

SOUTH AFRICA / JUDGMENT

Jagers v Pienaar and Others (4108/2023) [2025] ZAECKMKHC 3 (23 January 2025)

[2025] ZAECKMKHC 3

COURT

Eastern Cape High Court, Makhanda

BEFORE

D.T. Young, A. Govindjee

CASE / FILE NUMBER

4108/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MAKHANDA

CASE

NO.: 4108/2023

In

the matter between:

GRAYSON
MARCELINO STEFINO JAGERS
Applicant
and
IRENE
MABEL PIENAAR
1st
Respondent
IRENE
MABEL PIENAAR
(NOMINE
OFFICIO)
2nd
Respondent
GRAYSON

DELWYN PIENAAR
3rd
Respondent
T[...]
T[...] H[...]
(Assisted
by her mother CHAVRILL HILL)
4th
Respondent
C[...]
P[...]
(Assisted
by his mother MICHEALA PRINCE)
5th
Respondent
D[...]
T[...]
(Assisted
by his mother DELISHKA TAAI)
6th
Respondent
D[...]
T[...]
(Assisted
by her mother DELISHKA TAAI)
7th
Respondent
D[...]
T[...]
(Assisted
by her mother DELISHKA TAAI)
8th
Respondent
E[...]
A[...] M[...]
(Assisted
by her mother ALADIA MOONIE)
9th
Respondent
M[...]
E[...]
(Assisted
by his mother MELISSA ESTREE)
10th
Respondent
T[...]
V[...]
(Assisted
by her mother MACHè JAGERS)
11th
Respondent

T[...]
M[...]
(Assisted
by her mother MACHè JAGERS)
12th
Respondent
M[...]
J[...]
(Assisted
by her mother MACHè JAGERS)
13th
Respondent
G[...]
J[...]
(Assisted
by his mother MACHè JAGERS)
14th
Respondent
G[...]
J[...]
(Assisted
by her mother MACHè JAGERS)
15th
Respondent
RHONWYN
RICARDO PIENAAR
16th
Respondent
K[...]
V[...]
(Assisted
by his mother BRITTANY VAN WYK)
17th
Respondent
TROSKLYNN
BERNICE PIENAAR
18th
Respondent
O[...]
B[...]
(Assisted
by her mother BULELWA BOOI)
19th
Respondent
ROMEO
OERSEN
20th
Respondent
D[...]
D[...]
(Assisted

by his mother MONNET VAN WYK)
21st
Respondent
W[...]
S[...]
(Assisted
by his mother ANNELIZE SMITH)
22nd
Respondent
R[...]
S[...]
(Assisted
by her mother ANNELIZE SMITH)
23rd
Respondent
CLINTON
PIENAAR
24th
Respondent
T[...]
W[...]
(Assisted
by her mother FELICITY WEITZ)
25th
Respondent
C[...]
S[...]
(Assisted
by her mother TITTYANA SAULS)
26th
Respondent
O[...]
P[...]
(Assisted
by her father CLINTON PIENAAR)
27th
Respondent
L[...]
H[...]
(Assisted
by her father CLINTON PIENAAR)
28th
Respondent
THE
MASTER OF THE HIGH COURT, MAKHANDA
29th
Respondent

JUDGMENT

YOUNG AJ

Introduction

1. The applicant is the son of the late Mr Troskie Pienaar (“the deceased”) who passed away on 22 August 2023. The applicant seeks an order that the document signed on 27 July 2020 be declared to be the Last Will and Testament (“the Will”) of the deceased, and that the Master of the High Court (“Twenty-Ninth

Respondent”) be directed to accept same. It is common cause that the Will does not comply with the formalities as set out in section 2(1)(a)(ii) of the Wills Act 7 of 1953 (“the Act”). The application is accordingly, premised on section 2(3) of the Act.

2. Irene Mabel Pienaar, the widow of the deceased is cited as the first respondent in her personal capacity, and as the second respondent in her representative capacity as the appointed Executrix of the deceased estate. The second to twenty-Eighth Respondents comprise children and grandchildren of the deceased. As indicated, the Master of the High Court is cited as the twenty-ninth respondent. The Master of the High Court does not oppose the application, and abides the decision of the court.

Background

3. Although the founding papers, together with fifty-six annexures thereto, ran to some one-hundred and seventy-six pages, the facts relevant to the issues to be determined, are largely common cause.
4. On 27 July 2020, the deceased and the first respondent signed a document styled “Will Questionnaire”. The document (hereinafter referred to as “the Will”) was completed in the deceased’s own handwriting.
5. Sometime during the period September to November 2020, the deceased handed a sealed brown envelope to the applicant. The deceased informed the applicant that the brown envelope included his Will, which had been signed by the first respondent. The applicant was instructed by the deceased to secure the Will in his safe at his residence. The applicant was furthermore instructed by the deceased that upon his passing, the applicant ought immediately to deliver the Will to Mr Matthew Anthony Yazbek (“Yazbek”) of Stirk Yazbek Attorneys. The applicant complied, and stored the Will in his safe where it remained unopened.

6. On 23 August 2023, and after the passing of the deceased, the applicant attended at the offices of Stirk Yazbek Attorneys in order to deliver the Will as instructed by deceased. The brown envelope containing the Will was opened by Ms Louise Kroon ("Kroon"), a legal secretary in the employ of Stirk Yazbek Attorneys, in the presence of the applicant and another employee of Stirk Yazbek Attorneys, Mrs Mailing Marshall ("Marshall"). The Will was thereafter handed to Yazbek.
7. At this stage, parallel processes followed concerning the reporting of the estate and the appointment of an Executor. Those being, the steps taken by Yazbek, as the nominated Executor in terms of the Will. And, those taken by Zibula Krwempe Attorneys on behalf of the first respondent. The contention by the first respondent, at the relevant time, was that she had been unaware of the existence of the Will. After being furnished with a copy of the Will, the first respondent disputed that it constituted a lawful and valid Will. Unsurprisingly, numerous items of contentious correspondence were exchanged between the respective legal representatives. Their content however, is irrelevant for present purposes.
8. Ultimately and on 31 October 2023, the twenty-ninth respondent appointed the first respondent as the Executrix of the deceased estate. The twenty-ninth respondent, in turn, informed Stirk Yazbek Attorneys on 1 November 2023 that the Will had indeed been registered, but that it was rejected for lack of compliance with the provisions of section 2(1) of the Act. All of which, culminated in the launch of these proceedings on 17 November 2023.

The application to strike out

9. On 21 February 2024, the respondents' attorney served and filed an application in terms of Uniform Rule 6(15), wherein it is sought that various paragraphs in the applicant's founding and replying affidavits, be struck out. More specifically, and in respect of the founding affidavit, that paragraphs 43.6, 43.10, 43.11, 45, 50, 51 and 60.2 be struck out on the basis that the allegations contained in these paragraphs are scandalous, vexatious and irrelevant. In respect of the replying affidavit, that paragraphs 18.4 and 27.2 be struck out on the aforementioned basis and that paragraphs 23.3 and 24.2 be struck out, as constituting new evidence.
10. The application to strike out is opposed. The applicant contends that it is fatally defective. I am constrained to agree, insofar as it concerns the alleged scandalous, vexatious and irrelevant matter. Uniform Rule 6(15) expressly provides that a court may not grant an application to strike out unless it is satisfied that the applicant will be prejudiced if the application is not granted. In this instance, no prejudice was advanced in the answering affidavit or the application itself. The prejudice requirement found expression in *Beinash v Wixley*,^[1] where the court held:

“Even if any part of the averments were indeed scandalous, vexatious or irrelevant, it does not follow that the application to strike out should succeed. I am not persuaded that Beinash suffered any prejudice if this allegation was not struck out. No such prejudice

was relied upon in argument.”

11. The respondents’ complaints concerning the alleged new evidence in paragraphs 23.3 and 24.2 of the replying affidavit, are on a different footing. The applicant alleged for the first time in paragraph 23.3, that the first respondent had met with Marshall and that the first respondent had informed her that she recalled signing a document which constituted a Will. Similarly, the allegation in paragraph 24.2 to the effect that the first respondent possessed an intense dislike for the applicant and the eighteenth respondent, constituted new evidence which ought to have been canvassed in the applicant’s founding affidavit. No explanation has been tendered by the applicant for these omissions. The resultant prejudice to the respondents is obvious. The respondents could not respond thereto. It has consistently been held that new matter ought not to be raised in replying affidavits. In the oft-quoted dictum in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)*,^[2] the court restated this general principle:

“It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits or the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter therein which should have been in the founding affidavits to be struck out.”

12. In the result, I’m of the view that paragraphs 23.3 and 24.2 of the replying affidavit are liable to be struck out. The application to strike out accordingly succeeds on this limited basis.

The points in limine

13. The first respondent raised as a point in limine, the non-compliance of the Will with the provisions of section 2(1)(a)(i) – (iv) of the Act. Firstly, the purported point in limine concerns the merits. It is incapable, as a stand-alone technical legal defence, to warrant the dismissal of this application. Secondly, it is in any event no defence to an application in terms of section 2(3) of the Act, which seeks condonation for the non-compliance with the requirements for the execution of a Will. Accordingly, the first respondent’s point in limine is without merit, and must fail.
14. The first respondent further called in aid the doctrine of ‘unclean hands’, under the rubric of this court’s inherent jurisdiction to prevent an abuse of its process. This defence was said to be premised on the recalcitrant and illegal conduct of the applicant. In this regard, the first respondent placed reliance on the content of the application to strike out, as a means of supporting the defence. I do not agree for the reasons which follow.

15. The doctrine of unclean hands concerns the honesty of a party's conduct. It holds that that where a party seeks to advance a claim that was obtained dishonestly or mala fide, that party should be non-suited, and precluded from persisting and enforcing such a claim.[3] It is not enough to disentitle a party to relief as a result of an illegality: such an illegality must have taken the form of fraud or, at the very least, dishonesty.[4] In *Maughan and Another v Zuma*, [5] the court explained as follows:

"95. Our courts have also found an abuse of process to exist where a litigant comes to court with 'unclean hands', and have dismissed a litigant's claim. Such power is sparingly exercised, as it prevents a litigant from having their day in court, which right is constitutionally entrenched in section 34 of the Constitution. The Constitutional Court has endorsed the approach of dismissing a claim on the grounds of abuse 'because the litigant who would bring it is disqualified from doing so by reason of their abuse'."

16. The allegations upon which the first respondent relies for this defence, do not begin to meet the stringent requirements for the exercise of the court's discretion to non-suit the applicant. In addition, the first respondent's various concessions point instead, to a bona fide application. Accordingly, the first respondent's second point in limine is dismissed.

The merits

17. As already addressed above, this court is enjoined in terms of section 2(3) of the Act to direct the Master to accept the document in issue as a Will once certain requirements are satisfied. Firstly, the document must have been drafted or executed by a person who has subsequently died. Secondly, the document must have been intended by the deceased to have been his or her will.[6] By 'drafted or executed' is meant that the document must have been created by the deceased personally.[7] On the established facts in this case, this requirement is not in issue. The first respondent accepts that the Will was both written

and completed by the deceased personally. It is worth mention also, that the first respondent does not seriously challenge the veracity of the content of the Will.

18. The crisp issue for determination then, is whether the deceased intended the document to constitute his Last Will and Testament.
19. It is the applicant's case that the deceased intended, through the completion of the Will, for his children, grandchildren and the first respondent to be beneficiaries in his estate. The applicant identified the children and grandchildren in paragraphs 43.3 to 43.11 of his founding affidavit. This, in order to explain the reference to 'above kids', which appears under the heading 'Bequests' in paragraph 5 of the Will. This aspect is reflected as follows in the Will:

"5. Bequests

Please explain to whom your assets must devolve after your passing:

- (a) Member dying first

To my wife and above kids.”(own emphasis).

20. The first respondent does not dispute the named beneficiaries in paragraph 4 of the Will comprising: Grayson Delwyn Pienaar, G[...] J[...], Rhonwyn Ricardo Pienaar, Trosklynn Bernice Pienaar, O[...] B[...] and the seven grandchildren who were to be added to his ‘testament’. I will return to this aspect below.
21. The applicant further contends that the deceased intended for Yazbek, to be appointed as the Executor. This is not disputed by the first respondent. The nomination is reflected in paragraph 7 of the Will:

“7. *Executors:*

Please provide the Name, Surname and Address of a Friend or Family member who will enforce your Will. Please think carefully, and choose someone who is honest and reliable.

Lawyer Matthew Yazbek, 18 Vincent Road, Vincent.”(own emphasis).

22. The Will is signed on the final page, by both the deceased and the first respondent. The first respondent confirms that to be the signature of the deceased. She confirms also that the Will bears her signature. Although not relevant, the first respondent instead contends that she was presented with a blank document to sign and that she did not consider it to be the last Will and Testament of the deceased when she appended her signature thereto.
23. As regards the extrinsic evidence in relation to the intention of the deceased, the applicant asserts that it is not open to dispute that the deceased prepared the document; sealed it in an envelope; required the applicant to keep it in safe custody, and that the applicant delivered it to the deceased’s nominated attorney on his passing. This conduct, the applicant argues, permits of no other logical conclusion, save that the deceased intended it to be his Last Will and Testament. In support of this contention, the Applicant references its content. The Will reflects carefully identified multiple heirs of the deceased’s estate, and contains the identity of the nominated Executor, attorney Yazbek. This court was referred to *Horn v Horn*[8] and *Logue v The Master*[9] wherein the respective courts held that in instances where all the elements as required by section 2(3) of the Act were met, the court has no discretion but to recognise the document as a Will.
24. The first respondent, in turn, asserts that her opposition is premised on ‘legal points and factual issues which the applicant has omitted’ and which are said to be, ‘at variance with the granting of the relief sought.’ I have already addressed the first respondent's preliminary points, which I found to be without merit. I presume that the 'factual issues' to which the first respondent refers, relate to the anomalies and defects apparent from the Will. The Will is certainly not a model of clarity.

24.1 The heading of the document identifies it as being a 'Will Questionnaire'. This is catenated by the following opening remark, "We only really think and talk about death after it's too late. Well done on being proactive and not leaving matters to chance. Soon you will have some peace of mind knowing that you and your loved ones are protected in the unfortunate event that you pass

away. Please take some time and think carefully when answering the questions below, which will help us to draft your last will and testament." A series of questions follow thereafter.

24.2 Under the sub-heading 'Children', and after identifying the children in the space provided, a manuscript insert reads 'NB Want to add 7 grandchildren from two of my sons that I did not add to my testament.' The meaning of this insert is unknown. It lends itself to conflicting interpretations. By means of example, it could be interpreted as an intention to amend the Will which at that stage was yet to be completed. It could also be interpreted as an amendment of the disputed Will.

24.3 A final typed note is reflected on the last page in the following terms, 'Please note: Your Pension Fund and Provident Fund does not form part of your Will. Please contact your Insurance Broker to discuss your Beneficiary Nominations.' This note is equally ambiguous. It is unclear whether this note refers to the disputed Will, or a Will yet to be concluded on behalf of the deceased.

25. I am mindful of these ambiguities, but the real question to be addressed is not what the document is or means, but whether the deceased intended it to be his Will. This enquiry entails an examination of the document itself, and also of the document in the context of the surrounding circumstances.[10]
26. Leaving aside the defects apparent from the Will, the material terms of the Will state very clearly the decisions made by the deceased. The deceased decided that upon his passing, his assets ought to devolve to the first respondent and to their children. And against the event that the first respondent should first pass, to his children and grandchildren. The deceased decided also that Grayson Marcelino Jagers be appointed as the Guardian of his minor children. And finally, that Yazbek be appointed as the Executor of his estate. The veracity of these decisions are unchallenged.
27. Turning to the surrounding circumstances, they are uncomplicated. After the conclusion of the Will, the deceased sealed it in a brown envelope and instructed the applicant to secure and store it in his safe. The deceased instructed that upon his passing, the applicant ought immediately to deliver the envelope to attorney Yazbek. This, the applicant did. The Will was stored in the applicant's safe where it remained unopened until the passing of the deceased. Whereafter, the applicant delivered the envelope to Stirk Yazbek Attorneys. It was opened by Kroon, in the presence of Marshall, and delivered to

attorney Yazbek.

28. The unequivocal decisions made by the deceased and recorded in the Will, considered against the surrounding circumstances which followed immediately after its conclusion, leaves an inescapable impression that the deceased intended the document to be his Will. The facts which confronted the Supreme Court of Appeal in *Van Wetten v Bosch supra*,^[11] are on all fours with those which confronted this court:

"[26] These are not the words of a person giving instructions for the drafting of his will. They are the words of a person who has made a decision to which immediate effect is to be given. They are his will. The very words used by the deceased are thus also decisive of the question before the Court: the deceased intended the document to be his will. The surrounding circumstances, and in particular, as I have said, the handing over of the documents in sealed envelopes to Van der Westhuizen, to be opened only should something happen to him, lead to the same conclusion."

29. Furthermore, the most probable inference arising from the conflicting interpretations alluded to above, is one that supports the reading of the questionnaire as the deceased's intended Will. I am accordingly satisfied, that the applicant has established and met all the requirements in terms of section 2(3) of the Act, and in the circumstances of this case, this court has no discretion but to recognise the document as the Last Will and Testament of the deceased.
30. Turning to the issue of costs, no reasons have been advanced to deviate from the general rule that costs ought to follow the result. Having said that, the opposition to the application was not unreasonable. A fair result would entail that the costs be paid by the estate late of the deceased.

ORDER

31. In the result, I make the following order:

31.1 The application to strike out paragraphs 23.3 and 24.2 of the replying affidavit is granted with costs.

31.2 The First Respondent's points in limine are dismissed.

31.3 The failure of Mr Troskie Pienaar ("the deceased") to comply with the formalities set out in section 2(1)(a)(i) – (iv) of the Wills Act is condoned.

31.4 The Will signed on 27 July 2020, by the deceased, (Identity Number 6[...]), which was registered with the Twenty-Ninth Respondent on 29 September 2023, is declared to be the Last Will and Testament of the deceased.

31.5 The Twenty-Ninth Respondent is directed to accept annexure "GJ2" as the Last Will and Testament of the deceased, for the purposes of the Administration of Estates Act, No. 66 of 1965.

31.6 The Twenty- Ninth Respondent is directed to remove the Second Respondent, as the executrix to the deceased's estate; and

31.7 The Twenty-Ninth Respondent is directed to appoint Mr Matthew Anthony Yazbek, as the executor to the deceased's estate as specified in the Will.

31.8 The First Respondent (or her appointed Agent) is directed to deliver to the nominated Executor of estate late Troskie Pienaar (namely Mr Matthew Yazbek) all estate files, documents and accounts within seven days of the date of the appointment of Mr Yazbek as Executor.

31.9 The First Respondent (or her appointed Agent) must account fully to the Executor, Mr Yazbek, in respect of all financial and other transactions undertaken in respect of estate the deceased, from the date of her appointment to the date of handover of the estate documentation to Mr Yazbek.

31.10 The costs of this application are to be borne by the estate of the late Mr Troskie Pienaar, on Scale C.

D.T. YOUNG

ACTING JUDGE OF THE HIGH COURT

I agree.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 19 September 2024

Delivered: 23 January 2025

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[1]

[1997] ZASCA 32; 1997 (3) SA 721 SCA at 733J to 734B.

[2] 1978

(1) SA 173 (W) at 177

[3] Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH 2023

(4) BCLR 461 (CC).

[4] Cambridge Plan AG and Another v Moore and Others 1987

(4) SA 821 (D) at 842F-H citing Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd and Others 1976 (4) SA 218 (T) at 221H.

[5] 2023

(5) SA 467 (KZP) at para 95.

[6] Van Wetten v Bosch 2004 (1) SA 348 SCA at para 14.

[7] Bekker v Naude en andere 2003

(5) SA 173 (SCA).

[8] 1995

(1) SA 48 (W)

[9] 1995

(1) SA 199 (N)

[10] Van Wetten supra fn 6 above at para 16.

[11] Id at para 26.

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