

SOUTH AFRICA / JUDGMENT

I.L.L v L.V.H (3700/2023) [2024]

ZAECQBHC 52 (3 September 2024)

[2024] ZAECQBHC 52

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Ellis

CASE / FILE NUMBER

3700/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GQEBERHA)

NOT

REPORTABLE

Case No: 3700/2023

In the matter between:

I[...]
L[...]
L[...]
Applicant
(IDENTITY NUMBER: 4[...])
and
L[...]
V[...]
H[...]
Respondent
(IDENTITY NUMBER: 6[...])

JUDGMENT

ELLIS AJ:

- [1] This is an application for payment of the sum of R4 700 000 together with interest thereon and costs. The applicant's claim is alleged to arise from a *donatio mortis causa*.
- [2] The factual matrix of the matter may be described as follows. The applicant and respondent are mother and daughter, who were reunited late in the applicant's life after many years being apart without any contact. The applicant moved to the United Kingdom around 2009 and returned to South Africa during November 2019, after separating from her husband. On arrival in South Africa the applicant stayed with the respondent and her family. The applicant instituted an action for divorce against her husband around January 2020, but before the divorce action could be finalised the applicant's husband died. Upon his death the applicant became the sole heir in her late husband's estate, which comprised of around R10 000 000 (more than £770 000). Unfortunately, the applicant's windfall then invited discord into what could have been a harmonious relationship between mother and daughter in the applicant's golden years.
- [3] It is not necessary to traverse the litigation history between the parties, suffice to state that it culminated in the applicant launching a so-called *Mareva* injunction application during July 2022, against inter alia the respondent, resulting in an order directing the return of certain funds to the applicant. It is clear that the relationship between mother and daughter had soured by then.
- [4] Approximately a year before the *Mareva* application, and during July 2021, while the relationship was still intact – no evidence to the contrary was placed before me – the applicant instructed the solicitor duly appointed to administer the winding up of the estate of the applicant's late husband, to release the sum of R4 700 000 in order to purchase the immovable property situate at 2[...] S[...] Road, B[...], Gqeberha (I will refer to this as "the property"). On 6 August 2021 the sum of R4 700 000 was transferred by the solicitors into the applicant's bank account. On 7 August 2021 the same amount was transferred by the applicant into the bank account of the nominated conveyancers as purchase price in respect of the property. The property was duly transferred and registered in the name of Sproink (Pty) Limited ("Sproink") of which the respondent and her husband are the sole directors and shareholders.
- [5] The applicant's version is that the sum of R4 700 000 was intended as an inheritance for the respondent and it was paid to the respondent. As such the applicant alleges that the donation is the monetary sum of R4 700 000 and not the property, which the respondent had purchased through the vehicle of Sproink.

Importantly, and the main contention why the applicant alleges the donation is a *donatio mortis causa*, is the fact that on both versions, supported by evidence adduced in the Mareva application, the sum of R4 700 000 was intended to be part of the respondent's inheritance. If the donation was given as an inheritance, the applicant alleges that it must have been given in contemplation of death and axiomatically must be a *donatio mortis causa*. Insofar as the *donatio mortis causa* was not reduced to writing and signed by the applicant, she alleges that the donation is invalid and unenforceable and she is entitled to repayment, alternatively to the extent that it may have constituted a valid

donatio mortis causa, she has revoked the donation and thus she is entitled to payment.

[6] The respondent's version is that after her mother received the funds from her late husband's estate, she expressed to the respondent that the money would be a means to improve all their lives

and her mother wished to purchase a property. This property was to be a gift to the respondent and her husband as donation and serve as an early inheritance.

[7] As main defence, the respondent alleges that although the property was viewed as an early inheritance, this was not done on the basis of a *donatio mortis causa* but as a gift – an *inter vivos* donation. In support thereof, Ms Morris, for the respondent, argued that the donation took place during the applicant's lifetime

and had vested (albeit in Sproink) as opposed to a *donatio mortis causa*, where the donor retains ownership of the item, and the vesting of the donation only takes effect on the death of the donor. The respondent also raised non-joinder as she alleges that her husband and Sproink ought to have been joined to the proceedings, as

she had not received the money, and the money was utilised to purchase the property registered to Sproink.

[8] A *donatio mortis causa* is one of the valid forms of the *pactum successorium*, which, simply put, is an agreement regulating the succession of the estate of a person upon their death. The *donatio mortis causa* is made in contemplation of the death of the donor, and one of the special features of the *donatio mortis causa* is that it may be revoked by the donor at any time prior to his/her death.

[9] In *Ex Parte Steyl* [1] De Beer JP referred to the *donatio mortis causa* as follows:

"... according to Maasdorp, Institutes (7th Ed Volume 1 pg 248), (a donatio mortis causa) may be made in one or other of these three ways:

(1) By the donor giving something in mere general contemplation of death, but without any fear of an early death or any imminent danger, upon the understanding that it is not to become the property of the donee until the donor's death; or

- (2) When the gift is made in fear of death from a present illness or from a particular imminent danger, with the undertaking that it is not to become the property of the donee until the death of the donor from the particular illness or danger; or
- (3) Where the donation is made in special fear of death, but on the understanding that the dominium is to pass to the donee at once, but that the property is to be returned if the donor recovers or escapes from the particular illness or danger.”

[10] According to Corbett CJ in *McAlpine v McAlpine N.O. and Another*[2] the most appropriate test for determining whether or not a contract amounts to a pactum successorium is the vesting test, applied by asking whether the promise of disposing of an asset in favour of another causes the right thereto

to vest in the promisee only upon or after the death of the promisor (which points to a pactum successorium); or whether vesting takes place prior to the death of the promisor, for instance at the date of the transaction giving rise to the promise (in which case it cannot be a pactum successorium).

[11] If there is doubt in a particular case as to the nature of a donation, the presumption is in favour of a donatio inter vivos as opposed to a donatio mortis causa. (See Voet 39 6 2; Van der Merwe and Rowland 1980 588; and *Jordaan v De Villiers* 1991 (4) SA 396 (C)).

[12] It is settled that our law requires a donatio mortis causa to be executed in accordance with the statutory formalities which apply to the execution of a will[3]. It is common cause that the donation by the applicant was not executed in this manner. I accept that as far as compliance with the formality requirements is concerned, it is possible that a donatio mortis causa that does not comply with testamentary formalities can be condoned by the court. Mr Pye on behalf of the applicant argued that despite the fact that no written donatio mortis causa complying with the testamentary formalities was executed, the intention was for the donation to be a donatio mortis causa (as it was given as inheritance) but due to non-compliance with the formalities the donatio is invalid and unenforceable. As alternative to that proposition he argued that a donatio mortis causa may be revoked at any time, and to the extent that the donatio was valid, the applicant is entitled to revoke the donatio at any time. On both scenarios, the applicant alleges she is entitled to payment of the sum donated. This proposition seems contradictory

to me as the applicant cannot have it both ways. If she accepts that there was no valid donatio mortis causa, then her cause of action lies elsewhere.

[13] The cash sum of R4 700 000 was never paid to or received by the respondent even on the applicant's own version. The funds were transferred into the nominated conveyancer's account and the applicant knew that the property would be purchased with the R4 700 000. The parties are in agreement that the donation was intended as early inheritance, but I agree with Ms Morris that the donation had vested upon the transfer of the immovable property. The fact that a donation is intended as early inheritance does not preclude such a

donation from being one inter vivos. It is rather the question of when the donor intended the donation to vest that is the determining factor. There are no allegations by the applicant that the donation (cash sum or otherwise) would only vest in the respondent upon the applicant's death, to the contrary the applicant says that the respondent already received the R4 700 000 as inheritance. Whether or not the applicant had knowledge of the entity in which the property was purchased has no bearing, as even on her own version she accepts that she paid R4 700 000 to purchase the property for the benefit of the respondent. This is not alleged to have been contingent on the happening of any other event, so there is no evidence that the vesting of the donation was to be postponed until the death of the applicant. The presumption that the donation was made inter vivos must accordingly prevail.

[14] The donation therefore did not constitute a donatio mortis causa and the application for payment cannot succeed on that basis. It would thus be superfluous to deal with the issue of non-joinder.

[15] In the circumstances I make the following order:

1. The application is dismissed with costs.

L ELLIS

ACTING JUDGE OF THE HIGH COURT

Date heard:

16 May 2024

Judgment

delivered:

3 September 2024

Appearances:

For the applicant:

Adv Pye SC

Cuthbertson & Palmeira Attorneys Inc.

C/o Jacques Du Preez Attorneys

For the respondent:

Adv Morris

Quinton Van der Berg Attorneys Inc.

[1] Ex parte Steyl 1951 (1) SA 275 (O)

[2]

[1996] ZASCA 127; 1997

(1) SA 736 (A) at 750 C – E.

[3] See section 2 of the Wills Act, 7 of 1953

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