IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/2236

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the application by

STRAUSS, ZELMA	FIRST APPLICANT
GERICKE, SONJA	SECOND APPLICANT

AND

STRAUSS, HEIN	FIRST RESPONDENT
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, NORTHWEST DIVISION, MAHIKENG	SECOND RESPONDENT

In re the matter between –

STRAUSS, HEIN	PLAINTIFF

AND

STRAUSS, ZELMA (formerly PISTORIUS, born STRAUSS)	FIRST DEFENDANT
GERICKE, SONJA (born STRAUSS)	SECOND DEFENDANT
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, NORTHWEST DIVISION, MAHIKENG	THIRD DEFENDANT

JUDGMENT

MOORCROFT AJ:

<u>*Summary*</u>

Application for leave to appeal – section 17(1)(a)(i) of Superior Court Courts Act, 10 of 2013 – No reasonable prospects of success on appeal – application dismissed

<u>Order</u>

[1] I make the following order:

1. *The application is dismissed;*
2. *The applicants are ordered to pay the costs of the application, including the costs of Senior Counsel, jointly and severally the one paying the other to be absolved.*

[2] The reasons for the order follow below.

<u>Introduction</u>

[3] This is an application for leave to appeal to the Full Court of this Division in terms of

section 17(1)(a)(i) of the Superior Courts Act, 10 of 2023 against a decision[1] handed down by me on 24 April 2023.

[4] I refer to the parties as they were referred to in the judgment.

[5] The grounds are set out in the application for leave to appeal dated 16 May 2023.

> *"1. The court erred in dismissing the applicants' counterclaim and granting the first respondent's claim;*
>
> *2. Specifically, the court erred, inter alia, in:*
>
> *2.1. not giving effect to the direct language of the joint will;*
>
> *2.2. not giving effect to the headings used in the joint will;*
>
> *2.3. importing words into the joint will that were not there;*
>
> *2.4. treating the joint will as a complex document (when it was simple) and rearranging its provisions around the words imported to arrive at a new*
>
> *meaning;*
>
> *2.5. increasing the scope of certain provisions of the joint will to areas which they were never meant to cover;*
>
> *3. The court erred in finding that paragraph 5 of the joint-will was free standing:*
>
> *3.1. both the applicants and the first respondent interpreted and accepted that paragraph 5 of the joint will had to be read in conjunction with paragraphs 4.2.1 to 4.2.3;*
>
> *3.2. the joint will only made sense (on either side's interpretation) if paragraph 5 was read in conjunction with the paragraphs 4.2.1 to 4.2.3;*
>
> *3.3. as such, the court should have read paragraph 5 as a follow on from paragraphs 4.2.1 to 4.2.3;*
>
> *4. The court erred in labelling the joint will as inelegant and very badly drafted*
>
> *when, instead, it:*

---

[1] *Strauss v Strauss and others* [2023] JOL 58905 (GJ), 2023 JDR 1302 (GJ), [2023] ZAGPJHC 377.

4.1. was a simple document providing for only one of two scenarios – one spouse pre-deceasing the other; and simultaneous death, which includes the passing of the spouses within 30 days of each other;

4.2. provided for what must happen in a direct and unequivocal manner;

4.3. contained provisions that showed it was well thought-out;

5. The court erred in entertaining concepts of the joint will being void – no one contended that it was void, it simply did not provide for matters beyond the first spouse dying or a simultaneous death;

6. The court erred in finding that only if the Afrikaans "of" (English "or") was imported into paragraph 4.2 of the joint will could paragraphs 4.2.1 to 4.2.3 be given effect to when:

6.1. paragraphs 4.2.1 to 4.2.3 do not need any words to be imported;

6.2. by importing "of" (English "or") the court changed the joint will into a different will the effect of which was to provide for something that it never intended;

6.3. without importing any additional words, paragraphs 4.2.1 to 4.2.3 provided for exactly what the joint will says, a specific devolution only upon (slegs indien) the spouses died simultaneously;

7. The court erred in finding that it was the applicants' case, contention or argument that the word "and" had to be imported into the joint will:

7.1. the suggestion came from the first respondent's counsel as a comparison to his own argument;

7.2. the applicants contended instead that –

7.2.1. no words could or should be imported into the joint will;

7.2.2. effect had to be given to the words in the joint will and there was no reason to depart from them;

7.2.3. the court could not and should not make a different will for the spouses;

8. The court erred in finding that the applicants' argument (that certain of the provisions of the will could be construed as massing) was at odds with their

plea or that it was at odds with their contention that the joint will never governed what was to happen to the survivor's estate:

8.1. the joint will provided that upon the death of a spouse, the first dying's estate would pass to the survivor: no massing;

8.2. the simultaneous death provisions were a rider which provided that if, and only if, the two spouses died within 30 days of each other, their joint estates would devolve to the applicants and the first respondent in a specific way: massing (because where the deaths were within 30 days of each other the spouses jointly disposed of the property of both, the disposition taking effect after the death of the survivor);

8.3. however, a massing never happened because the spouses died more than 30 days apart;

9. The court erred in finding that the applicants' argument (that the joint will was silent as to what was to happen to the survivor's estate upon his/her death) defeated the massing argument or that it was a difficult fit, when the applicants' argument was:

9.1. the spouses died more than 30 days apart and so there was no massing;

9.2. after the husband died his estate went to his wife;

9.3. the joint will did not provide for what was to happen to the wife's estate (as survivor) and so one can infer that the joint will –

9.3.1. gave the survivor the freedom to do with the estate as he/she pleased;
9.3.2. presumed that if the spouses died more than 30 days apart, the survivor would have a sufficient time and opportunity to prepare their own will, if they so wished;

10. The court erred in labelling problematic the applicants' interpretation of the joint will (that paragraph 4 fell away or did not apply if the spouses died more than 30 days apart) because this is exactly what the joint will provided for;

11. The court erred, when setting out the context, in not including the fact that the value split in the joint estate had shifted between the execution of the joint will and the death of the surviving spouse, specifically:

11.1. when the spouses made the joint will on 27 March 2014, a particular spilt of their assets to their children applied in the case of their simultaneous death;

11.2. the spouses (father and mother) loved their three children (the applicants and the first respondent) equally and treated them fairly;

11.3. being the parents they were, one could expect the split they had in mind to result in roughly an equal distribution of value in their estate to each of their children or at least a specific balance of value;

11.4. over the period 2015 to 2018 the balance of value shifted;

11.5. as such, a distribution to the children after 2015 – as if the simultaneous death provisions applied – would result in a totally different distribution of value to what the joint-will had in mind on 27 March 2014;

11.6. insofar as one might have expected the wife to recognise the shift in value and make a new will after the husband died, she never got the chance because she was placed under curatorship in 2015 and unable manage her own affairs;

12. The court erred in using the numbering of paragraph 5 of the joint will as a reason to import additional words into the joint will that altered its meaning:
12.1. paragraphs 4.2.1 to 4.2.3 provided for a particular devolution of the spouses' joint estate on simultaneous death with paragraph 5 providing for the residue devolving to the applicants;

12.2. both sides (the applicants and the first respondent) agreed that paragraph 5 had to be read with paragraphs 4.2.1 to 4.2.3 – chronologically paragraph 5 followed paragraph 4.2.3, it was the next in line;

12.3. the imperfect numbering of paragraph 5 did not entitle the court to import

words into the joint will;

13. The court erred when it found that the applicants' argument entailed the

inference that the spouses must have intended the survivor to die intestate:

13.1. this was not the applicants' argument;

13.2. the spirit and effect of the joint will was –

13.2.1. the first-dying would give everything to the survivor;

13.2.2. there was only one rider, simultaneous death, which never happened;

13.3. after the first spouse died the survivor was to have complete freedom to do with the estate as they pleased;

13.4. it was and must have been the intention of the spouses, and they would have envisaged, that the survivor would make a further will by themselves;

13.5. because the wife developed Alzheimer's and had a curator appointed in 2015, she never got the opportunity;

13.6. this was no reason to stretch the simultaneous death provisions to apply to the survivor's estate three years later;

14. In the circumstances, the court should have found that:

14.1. the joint will did not deal with, and was never meant to deal with, what was to happen with the survivor's estate after the death of the first-dying and where the survivor outlived the first dying by more than 30 days;

14.2. the wife inherited her husband's estate and never got the opportunity to make a further will;

14.3. as such, the wife died intestate;

14.4. her estate must be dealt with in terms of the Intestate Succession Act 81 of 1987 and divided per stirpes between her three children – the applicants and the first respondent; and

14.5. the first respondent should pay the costs."

The applicable principles in an application for leave to appeal

[6] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused. Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.

[7] In *KwaZulu-Natal Law Society v Sharma*[2] Van Zyl J held that the test enunciated in *S v Smith*[3] still holds good:

> *"In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[8] This passage must be qualified to some extent. In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*[4] held that the test for leave to appeal is more stringent under the Superior Courts Act, 10 of 2013 than it was under the

---

2 *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) par. [29]. See also *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC).

3 *S v Smith* 2012 (1) SACR 567 (SCA) par. [7].

4 *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 par. [6].

repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed by Shongwe JA in the Supreme Court of Appeal in *S v Notshokovu*[5] and in other matters.[6]

[9] In *Ramakatsa and others v African National Congress and another*[7] Dlodlo JA placed the authorities in perspective. He said:

> *"[10] … I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."*[8]

Analysis

[10] I deal with the arguments raised under a number of headings below.

Massing[9]

[11] The will provides in clause 3 that upon the demise of one spouse, his or her estate

5 *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 par. [2].

6 See Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) par. [25]; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 par. [5]; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) par. [5]; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras [25] and [26]; *Lephoi v Ramakarane* [2023] JOL 59548 (FB) par. [4].

7 *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* 2021 ZASCA 31.

8 Footnote 9 in the judgment reads as follows: "*See Smith v S [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); MEC Health, Eastern Cape v Mkhitha [2016] ZASCA 176 para 17"*

9 Judgment paras 13 to 18, notice par. 8.

would be inherited by the surviving spouse. The surviving spouse is not put an election and the will does not provide for what was to happen to the 'massed estate' upon the passing of the surviving spouse.

[12] The will does not provide for massing and it is not possible to the equate the surviving spouse's inheriting of the estate of the other spouse with massing.

The importation of the word 'and'

[13] It is argued in paragraph 7 of the notice that the *"court erred in finding that it was the applicants' case, contention or argument that the word "and" had to be imported into the joint will."*

[14] The use of the word 'and' is derived from paragraph 6.2.2 of the plea and not from any submission by the plaintiff's counsel. The paragraph reads as follows:

> *"6.2.2. the will provided that upon the deceased or her late husband's death, the other would inherit the entire estate with the exception that if they died simultaneously, or within 30 days of each other, and had not made and did not make a further will before the lapsing of the 30 days of the first dying, the entire estate would devolve to their three children – the plaintiff as a legatee and the first and second* defendants as heirs to the residue;*".* [emphasis added]

[15] Whether the word 'and' is read into the will is not an element of the interpretation by the defendants or in the judgment.[10]

The court entertained concepts of the joint will being void.[11]

---

10 Judgment par. 10, penultimate line.
11 Notice par. 5.

[16] It was common cause during argument and on the pleadings and evidence that the will was not void and no such concepts were entertained.[12] It was stressed that a will is not void merely because the drafting is inelegant.

The armchair approach

[17] I set out the context in which the will was made in paragraph 32 of the judgment.

[18] It was argued on behalf of the defendants that the will is silent on what was to happen to the estate of the surviving spouse if he or she passed away more than thirty days after the first-dying spouse. This required clause 5 of the will to be read as a sub-clause of clause 4.2, the last clause with its own heading.

[19] It was however argued that the will was nevertheless not an inelegant and badly drafted document as found by me, but was in fact a simple document providing only for what was to happen in the event of simultaneous death or death within a period of thirty days.[13] The will would then have no relevance after the expiry of the thirty-day period – either the surviving spouse would die intestate or would have made a new will prior to death.

[20] It was argued that the court erred[14] when setting out the context in which the will was made, in not including the fact that the value split in the joint estate had shifted between the execution of the joint will and the death of the surviving spouse, and that surviving spouse was at some later stage precluded from making a new will because of her health problems. It was then argued[15] that *"one could expect the split they had in mind to result in roughly an equal distribution of value in their estate to each of their children or at least a specific balance of value."* There is nothing in the will to indicate that such a split was on their minds when they made the will and the argument is not borne out by the evidence. The evidence was that the plaintiff played a central role in the family business and that the assets listed in clause 4.2 of the will were business assets (clause 4.2.2 and 4.2.3) and comprised (clause 4.2.1) the house where the plaintiff resided with his parents and his own family, he having

12 Judgment par. 7.
13 Notice par. 4.
14 Notice par. 11.
15 Notice par. 11.3.

sold his own house to invest in the business. The defendants inherited the remaining assets, being non-business assets referred to as *"die restant."*[16]

[21] Thus, the plaintiff inherited the business assets and the defendants the other assets.

[22] It is reasonable to infer that the parties knew when making the will that circumstances might change in future, but there was no evidence to suggest that they knew that the surviving spouse would later be placed under curatorship[17] and would then not be able to make a new will. When they made the will, they expressly provided that the surviving spouse was at liberty to make a new will.

[23] It was also argued that[18] "*it was and must have been the intention of the spouses, and they would have envisaged, that the survivor would make a further will by themselves.*" While the surviving spouse was, as already stated, at liberty to make a new will there was no such obligation or condition, and an inference that *unless* the survivor made a new will, the intention was to die intestate is not justified.[19]

[24] It is also simply incorrect, as the defendants seek to argue,[20] that the surviving spouse "*never got the opportunity to make a further will*." She was at liberty to make a new will at any time after the death of her husband and before she was placed under curatorship.

.

Conclusion

[25] I am the view that the appeal would not have any reasonable prospect of success and that the threshold for leave to appeal to be granted, was not met.

[26] For the reasons set out above I grant the order in paragraph 1 above.

---

16 Clause 5 of the will.
17 Notice par. 11.6.
18 Notice par. 13.4.
19 Judgment par. 35.
20 Notice par. 14.2.

_____

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **21 JULY 2023**.

COUNSEL FOR THE PLAINTIFF (FIRST RESPONDENT):	R STOCKWELL SC
INSTRUCTED BY:	ROXO LAW ATTORNEYS
COUNSEL FOR THE FIRST AND SECOND DEFENDANTS (APPLICANTS):	W STROBL
INSTRUCTED BY:	CLIFFE DEKKER HOFMEYR INC
DATE OF THE HEARING:	17 JULY 2023
DATE OF JUDGMENT:	21 JULY 2023