
SOUTH AFRICA / JUDGMENT

Hoste N.O. and Another v Lotter N.O. and Others (3710/2015) [2016] ZAECHGHC 4 (5 February 2016)

[2016] ZAECHGHC 4

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering

CASE / FILE NUMBER

3710/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 3710/2015

Date heard: 4 February 2016

Date delivered: 5 February 2016

In the matter between

PATRICIA SHELLEY HOSTE (FORMERLY

MALKOFF) N.O.

First Plaintiff

DEBORAH ANNE HOTZ N.O.

Second Plaintiff

vs

KAREN LOTTER N.O.

First Defendant

DIRK STOFFBERG

Second Defendant

GORDON GARY STOFFBERG

Third Defendant

GIRLS AND BOYS TOWN SA

Fourth Defendant

SALVATION ARMY

Fifth Defendant

THE SOCIETY FOR THE PREVENTION OF

Sixth Defendant

CRUELTY TO ANIMALS – EAST LONDON

SAINT BERNARDS CHURCH

Seventh Defendant

SOUTH AFRICAN AIR FORCE

ASSOCIATION

Eight Defendant

DURBAN HIGH SCHOOL

Ninth Defendant

WANDERERS CRICKET CLUB

Tenth Defendant

CHIRSTINE GALE ODENDAAL

Eleventh Defendant

MERLE WILLIAMSON

Twelfth Defendant

DEBRA JENNINGS

Thirteenth Defendant

JORDANA MALKOFF

Fourteenth Defendant

SAINT DOMINICS HOSPICE

Fifteenth Defendant

BETTINA VAN NIEWENHUIZEN

Sixteenth Defendant

THE MASTER OF THE HIGH COURT,

GRAHAMSTOWN

Seventeenth Defendant

24 SQUADRON, JOHANNESBURG

Eighteenth Defendant

JUDGMENT

PICKERING J:

- [1] The two plaintiffs, who are described as “the co-trustees for the time being of the Jordana-Beth Trust”, a trust duly registered in terms of the Trust Property Control Act 57 of 1998, have issued summons, nomine officio, out of this court seeking orders to the effect, inter alia, that three Wills allegedly executed by one Stuart Bruce Doveton Helps (“the deceased”) be declared to be invalid and that one will (will
- 4) in terms whereof the Trust was named as one of the beneficiaries be declared to be the last will and testament of the deceased.
- [2] The deceased’s first will was duly executed by him on 24 December
2007. In terms of this will (POC7/Will 5) the deceased bequeathed, inter alia, “my Kalinka Garden Home and the motor vehicle that I own at the time of my death to my niece, Patricia Malkoff.”
- [3] That will was replaced by a subsequent will dated 3 December 2010 (POC6/Will 4) in terms whereof, inter alia, the aforementioned Kalinka Garden Home and the motor vehicle referred to in the 2007 will were now bequeathed to “the Jordana-Beth Trust NO IT 1190/00.”
- [4] Thereafter deceased allegedly executed a further three wills. These were executed on the following dates, namely, 2 August 2011 (POC4/Will 3); 10 February 2012 (POC3/Will2); and 25 March 2012 (POC2/Will 1) respectively. The Jordana-Beth Trust was not named as a beneficiary in any of these three subsequent wills. Instead, in each of these three wills, the Kalinka Garden Home was bequeathed to the second respondent herein, Mr. Dirk Stoffberg, he being the deceased’s stepson. In the last will, namely POC2/Will 1, the motor vehicle was bequeathed to the deceased’s “living in nurse.”
- [5] The Master of the High Court accepted and registered, as the deceased’s final will, the will which was executed on 25 March 2012, namely POC2/Will 1.
- [6] In their particulars of claim the plaintiffs pleaded, inter alia, as follows:

“35. The Plaintiff’s have caused forensic document examinations to be conducted on all of the aforementioned Wills.

36. Pursuant to an expert report provided to the Plaintiffs, it is concluded that, on a preponderance of probabilities, Will 1, Will 2 and Will 3 (“the Wills”) should be set and declared invalid as:

36.1 The deceased did not sign the Wills in the same session as the witnesses as is required under the provisions of the Wills Act 7 of 1953 (“the Wills Act” and/or;

36.2 The deceased did not sign every page of the Wills in succession and in the same session as is required under the provisions of the Wills Act and/or;

36.3 The Wills are tainted by an act/acts of fraud or forgery, which renders the Wills invalid.

37. By reason of the foregoing, coupled with other surrounding circumstances which will be brought to light at the hearing of this matter, the Plaintiffs seek an Order declaring the Wills to be invalid.”

- [7] On 15 September 2015 the second defendant filed a notice in terms of Rule 23(1) giving notice of his intention to except to plaintiffs’ particulars of claim on the basis that they were vague and embarrassing in three respects, namely:

“(a) That the expert report referred to was not annexed thereto nor were the material facts relied upon disclosed;

- (b) That the assertion that the deceased did not sign the Wills “in the same session as the witnesses” and that he “did not sign every page of the Wills in succession in the same session” did not disclose a basis to impugn the Wills for not having been executed in accordance with section 2 of the Wills Act no 7 of 1953;
- (c) That no facts were alleged to found the allegation that the Wills were “tainted by an act/acts of fraud or forgery” and
- (d) That the reference to “other surrounding circumstances which will be brought to light at the hearing” disclosed no facts to which the defendant could respond.”

- [8] In response hereto the plaintiffs filed a Notice of Intention to Amend their Pleading, by the deletion of paragraphs 35 and 36 and their substitution with the following:

“35. The Plaintiffs contend that Will 1, Will 2 and Will 3 (“the Wills”) should be set aside and declared invalid as:

35.1 the deceased did not sign the Wills in the presence of two witnesses at the same time, as is required under the provisions of Section 2(a)(ii) of the Wills Act of 1953; and/or

35.2 the deceased did not sign every page of the Wills in compliance with Section 2(a)(iv) as read with 2(a)(ii) of the Wills Act; and/or

35.3 the Wills are tainted by an act/acts of fraud or forgery which render the Wills invalid.

36. By reason of the foregoing the Plaintiffs seek an Order declaring the Wills to be invalid.”

[9] The second defendant has objected to the proposed amendment on the basis that such amendment would not cure the particulars of claim from being excipiable.

[10] It is trite that an amendment should be refused if it is clear that the amended pleading will be excipiable. In this regard Rule 18(4) provides that every pleading “shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim ... with sufficient

particularity to enable the opposite party to reply thereto.” In other words, a sufficient factual basis must be alleged so as to enable the defendant to know what case he has to meet and that those facts sustain a cause of action.

[11] Turning to the proposed amendment there can be no objection to the averments contained in paragraph 35.1. Section 2(a)(ii) provides that the testator must sign the will in the presence of two or more witnesses present at the same time. The averment that this did not occur and that the formalities prescribed by the Act were not complied with is, on its own, unexcipiable, nor did Mr. de la Harpe who appeared for second defendant submit otherwise.

[12] He submitted, however, that the proposed amendments contained in paragraphs 35.2 and 35.3 were on a very different footing. He submitted that the averment contained in paragraph 35.2, to the effect that the deceased did not sign every page of the Wills in question is, ex facie the copies of the Wills, contradictory to what appears on the Wills themselves, all of which bear a signature on each page purporting to be that of the deceased.

[13] Mr. Cole submitted, however, that such a reading of the paragraph ignored the references therein to section 2(a)(iv) and (2)(a)(ii) of the Act which, so he submitted, made it clear that the averment in paragraph 35.2 was to the effect that the deceased had not signed every page of the Wills in the presence of two witnesses at the same time and was not to the effect that deceased had failed to sign any particular page.

[14] In my view, Mr. Cole’s submission in this regard is correct. Although at first blush the reference to the statement that the deceased “did not sign every page of the Wills” appears to convey the meaning attributed to the paragraph by Mr. de la Harpe, the further references to the particular sections of the Act make it clear, in my view, that such meaning is not intended.

[15] In my view therefore paragraph 35.2 contains a sufficiently clear exposition of the plaintiff’s case to enable second defendant to plead thereto.

[16] Mr. de la Harpe’s submissions with regard to the contents of paragraph 35.3 are, in my view, on a sounder footing.

- [17] The averment contained in paragraph 35.3 does no more, in my view, than to state a conclusion of law. The bald allegation of fraud or forgery is entirely unsupported by any factual averments such as would sustain this conclusion of law. I agree with Mr. de la Harpe that in the circumstances the second defendant is left to speculate as to the nature of the alleged fraud or forgery. It is not apparent whether it is alleged that the fraud or forgery pertains to the purported signatures of the deceased on any of the Wills or to the purported signatures of the witnesses to the deceased's signatures or both or to any other possible instance of fraud. In this regard Mr. Cole submitted that the allegation of fraud related to the fact that the deceased had not signed the Wills in the presence of two witnesses at the same time as set out in paragraphs 35.1 and 35.2. It may be that this is what the pleader intended to convey by the amendment but, that is not what the paragraphs say. The fact is that the second defendant would be in the dark as to the nature of the alleged fraud or forgery. It was incumbent on the plaintiff to plead such facts in relation to the fraud or forgery as would support that conclusion of law. In the circumstances the proposed amendment contained in paragraph 35.3 is, in my view, vague and embarrassing.
- [18] I am satisfied therefore that the proposed amendment contained in paragraph 35.3 would render the particulars of claim excipiable and that it must therefore be refused. The proposed amendments contained in paragraphs 35.1 and 35.2 must, however, be allowed.
- [19] This then leaves me with the issue of costs. In my view, in exercising my discretion it would be appropriate and fair to the parties that each bear their own costs, each having achieved substantial success.
- [20] Accordingly the following order will issue:
1. The application to amend the Particulars of Claim in the respects set out in paragraphs 35.1, 35.2 and 36 is allowed.
 2. The application to amend the Particulars of Claim in the respect set out in paragraph 35.3 is dismissed.
 3. Each party shall bear their own costs, including such costs as were previously reserved.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiffs: Adv. Cole

Instructed by: Messrs. Joubert Galpin Searle Attorney, Mr. Huxtable

Appearing on behalf of Second Defendant: Adv. de la Harpe

Instructed by: Whitesides Attorneys, Mr. Nunn

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