



**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: 5380/2022

In the matter between:

**N M**

First Applicant

[Identity Number: [...]]

**N M**

Second Applicant

[Identity Number: [...]]

and

**CORNELIA ELIZABETH MITCHELL N.O.**

First Respondent

[In her capacity as Trustee of the RODNEY BRUCE  
MITCHELL TESTAMENTARY TRUST: MT12884/2008]

**DISCOVERY LIFE INVESTMENT SERVICES (PTY) LTD**

Second Respondent

[Registration Number: 2007/005969/07]

**THE MASTER OF THE HIGH COURT, FREE STATE  
DIVISION, BLOEMFONTEIN**

Third Respondent

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**HEARD ON:**

22 DECEMBER 2022

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**CORAM:** MATHEBULA, J

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**DELIVERED ON:** The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 29 DECEMBER 2022. The date and time for hand-down is deemed to be 29 DECEMBER 2022 at 12H00.

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[1] On 28 October 2022 the applicants filed an urgent application wherein the following orders were sought: -

1. That the applicants' failure to comply with the provisions of the Rules of Court pertaining to notice, time limits, service and process be condoned and that this application be heard as an urgent application in terms of the provisions of Rule of Court 6(12).
2. The first respondent be ordered/directed:
  - 2.1.
    - 2.1.1. To pay to the first applicant her monthly stipend in the amount of R6,000.00 for the month of October 2022 and in the amount of R6,000.00 for the month of November 2022 within five (5) days of this order being granted;
    - 2.1.2. To pay to the second applicant her monthly stipend in the amount of R4,000.00 for the month of October 2022 and in the amount of R4,000.00 for the month of November 2022 within five (5) days of this order being granted; and
    - 2.1.3. To continue to pay the aforesaid monthly stipends to the first and the second applicant for the month of December 2022 and the months following thereafter, said payments to be made on the 1<sup>st</sup> day of each month.
  - 2.2.
    - 2.2.1. To pay the rent in the amount of R9,600.00 for October 2022 and in the amount of R9,600.00 for November 2022 in respect of No. [...] Aloe (townhouse), Olea Street, Bloemfontein, into A List Rentals' ABSA cheque account, No. [...] within five (5) days of this order being granted;
    - 2.2.2. To pay to the second applicant the sum of R7,000.00 for October 2022 and an additional sum of R7,000.00 for November 2022 in respect of her rental obligations for the

- aforesaid two months within five (5) days of this order being granted; and
- 2.2.3. To thereafter continue to pay the monthly rental reasonably required by the first and the second applicant to provide them with adequate accommodation.
  - 2.3. To pay the first and the second applicants' medical aid premiums in the amount of R1,685.00 in respect of each of the applicant's for the month of October 2022 and November 2022 within five (5) days of this order being granted and to continue to do so as from December 2022, and monthly thereafter.
3. That, in the event of the second respondent being informed, in writing, by the applicants' attorneys (Mr P Joubert and/or Mr H Adam) that the first respondent has failed and/or refuses to comply with any part or the whole of the order as formulated in paragraph 2 above, the second respondent be authorized, directed and ordered:
    - 3.1. To pay out of the income and/or the capital of the endowment policies with Investment Numbers [...] and/or [...] the sum of R30,309.92 in respect of October 2022 and the same sum in respect of November 2022 into the Trust account of Symington & de Kok Attorneys, held at First National Bank, with Account Number [...] and under Reference Number [...], in order for the said sums or any part thereof to be paid to the first and the second applicant and/or for their benefit in respect of their rental needs and medical aid premiums; and
    - 3.2. To continue to pay the aforesaid sum into the aforesaid Trust Account of Symington & de Kok Attorneys as from 1 December 2022, and monthly thereafter, for as long as there are funds available to do so, until the second respondent is instructed by a letter, signed by any of the applicants' aforesaid attorneys to cease making further payments.
  4. That the first respondent be ordered to personally pay the costs of this application.
  5. That the first and the second applicant be granted leave to supplement their founding affidavit, if necessary, in order to apply for further relief.
  6. Further and/or alternative relief.

- [2] After hearing counsel for the applicants Mhlambi J ordered prayer 2 to operate with immediate effect. A return date of 8 December 2022 was ordered by the court as to why the order should not be made final. On the last mentioned date, the rule *nisi* was extended to 22 December 2022 by Daniso J because of administrative glitches. In the present proceedings, the applicants seek confirmation of the rule *nisi* with costs to be borne personally by the first respondent. The first respondent, who is the only one opposing the application, is arguing for the discharge of the rule *nisi* with costs.
- [3] It is disheartening to witness a family bound together by common interests being ripped apart by disputes that are capable of amicable settlement. The applicants and the first respondent have been at each other in this court on different facets of the same issue. The reality is that the very funds that each profess to be protecting are being depleted by spiralling litigation costs. Nevertheless, their appetite to litigate seems to be on the rise instead of waning. The proceedings before me are just another round.
- [4] The facts that can be obtained from the papers are fairly clear and simple. The first respondent is the paternal grandmother of the applicants. On 16 October 2006, their parents namely R and L M, executed a joint Will. In terms of the joint Will the applicants were nominated as beneficiaries to inherit the sum of R1,500,00.00 each. The joint Will stipulate that the aforesaid amount must be kept in a Testamentary Trust ("Trust") to be established with the applicants as beneficiaries. The first respondent was appointed as the joint Trustee together with a certain C.J. Terblanche. The Testator died in September 2009 and the joint Will was accepted by the third respondent and its provisions given effect to. It is common cause that C.J. Terblanche resigned as a Trustee which left the first respondent firmly in control of the Trust.
- [5] It is self-evident that from a tender age until recently, the applicants lived off the income generated from their inheritances to cover for daily expenses. As they grew older, the applicants were dissatisfied in the manner that the first respondent was controlling the funds and therefore launched an application for her removal as the Trustee. That application which is opposed is still pending before this court.

- [6] The pith of their case is that the first respondent committed certain irregularities and did not act in accordance with the edicts of her office. On the other hand, the first respondent avers that all her actions were according to the dictates of her office as a Trustee and in the interests of the applicants. Her main point is that confronted with the rising costs and shrinking income, the Trust is unable to meet its monthly obligations towards the applicants.
- [7] The applicants contend that the Trust has sufficient cash assets to meet their needs. The first respondent is simply refusing to do so because she is vindictive and generally acting *mala fide*. Counsel for the applicants argued that the first respondent must borrow or even beg in order to comply with her obligations as a Trustee. He launched a broadside at the conduct of the first respondent by investing the Trust funds in her own name. The climax of his submissions is that the impossibility of performance (if any) is self-created and the first respondent cannot be allowed to benefit from it.
- [8] Counsel for the first respondent raised a point *in limine* with regards to non-compliance with Uniform Rule 41A. The first respondent had filed a notice as per the Uniform Rule and the applicants did not even seek a condonation. On these bases the first respondent moves for an order that the application must be dismissed or I make an appropriate costs order.
- [9] He also raised the defence of impossibility of performance. Counsel pointed out that the Trust coffers have run dry and therefore she could not meet her obligations. This aspect, it was contended, was brought to the attention of the applicants on numerous occasions in the past. The funds were depleted because of wrong choices made by the applicants and their insistence of audited financial statements which cost money. In a nutshell, they brought this dire situation upon themselves.
- [10] Mediation as a dispute resolution mechanism is fairly in its embryonic stage. It is applicable to both actions and application proceedings that are brought before court. Urgent applications are not an exception. It stands to reason that non-compliance should attract some kind of sanction. The objection, valid as it may be, cannot be the ground upon which this matter can be dismissed. The

principle that the rules are for the Courts not the Courts for the rules must apply. I am inclined to condone non-compliance simply because this matter requires urgent attention of the court.

[11] The battle royal between the parties is about the sum of R800,000.00 which is invested in a fixed financial instrument with the second respondent. According to the applicants there is no conceivable reason why these funds cannot be used for their upkeep. Even if it means terminating the investment and incurring penalties if applicable. The first respondent avers that the policy matures in December 2024 and the funds will be available to the applicants. Although the investment is made in her name and not the Trust, the beneficiary thereof is the Trust. The explanation is that it could not be done in the name of the Trust and the primary benefit is a life insurance called the “booster plan” attached to it. All the same, this kind of investment was previously made in 2012, 2014 and the current one in 2019. This explanation which in my view makes sense, disavow any allegations of impropriety.

[12] The applicants essentially seek maintenance from the Trust. This issue can be dealt with adequately by the relevant Maintenance Court. The parties can do so by ventilating their issues there and presenting evidence to support their assertions. Earlier I briefly alluded to the long litigation history between the parties. This is evidenced by a flurry of strongly worded letters emanating from both sides about a number of issues. The matter is riddled in material factual disputes incapable of being resolved in motion proceedings. Only oral evidence will do. The principles well established under the Plascon-Evans rule find application in this matter.<sup>1</sup>

[13] The applicants’ case deals with the dereliction of duty on the part of the first respondent. There is also broadside allegations that she may have misappropriated their funds. As a result, she is unfit to remain in office. This is a dispute that is still pending and not really an issue before me. The averments in the papers before me do not justify the making of any conclusion to that effect. It is far from clear on what basis the first respondent is implicated at all.

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<sup>1</sup> Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

- [14] The parties differ on their understanding of what the Trust must do. According to the applicants it must cater for their needs until it is dissolved and any remaining funds paid to them. The first respondent is of the view that it was not the intention of the testator that applicants will be supported after they have been equipped with the necessary tools to look after themselves. The contention is that she acted in their interests when she invested the funds. There is no law that she could not have made the investment in her name. The determination of this point is not within the purview of the application before me.
- [15] Courts have repeatedly held that the golden rule in the interpretation of Wills is that the court shall seek to ascertain the wishes of the testator. This can be detected from the language used in the Will. The main question is to determine what was meant by the testator. Certainly if this does not resolve the difficulty, extrinsic evidence does play a role. One would have expected the surviving spouse to file an affidavit to deal with this point.
- [16] The law is trite that applications are about common cause facts and applicable law. They are not about probabilities. That said, there are significant difficulties as discussed above in the case of the applicants. Therefore, there is no cogent reason why the rule *nisi* should not be discharged.
- [17] What remains is the issue of costs. Both parties desired punitive costs order against each other. This is indicative of the hostile environment that exists between them. The applicants are impecunious and it was mentioned that their attorneys are acting *pro bono*. On the other hand, the first respondent will undoubtedly pay her legal team with the funds belonging to the Trust. She is sued in her representative capacity as the Trustee. The loser in the long run is the very Trust. Perhaps it is opportune for the parties to stand back a bit and endeavour to arrest the unnecessary haemorrhaging of cash. A costs order that each party pays its own costs is deemed to be an appropriate one.
- [18] In the result I make the following order: -

- 18.1. The application is dismissed, the rule *nisi* is discharged.
- 18.2. Each party pays its own costs.

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**M.A. MATHEBULA, J**

On behalf of the applicants:  
Instructed by:

Adv. J.G. Gilliland  
Symington & de Kok Attorneys  
BLOEMFONTEIN

On behalf of the 1<sup>st</sup> respondent:  
Instructed by:

Adv. C.L.H. Harms  
Grundlingh & Associates  
CENTURION  
C/O Badenhorst Attorneys  
BLOEMFONTEIN

On behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> respondents: No appearance