

SOUTH AFRICA / JUDGMENT

Mcunu and Others v Master of the High Court Gauteng Division, Johannesburg and Others (2023/053319) [2024]

ZAGPJHC 1200 (14 November 2024)

[2024] ZAGPJHC 1200

COURT

South Gauteng High Court, Johannesburg

BEFORE

Windell

CASE / FILE NUMBER

2023/053319

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

NO: 2023-053319

(1)

REPORTABLE: YES

/ NO

(2)

OF INTEREST TO OTHER JUDGES: YES

/ NO

(3)

REVISED: YES / NO

In

the matter between:

THANDEKA
THABISILE TRUELOVE MCUNU
First
Applicant
AYANDA
MCUNU
Second
Applicant
SIFISO
NJABULO MCUNU
Third
Applicant
And
MASTER
OF THE HIGH COURT,
GAUTENG
DIVISION, JOHANNESBURG
First
Respondent
RYNHART
KRUGER N.O.
Second
Respondent
LETICIA
MMABATHO MCUNU
Third
Respondent
LUNGILE
MCUNU
Fourth
Respondent
SHANTEL
TSHOLOFELO MCUNU
Fifth
Respondent
THULASIZWE
DAMBUZA
Sixth
Respondent
KHANSILE
MBAU
Seventh
Respondent
IMBALLENHLE
PALESA MCUNU
Eighth
Respondent
MENZILEK
HLOLOHELO MCUNU
Ninth
Respondent

JUDGMENT

WINDELL J

INTRODUCTION

‘Freedom of testation, constitutes a pillar stone of our law of testate succession and is fundamental to the interpretation of Wills.’^[1]

- [1] The will of Menzi Mcunu is the focal point of this case. Nevertheless, the issue is not limited to the distribution of an estate. It is the fundamental essence of familial recognition, the concept of being considered "one's child", and the consequences that such recognition, or its absence, can have on those who are left behind.
- [2] The parties involved must be considered at the outset. The Second and Third Applicants, as well as the Fourth to Ninth Respondents, are all biological children of the testator, Menzi Mcunu (the testator). The Second and Third Applicants were born from the relationship between the testator and Phindile Veronica Mashewula (Phindile) and the Fourth to Ninth Respondents from the relationship between the testator and the Third Respondent, Leticia Mmabatho Mcunu, the surviving spouse of the testator.
- [3] The First Applicant, Thandeka Mcunu (the Applicant), is not the biological child of the testator. This was only uncovered subsequent to the testator's death. For the past four decades, she was raised as his daughter, carried his surname and maintained a close relationship with him until his passing on 20 September 2020.
- [4] The First Respondent is the Master of the High Court, Johannesburg. The Second Respondent is the executor of the testator's estate.
- [5] The application is opposed by the Second and Fourth to Seventh Respondents. The Second Respondent is opposing the application on the basis that he needs to ensure that the distribution is strictly done in accordance with the will of the testator. I accept that he is involved in the application purely to assist the court.

BACKGROUND

FACTS

- [6] The testator was married to the mother of the Applicant, Phindile, – first customarily and later through a civil union in 1993. They divorced in 2001.

- [7] The Applicant was born in 1984, while her brothers, the Second and Third Applicants, were born in 1989 and 1992, respectively. The surname Mcunu is shared by all three offspring. Every one of them was born prior to the testator's civil union with their mother.
- [8] The testator passed away whilst married to the Third Respondent. She is not a beneficiary of the will. The testator died testate, leaving a will that stipulated the distribution of his estate. According to the testator's will, his estate is required to be divided among his children. In clause 4 of the will, he states as follows:
- "I bequeath and direct that my entire Estate, property and effects, which shall include, but not limited to my house situated at plot NO [...] A[...] road Gauteng Province and at number shall develop upon my children, shell filling station D[...] E[...] M[...] Road. tTo be share equal including shoprite u save at the market value prime cure clinic, office park Orlando West." (My emphasis)*
- [9] The Second Respondent was appointed as the executor of the estate following the testator's death. He ordered all the testator's children to undertake DNA testing in order to ascertain the legal heirs of the testator, in accordance with his fiduciary responsibilities. The Applicant, the eldest of the children, was only subsequently informed, much to the surprise and disbelief of all, that she is not the biological child of the testator. When the Second Respondent submitted the First and Final Distribution Account, the Applicant was excluded as a beneficiary on the premise of the paternity test.
- [10] The Applicant was never informed by her mother or the testator that she was not the testator's biological child. Her biological father is unknown to her. The testator was always a present father and always treated her as his biological child, his flesh and blood.
- [11] During her formative years of education, the Applicant lived in D[...] Extension [...] with her mother, the testator, and her two siblings. They subsequently relocated to Meredale, where she attended Meredale Primary School and Mondeor Secondary School. She later on completed her Bachelor of Commerce in Business Management at the University of KwaZulu Natal in
2006. The testator was consistently responsible for covering the costs of her education and university tuition.
- [12] When her parents divorced, the Applicant was sixteen years old. Nevertheless, she continued to reside with the testator even after the divorce. The testator attended her graduation ceremony, as he had done for all her significant life accomplishments throughout her childhood. After her university studies she was engaged at Nedbank as a Nedbank Graduate. At that time, she continued to reside with the testator in their residence.
- [13] Upon the Applicant's 21st birthday, the testator conducted umemulo, a traditional Zulu ceremony that signifies the transition of a young woman into womanhood and her suitability for marriage. Later, he was the one who negotiated lobola for her.

- [14] He acquired her initial motor vehicle, a black Toyota Tazz, which he later replaced with a Ford Focus when she began working. Subsequently, he assisted her in becoming a member of the Diep Meadow Taxi Association, procured her initial taxi and provided ongoing assistance in the expansion of her taxi business. He consistently intended for her and her two siblings to assume control of his taxi business and he began preparing the applicants for the position at a young age. She began working in his taxi business and managed his enterprises while he was hospitalised, as she had been trained in the industry. The testator frequently conveyed to her his desire for her to assume responsibility of his transportation business.
- [15] After the hearing, the Applicant was directed by the Court to file her abridged and unabridged birth certificate. She filed the birth certificates on 27 August 2024. The documents were issued in accordance with the provisions of sections 6, 9 and 28(1) of the Births and Deaths Registration Act 51 of 1992 and constitutes prima facie evidence of the particulars set forth therein.[2] From the unabridged birth certificate, the Applicant's mother is Phindile Veronica Mashewula and the father is Menzi Kwame Nkrumah Mcunu (the testator).

THE ISSUE BEFORE THE COURT

- [16] South Africa acknowledges and ensures the freedom of testation in accordance with common law. A testator is entitled to dispose of his assets as he sees fit, and the courts are responsible for resolving any disputes that may arise in order to fulfil the deceased's wishes, provided that it is not contra bonos mores.
- [17] The central issue before this Court is the interpretation of the words "my children" as used by the testator in his will. Do these words include the Applicant, who, despite not being of his blood, was regarded as his own during his lifetime? Or do they exclude her based on the biological truth that the DNA tests have revealed?
- [18] The Applicants are seeking a declaratory order that would confirm that the phrase 'my children' in clause 4 of the will encompasses the Applicant. The applicants contend that it was the testator's intention to include the Applicant within this umbrella term. This claim is corroborated by the fact that the testator considered the Applicant as his daughter for the duration of his life. It is submitted that the word 'children' as used in the will should be given its ordinary meaning and that on
- a proper interpretation of the will, the use of the word 'children' cannot be interpreted to mean biological children only.
- [19] The Respondents, on the other hand, assert that the DNA results exclude the Applicant from the definition of 'my children.' They argue that the testator's intention, as expressed in his will, does not encompass the Applicant and that the words 'my children' should be interpreted strictly considering the biological facts.

- [20] The Second Respondent agrees with the Applicants' interpretation of the word 'children' in that it should include a reference to both biological and non-biological children of the deceased. Nevertheless, it is submitted that the Applicant does not meet any of the established categories of offspring for succession purposes.
- [21] In *Lello*,^[3] the Supreme Court of Appeal stressed that although it is in the will itself that the indications and pointers must be sought, it is permissible and sometimes essential to read and interpret the will in the light of the relevant circumstances existing at the time of its making.
- [22] In cases like this the court is thus responsible for interpreting the will in a manner that fulfils the testator's expressed intentions.^[4] The purpose of this exercise is not to speculate on the testator's intentions, but rather to discern them as they are expressed in the language of the will. The issue at hand is not the abstract meaning of words but rather the intention of the testator in employing them. The words selected by the testator are of the utmost importance: they serve as the medium through which his intentions are conveyed and must be interpreted in the context of their composition.^[5] Although the testator's intention is a subjective element, the process of its determination is objective in form.^[6]
- [23] This brings me to the issue of extrinsic evidence, which is evidence that lies outside the four corners of the will. The approach to such evidence was authoritatively articulated by Corbett J in *Allen*^[7] as follows:

"There was some debate at the Bar regarding the extent to which the Court could look to the evidence of the background facts and surrounding circumstances in the interpretation of the bequest in issue....Briefly, the position is as follows: Basically, the duty of the Court is to ascertain not what the testator meant to do when he made his will but what his intention is, as expressed in his will. Consequently, where his intention appears clearly from the words of the will, it is not permissible to use evidence of surrounding circumstances or other external facts to show that the testator must have had some different intention. At the same time no will can be analysed in vacuo. In interpreting a will, the Court is entitled to have regard to the material facts and circumstances known to the testator when he made it, it puts itself in the testator's armchair. Moreover, the process of interpretation invariably involves the ascertainment of the association between the words and external objects and evidence is admissible in order to identify these objects. This process of applying the words of the will to external objects through the medium of extrinsic evidence may reveal what is termed a latent ambiguity in that the words, though intended to apply to one object, are in fact equally capable of applying to two or more objects (known technically as an 'equivocation') or in that the words do not apply clearly to any specific object, as where they do not describe the object or do not describe it accurately. In both these instances additional extrinsic evidence is admissible in order to determine, if possible, the true object of the bequest, but, except in the case of

an equivocation, such evidence may not include extrinsic declarations of the testator's intention."

[24] Consequently, the court's primary responsibility is to determine the testator's intention as it is articulated in the will. It is not permissible to employ extrinsic evidence to argue for a distinct intention when the intention is evident from the words of the will. Nevertheless, it is impossible to interpret any will in a vacuum. The court is entitled to take into account the material facts and circumstances that were known to the testator at the time of the will's preparation, thereby effectively assuming the testator's position. This holistic approach ensures that the interpretation of the will is not divorced from the reality in which it was created[8].

CONCLUSION

[25] Freedom of testation ought not to be narrowly construed. It includes the freedom of a testator to identify or name beneficiaries, to select the property that a beneficiary is entitled to inherit, to specify the proportion of an inheritance, and to prescribe the terms and/or conditions associated with such a bequest, but they should not be limited to these aspects. A narrow, over formalistic interpretation of this freedom would be incongruent with South Africa's liberal, democratic nature. This is part of the so-called "generous" and "full benefit" interpretive approach.[9]

[26] The Constitution guarantees the right to human dignity in section 10. Inheritance is an important aspect of human dignity, as it is tied to a person's sense of self-worth and belonging. Furthermore, the South African Constitution protects the family as a unit in section 28, and this includes the rights of children within the family.

[27] The common cause evidence in this matter leaves no doubt that the testator considered the Applicant as one of his children when he executed the will. The Applicant, who was raised by the testator, and who had a close relationship with him should not be denied the right to inherit from his estate just because she is not biologically related to him. Such an interpretation would be against the principle of protection of the family and children and a violation of her right to human dignity.

[28] In the result the following order is made:

- a. It is declared that the words "my children" in clause 4 of the written will of Menzi Mcunu, includes the First Applicant, Thandeka Thabisile Truelove Mcunu.
- b. Costs are awarded against the fourth to the seventh respondents on a party and party scale (scale B), jointly and severally, the one paying the other to be absolved.
- c. No costs order is made against the second respondent. The costs incurred in opposing the application by the second respondent are to be paid by the Estate Late Menzi Mcunu.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: These written reason were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 November 2024.

APPEARANCES

Counsel for the applicants: Instructed by: Advocate E. Muller Maname Attorneys Counsel for the second respondent: Instructed by: Counsel for the 4th to 7th respondent: Instructed by: Date of hearing: Date of order: Date of written reasons: XXXXXXXXXXXXX Advocate I. Naidoo Rynhart Kruger Attorneys Mr F. Richards Richards INC Attorneys 27 August 2024 12 November 2024 14 November 2024

[1] Harvey NO v Crawford NO 2019

(2) SA 153 (SCA) at para.

41. Also see Moosa v Minister of Justice & Correctional Services [13698/2007] [2008] ZAWCHC 196 (12 May 2008).

[2] Section 28 (2) of the Births and Deaths Registration Act 51 of 1992.

[3] Lello and Others v Dales NO 1971 (2) SA 330 (A) at 335D-E.

[4] Ex Parte Estate Stephens 1943 CPD 397 at 402, quoted with approval by Corbett J in Audrey-Smith v Hofmeyr NO 1973 (1) SA 655 (C) at 657G-H.

[5] Leiman v Ostroff and Others 1954 (4) SA 457 (W) at 461E-F. See also Cumming v Cumming 1945 AD 201 at 206.

[6] Natal Joint Municipal Pension Fund v Endumeni 2012

(4) SA 593 (SCA) at par. 23.

[7] Allen and Another, NNO v Estate Bloch and Others 1970 (2) SA 376 at 380A-E. See also Allgood v Blake

(1873) LR 8 Exch 160 at 163 (referred to with approval in Cuming v Cuming 1945 AD 201).

[8] Natal Joint Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

[9] See Ferreira v Levine; Vryenhoek v Powell 1996 (1) SA 948 (CC) at par 58.

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