 11 October 2026 · Esheria