

SOUTH AFRICA / JUDGMENT

Robbetze v Gouws and Others (37115/2015) [2016] ZAGPPHC 246 (22 April 2016) [2016] ZAGPPHC 246

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

37115/2015

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HIGH COURT OF SOUTH
AFRICA

(GAUTENG DIVISION,
PRETORIA)

22/4/16

Case no. 37115/2015

Not reportable

Not of interest to
other judges

Revised

In the matter between:

M.J.
ROBBETZE Applicant
and
N.
GOUWS First
Respondent
N. GOUWS
N.O. Second
Respondent
THE MASTER OF THE HIGH
COURT, PRETORIA Third
Respondent

JUDGMENT

RABIE, J

1. The applicant applied for a number of orders against the first and second respondents. The first set of orders is aimed at compelling the first respondent to account to the applicant in respect of certain insurance policies, to furnish the applicant with certain documentation and information, and to order the first respondent to debate the account with the applicant. In the second set of orders the applicant claims maintenance and arrear maintenance in respect of her minor daughter to which I shall refer to as Y.
2. The applicant was the second wife of Mr E.N. Robbette, whom she divorced on 10 February 2005. It was from this marriage that Y was born. The first respondent is also a daughter of Mr Robbette but from a marriage prior to his marriage to the applicant. Mr Robbette (the deceased) passed away on 24 June 2014 and the first respondent was appointed as executrix of his deceased estate. She was cited in this application in her personal capacity as first respondent and, in her capacity as executrix, as second respondent.
3. The claim for statement and debatement of account relates to two Liberty Life policies. According to the applicant Y is entitled to half of the proceeds of these policies and consequently she, as sole guardian and remaining parent of Y, is entitled to be kept informed in respect of the policies and more particularly how Y's share is retained, managed and controlled. According to the applicant the duty of the first respondent in this regard is both a fiduciary and a custodial duty. According to the applicant Y's rights in this regard emanated from the terms of the will of the deceased.
4. The claim for maintenance was for payment in the minimum amount of R7 401,00 per month and for arrear maintenance in the aforesaid amount per month with effect from 24 June 2014 to date. This claim was directed at the second respondent, i.e., as executrix of the deceased estate.
5. The first and second respondents opposed the application. For the sake of clarity I shall only refer to her as "the respondent" unless it is necessary to differentiate between the two capacities in which she was cited.
6. I do not regard it necessary to refer to all the issues raised by the respondent and shall merely refer to the salient features thereof. The respondent explained that her father, the deceased, was killed in a motor vehicle collision and as the cause of his death was cited as "unnatural", the problems experienced with the finalisation of the estate were compounded. So, for example, policies do not pay out when the insurance companies are informed of such a death and there is an insistence on additional documents, information and post-mortem reports. In order to assist her with the administration, liquidation and distribution of the estate of the deceased she gave power of attorney to Mr W.F. Bouwer, a practising attorney who specialises in such matters.

7. It is clear from the answering affidavit that the administration of the deceased estate is being properly done, that it is up-to-date and that everything is accounted for. Mr Bouwer has been in constant communication with the relevant insurance companies and has exerted the required pressure to obtain copies of the said policies in order to ascertain who the beneficiaries are and to supply information to such companies as and when required by them.
8. I shall first refer to the two policies referred to by the applicant. The first is the Liberty Lifestyle Protector Policy number 586 307 73 400. This policy was taken out by the deceased in order to assure an income in case of disability. As he passed away, this policy is no longer of any relevance as nothing will be paid out. No more needs to be said about this policy.
9. The second policy is the Liberty Lifestyle Protector Policy number 586 305 901 00 which was taken out by the deceased during February
2006. This policy seems to be the main concern of the applicant as it is the only policy that has to date paid out any money. This policy assured the life of the deceased. The nominated beneficiary of 100% of the proceeds of the policy is the respondent. The deceased never amended the policy and the respondent remained the sole beneficiary of this policy until the death of the deceased. The total amount in respect of this policy was R 2 577 279 .28 and was paid into the respondent's account.
10. As beneficiary in terms of the provisions of this policy, which was an insurance contract between the deceased and Liberty Life in the interest of the respondent as the third party, the respondent was entitled to the full proceeds thereof. The proceeds never formed part of the deceased estate. It was submitted on behalf of the applicant that from an Estate Administration viewpoint, the proceeds of this policy will not be reflected in the Liquidation and Distribution account as part of the deceased's estate. It, however, needs to be reflected in the Estate Duty Addendum for estate duty purposes. Therefore, the only time it would have been necessary to reflect the proceeds in the estate account (as an asset), would have been if no beneficiary had been nominated, which was not the case. I agree with these submissions. The respondent became fully entitled to the full proceeds of the policy and as it has been accepted by her, no one else has any claim thereto.
11. The will of the deceased consists of only one paragraph. I shall quote the will verbatim but point out that allowance has to be made for the fact that the deceased suffered from dyslexia. The relevant part reads as follows:

"Hier by my laast wil. Alie ander Testament Tot Niet Verklaar. Al my polise gaan na my ouste dogter Nadia Gous <Robbetze>. So dit in die polise is van wie die beginstide is. Sy sal dit vir deel tussen haar en haar kliek sus Yolani Robbetze. Sy mag doen wat sy wil met haar deel nes sy wil. Maar met haar kliek sus se deel moet sy dit in n beleging sit wat haar deur skool en inversietyd sal sit en help om haarby te staan met al haar benodigheede. Daar is ook n polis Vir Yolani wat haar sal help met haar studies. MY ardse bisitengs <Reorende> sal my oudte Kind Nadia Gous dit erf en beslyt wat daarmee gebeer.

Geeken

Te Benonie

12. It was submitted on behalf of the applicant that in terms of this will Y became entitled to 50% of the proceeds of the aforesaid policy which had paid out. However, as I have indicated above, the proceeds of the policy were payable unconditionally to the respondent and the respondent became the owner thereof in terms of the provisions of the policy. The proceeds never formed part of the estate of the deceased and as such he could not be prescriptive as to what the respondent should do with the money paid to her.
13. The respondent stated that although she regarded the money as hers, she nevertheless decided to assist her sister, Y, as was the wish of the deceased as expressed in his will. In her personal bookkeeping of the account in which she had paid the proceeds, she had divided the amount in two and has kept proper books of account ever since.
14. The respondent explained that the deceased had paid for her tertiary education and that he had made provision for Y's studies by way of another policy as mentioned in the will. From a reading of the will it seems clear that the deceased would inherit all his other policies but he wanted her to assist Y in her needs through school and university. According to the respondent this is exactly what she had been doing since the deceased passed away. Before I deal with this issue, however, it is necessary to refer to the policy mentioned in the will which was intended to assist Y in her studies.
15. The applicant failed to refer to this policy. It is a Discovery Global Education Protector policy and the beneficiary of this policy is Y. The policy has been paying certain benefits in respect of Y's tuition and maintenance. The insurance company did not consult and/or correspond with the respondent in respect of this policy but has done so with the applicant. The respondent ascertained that this policy has been paying and will pay for the actual education fees directly to the school which Y is attending. This includes her residential fees as well as 10% of books purchased. All South African universities, including universities of technology, are included in this benefit.
16. Apart from the aforesaid the respondent had paid an amount of R3 100,00 per month towards Y's maintenance as well as a number of other expenses which include her extramural activities. For this purpose she utilised the aforesaid policy which had paid out and which she had kept in a separate money market account.
17. The respondent has referred to another policy which is not necessary to refer to. The proceeds thereof were ceded by the deceased to Nedbank as security for a debt of the deceased. The balance would be paid into the estate account once payment is made. As and when information becomes available in respect of the policies mentioned Mr Bouwer updates a draft liquidation and distribution account. The latest draft was attached to the answering affidavit which, inter alia, shows the net balance for distribution which is, however, only an approximate amount as final figures are still being awaited.

18. Mention may also be made to policies which are Retirement Annuities. The respondent and Mr Bouwer have had particular difficulty in finalising these issues. The proceeds of these policies do not fall within the deceased estate and are being dealt with in terms of the provisions of section 37C of the Pension Funds Act, 33 of 1943. The Boards of Trustees of the insurance companies have to decide, after comprehensively ascertaining all relevant facts, on who the benefits in respect of the retirement annuities, will devolve. The Boards of Trustees take all aspects into consideration in order to make well considered comprehensive payouts to dependents from the available funds. Despite their best efforts, the respondent and Mr Bouwer have not yet been able to ascertain the amounts available in this regard.
19. The applicant's claim was based on the alleged fiduciary duty and custodial duty of the respondent towards the applicant and Y. As has been stated above, it is clear that the sum insured by the aforesaid policy which had paid out, never formed part of the deceased estate. The deceased therefore never had the right to dispose of the proceeds thereof in his will. At best, he could merely express a wish, as he had done. There was therefore never a legal duty or obligation on the respondent to disclose any information in respect thereto to the applicant. The fact that the respondent has altruistically decided to honour the wishes of her deceased father does not confer any rights on the applicant or on Y nor did it result in a fiduciary relationship between them. The respondent became the owner of the money paid to her and she need not account to anyone in respect thereof. For these reasons the applicant's claim for the statement and abatement of account and the delivery of documents, should be dismissed.
20. I shall now refer to the claim for maintenance which is against the second respondent as executrix. The amount claimed in the Notice of Motion is R 7 401.00 per month. Except for stating that the first respondent has contributed R3 100,00 per month to the maintenance of Y, not an iota of evidence was presented regarding expenses of, or, in respect of, Y.
21. According to the answering affidavit it does not seem that Y lacks anything in respect of her maintenance. Firstly, the applicant also has an obligation to maintain Y. Secondly, as far as the deceased estate is concerned, Y benefits from the study policy referred to above and over and above that, the respondent pays the amount of R3 100,00 per month to the applicant in respect of Y's maintenance and makes further payments of her own volition in respect of Y's extramural activities, tuition and other aspects as and when needed. She does so as it was her father's wish and because at present the estate is in a process of flux and uncertainty and nowhere near finalisation. There is consequently currently no money available in the estate except for an amount of R104 080,51 net which, according to the provisional draft liquidation and distribution account is available for distribution between Y and the respondent. Y would further benefit from the retirement annuities once the respective Boards of Trustees have resolved as to what should be done with the proceeds of these policies. Consequently, apart from failing to make out a case for the need to have the amount claimed paid in respect of Y's maintenance, it would seem that the applicant's claim

is in any event flawed and, at the very least, premature.

22. A dependent's claim for support from the estate of a deceased, is based on need and, as stated above, no facts were presented by the applicant to lay a foundation for such a claim. The applicant also failed to show that she had submitted a properly substantiated claim for interim maintenance with the second respondent as executrix.
23. Section 26 (1A) of the Administration of Estates Act, Act 66 of 1965, expressly stipulates that an executor may, before an account has lain open for inspection (after finalisation and advertisement) in terms of section 35 (4) of that Act, with the consent of the Master, release such amount of money and such property out of the estate as, in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household. This would include a claim for interim maintenance.
24. The applicant failed to follow this route and by applying to this court in the way that she did, by claiming maintenance as of right, she disregarded the discretionary powers of the Master and the executrix. By doing so she also attempts to avoid the provisions of section 32 which deals with disputed claims and has failed to disclose the provisions of the Education Policy and the benefits derived therefrom as well as her own income and expenses and the needs of Y. These are all aspects that need to be considered by the Master and an Executrix in order to consider interim maintenance payments. Whether it be for maintenance or earlier maintenance, the applicant should have submitted a proper, comprehensive and substantiated claim with the second respondent which comprehensively deals with all expenses, amounts received and other such relevant matter. This she failed to do and the second respondent, as executrix, was not entitled to pay out any monies without the consent and approval of the Master of this Court. Consequently, the applicant's claim for maintenance and arrear maintenance should also be dismissed.
25. Having regard to all the aforesaid, there is no reason why the costs of this application should not follow the event.
26. In the result, the following order is made:
 1. The application is dismissed with costs.

C.P. RABIE

JUDGE OF THE HIGH COURT

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