



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5159/2021

In the matter between:

JAN GABRIEL VERMEULEN N.O.

(In his capacity as Co-Executor of the
Estate of Late J.G. Vermeulen Nr. B004233/2021)

1st APPLICANT

ANDREAS STEFANUS CAROL DU PREEZ N.O.

(In his capacity as Co-Executor of the
Estate of Late J.G. Vermeulen Nr. B004233/2021)

2nd APPLICANT

and

GETRUIDA SOPHIA VERMEULEN

1st RESPONDENT

**MASTER OF THE HIGH COURT,
BLOEMFONTEIN**

2nd RESPONDENT

HEARD ON: 27 JANUARY 2022

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 03 May 2022. The date and time for hand-down is deemed to be 03 May 2022 at 12H00.

Introduction

[1] At the centre of the dispute between the parties is the delivery by the first respondent of the 2008 model Nissan X-Trail (hereinafter referred to as “X-Trail”) with registration letters and numbers DSJ 690 FS to the applicants. The applicants are co-executors of the Estate Late Jan Gabriel Vermeulen (hereinafter referred to as “the deceased”). The first applicant, who is the deponent of the founding affidavit, is the son of the deceased. His appointment is in terms of the last will of the deceased. The first respondent is the widow of the aforementioned. No relief is claimed against the second respondent.

Brief exposition of the facts

[2] On 10 June 2004 the late J.G. Vermeulen entered into an ante-nuptial agreement with the first respondent. It was duly registered on 24 June 2004 at the Deeds Registry, Bloemfontein. Paragraph 4 of the ante-nuptial agreement reads as follows: -

“Dat die partye hiermee ooreenkom dat indien Jan Gabriel Vermeulen te sterwe sou kom voor Gertruida Sophia Cronje, dan en in daardie geval, sal Gertruida Sophia Cronje ‘n onderhoudseis het teen die boedel van Jan Gabriel Vermeulen in die bedrag van R500,000.00 [vyfhonderd duisend rand] synde vir en ten opsigte van die eerste jaar van die huwelik, waarna ‘n bedrag van R100,000.00 [eenhonderd duisend rand] per jaar vir elke jaar wat die huwelik voortgeduur het tot datum van afsterwe van Jan Gabriel Vermeulen bygevoeg sal word by die R500,00.00 [vyfhonderd duisend rand] van die eerste jaar.

Verdermeer by die afsterwe van Jan Gabriel Vermeulen skenk Jan Gabriel Vermeulen aan Gertruida Sophia Cronje die motorvoertuig waarmee sy op daardie stadium daaglik ry as haar uitsluitlike eiendom.”¹

[3] The loose translation in English reads as follows: -

“That the parties agree that if Jan Gabriel Vermeulen were to die before Gertruida Sophia Cronje, then and in that case, Gertruida Sophia Cronje would have a maintenance claim against the estate of Jan Gabriel

¹ Page 37 of the Paginated Papers.

Vermeulen in the amount of R500,000.00 [five hundred thousand rand] being for and in respect of the first year of the marriage, after which an amount of R100,000.00 [one hundred thousand rand] per annum for each year that the marriage continued until the date of death of Jan Gabriel Vermeulen will be added to the R500,000.00 [five hundred thousand rand] of the first year.

Furthermore, on the death of Jan Gabriel Vermeulen, Jan Gabriel Vermeulen donated to Gertruida Sophia Cronje the motor vehicle she was driving daily at that time as her exclusive property.”

- [4] The deceased regulated his affairs by attesting to two (2) known wills in his life. The first will was dated 5 December 2014. In it he bequeathed his motor vehicle for his daily use before and at the time of his death to his daughter.² For ease of reference I will refer to it as the first will. This will was revoked or cancelled by the subsequent will attested to on 28 March 2018.³ This will be referred to as the second will. The bequest mentioned in the first will was excluded and certain loans were recorded between the deceased and the first respondent. Pertinently, the deceased had bequeathed to the first respondent to her any amount still owed to him at the time of his death.
- [5] The contested subject matter was acquired by the deceased and registered in his name on 5 November 2008. It was for his personal everyday use. In March 2010 he bought a Mercedes Benz S320 for the first respondent. Initially the X-Trail was used by the deceased and the first respondent. As his health deteriorated, he desisted from driving the X-Trail from November 2020. It was used on daily basis by the first respondent for their household and farming activities. For all intents and purposes, the possession of the motor vehicle resides with the first respondent. Before engaging in this litigation, the parties reasoned with each other through letters for the return or continued possession of the X-Trail which did not produce any solution. It is apparent that they have different opinions about both the facts and law underpinning their contentions.⁴

² Clause 3.1.1 of the Will on page 43 of the Paginated Papers.

³ Pages 49-54 of the Paginated Papers.

⁴ Pages 56-78 of the Paginated Papers.

Contentions of the parties

- [6] The contentions raised on behalf of the applicants are based on the provisions of the Administration of Estates Act 66 of 1965. The topics covered detailed aspects of the administration of the estate from reporting the estate, retention of possession of the property prior to the appointment of the executor and surrendering the property when such a demand is made to do so once the executor has been appointed. The emphasis made was that the property belonging to the estate must be under the control and custody of the executor not the claimant irrespective of the source of his right. This assertion was made against the background that the motor vehicle is the property of the estate.
- [7] The second point raised concerned the correct approach to the interpretation of contracts. Counsel placed heavy reliance on the often-quoted passage in the **Natal Joint Municipal Pension Fund v Endumeni Municipality** where the Supreme Court of Appeal restated the principles of interpretation. The quintessence of interpretation is that 'consideration must be given to the language used in the light of the ordinary rules of grammar and syntax'.⁵
- [8] Mr Zietsman for the applicants, on the third point contended that the ante-nuptial agreement does not constitute a will. He argued that although the ante-nuptial agreement may contain valid provision in regard to property to take effect upon death and may resemble a will, the ante-nuptial agreement is not deprived its character as an agreement between the parties. The nub of his submission is that despite the resemblance of such an agreement to a will, it does not make it the last will and testament. On the conspectus of evidence, he submitted that the intention of the deceased clearly indicated that the motor vehicle is an asset of the estate. As a result, the first respondent has no valid ground in law not to surrender the X-Trail to the applicants.

⁵ 2012 (4) SA 593 (SCA) at para 18.

- [9] The defence of the first respondent is that the terms of an ante-nuptial agreement cannot be revoked by means of a will without the permission of the other party. Mr Coetzee contended that the first respondent did indeed have a legitimate and protectable right in terms of a contract. That being the case, the provisions of section 26 (1) of the Administration of Estates Act 66 of 1965 stipulated that the executor had no authority to take into custody such contested property.
- [10] The other point relied upon is that there is a real and genuine dispute of fact that has arisen in the affidavits. He pointed on the dispute raised regarding who was driving the motor vehicle on daily basis at the time the deceased passed away. The other dispute revolves around whether the deceased drove any motor vehicle since January 2021 or that the first respondent drove the X-Trail since November 2020. These issues could not be resolved without resorting to listening to *viva voce* evidence. On this basis, the dispute of fact should have been foreseen by the applicants. Accordingly, the application must be dismissed with costs.

Discussion

- [11] The first respondent alleged the existence of the dispute of fact and argued that this is dispositive of the dispute between the parties. Our law is clear that motion proceedings are not configured to resolve factual disputes. The proper approach to be followed by a court when confronted with by such dispute of fact in motion proceedings was laid out in the often-quoted **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**.⁶ The aptly named Plascon-Evans Rule holds that when factual disputes arise where the applicant seeks final relief, it can only be granted if the facts averred in the applicant's founding affidavit which have been admitted by the respondent together with the facts alleged by the respondent in the answering affidavit, justify the order prayed for.

⁶ 1984 (3) SA 623 (A) at 634F.

- [12] As a starting point, the court should not decide matters on application where such material dispute of facts exists. Equally such disputes should not be taken as true and genuine without being questioned or doubted. They must be scrutinised whether they are real and could be resolved without oral evidence. This approach was laid out by the Supreme Court of Appeal in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**.⁷
- [13] This contention is premised on two (2) averments made by the applicants in their papers. Firstly, that the deceased was driving the X-Trail on a daily basis prior to his death and the first respondent drove the Mercedes Benz S320. According to the first respondent the deceased was unable to drive a motor vehicle from January 2021. Secondly, the Mercedes Benz S320 had not been driven from August 2020. It was only driven around the time of the funeral because transport was required to ferry guests.
- [14] My view is that the deponent of the founding and replying affidavit made these averments without any factual basis. These are bare claims that are made without being sustained by any facts. In the founding affidavit, the first applicant averred that he has personal knowledge about the usage of the motor vehicle by the deceased and the first respondent. What is missing is the evidence as to how he gained that personal knowledge. Later in the replying affidavit he changed tack and seemed to acknowledge that the first respondent was driving the motor vehicle from time to time. The paucity of detail in the rest of the paragraph is astonishing.
- [15] These facts, assuming they are correct, are within his knowledge and should have been laid out in the affidavits. The important part is that the veracity or accuracy of these averments is with him. The first respondent denied these averments with clarity and detail. The conclusion is that these are not real or genuine dispute of facts. The inescapable conclusion is that the application is capable of being adjudicated on the papers.

⁷ 2008 (3) SA 371 (SCA) at para 11.

[16] Counsel for the applicants advanced argument that the provisions of the ante-nuptial agreement registered on 24 June 2004 constitutes an indirect *pactum successorium*. This legal concept was defined by Gubbay J in **Ex parte Calder Wood NO: In Re Estate Wixley** in the following terms: -

“I think these cases show that a *pactum successorium* is an agreement relating to the succession to an estate, or a portion thereof, or to a specific asset or benefit belonging thereto, which postpones the devolution of personal rights until the death of the owner and which prevents the latter from bequeathing his estate or property to another person when otherwise he would be entitled to do so. It is the deprivation or curtailment of testamentary freedom that justifies the prohibition of such an agreement.”⁸

[17] As a general rule *pactum successorium* is invalid and not enforceable. The main reason is that these agreements infringe the freedom of testation and courts are reluctant to uphold such agreements which chiefly infringe that principle. The main point, it seems, that if allowed it would result in the circumvention of the formal execution of wills.⁹ The exception to the rule is that the succession agreement incorporated in the ante-nuptial agreement is valid provided it complies with the prerequisite of the testamentary formalities. In this matter, it is conceded, although not expressly, that the ante-nuptial agreement does qualify as a valid testamentary document.

[18] This brings me to the next question which is the mainstay of the case for the applicants. It boils down to interpretation of the two (2) wills attested to by the deceased. In support of his contentions, counsel for the applicants relied on the passage in **Natal Joint Municipal Pension Fund v Endumeni Municipality** where the Supreme Court of Appeal adopted the objective process as a stated principle and said the following: -

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must

⁸ 1981 (3) SA 727 (Z) at 735 A-C.

⁹ McAlpine v McAlpine NO and Another 1997 (1) SA 736 (A) at 751.

be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',-read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."¹⁰

- [19] The emphasis is that consideration must be placed on the context and the language together with neither the strongest of the other. The submission on behalf of the applicants is that it was the intention of the deceased as stated in the ante-nuptial agreement to provide the first respondent with a motor vehicle. This proposition is based on the fact that when the ante-nuptial agreement was entered into, both the two (2) motor vehicles were not acquired by the deceased. Therefore, there could be no talk of the contract or agreement entered into pertaining to the X-Trail. In amplification of this argument, it was pointed out that the deceased specifically dealt with the motor vehicle in the first will and was silent in the second will. Accordingly, it was self-evident that his intention was achieved when he purchased the Mercedes Benz S320 for the first respondent and any reliance on the provisions of the ante-nuptial agreement was fallacious. Right at the very beginning the Mercedes Benz S320 belonged to the first respondent and did not form part of the estate of the deceased.
- [20] The argument is only alive when a comparison is made between the two (2) wills. I have difficulty with it in the absence of any extrinsic evidence why the

¹⁰ 2012 (4) SA 593 (SCA) *supra*.

deceased acquired the two (2) motor vehicles in the first place. It does not logically follow that because he bought the motor vehicle for the first respondent therefore he had achieved his intention. It cannot be easily concluded that because he mentioned it in one (1) will and did not do so in the other will, therefore it absolves him of his obligation as contained in the ante-nuptial agreement. In the contrary paragraph 4 of the first will, the deceased expressly gave his executors an order/instruction to comply with the provisions of his matrimonial property regime. That to me is an objective fact indicative of his intentions at all times.

[21] The argument that at the time the ante-nuptial agreement was entered into the motor vehicle concerned was not acquired is fundamentally flawed. The deceased did not specify the motor vehicle but simply referred to the ones he will be driving on a daily basis at the time of his death. In this case the motor vehicle is the X-Trail. It does not get clearer than that. It will not be interpreting this will business-like if such clear intention is not given effect to. The contention cannot stand at all.

[22] There is one point that the applicants did not argue. I suppose they could not do so because it simply annihilates their case. That concerns the revocation of wills. In the second will the deceased inserted a revocatory clause expressly revoking and cancelling previous wills, testaments, codicils or any document purporting to such which he might have had. What is clear in both wills is that it is apparent that the intention of the deceased was to dispose of his entire estate.

[23] The correct approach was articulated in **Pienaar and Another v Master of the Free State High Court, Bloemfontein and Others**. Writing for the undivided bench Theron JA said the following: -

“Where a deceased dies leaving more than one testamentary disposition the wills must be read together and reconciled and the provisions of the earlier testaments are deemed to be revoked in so far as they are inconsistent with the later ones. Where there is conflict between the provisions of the two wills, the conflicting provisions of

the earlier testament are deemed to have been revoked by implication."¹¹

[24] It is trite that the golden rule for the interpretation of wills must be ascertained from the language used in the will. I could not find any import of the argument advanced on behalf of the applicants. The applicants beseech me to read into the second will that which is unwritten. This suggestion is untenable as it lacks no basis in law. The purported intention of the deceased seems to be far-fetched and lacks no basis. In any event, the earlier will was revoked. The principle is clear that where the wills contain conflicting provisions, effect must be given to the last will.

[25] For the foregoing reasons the application must fail. The remaining issue is that of costs. The consequence is that the losing party must pay the costs.

[26] I make the following order: -

26.1. The application is dismissed with costs.

M.A. MATHEBULA, J

On behalf of the applicants:

Adv P. Zietsman SC assisted by Adv J.
Ferreira
Stander and Associates
Bloemfontein

Instructed by:

¹¹ 2011 (6) SA 338 (SCA) at para 11.

On behalf of the first respondent:
Instructed by:

Mr R. Coetzee
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/TKwapa