

SOUTH AFRICA / JUDGMENT

Jansen van Rensburg NO and Others v Master of the High Court, Grahamstown and Another (585/2012) [2012] ZAECGHC 38 (23 April 2012)

[2012] ZAECGHC 38

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Roberson, Makaula

CASE / FILE NUMBER

585/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION - GRAHAMSTOWN)

CASE

NO: 585/2012

DATE

HEARD: 26/04/2012

DATE

DELIVERED: 23/04/2012

In

the matter between:

SHAUN

LEON JANSEN VAN RENSBURG N.O.

.....1st

APPLICANT

(Estate

late L Jansen van Rensburg)

SHAUN

LEON JANSEN VAN RENSBURG

.....2nd

APPLICANT

SHARON

ELIZABETH JANSEN VAN RENSBURG

.....3rd

APPLICANT

and

MASTER

OF THE HIGH COURT, GRAHAMSTOWN

.....1st

RESPONDENT

DIANN

MARLENE TODKILL

.....2NU

RESPONDENT

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OF THE HIGH COURT, GRAHAMSTOWN

.....1st

RESPONDENT

DIANN

MARLENE TODKILL

.....2NU

RESPONDENT

JUDGMENT

ROBERSON J:- [1] This application involves the interpretation of the last two clauses of the will of the late Leonard Jansen van Rensburg (the deceased). It is brought by the first applicant (Shaun) in his capacity as the executor of the estate of the deceased, and in his personal capacity as the son and heir of the deceased. The third applicant (Sharon) is the daughter of the deceased, also an heir in the estate. The first respondent issued letters of executorship to the first respondent. The second respondent was the fiancée of the deceased and is also an heir in the estate. The first respondent abides the decision of the court and the second respondent did not oppose the application. [2] According to the founding affidavit, the deceased executed his will on 17 October 2009, and died on 14 August 2010. The deceased's

mother died on 29 April 2010, and in her will bequeathed to the deceased the proceeds of the sale of an immovable property. The

monetary value of such bequest is the sum of R141 913.44. The deceased died before this sum was paid out. It however forms part of his estate. [3] It is necessary to reproduce the whole of the deceased's will, including the exact format: [4] The applicants seek an interpretation to the effect that the last two clauses are linked and deal with household contents, and that the words "the rest will go to" refer to those items of household contents which they did not take within 30 days of the deceased's death. According to the founding affidavit Absa Trust, which was appointed as an agent to administer the estate because neither Shaun nor Sharon had the necessary expertise, is of the view that the last clause of the will means that the residue of the estate should devolve upon the second respondent. [5] In *Aubrey-Smith v Hofmeyr* N.O. 1973 (1) SA 655 (CPD) at 657E-H (authorities omitted): "Generally speaking, in applying and construing a will, the Court's function is to seek, and to give effect to, the wishes of the testator as expressed in the will. This does not mean that the Court is wholly confined to the written record. The words of the will must be applied to the external facts and, in this process of application, evidence of an extrinsic nature is admissible to identify the subject or object of a disposition. Evidence is not admissible, however, where its object is to contradict, add to or alter the clearly expressed, intention of the testator as reflected in the words of the will. As stated "...in construing a will the object is not to ascertain what the testator meant to do but his intention as expressed in the will" "On the other hand, in addition to receiving evidence applying the words of the will to the external facts, the Court is also entitled to be informed of, and to have regard to, all material facts and circumstances known to the testator when he made it. As it has been put, the Court places itself in the testator's armchair. Nevertheless, the primary enquiry still is to ascertain, against the background of these material facts and circumstances, the intention of the testator from the language used by him in his will." [6] With the exception of the Isuzu vehicle, and leaving aside the last two clauses of the will, the deceased clearly intended that his assets be shared between Shaun, Sharon and the second respondent. Although the Old Mutual Flexi Pension was to be shared between Shaun and Sharon only, the deceased was apparently at pains to point out that it had been paid up before he met the second respondent, in other words if it had not been paid up

she would have received a share. When it comes to the household contents, one would therefore expect, in the general scheme of the will, that the deceased would have intended that those too would be shared between Shaun, Sharon and the second respondent. Implicit in the second to last clause is that there might be some household contents left over which were not taken by Shaun and Sharon. The deceased could not have intended that they be left unaccounted for. Household contents were given a separate heading, just like the other assets. In my view, in view of the general scheme of the will, the words "the rest will go to" refer to those household contents not taken by Shaun and Sharon within 30 days of his death. This interpretation has the result that the deceased did not deal in his will with any residue which there

may have been in his estate. [7] In my view there are no grounds for interpreting the will to the effect that by implication the deceased intended to deal with any residue in his estate. When he executed his will, his mother was still alive and her bequest to him did not form part of his estate. In *Estate Greenacre v Brett N.O. and Another* 1956

- (4) SA 291 (N) at 295 A-F, James AJ (as he then was) said the following (authorities omitted): "To my mind, the effect of the cases dealing with a bequest by necessary implication may be summarized as follows: (1) "if an event has occurred which was not contemplated by the testator at the time he made his will, the Court is not entitled to surmise what the testator's intention would have been if he had contemplated the occurrence of that event and given effect to such surmise. To do so would be to add something to the will and not construe it (2) Notwithstanding the above rule, if the Court is satisfied from the language used by the testator in his will that he has in fact contemplated the occurrence of that event and has indicated his intention in respect thereof, then even if his intention has not been expressed in specific words, it may be gathered by necessary implication from the terms of the will. (3) Conjecture must not be taken for implication and, before a Court will gather a testator's intention by necessary implication, it must be satisfied that his intention is indicated in such a way that an intention to the contrary cannot be supposed. (4) In cases where the testator's intention may legitimately be implied, the implication may be used not only to fix the sense of ambiguous words but to control the sense even of clear words and supply the place of express words in cases of difficulty or ambiguity." [8] In my view the language used by the deceased in his will does not reveal that he contemplated the bequest from his mother, or any residue at all. There is simply no mention of any other property in his estate. There is therefore no room for implying that he bequeathed the residue in his estate to any particular person. [9] In the result, the bequest from the deceased's mother is to devolve in accordance with the law of intestate succession. [10] In addition to a declaratory order interpreting the last two clauses of the will, the applicants asked for an order that the amount of R141 913.44 be divided equally between them. Such a division would be on the basis that they are the intestate heirs to that portion of the estate which was not dealt with in the will. However it is not altogether clear in the founding affidavit that they are the only intestate heirs in the estate. An order merely that the residue should devolve in accordance with the law of intestate succession will not prejudice them if they are the only intestate heirs. [11] The applicants asked for costs only in the event of the application being opposed. In the result,

the following order will issue: It is declared: 1. the words "the rest will go to" in the last clause of the will of the late Leonard Jansen van Rensburg, identity number 490203 5068 08 2, such will having been executed on 17 October 2009, refer to those household contents of the said Leonard Jansen van Rensburg which were not taken by Shaun Leon Jansen van Rensburg and Sharon Elizabeth Jansen van Rensburg within 30 days of the death of the said Leonard Jansen van Rensburg. 2. The residue of the estate of the said Leonard Jansen van Rensburg is to devolve in accordance with the law of intestate succession. There is no order as to costs. J M ROBERSON JUDGE OF THE HIGH COURT MAKAULA J:- I agree MMAKAULA JUDGE OF THE HIGH COURT

JUDGMENT

ROBERSON J:-

- [1] This application involves the interpretation of the last two clauses of the will of the late Leonard Jansen van Rensburg (the deceased). It is brought by the first applicant (Shaun) in his capacity as the executor of the estate of the deceased, and in his personal capacity as the son and heir of the deceased. The third applicant (Sharon) is the daughter of the deceased, also an heir in the estate.

The first respondent issued letters of executorship to the first respondent. The second respondent was the fiancé of the deceased and is also an heir in the estate. The first respondent abides the decision of the court and the second respondent did not oppose the application.

- [2] According to the founding affidavit, the deceased executed his will on 17 October 2009, and died on 14 August 2010. The deceased's

mother died on 29 April 2010, and in her will bequeathed to the deceased the proceeds of the sale of an immovable property. The

monetary value of such bequest is the sum of R141 913.44. The deceased died before this sum was paid out. It however forms part of his estate.

- [3] It is necessary to reproduce the whole of the deceased's will, including the exact format:

- [4] The applicants seek an interpretation to the effect that the last two clauses are linked and deal with household contents, and that the words "the rest will go to" refer to those items of household contents which they did not take within 30 days of the deceased's death. According to the founding affidavit Absa Trust, which was appointed as an agent to administer the estate because neither Shaun nor Sharon had the necessary expertise, is of the view that the last clause of the will means that the residue of the estate should devolve upon the second respondent.

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"....in construing a will the object is not to ascertain what the testator meant to do but his intention as expressed in the will"

"On the other hand, in addition to receiving evidence applying the words of the will to the external facts, the Court is also entitled to be informed of, and to have regard to, all material facts and circumstances known to the testator when he made it. As it has been put, the Court places itself in the testator's armchair. Nevertheless, the primary enquiry still is to ascertain, against the background of these material facts and circumstances, the intention of the testator from the language used by him in his will."

[6] With the exception of the Isuzu vehicle, and leaving aside the last two clauses of the will, the deceased clearly intended that his assets be shared between Shaun, Sharon and the second respondent. Although the Old Mutual Flexi Pension was to be shared between Shaun and Sharon only, the deceased was apparently at pains to point out that it had been paid up before he met the second respondent, in other words if it had not been paid up she would have received a share. When it comes to the household contents, one would therefore expect, in the general scheme of the will, that the deceased would have intended that those too would be shared between Shaun, Sharon and the second respondent. Implicit in the second to last clause is that there might be some household contents left over which were not taken by Shaun and Sharon. The deceased could not have intended that they be left unaccounted for. Household contents were given a separate heading, just like the other assets. In my view, in view of the general scheme of the will, the words "the rest will go to" refer to those household contents not taken by Shaun and Sharon within 30 days of his death. This interpretation has the result that the deceased did not deal in his will with any residue which there

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- (1) "if an event has occurred which was not contemplated by the testator at the time he made his will, the Court is not entitled to surmise what the testator's intention would have been if he had contemplated the occurrence of that event and given effect to such surmise. To do so would be to add something to the will and not construe it
- (2) Notwithstanding the above rule, if the Court is satisfied from the language used by the testator in his will that he has in fact contemplated the occurrence of that event and has indicated his intention in respect thereof, then even if his intention has not been expressed in specific words, it may be gathered by necessary implication from the terms of the will.
- (3) Conjecture must not be taken for implication and, before a Court will gather a testator's intention by necessary implication, it must be satisfied that his intention is indicated in such a way that an intention to the contrary cannot be supposed.
- (4) In cases where the testator's intention may legitimately be implied, the implication may be used not only to fix the sense of ambiguous words but to control the sense even of clear words and supply the place of express words in cases of difficulty or ambiguity."
- [8] In my view the language used by the deceased in his will does not reveal that he contemplated the bequest from his mother, or any residue at all. There is simply no mention of any other property in his estate. There is therefore no room for implying that he bequeathed the residue in his estate to any particular person.
- [9] In the result, the bequest from the deceased's mother is to devolve in accordance with the law of intestate succession.
- [10] In addition to a declaratory order interpreting the last two clauses of the will, the applicants asked for an order that the amount of R141 913.44 be divided equally between them. Such a division would be on the basis that they are the intestate heirs to that portion of the estate which was not dealt with in the will. However it is not altogether clear in the founding affidavit that they are the only intestate heirs in the estate. An order merely that the residue should devolve in accordance with the law of intestate succession will not prejudice them if they are the only intestate heirs.
- [11] The applicants asked for costs only in the event of the application being opposed.

In the result, the following order will issue:

It is declared:

1. the words "the rest will go to" in the last clause of the will of the late Leonard Jansen van Rensburg, identity number 490203 5068 08 2, such will having been executed on 17 October 2009, refer to those household contents of the said Leonard Jansen van Rensburg which were not taken by Shaun Leon Jansen van Rensburg and Sharon Elizabeth Jansen van Rensburg within 30 days of the death of the said Leonard Jansen van Rensburg.
2. The residue of the estate of the said Leonard Jansen van Rensburg is to devolve in accordance with the law of intestate succession.

There is no order as to costs.

J M ROBERSON

JUDGE OF THE HIGH COURT

MAKAULA J:-

I agree

MMAKAULA

Appearances

Applicants: Adv. S. McTurk, instructed by Nolte Smit Attorneys, Grahamstown.

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