

SOUTH AFRICA / JUDGMENT

Jeffery and Others v Glur (20669/02)

[2003] ZAGPHC 11 (9 October 2003)

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COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

20669/02

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 20669/02

DATE:2003-10-09

In the matter between

JEFFERY, JULIA MARGARET & OTHERS..... Applicant

and

GLUR, CHRISTOPHER ROBERTS & Others..... Respondent

JUDGMENT

WILLIS J: This is an application in terms of which the applicants seek the following relief:

1. That the will dated 24 June 1999 of the late Otto Caesar Glur ("the Will") be rectified as follows:

- 1.1 By the correction of the spelling of the surname "Gllur" in the heading of the will to "Glur";

- 1.2 By correcting the spelling error in clause 3.1 of the will by replacing the word "bequeth" with the word "bequeath";

1.3 By the insertion of a comma after the word "heirs" where it appears in the first line of clause 6 of the will and the insertion after such comma of the words "children, grandchildren", so that once amended the aforesaid clause 6 of the will reads as follows: "6 RELEASE OF HEIRS

I further direct and instruct my executors to release and absolve my heirs, children, grandchildren and beneficiaries from any liability

to me or my estate at the date of my death, and hereby abandon any claim for payment of such sum owing."

2. That no order be made in regard to the costs of this application save in the event of opposition, in which event the parties/IES

opposing this application be ordered to pay the costs, including all costs of opposition.

3. Granting the applicant further and/or alternative relief.

The first applicant and the first respondent are the children of Otto Caesar Glur ("the Testator"). They are half-brother and sister in that they share the same father but have different mothers. The second to fifth applicants are the children of the first applicant and are the testator's grandchildren. During the testator's lifetime he transferred shares in the company to the first respondent as well as each of the five applicants. The effect thereof was that the first respondent as well as each of the five applicants became indebted to the testator for the value of the shares transferred to them. I shall refer to this transaction of the loans to the applicants and the first respondent as "the loans" ...

In terms of the testator's will, clause 3 provides that the testator bequeaths the residue of his estate to the first respondent. Clause 6 has the effect of releasing the first respondent from repaying his loan but not the first to the fifth applicants. At the time of signing the will it was the testator's intention that upon his death, the first respondent as well as each of the five applicants would be absolved from repaying the loan. The applicants accordingly seek an order rectifying clause 6 of the will to reflect the testator's intention at the time that it was signed by him more particularly, to insert the words "children, grandchildren" in clause 6 of the will.

It is not in dispute that prior to the signing of the will it was the testator's intention that, upon his death, the shares in the company would be transferred to the first respondent and each of the five applicants. It is not in dispute that during 1998/1999, the testator accepted advice to the effect that during his lifetime he should transfer the shares to the first respondent and each of the five applicants and that the loans created by the transaction should be extinguished upon his death, in terms of a new will to be signed by him. It is not in dispute that an attorney was instructed to prepare a will to reflect the testator's intention, in accordance with the advice received by the testator, as referred to above. It is not in dispute that a will was prepared on the basis that the shares had already been transferred, which led to the family meeting to facilitate the transfer of the shares.

It is clear that the shares were in fact transferred to the first respondent. It is not in dispute that the will prepared by the

attorney, erroneously did not contain clause 6 in the form intended to be signed, and that as a result thereof the attorney instructed

the second applicant to insert the clause (as rectified) in order to reflect the testator's intention and that in error, the second

applicant omitted the words "children, grandchildren". It is not in dispute that during the course of the family meeting and in the presence of the testator and the first respondent, the testator's intention was explained to and accepted by all present, more particularly that the loans would be extinguished upon the testator's death, in terms of his will.

The first respondent's defence to the allegation is that although the testator was physically present, he was not "mentally present". It is not in dispute that the testator accepted at the meeting that the reference in clause 6 of the will to "heirs and beneficiaries", included the first respondent and each of the five applicants. It is also not without significance that clause 1.3 which reads: "I bequeath the residue of my estate to my son Christopher Glur", technically creates him as the sole heir to his father's estate but on the other hand in paragraph 6 the testator refers to his "heirs". This to my mind is a further indicator that the testator did not intend to release solely his son from the liability in respect of the loans.

The first respondent also contends that the testator was unduly influenced and was not therefore competent to make the will. The onus rests upon the first respondent to prove that the testator was not competent to make the will. See *Thirion v Meester van die*

Hooggeregshof (2002) 1 All SA 346 (T) 355. In support of the contention that the testator was not competent to make the will, the first respondent relies upon "7 examples".

The first respondent on his own version, does not make out a case that the testator was not competent to make the will. The relief sought by him is nothing more than the evaluation of the mental state of the testator which he believes would prove "senile dementia". In any event the first respondent is not suitably qualified to contend that the testator was not competent to make the will. The testator's family doctor states that at the time the will was signed the testator was of sound mind.

It would appear that the real reason why the first respondent has opposed the relief sought is that the effect of the testator's will, if rectified, will be to make him a minority shareholder where he could be outvoted by his half-sisters and her children. It is clear from these papers that there has been a serious family rift. It seems to me that the best way for the parties to resolve that rift and to extricate themselves from a situation which can cause them both considerable pain and anguish would be for the first respondent to agree to sell his shares to the five applicants and for them to agree to buy them at a price determined by an independent valuer.

I made this recommendation to the parties. It appeared to be acceptable to the first respondent, but regrettably was not accepted by the applicants, t nevertheless would prevail upon the applicants seriously to consider entering into such an arrangement as in the long run I can only believe that everyone will benefit and ultimately save themselves a lot of costs. It is not unimaginable that this case will not dispose of the dispute that lingers between the parties. Nevertheless in the absence of an agreement between the parties I am unable to make any such order on the papers before me.

If it is proved that the alleged discrepancy between the expression in the will and the testator's intention was due to a mistake and what the testator really meant to provide in his will, it is competent for the court to rectify a will. See *Will NO v The Master & Others* 1991 (1} SA 206 (C) 2138G-I and it is furthermore competent for a court to rectify a will by the addition or insertion of words, see *Ex parte van der Spuy NO 1 966 (3) SA 1 69 (T) 1 76A-B* and also *Wilt NO v the Master & Others* (supra) at 214A-C.

The first respondent has made a so-called "claim in reconvention". In my view this is not a counter application properly so-called and in any event the relief sought therein relates to precisely the issues upon which I have so strongly recommended the parties should settle.

Accordingly I am satisfied that the applicants are entitled to the relief which they seek and an order is made in terms of prayer 1 of the notice of motion dated 28 October 2002.

The first respondent is to pay the costs of this application.

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Prepared on 11 October 2026 · Esheria