



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: D6046/2023

In the matter between:

ALYSTER ALLEN MOODLEY

APPLICANT

and

**PREMAJODHI JAMES
RESPONDENT**

FIRST

**SANLAM TRUST (PTY) LTD
RESPONDENT**

SECOND

**THE MASTER OF THE HIGH COURT, DURBAN
RESPONDENT**

THIRD

ORDER

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1. The first respondent is directed to sign the trust deed and the master's prescribed *inter vivos* trust form within ten days from the date of this order.
 2. The second respondent is also directed to sign the trust deed, acceptance of trust and depose to the sworn affidavit by an independent trustee.
 3. The first respondent is ordered to pay costs of the application.

4. The counter-application is hereby dismissed with costs.

JUDGMENT

Hlatshwayo AJ:

Introduction

[1] It has been said that a testator enjoys complete freedom to dispose of their assets upon their death by means of a will in such a manner as they see fit and a court is ordinarily obliged to give effect to their wishes as expressed in such a will.¹ This golden rule must also find application in this matter.

[2] On 30 April 2018, Mr Suanantha Poonsamy Polly (“Mr Polly”) and Mrs Velliamah Polly (“Mrs Polly”) made a joint will regulating how their estate is to devolve upon their death. Before this court is an urgent application seeking an order compelling the first respondent to implement the provisions of the said will by establishing a trust. The first respondent was mandated by clause 3 of the will to create an *inter vivos* trust and was also nominated as the trustee of this trust. The first respondent, however, resisted the relief sought on the basis that what the applicant seeks is contrary to the express provisions of the joint will.

[3] In addition, the first respondent has filed a counter-application seeking a declaratory order that the late Mr Polly died partially testate and partially intestate. This matter thus turns on the proper interpretation of the will.

Background

[4] Mrs Polly passed away on 24 September 2022 and Mr Polly subsequently passed on 3 January 2023. In terms of the will, the first respondent was directed to

¹ *JW v Williams-Ashman NO and others* 2020 (4) SA 567 (WCC).

create a trust within 30 days after being called upon by the second respondent to do so.

[5] In compliance with its obligations in terms of the will the second respondent duly issued a notice on 11 May 2023 calling upon the first respondent to create the said trust. On 19 May 2023 the applicant's legal representatives sent a letter to both the first and second respondents expressing concerns on the delay and calling upon the first respondent to establish the trust.

[6] When no trust was created, the applicant secured an interim order on an urgent basis extending the period within which the trust in question must be formed pending the final determination of the disputes between the parties.

[7] It is common cause that the will in question was validly executed by the testators. It is also not in dispute that the applicant in this matter is the grandson of the testators and resided with them ever since he was born. Further, Mr and Mrs Polly had five children which includes the first respondent. It is also common cause that among the said children, one of them resided with the said testators due to her mental disability, together with her minor child.

[8] The dispute essentially is cantered around the interpretation of two (2) clauses of the will. The relevant portions of clause 3 reads:

'Should we however die simultaneously or within 30 (thirty) days of each other, we revoke the bequest above and bequeath our separate estates to an inter vivos trust which is to be established by our daughter, Premajodh James of which our grandson, Alyster Moodley shall be the capital and income beneficiary.

...

Should the inter vivos trust not be established within a period of 30 (thirty days) after the executor gave the settlor a written notice to this effect, the said bequest shall devolve upon our children...'

Clause 4 on the other hand reads:

'Should the survivor of us, survive the first dying by more than 30 (thirty) days and subsequently dies without leaving a will, the survivor bequeaths his or her estate as mentioned in clause 3 above.'

Summary of legal submissions

[9] The applicant contended that the dominant clause of the will is clause 3 which should be given effect to and the time period within which the trust should be created should not detract from the clear intention of the testator as expressed in their dominant clause of the will. Reliance was placed on *Schaumberg v Stark*² Centlivres CJ endorsed the views in *Ex parte Melle and others*³ that:

'full effect should be given to the dominant clause which bequeaths the legacy or institutes the heir and that its effect should not be modified nor its meaning be strained because there are other clauses in the will which, apparently, require this to be done, unless it is quite clear from those other clauses that the testator so intended.'

[10] It was submitted by Ms *Nicholson* that the first respondent enjoys no discretion whether or not to create a trust and to hold that she enjoys a discretion would allow her to repudiate the testator's bequest. The first respondent contended that the dominant clause of the will is clause 2 where the entire estate was left to the surviving spouse. Ms *Reddy* submitted that the surviving spouse did not die simultaneously or within 30 days as envisaged in the will and therefore clause 3 is not applicable.

[11] She further submitted that in terms of clause 4, in the event that the surviving spouse survives the first dying by more than 30 days and subsequently dies without a will, then clause 3 will apply. It was contended that the deceased left a valid will hence the provisions of clause 3 cannot be invoked. In light of the fact that the will is then silent on how the estate is to be distributed, the first respondent's contention is that the laws of intestate succession are applicable. The respondent thus seeks a declaratory order that the deceased died partially testate and partially intestate.⁴

Urgency

² *Schaumberg v Stark* NO 1956 (4) SA 464 (A) at 468.

³ *Ex parte Melle and others* 1954 (2) SA 329 (A).

⁴ *Verseput and others v De Gruchy NO and another* 1977 (4) SA 440 (W).

[12] It is important to briefly mention in passing that this matter was brought before court on an urgent basis. The main ground relied upon to show that the matter was urgent is that the 30 day period within which the first respondent was required to create the trust as mandated by clause 3 of the will was due to lapse. A consent order was subsequently granted on the 8th August 2023 which in essence extended the time frame within which the first respondent must establish the said trust until this dispute is finalised. Consequently, both parties did not place before me the issue of urgency in dispute

The applicable legal principles and evaluation

[13] It is trite that when interpreting a will, the golden rule is that the wishes of the testator must be established from the language used and the court is bound to give effect to those wishes unless prevented by the law.⁵ A court may not speculate on the testators' reasons for making a bequest where his language shows he intended a particular result.⁶ The starting point in determining the intention of the testator is to apply the plain meaning rule to the words used. The words of the testator in their ordinary sense must be considered.⁷

[14] The fact that both testators created a joint will is by itself significant. Upon their demise they wanted their estates to be bequeathed to their common beneficiary. This is clear from how the will was structured and the language used. Consistent with the norm in joint wills, the first dying bequeathed his or her estate to the survivor. It is common cause that Mr Polly survived for a few months after the death of Mrs Polly. Clause 3 and 4 thereafter sets out how the estate is to devolve upon the death of the survivor. It is clear that clause 3 and 4 are dominant clauses of this will as they best represent the testators' wishes regarding their estate and this court must seek to give full effect to them.⁸

[15] The first paragraph of clause 3 undoubtedly bequeaths the separate estates of the testators to an *inter vivos* trust and the applicant was nominated as the sole capital and income beneficiary. Clause 3 is clearly applicable if the testators died

⁵ *Robertson v Robertson's Executors* 1914 AD 503.

⁶ *Chapman NO v Ballim and another* 1968 (2) SA 809 (D).

⁷ *Lategan v The Master* 1931 TPD 193.

⁸ See *Ex parte Melle and others* 1954 (2) SA 329 (A) at 336.

simultaneously or within 30 days of each other. Consequently, when one reads this clause in isolation, it cannot be used to determine the devolution of the estate. It must be stated though that the purpose of a 30 days limitation is not immediately apparent from the will. What compounds the matter further is the penultimate paragraph of clause 3 which bequeaths the estate to the children of the testators if the trust is not created within 30 days. The 30 days' time frame is yet another poorly drafted clause which has created a fertile ground for disputes and has led to delays in finalising the estate.

[16] Regardless of the above, when one construes clause 4 together with clause 3, there is no hesitation that the testators' wishes were that clause 3 be the dominant clause and must determine how their estate shall devolve. Clause 4 makes it clear that even if the surviving spouse does not die within 30 days of each other but at any stage thereafter dies without leaving a will, the circumstances shall be regulated by the provisions of clause 3 which directs that an *inter vivos* trust be formed. This interpretation is in line with the wishes of the testators as expressed in the will and is consistent with the central theme which is the creation of the trust. This is clear from clause 3 which deals with the creation of the trust, and clauses 5, 6, 7, 8, and 11 dealing extensively with how the said trust is to function.

[17] The first respondent appears not to quarrel with the above interpretation that clause 4 directs that the estate be regulated in accordance with clause 3 but argues that the latter does not apply because the surviving spouse died leaving a will as envisaged in clause 4. It is the first respondent's contention that the will referred to is the same joint will in question. She further argued that this would mean that there is no distribution of the estate in place and therefore the deceased died partially testate and partially intestate. The result is that the deceased estate must be distributed in terms of the intestate succession law.

[18] The interpretation by the first respondent is contrary to the plain meaning of the will which unambiguously states that the testator must subsequently die without leaving a will. It defies logic that the surviving testator can subsequently re-create a joint will with the very same spouse who has predeceased him. It is clear that the only reason clause 4 was created is that having survived more than 30 days, the

survivor has freedom to create a new will should he so wish. Clause 4 then creates a default position where the entire estate must be regulated by clause 3, should no will be created. Further, the construction by the first respondent would result in the will being redundant and meaningless. I agree with counsel for the applicant that a court has a duty when interpreting the will to uphold the wishes of the testator by giving effect to his bequest. *Brunsdon's Estate*⁹ echoes these views and it was held that there is a presumption in favour of testacy unless it is clear that the testator has not disposed of any part of the will either expressly or by implication.

[19] I am satisfied that despite the flaws in clause 3, the joint will, when properly construed as a whole, must be upheld thereby giving effect to the wishes of the testators. Counsel for the first respondent could not answer how the interpretation sought by the first respondent gives effect to the wishes of the testators. In addition, the first respondent does not suggest that she has a discretion by virtue of the penultimate paragraph of clause 3 to decide whether or not to create the trust within 30 days after being called to do so. To allow such a discretion would be tantamount to being given powers to decide the beneficiaries and substitute the testator's wishes for her own. There is thus no basis for her continued delay in forming the trust and it is clear that her refusal is unlawful. She must thus be ordered to create the trust as directed by the will.

[20] The first respondent's counter application to declare that Mr Polly died partially intestate has no merit and must be dismissed. I must also state that both parties' reliance on substantial extrinsic evidence to demonstrate what the testators' intentions were, is not relevant in the circumstances. On the plain meaning of the will, I have found that a trust must be created in line with the testators' wishes as expressed in clause 3 of the will.

[21] In the result I make the following order:

1. The first respondent is directed to sign the trust deed and the master's prescribed *inter vivos* trust form within ten days from the date of this order.

⁹⁹ *Brunsdon's Estate v Brunsdon's Estate and others* 1920 CPD 159 at 169.

2. The second respondent is also directed to sign the trust deed, acceptance of trust and depose to the sworn affidavit by an independent trustee.
3. The first respondent is ordered to pay costs of the application.
4. The counter-application is hereby dismissed with costs.

HLATSHWAYO AJ

Heard on: 02 / 11 / 2023

Delivered on: 04 / 12 /2023

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