

SOUTH AFRICA / JUDGMENT

Van der Merwe v De Klerk and Others (82534/2016) [2017]

ZAGPPHC 593 (12 September 2017)

[2017] ZAGPPHC 593

COURT

North Gauteng High Court, Pretoria

BEFORE

Mothle

CASE / FILE NUMBER

82534/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 82534/2016

DATE: 12/09/2017

REPORABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
In

the matter between: RACHEL
ANNIE MARIA
VAN DER
MERWE Appellant
And
PETRUSIA
DE
KLERK
First Respondent
SUSANNA
DU
PLESSIS
Second Respondent
ANNE
MINETTE

SMITH Third
Respondent
CHRISTIAN
HENDRIK
BOSHOF
Fourth Respondent
WOUTER
POTGIETER Fifth
Respondent
THE
REGISTRAR OF DEEDS
(PRETORIA) Sixth
Respondent
MASTER
OF THE NORTH GAUTENG HIGH COURT Seventh
Respondent

JUDGMENT

MOTHLE J

1. This is an application for confirmation of a rule nisi which was issued by this Court on 25 October 2016. The rule nisi entails that:
 - 1.1 The Respondents pay back to the Estate Late P A Van der Merwe, a total amount of R492,357.68;
 - 1.2 The First Respondent be removed from her office as executrix of the Estate Late P A Van der Merwe;
 - 1.3 The Respondents be ordered to render an account to the Applicant reflecting all amounts received in respect of the sale of movable property and the income derived from immovable property of the Late P A Van der Merwe;
 - 1.4 The Respondents be ordered to hand over to the Applicants all documents in their possession relating to the administration of the Estate of the Late P A Van der Merwe; and
 - 1.5 The Respondents be ordered to pay the costs of the application on an attorney and own client scale.
2. The rule nisi order arises out of a dispute concerning the Estate of the Late P A Van der Merwe (“the deceased”). The facts are briefly that the deceased in his life time, had three daughters with his first wife who predeceased him. The daughters are cited as the First, Second and Third Respondents in this application. The deceased then married the Applicant.

3. During his life time the deceased was owner of amongst others, six properties in the form of residences which were leased out. Prior to his death on 14 June 2014, the deceased had prepared a Will in terms of which he appointed the Applicant and the First Respondent as executrix. In terms of the Will, he provided for registration of a Trust to administer the estate. He further provided for what appears to be a usufruct in favour of the Applicant for her maintenance and care for as long as she is alive. This maintenance was to be drawn from the estate. The deceased also made further allocations of annual pay-outs to the three daughters from the estate.
4. Upon being notified of the death of the deceased in June 2014, the Master, acting in terms of the provisions of the Will, appointed the Applicant and the First Respondent as joint executrix. They, in turn, engaged the services of the Fourth and Fifth Respondents, to assist them with the administration of the estate.
5. It is common cause between the parties that the executrix, instructed the Fourth and Fifth Respondents to prepare a Redistribution

Agreement (“the Agreement”) which deviated from the provisions of the Will. When the parties attempted to obtain approval for the Agreement from the Master, the Master refused to grant such approval. However, the Fourth and Fifth Respondent proceeded to implement the terms of the Agreement against the objection of the Applicant as one of the executrix. Monies were paid out to different parties including the Applicant outside the provisions of the Will in terms of the disputed Agreement and without authorisation by the Master of the High Court.

6. The Applicant now seeks an order confirming the rule nisi on the basis that the First Respondent, amongst others, should be removed as an executrix and that the Fourth and Fifth Respondents

should make available all documentation relating to the estate, including the debatement of the account to date. The Respondents

oppose this application on the grounds amongst others that the Applicant herself intended to deviate from the provisions of the Will and wanted to sue for maintenance.

7. There is no cogent reason advanced as to why the parties deviated from implementing the terms of the Will. Neither of the parties has raised any objection to the validity of the Will.
8. As far back as 1924 in the matter of *Kunz v Swart*[1], South African law recognised the presumption of validity. “A will complete and regular on the face of it is presumed to be valid until the contrary is proved, and the burden of proving that it is invalid lies on the party challenging the will”[2] . It is trite that any party wishing to challenge the validity of the will, more so the executor must prove such invalidity. The executors in this case failed to do so. In addition, no reasons were advanced as to why the parties sought a deviation from the terms of the will and preferred to conclude the Agreement.

9. It is clear from this factual matrix that the genesis of the dispute between the two parties lies in the decision to unilaterally set aside the provisions of the Will and proceed on an agreement between them as to the distribution of the assets. While it is accepted that an executor may make out a case for not implementing the terms of a Will, it is unlawful however to proceed to implement a process deviating from the provisions of the Will, unless and until approval is obtained from the Master and/or from the High Court. No approval was obtained from the Master in this case and no party had approached Court to declare the Will invalid or impossible to implement.
10. The Applicant contends that it was the First Respondent who instructed the Fourth and Fifth Respondents to prepare a Redistribution Agreement and deviate from the Will. For that reason, it is contended, the First Respondent must be removed as an executrix. The Respondents in turn allege that the Applicant was initially part of the agreement to deviate from the terms of the Will, but later reneged. She is alleged to have undertaken to submit a different Redistribution Agreement.
11. Any executor intending to deviate from implementing the terms of the Will require at the very least, the approval from the Master to do so. In this case attempts to acquire such approval failed. As the Court indicated to the parties during argument, apart from considering the merits and demerits of the disputed transactions to the estate account, which in my view is not really necessary at this stage, is to nullify everything else that was done outside the provisions of the Will and to order the parties to implement the provisions of that Will.
12. It is trite that a Court has the authority, where there is evidence to justify such, to remove a party as an executor, including an executor dative. In this case that would not be an appropriate remedy. It will be an exercise in futility in that in terms of the Will, the functions of the executrix in essence is to establish a Trust. It will be the function of the trustees to give effect to the terms of the Will and not the executrix. The First Respondent will only have to wait for the Trust to be registered and will then resume her role, this time as a trustee. For this reason, I am not incline to remove her as executrix.
13. The Fourth and Fifth Respondents, as attorneys, failed to act professionally in accepting instructions to implement the Agreement after the Master had declined a request to approve same. It cannot be heard at this stage that they were acting under instructions of the two executors even though they were aware that legal authorisation from the Master had not been obtained. The Court could not find, in the lengthy papers they filed, any proper explanation or justifiable reason why they proceeded to implement what was patently an unauthorised redistribution agreement. Thus, it is the Court's view that the Fourth and Fifth Respondents' conduct in this regard deserve censure.
14. Having regard to the conspectus of the evidence in this case, it is the Court's view that it would be in the interest of justice to restore the administration of the estate to the position it was just after the passing of the deceased. This implies that all monies paid from the estate,

should be paid back by the recipients into the account of the estate, and to be dealt with in terms of the provisions of the Will. Any fees charged by the Fourth and Fifth Respondents in execution of their functions, particularly after the Master had refused to authorise the redistribution agreement, must be submitted for taxing and authorisation by the Master.

15. In the premises I make the following order:

15.1 The rule nisi is discharged and substituted by the following:

- a) Any party who has received payments from the estate is ordered to refund such monies within 60 days from date hereof;
- (b) The Respondents are ordered to produce and make available for inspection by the Applicant and the Master, all original documents relating to the transactions conducted on behalf of and in the name of the estate, including a statement of all financial transactions;
- (c) The Fourth and Fifth Respondents are ordered to submit all the fee invoices for all payments received from this estate, including for all work done after the Master refused to approve the Agreement, to the Master for taxing within 10 days from the date of this order;
- (d) The Applicant and the First Respondent are retained as executors and must, within 30 days from the date of this order, constitute and lodge a trust as directed by the provisions of the Will, for approval by the Master;
- (e) It is further ordered that there be a clause in the trust which provides that all decisions by the trustees to deviate from the provisions of the will must be supported by all individual trustees in writing and approved by the Master;
- (f) No agreement to deviate from the will must be implemented prior to approval by the Master and where necessary by this Court;
- (g) The First Respondent and all the trustees or their agents is prohibited from taking any measures under any circumstances

whatsoever; that would deny the Applicant what she is entitled to inherit in terms of the will;

- (h) The First, Second, Third, Fourth and Fifth Respondents shall be jointly liable for the payment of the costs of these proceedings including the costs of Applicant's counsel on an attorney and client scale. Such costs shall not be deducted from the estate.

SP MOTHLE

Judge of the High Court.

Gauteng Division, Pretoria

For the Applicant : Adv. J S Grobler

Instructed by :

Van der Hoff Incorporated

Sinoville

Pretoria

For the Respondents : Adv. R Grundlingh

Instructed by :

Messrs Spies Bester Potgieter Attorneys

Colbyn

[1] 1924 AD 618.

[2] Joubert et al, The Law of South Africa, First Reissue, Vol 31, page 171 para 257.

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