IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES/~~NO~~
(2) OF INTYEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

Appeal Case No: A85/2017
Court *a quo* Case No: 69475/2014
28/2/2019

In the matter between:

JACKIE OUTHOFF	First Appellant
(I.D No: [….])	
KIM OUTHOFF	Second Appellant
(I.D No: [….])	

and

MORRIS KAPLAN N.O.	First Respondent
MARIA DEBORAH OUTHOFF (Born Kritzinger)	Second Respondent
ELAINE-MARI SEYMOUR	Third Respondent
BARRY SEYMOUR	Fourth Respondent
THE MASTER OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA	Fifth Respondent
(Estate No: 18169/2013)	

JUDGMENT

Haupt, AJ

INTRODUCTION:

[1] On 18 February 2010, Mr Cornelis Outhoff and the second respondent, Mrs Maria Deborah Outhoff, who were married to each other, executed a mutual will *(" the mutual will"* or *"will')* in which the appellants, two minor children and the third and fourth respondents were bequeathed certain bequests and legacies on the death of the surviving spouse. In what follows I shall refer to Mr Outhoff as *"the deceased"* or *"the testator"* and to Mrs Outhoff as *"the second respondent"* or *" the testatrix",* and to them jointly as *"the testators".*

[2] The appellants are the daughters of the deceased from a previous marriage. The second appellant was also cited in her capacity as the biological mother and guardian of the two minor beneficiaries.

[3] The first respondent is the appointed executor in terms of the provisions of the mutual will. The third respondent is the second respondent's daughter from a previous marriage. The fourth respondent is the husband of the third respondent. The fifth respondent is the Master of the High Court, Gauteng Division, Pretoria, who did not participate in these proceedings. I shall refer to the first to fourth respondents as *"the respondents"*

[4] The appellants are appealing the whole of the judgment and order granted by Hughes J on 17 August 2016. In essence the principal questions on appeal are (i) the interpretation of the mutual will, (ii) whether the second respondent, as the surviving spouse, is duty bound to exercise her election, whether to adiate or repudiate the benefits in terms of the mutual will, (iii) the effect of the surviving spouse's adiation or repudiation of the benefits in terms of the will and (iv) whether the mutual will effected a massing of the estate of the deceased and the second respondent.

FACTUAL BACKGROUND:

[5] The relevant background facts are largely undisputed and arose in the following circumstances. Prior to their marriage, the deceased and the second respondent concluded an ante-nuptial contract *("ANC")* on 2 April 1974 providing for their marriage to be out of community of property.[1]

[6] The ANC provided, *inter alia,* that each party shall be at full liberty to depose of his or her property by testamentary disposition as he or she deems fit and that the second respondent shall have exclusive and uncontrolled administration and alienation of the property she possessed before the marriage and all other property she may possess after the marriage.

[7] The clauses in the mutual will which are relevant to the dispute regarding the interpretation of the will reads as follows:

> *" 1. We do hereby appoint* as *Executor of* ***our respective estates,*** *MORRIS KAPLAN of Kaplan & Kaplan, Johannesburg* ...
>
> *3. In the event of the death of either party,* ***our entire estate*** *will be bequeathed to the remaining party* ***without reserve.***
>
> *4. On the death of the surviving party,* ***we*** *hereby give and bequeath the undermentioned bequeaths and legacies to the following people stated next to their names:*
>
> *4.1 JACKIE OUTHOFF, daughter of Cornelis Outhoff:*
>
> *4.1.1 Owelling at 6 Kruinsig, Kameeldoring Street, Overkruin, Heidelberg, Mpumalanga, together with contents thereof·, and*
>
> *4.1.2 20% (twenty percent) of monetary assets held in FIRST NATIONAL BANK, HEIDELBERG ... and ABN AMRO BANK, HOLLAND .. .*
>
> *4.2 KIM TRETHAN, daughter of Cornelis Outhoff:*
>
> *4.2.1 40% (fourty percent) of monetary assets held in FIRST NATIONAL BANK, HEIDELBERG and*

[1] The accrual system only became into operation 10 years after the party's marriage on 1 November 1984, with the enactment of **Matrimonial Property Act, 88** of 1984

ABN AMRO BANK, HOLLAND; and

4.2.2 The current motor vehicle owned by the surviving party.

4.3 ELAJNE..MARI SEYMOUR daughter of Maria Deborah Outhoff:

4.3.1 All jewellery belonging to Maria Deborah Outhoff, with exception of the 3 (three) string pearl choker. The surviving party shall have the discretion to award this bequest prior to their death.

4.3.2 40% (fourty percent)of monetary assets held in FIRST NATIONAL BANK, HEIDELBERG and ABN AMRO BANK, HOLLAND; and

4.3.3 The lady's Rado watch and the spoon collection and cabinets.

5.6 BARRY SEYMOUR The gent's Rado watch

5.7 KERYS TRETHAN, granddaughter:

The 3 (three) string pearl choker in the commencement of her matric year or at the discretion of the surviving party.

5.8 KIAN TRETHAN, grandson:

The gent's Piaget watch in the commencement of his matric year." (own emphasis added)

[8] The mutual will concludes with the following provision:

"We reserve to ourselves the power from time to time and at all times hereafter to make all such alterations in or additions to this our Last Will as we shall think fit either by separate act or at the foot hereof, desiring that all such alterations or additions so made under our own signature shall be held to be as *valid and effectual as if inserted herein."*

[9] The deceased passed away on 3 August 2013. The mutual will was subsequently accepted by the fifth respondent as being the will of the said two testators.

[10] On 26 September 2014 the appellants issued summons and attached the mutual will as Annexure "POC1" to the particulars of claim. In the particulars they contended that they and the two minor grandchildren are beneficiaries in terms of the mutual will, that the will provides for massing of the estates of the deceased and the second respondent (second defendant a *quo)* and/or that the second respondent, as joint testator and surviving spouse, was put to her election (as it relates to the bequest in clause 3) to either adiate or repudiate the benefits under the will of the deceased.

[11] The appellants sought the following relief:

> *"1. That it be declared:*
>
> *1.1 That the Second Defendant is duty bound to exercise her election whether to adiate or repudiate the benefits in terms of Annexure "POC1" hereto.*
>
> *1.2 That the First and Second Plaintiffs and the minor children referred to .. . are beneficiaries in terms of Annexure "POC1" hereto.*
>
> *1.3 That in the event of the Second Defendant adiating the benefits in terms of Annexure "POC1" hereto, she is not entitled to make a new will in which she purports to dispose to any of the assets forming part of the separate estates of the deceased and herself immediately prior to the demise of the deceased, Cornelis Outhoff.*
>
> *1.4 In the event that the Second Defendant repudiates the benefits in terms of Annexure "POC1", the Second Defendant will not be a beneficiary of the estate of the deceased and will be able to make a will in respect only of the assets forming part of her own separate estate.*

2. *That, in the event of the relief sought herein, not being opposed by the defendants, that the costs of this action be paid from the deceased estate of Cornelis Outhoff.*
3. *That, in the event of the relief sought in this action being opposed, that those defendants opposing the said relief be ordered to pay the costs of this action debonis propriis."*

[12] The respondents (first to fourth defendants a *quo)* raised a number of defences and factual disputes in their plea dated 6 November 2014. One of the defences included a special plea that the appellants lacked *locus standi.*

[13] The respondents abandoned these defences and factual disputes on 26 April 2016, when they replied to the plaintiffs' list in terms of Rule 37(4) was filed. This was approximately a week before the allocated trial date of 9 May 2016.

[14] The only dispute that remained for the trial court to adjudicate was the interpretation and application of the mutual will.

PROCEEDINGS BEFORE THE TRIAL COURT:

[15] Mr Vorster SC, appeared on behalf of the appellants and Mr Klopper on behalf of the respondents when the matter came before Hughes J on 9 May 2016.

[16] Both counsel elected not to lead any evidence and closed their respective cases. A trial bundle was handed up by agreement and the status of the documents contained in the bundle was agreed upon between the parties at the pre-trial held on 5 April 2016. The agreement was that the documents contained in the bundle or copies thereof will, without further proof, serve as evidence of what they purport to be, without the correctness of the contents of such documents being admitted.

JUDGMENT OF THE TRIAL COURT:

[17] On 17 August 2016, Hughes J gave judgment, dismissing the appellants' action for declaratory relief with costs.

[18] In its judgment, the trial court with reference to the judgments in **Bothma-Batho Transport v Bothma and Seun Transport**[2] and **Theart v Scheibert and others**[3] and to Corbett, The Law of Succession in South Africa[4], made the following findings:

> *"[21] In my view, clause 3 is explicit that on the death of any of the signatories to the will their entire estate is bequeathed to the surviving spouse without reserve. This in my view is clearly the dominant clause. Consequently, the surviving spouse obtains the entire joint estate of the parties on the death of the first dying spouse.*
>
> *[22] Following on clause 3, clause 4 commences with 'on the death of the surviving party, we hereby give an bequeath the undermentioned [sic] bequests ... to the following people ... ', this clause now dictates how the dispositions would be made to family members, including the plaintiffs, on the death of the surviving spouse. These two clauses direct bequest[s] to different parties. Clause 3 to the surviving spouse at the death of the first dying spouse and clause 4 to family members at the death of the surviving spouse. That wish, in my view, is notable from clause 4, is the use of the words 'We' make the bequest on the death of the surviving spouse meaning both spouses make the bequest on the death of the surviving spouse.*
>
> *[23] Corbett at 437 [supra] states 'Where a joint and mutual will of the spouses disposes not only of the estate of the first-dying spouse but also of the estate of the surviving spouse after the survivor's death, the survivor cannot take the benefits left in the*

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[2] 2014 (2) SA 294 (SCA) at paragraphs 10 - 1 2 in relation to the requirements to interpret documents

[3] 2012 (4) All SA 278 (SCA} at paragraph 21 in relation to the correct approach to the interpretations of a joint/mutual will as laid down in **Rhode v Stubbs** 2005 (S} SA 104 (SCA} at paragraphs 16 - 18

[4] Corbett, Hofmeyer and Kahn The Law of Succession in South Africa (2nd edition) (Juta) at 236 - 237

will of the first-dying and refuse to deal with his or her own estate in the manner set out in the will . . .'.

In the circumstances the surviving spouse cannot seek to accept the inheritance from the first-dying spouse and not comply with the dictates of the will as regards her estate.

[24] Did the signatories to the will intend that massing materialised? In clause 3 and 4 the words 'our' and 'we' are used respectively. On face value. in my view. this is an indicator that massing was intended even if we consider the fact that a *joint will should be read as if each of the signatories had made individual will. The question to be answered would be that if one was to determine whether massing was intended one must establish from the wording of the will that the testatrix disposed of the testator's share of the joint estate as well as her own share of the joint estate, either at the time of the death of the testator or the testatrix."* (own emphasis added)

[19] However, the trial court concluded that the wording of clause 3 of *"Our entire estate will be bequeathed to the remaining party without reserve"* indicates that the testator's estate is bequeathed to the testatrix, whilst clause 4 provides for certain bequeaths after the death of the surviving spouse and held that this creates confusion which would amount to ambiguity.

[20] The confusion relates to whether the bequests are derived from the testator's or the testatrix's estate or from both their estates as a whole as from clause 4 it is not evident whether the assets bequested was that of the testator or the testatrix or derived from the consolidation of the two estates. The trial court therefore applied the presumption against massing and found the presumption to be decisive in the present matter.

[21] I now turn to consider the merits of the appeal.

MERITS OF THE APPEAL:

[22] The essence of the applicants grounds for appeal are that the trial court erred in (i) holding that the mutual will create some confusion and amounts to an ambiguity, (ii) finding that it is not clear whether the bequests are derived from the estate of the testator or the testatrix, or both estates as a whole and that it is not evident if the bequest in clause 4 is derived from the consolidaiton of the two estates forming the joint estate, from which the testatrix could make the disposition sought; (iii) in holding that it is not clear that the testator's estate was consolidated with that of the testatrix in order to make out the bequests in clause 4 and that the presumption against massing has to be applied; and (iv) in not finding that the terms of the mutual will put the second defendant to an election whether to adiate or repudiate the bequests to her.

[23] It would be convenient to commence with the applicable principles. The first principle relevant to the present case is that the only choice open to an heir in modern law relating to a benefit bequeathed to him/her in a will, is either to accept (adiate) or repudiate (renunciate.)[5] Without an election the executor can't proceed with the process of finalising the estate.

[24] On the pleadings the respondents contend that the second respondent does not need to adiate or repudiate the benefits in terms of the mutual will. Mr Klepper further argued that the issue of massing is decisive for the relief sought and that election only comes into play if there was massing. I do not agree with this argument.

[25] In the present case, irrespective of whether a massing of the estate of the deceased and the second respondent had taken place, or not, the second respondent had to exercise a choice. In this regard the reference by Corbett *supra* to the author Lee[6] and the doctrine of election[7] is of particular significance:

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[5] See: Corbett *supra* at 17
[6] At 437 and footnote 8
[7] At 444

"...*[A]s RW Lee remarked:*

'The conclusion to be drawn from a *careful consideration of the cases is that the essential question is not whether there has been massing, but whether the surviving spouse has been put to his or her election.'"*

and at 444:

"The effect of massing and adiation is but one instance of the general doctrine of election. Stripped down to its essentials, the doctrine is a *simple one: where strings are attached by* a *testator to a testamentary benefit, the beneficiary cannot take the benefit and ignore the strings. Thus, when appointing an heir or legatee the testator may, by way of modes or otherwise, impose an obligation upon the beneficiary ... In all these cases, the heir or legatee .,.. has to make a choice: acceptance of the benefit entails comp/lance with the testator's directions* ...

Thus a *surviving spouse may be put to an election even though there has been no massing, or, for the matter, joint and mutual will."*

[26] In the present case the decision or choice to accept or repudiate is of crucial importance. The appellants' contention is that, in the event that the second respondent adiates, she is not entitled to make a new will in which she purports to dispose of any of the assets forming part of the separate estates of the deceased and herself prior to his passing. Alternatively, in the event that the second respondent repudiates, she will not be a beneficiary of the estate of the deceased and will be able to make a will in respect of only the assets that form part of her own separate estate.

[27] In my view for the reasons as more fully dealt with later in the judgment, I agree with the argument on behalf of the appellants that the second respondent, as joint testator and surviving spouse, was put to an election (in relation to the bequest in clause 3 of the will) to either adiate and thereby accepting the benefit under the will of the deceased with the

strings attached (in relation to the clause 4) or to repudiate same.

[28] The second relevant principle relates to the current approach to the interpretation of documents as elucidated in **KPMG v Securefin Ltd**[8]**, Natal Joint Municipal Pension Fund v Edumeni Municipality**[9] and **Bothma-Batho Transport** *supra* which resulted in a change to the conventional approach to the interpretation of wills. The conventional approach rested on the so-called *"golden rule"* and *"plain meaning rules"* and the rule that the court will have regard to the surrounding circumstances when the will is ambiguous or uncertain.[10]

[29] The current approach indicates that interpretation is the process of attributing meaning to the words used in a document, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attended upon its coming into existence. Further, consideration must be given to the language used in 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 light of all these factors and the process is objective not subjective. The inevitable point of departure is thus 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. Interpretation is therefore no longer a process that occurs in stages but is *"essentially one unitary exercise".*[11]

[30] Lastly, as the document to be interpreted is a will, the well-known benevolent approach in interpreting wills is also applicable. This entails that the court will do its best to ascertain the testator's true intention however poorly expressed and will not invalidate a dispossession on the grounds of uncertainty, unless confusion leaves no other choice.[12]

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[8] 2009 **(4)** SA 399 (SCA) at paragraph 39
[9] 2012 (4) SA 593 (SCA) at paragraph 18
[10] Corbett *supra* .it 451 - 461
[11] **Bothma-Batho Transport** *supra* at paragraph 10 and 12
[12] Corbett *supra* at 448: *"The problems encountered in the interpretation of a will do not basically*

[31] Applying the aforementioned principles to the facts before us, I firstly deal with the reference in clause 3 and in particular the words *"our entire estate"* and *"without reserve".* We were not referred to any reported judgment in which the phrase *" without reserve"* has been interpreted in the context of a will. Therefore the meaning of the phrase has to be determined having regard to the context provided by reading the particular provision in light of the mutual will as a whole and the circumstances attended upon its coming into existence. The phrase cannot be considered in isolation. In my view, the context of clause 4 cannot simply be ignored when the meaning of clause 3 is considered.

[32] Despite the provisions of the testators' ANC and the fact that they were married out of community of property, they elected to execute a mutual will. The second respondent exercised her freedom of testation as did the deceased when they executed the mutual will, wherein they specifically provided for two phases.

[33] On applying the principles of interpretation to the present case it is clear that the deceased and the second respondent envisaged two phases when they executed the will. The first as provided for in clause 3, is in the event of one spouse surviving. The second, as provided for in clause 4, is when the surviving spouse passes away. Reading the mutual will as a whole and the context in which the provisions appear, in my view there is a logical and practical symbiotic flow between clause 3 and 4 and consequently they are of equal importance.

[34] The respondents contend that the words *"without reserve"* indicate an intention that the surviving spouse would be entitled to do with the entire

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differ from those encountered in the interpretation of other documents. Many of the canons of construction that are applied when a statute or contract has to be Interpreted are also applied in the interpretation of a will ... But there are important differences between wills, on the one hand, and statutes and contracts, on the other, which must needs effect the process of interpretation ...This explains why since time in memorial judges have adopted a benevolent approach in interpreting wills. They will do their best to ascertain the testators true intention, however poorly expressed, and will not invalidate a dispossession on grounds of uncertainty unless perplexity leaves them no other choice. It also explains why, in the interpretation of a will, the courts will try harder to unravel the testator's subjective intention from its objective manifestation than in the interpretation of a contract. As Van Den Hever JA put it in Crookes NO v Watson:
'In interpreting and putting into effect the provisions of a will the testator's wishes are of paramount importance ... Whereas a contracting party is sternly held to his intention as

estate as he/she pleases. If this was the case, then the inclusion of clause 4 and the second phase envisaged by the parties with such particularity as to specified assets going to specific beneficiaries, makes no logical sense given the context in which clause 4 appears, the apparent purpose to which it is directed and the material known to those responsible for its production. It was the second marriage for both the deceased and the second respondent. They both had children from their previous marriages. The beneficiaries that would receive a bequest in terms of clause 4, refer to the parties' respective children or family in relation to assets that belonged to the respective spouses.

[35] I agree with the argument on behalf of the appellants that the respondents' approach boils down to the words *"without reserve"* being interpreted to entitle the surviving spouse to deal with the estate as he/she pleases and that as clause 3 is the dominant clause and clause 4 contradicts clause 3, clause 4 is thus to be ignored. This approach is not in accordance with the authorities that indicate that where two dispositions seems to conflict, an attempt should be made to reconcile them.[13]

[36] The content of clause 4 is very specific pertaining to particular assets being bequeathed to specific beneficiaries. When the ordinary rules of grammar and meaning of the word *" reserved"* is considered it is evident that it has a host of possible meanings, including *"something kept back or stored for future use".*[14] The dictionary of legal words and phrases describes *" reserve"* as *"that which is held back from present disposal".*[15] The Oxford Dictionary includes the meaning of the word *"reserve"* to mean, *inter alia,* "a *thing or place* set *apart for* a *specific purpose".*[16]

[37] I agree with the submission on behalf of the appellants that properly interpreted, the words *"without reserve"* mean, within this context, *"without anything held back".*

[38] Although clause 3 further refers to *"our entire estate",* which may render

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expressed.'"

[13] See: Corbett *supra* at 462 and the authorities cited in footnote 112

[14] The new shorter Oxford English Dictionary

[15] 2nd Edit ion , p R- 69 and W-34

[16] 6th Edition, Volume 2

the phrase *" without reserve",* tautologous or superfluous if interpreted to mean *"without anything held back",* the authorities indicate that the courts recognise that tautology is not unknown in written documents and that the importance of the presumption against tautology should not be over-emphasised.[17]

[39] It is not uncommon that testators' use superfluous words and the present case is no exception. For example in clause 4 the testators used superfluous words such as *"give and bequeath"* in clause 4.

[40] It is trite law that a will must be interpreted so as to leave the greatest possible freedom of testation. However, a testator can deprive him- or herself of the right to make a will by massing.[18] Whether or not there has been massing is a matter of construction. However, when there is confusion or ambiguity regarding the meaning of the testator, the presumption against massing finds application.[19]

[41] In **Receiver of Revenue v Hancke**[20] as referred to in Corbett *supra*[21] ,Innes CJ remarked as follows:

> *"The two elements then which must concur in order to deprive the survivor of the right to revoke the mutual will are* a *disposition of the survivor's property or* a *specific portion after the survivor's death, and an acceptance by the survivor of some benefit under the will. Upon electing to take the benefit he automatically assents to the bequest. On the other hand if he elects to reject the benefit, he reverts to his legal position before the testator1s death, the mutual arrangement falls away, and the will of the first dying operates only upon his share of the property."* (own emphasis added)

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[17] Christie, The Law of Contract in South Africa (6th edition), p 229; Se e also **Rhode v Stubbs** 2005 (5) SA 104 (SCA) at paragraph 16
[18] **Joubert v Ruddock** 1968 (1) SA 95 (El at 98 E-G; **Rhode v Stubbs** *supra* at paragraph 16 to 17
[19] **Rhode v Stubbs** *supra* at paragraph 18
[20] 1915 (AD) 64 at 72
[21] At 440. See also 439 and 440 relating to the effects of massing.

[42] In my view in the present case the mutual will executed by the deceased and the second respondent, provides a good example of massing. Clause 3 and 4 are comparable to an example of massing as referred to by Corbett *supra* where parties are married out of community of property:

> *"Where the joint and mutual will* of *the spouse is disposed not only of the estate of the first dying spouse but also of the estate of the surviving spouse after the survivor's death, the survivor cannot take the benefits left in the will of the first dying and refuse to deal with his or her own estate in the manner laid down in the will.* .....
> .....
> *In a typical case of massing, the surviving spouse surrenders his or her right* ..., *where the spouses are married out of community, to his or her separate estate. to the children of the spouses in return for* a *usufuctory fiduciary, or other limited interest in the estates of both spouses.*[22] (own emphasis added)

[43] Clause 4 provides, that the deceased and the second defendant intended to depose of each other's assets at the death of the survivor. If the parties were not making disposition of each other's assets, why then did they use the word *" we"* in clause 4:

> *" On the death of the surviving party, we hereby give and bequeath* ... "

[44] Where there has been a massing for joint disposition, the surviving spouse is put to an election. The surviving spouse may adiate by accepting the benefits under the will and in doing so will lose the freedom to vary or revoke his/her own portion of the joint will insofar as it relates to the massed estates or to dispose of his/her share in the massed estates in any manner at variance with the term or he/she may repudiate. In the

[22] See also: The further examples listed in footnote 9 on 437

event of the surviving spouse repudiating he/she retains his/her separate estate and may then freely dispose of it by will or otherwise, but forfeits his/her claim to any of the benefits left to him or her in the will of the first dying spouse[23].

[45] I, disagree with the finding of the trial court that the joint will with reference to clauses 3 and 4 creates some confusion and amounts to an ambiguity and that it is not clear whether the bequests are derived from the estate of the testator or the testatrix or from the consolidation of the two estates.

[46] The trial court was informed at the hearing that it was common cause between the parties that the Kruinsig dwelling, referred to in clause 4.1.1, was the property of the testator. From the record it is evident that Mr Klepper, during argument, referred to the Deed of Transfer of the Kruinsig dwelling. The trial bundle included a copy of a Deed of Transfer and a preliminary inventory of the deceased's estate. The Deed of Transfer indicated the deceased as the registered owner of the immovable property *(" the Kruinsig dwelling")* referred to in clause 4.1.1 of the mutual will.

[47] The preliminary inventory signed by the first respondent, in his capacity as the nominated executor of the deceased's estate on 11 November 2013, indicated the deceased's assets as, *inter alia,* the Kruinsig dwelling, money held at FNB Heidelberg and two Rado watches (a lady's and gent's). These assets are respectively referred to in clauses 4.1.1, 4.1.2, 4.2.1, 4.3.2 and 4.3.3 and 5.6 of the mutual will. The jewellery referred to in clause 4.3.1 clearly belongs to the second respondent and which is then bequeathed to the second respondent's daughter (third respondent) and the children of the second appellant. In my view it is clear that there was a disposition in the joint will of not only the second respondent's property but also of the deceased's property and that it is a classic situation of massing that occurred.

[48] In my view therefore there is no ambiguity and uncertainty and therefore the presumption against massing is not applicable.

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[23] **Receiver of Revenue v Haneke** 191S (AD) 64 *supra;* **Corbett** *supra* at 440

CONCLUSION:

[49] Regarding the issue of costs, the appellants seek an order that the costs should be paid by the second, third and fourth respondents, joint and severally, as it relates to the costs in the court a *quo* and in the appeal. It is further contended that it would not be appropriate to burden the estate with the costs of this litigation.

[50] From the reading of the pleadings, it is evident that the first to fourth respondents raised numerous spurious, if not frivolous, defences and placed facts in dispute only to abandon these defences and denials very close to the trial date. In my view, the defences and denials raised by the respondents, such as that the appellants lacked *locus standi,* that the claim was premature and their interpretation of the will is opportunistic, that the attached copy of the mutual will was not accepted by fifth respondent, and that terms and clauses of the will was quoted incorrectly, was ill-considered and ill-advised.

[51] I agree with the contention that the estate should not be burdened with costs in the event of the appeal being upheld. Fortunately for the first respondent, the appellants are not persisting with a costs order *de bonis propriis* against him. In my view, as executor the first respondent should have remained impartial and neutral. He should not have become embroiled in the personal tone that the litigation took if regard is had to the correspondence addressed by the respondents' attorney. It is unfortunate that he did not obtain his own independent advice and representation separate from that of the second to fourth respondents when it became apparent that the beneficiaries mentioned in the will had different interpretations of the will. If he had done so, it might have curtailed some of the disputes in particular relating to the raising of frivolous defences and denials which only fuels unnecessary litigation and costs.

[52] The following order is made:

1. The appeal is upheld.

2. The order granted by Hughes J on 17 August 2016, dismissing the

appellants/plaintfifs' action with costs, is hereby set aside.

3. It is declared:

   3.1 that the second defendant is duty bound to exercise her election whether to adiate or repudiate the benefits in terms of Annexure "POC1" to the particulars of claim;

   3.2 that the first and second plaintiffs and the minor children referred to in paragraph 2.2 of the particulars of claim, are beneficiaries in terms of Annexure "POC1" to the particulars of claim;

   3.3 that in the event of the second defendant adiating the benefits in terms of Annexure "POC1" to the particular of claim, she is not entitled to make a new will in which she purports to dispose of any of the assets forming part of the separate estates of the deceased and herself immediately prior to the demise of the deceased, Cornelis Outhoff;

   3.4 in the event that the second defendant repudiates the benefits in terms of Annexure "POC1" to the particulars of claim, the second defendant will not be a beneficiary of the estate of the deceased and will be able to make a will in respect only of the assets forming part of her own estate.

4. The second, third and fourth defendants are ordered, jointly and severally, to pay the costs of the action including the costs of the appeal.

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L C HAUPT (AJ)

Acting Judge of the High Court

I agree and it is so ordered.

R G TOLMAY
Judge of the High Court

I agree and it is so ordered.

D NAIR
Acting Judge of the High Court

I agree and it is so ordered.

HEARD ON:	7 November 2018
DATE OF JUDGMENT:	28 February 2019
APPELLANTS' COUNSEL:	J P Vorster SC
RESPONDENT'S COUNSEL:	J A Klopper
APPELLANTS' ATTORNEY:	Jacobson & Levy Inc.
FIRST TO FOURTH RESPONDENTS' ATTORNEYS:	JJ Badenhorst Attorneys c/o Louis Ben Attorneys