214/92

CASE NUMBER: 245/91
H V N

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

P. GEFFEN N.O. Appellant

and

JACOB MARTINUS CROESER Respondent

CORAM: HOEXTER, VAN HEERDEN, GROSSKOPF E M, EKSTEEN, JJA et HOWIE, AJA

HEARD: 20 NOVEMBER 1992

DELIVERED: 27 NOVEMBER 1992

J U D G M E N T

Howie, AJA:

The late Nathan Weinstein ("the testator"), who died on 22 June 1985, lived together with respondent for about 22 years. For most of that time they resided

in the testator's house in Kensington South, Johannesburg. The testator left a will written for him by respondent. Apart from bequeathing sums of money to various relatives and his household goods to respondent, the testator left the balance of his estate to his two brothers and respondent. This general provision was subject to respondent's having the use of the house for his lifetime. The will was signed at the Johannesburg General Hospital where the testator was a patient prior to his death. It bears the date 1 June 1985, the signature of the testator and the ostensible signatures of two hospital nurses respectively named Dalton and Osler. Appellant was appointed as executor of the testator's estate.

In the Court below respondent claimed sundry forms of relief based on the allegation that a universal partnership had existed between the testator and himself. Appellant counterclaimed for respondent's

ejectment from the house on the ground that the estate was the owner and respondent was in possession. The claim was abandoned prior to the trial and the hearing proceeded solely on the counterclaim.

Respondent's defence to the counterclaim was that he was in possession of the house by virtue of the usufruct conferred upon him by the will. He alleged that his appointment as beneficiary had been orally confirmed by the testator to one Pamela Scott on 8 June 1985. He therefore maintained that such confirmation removed the disqualification formerly attaching to him as writer of the will and permitted him to take under it.

Appellant replicated to the effect that the will was invalid because the witness Osler had not been present on 1 June 1985 when the testator signed the will.

The Master filed a report in the case,

intimating that he abided the Court's decision.

The trial Judge (Spoelstra J) dismissed appellant's counterclaim but gave him leave to appeal to this Court.

The evidence in support of respondent's case was that of himself and Mrs Scott. Appellant called the nursing sister in charge of the testator's ward, Sister Durandt, and Nurse Osler.

Respondent said in evidence-in-chief that the testator was admitted to hospital late in May 1985 in order to undergo a gall-bladder operation. This was the fifth time that he had been hospitalised. The previous occasions involved lung cancer surgery, a heart attack, pericarditis and heart-bypass surgery. During the week preceding Saturday 1 June the testator said that he wanted to make a will and asked respondent to bring him a sheet of paper. On it the testator wrote the basic provisions he wished inserted in the will. He then

requested respondent to write out the will neatly at home and then to bring it to him in hospital. Respondent complied and gave the draft to the testator on Saturday 1 June. The latter read and approved it. He then placed it in his bedside drawer. On Monday 3 June respondent saw the will being signed by the testator and Nurses Dalton and Osler, all in each other's presence.

Under cross-examination respondent was questioned about his reasons for alleging that there had been a universal partnership between himself and the testator. He explained, in effect, that in view of the relationship between them, the assets they had shared and the interests which they had jointly pursued, he had initially understood that there was such a partnership. However, having gained a better insight into the position subsequently, he had come to accept that his allegation was not legally tenable.

Asked about the date of signature of the will, respondent said he inscribed 1 June when writing the will, fully expecting that it would be signed on that day. He was unable to explain why the pleadings, and also certain pre-trial particulars, alleged that the will was in fact signed on that date. He did not consider the date of signature to be of importance and had not thought to change the date appearing on the document.

Respondent was then confronted with an affidavit which he had made in a related application preceding the trial. In it the allegation was made, firstly, that the testator dictated the contents of the will to respondent and, secondly, that after receipt and approval of the draft the testator called for witnesses and signature then took place. Respondent said that this allegation was incorrect in both respects. He was then accused of changing his version as to the date of

signature because he had become aware that Nurse Osler had not been on duty on 1 June. His answer was that he had been aware of that fact since 1989 (he gave evidence on 19 March 1991) and that his evidence on the matter of the date was no afterthought.

Respondent's evidence that the will was signed on Monday 3 June was met with the challenge that that was the day of the testator's operation and that he was not returned to his ward until the following morning. He readily accepted that and said he had told his legal representatives that signature could have occurred on Monday 3, Tuesday 4 or Wednesday 5 or even later that week, and that he could not be sure. He confessed uncertainty as to whether the testator had summoned the witnesses (as he had said in evidence-in-chief) or whether he had done so himself (as he testified in cross-examination) but he recalled that the will was signed at about 6.45 in the evening, shortly before the

nurses concerned went off duty.

Respondent went on to say that some days after executing the will the testator expressed himself as very happy at having done so.

Mrs Scott had a long-standing friendship with respondent and the testator. They had a common interest in dogs and saw one another frequently. She visited the testator several times before his death, in particular shortly after lunch on Saturday 8 June. He appeared to her to be greatly depressed and in very low spirits. She urged him to cheer up as this was not his usual attitude. His response was "No, this time I think I have had it, I am not going to make it this time" or words to that effect. This prompted her to ask him - as she put it - about "his intentions". Mrs Scott reported the testator as variously replying "I have made provision for Mart [the testator's name for respondent], the dogs will be looked after, Mart will have the use of

the house and the dogs will at least be looked after" and "At least Mart will be all right and I have left the house, Mart will have a roof over his head and the dogs will be looked after .... have a home".

Mrs Scott emphasised that the testator did not mention the word "will" nor did he discuss the provisions of the will with her. Referred to her affidavit in the application mentioned earlier, she said it was drawn up by respondent's attorney in Afrikaans, which she understood only very slightly and could not read. She accepted that the affidavit alleged that the testator had spoken of a "will" and a "usufruct" but suggested that the attorney must have misunderstood her. She said she signed the affidavit subsequent to the attorney's having summarised for her what it contained and trusting that it accorded with the information she had given him.

Sister Durandt's evidence was of a formal

nature, in the course of which she handed in certain hospital records. These related, firstly, to the testator's progress from 3 to 7 June and secondly, to the attendance of the nurses who were on duty in his ward. Of relevance in the physiotherapist's report of Friday 7 June are entries to the effect that having had a bad night on the Thursday, with temperature swings accompanied by sweating, the testator was tired, in pain and not very responsive. The attendance records showed that Nurses Dalton and Osler's duty periods over the week 2 to 8 June were identical. They were off duty on Sunday 2 and Thursday 6. They were on duty on Monday 3 from 1 pm to 7 pm, on Tuesday 4 from 7 am to 7 pm, on Wednesday 5 from 7 am to 4 pm and on Friday 7 from 1 pm to 7 pm.

Nurse Osler was a junior student nurse and about 18 years of age at the time of the testator's sojourn in the hospital. She said that the signature on

the will which was allegedly hers resembled her signature but that she did not remember signing. In evidence-in-chief she was certain that she had not signed anything in the presence of the testator and Nurse Dalton. Had she done so the would have recalled it.

In cross-examination she said she would not say it was her signature: it only resembled her signature and she did not remember signing. She would have remembered having done so and had no such recollection. Asked why she would have remembered such an incident, she said that it was an "important procedure" and that she had never signed a will. When she was asked in what circumstances she signed the document, assuming it was her signature, she said she did not know and could not say.

The trial Judge considered that respondent had not made an unfavourable impression. He had conceded

readily when he had been wrong and the aspects on which he had been subjected to criticism by appellant's counsel - which I summarised earlier - were capable of innocent explanation and not destructive either of respondent's credibility or his case. The learned Judge accepted respondent's evidence "met inagneming van die voornoemde kritiek" but held that such acceptance was not sufficient in itself to permit a finding favourable to respondent.

Mrs Scott was found by the court below to be a formidable witness, in keeping with her manifestly strong personality and considerable self-assurance. Despite her friendship with the testator and respondent she bore no trace of bias and her evidence was held, without reservation, to be wholly trustworthy.

The evidence of Nurse Osler, on the other hand, was judged to be of little value. Essentially, said the Court, she could not recall anything of

relevance and her reason for saying that she would have remembered a tripartite signing was so unconvincing it was rejected.

The appeal raises two issues. The first is whether the will is valid. That, in turn, involves deciding whether Nurse Osler signed the will and, if so, whether she did so when the testator and Nurse Dalton signed it. The second issue is whether the testator expressed his confirmation to Mrs Scott that respondent was a beneficiary under the will.

On the matter of validity, it was rightly accepted by appellant's counsel that a will which is complete and regular on its face is valid unless its invalidity is proved: Corbett, Hahlo and Hofmeyr, The Law of Succession in South Africa, 81 and cases cited there. It was faintly argued that the will was not complete and regular on the face of it because it was not in fact signed on 1 June. That contention is

untenable. The will is obviously complete and regular on the face of it. The onus was therefore on appellant to prove invalidity. This he sought to do through the the evidence of Nurse Osler.

I can find no fault with the trial Judge's conclusion regarding her testimony. There is no good reason why signing a will in the presence of the testator and another nurse would have imprinted itself on her memory. There is no evidence that she had been told it was a will she was required to witness, but, even if she had been, the presence of the testator and Nurse Dalton would not have added any real element of novelty to the occasion. She would have been present with them in the surroundings and circumstances in which they were familiar. Apart from that, however, a signature resembling hers appears on the will and there has never been any suggestion that it is a forgery. The probabilities therefore point unwaveringly to the

conclusion that it is indeed her signature. Once that is so, and once she could not explain why and how she signed the will, it was really not open to her to say that she did not sign in the presence of the testator and Nurse Dalton. The onus resting upon appellant on the first issue was not discharged.

On the issue of confirmation by the testator, the onus was on respondent. Counsel were ad idem that for such confirmation to be legally effective it had no need to be written but could be established "by other satisfactory proof": Smith and Another v Clarkson and Others 1925 AD 501 at 510; that such other proof could be by way of oral evidence: Mellish v The Master and Others, 1940 TPD 271 at 278; and that confirmation had to follow execution of the will, not precede it: Mellish's case at 279-280.

Counsel for appellant sought to contend that to constitute effective oral confirmation, a testator's

utterance had to make express reference to his will so as to identify the will (as opposed to a donation or other contract) as the instrument by which he had conferred the benefit in dispute. Not surprisingly, we were referred to no authority to this effect. Whether there has been confirmation is a question of fact. Neither principle nor logic restricts one to the testator's words. Where his words are in writing, one would undoubtedly have regard to the backgrond facts known to him. The position can be no different where the statement in contention is oral.

As to Mrs Scott's evidence, which undeniably identifies respondent as the beneficiary in respect of the use of the house, appellant's counsel conceded that he could not accuse her of dishonesty. He contended nonetheless that for reasons of friendship she had been moved, perhaps only subconsciously, to colour her evidence in favour of respondent. That argument is not

acceptable. The trial Judge's strong commendation of Mrs Scott as an excellent witness is fully supported by a study of the record. Had she been in the least degree partisan she could have alleged, simply and believably, that the testator mentioned his will as the means by which he had made provision for respondent.

Judging by Mrs Scott's account of what the testator told her, it seems clear that the provision he had made for respondent was something he had accomplished prior to her visit. That emerges from the tense and the tenor of the words he used. In that regard, however, appellant's counsel contended that those words were ambiguous and that the provision in question could have been effected by way, for example, of a donation. In my view, in the light of the background facts, especially the testator's wish to make a will and his approval and retention of the completed draft with which respondent had provided him, the

conclusion is unavoidable that the provision which he mentioned to Mrs Scott was testamentary.

It was then submitted that even if the provision concerned was testamentary, that did not mean that the will had actually been signed prior to 8 June. Accepting in appellant's favour, consistently with the approach of the trial Judge, that respondent's evidence, although honest and reliable on most aspects, was insufficient, in view of the onus upon him, to prove by itself when the will was signed, the following considerations show that the will was probably signed before that date.

In the first place, as already mentioned, the testator had decided even before his operation that he wanted to make a will. Conceivably he thought he would wait and see how successful the operation was before he implemented that intention but in the absence of a remarkable upswing in his state of health the general

probability is that he proposed to implement it in due course. Secondly, the hospital records produced in evidence on behalf of appellant, which were clearly tendered not only for their authenticity but also for their probative value, demonstrate a perceptible deterioration in the testator's general condition approaching the weekend of 7 and 8 June. Thirdly, by the time of Mrs Scott's visit the testator thought his end was not far off. His premonition that he was "not going to make it this time" is very significant. He had in the past experienced a number of health crises and had undergone major surgery. He had survived. He knew well how survival felt. Obviously he did not have that feeling or the expectation of it on this occasion. It is probable that the testator had already sensed the inevitable before that Saturday. In all likelihood he would have executed the will when first that realisation struck him, if not before. It was simply a question of

taking the draft from his drawer, having readily available witnesses summoned and then signing. The witnesses were on duty until 7 pm on two days that week - Tuesday 4 and Friday 7. Execution on either of those days accords with the probabilities. Finally, it is remarkable, knowing Mrs Scott as well as he did, that he did not tell her that he had a draft will which he had not yet signed. Had that been the case, his mood and his concern for respondent would probably have prompted him to mention that something so important remained undone.

Far from being persuaded that the trial Court was wrong I am, on the contrary, satisfied that it was right. The appeal must therefore fail.

As to the costs, it is appropriate to order, as was done in the case of the costs order made against appellant in the trial Court, that the costs of appeal be paid out of the estate of the testator.

One final consideration must be mentioned. In giving leave to appeal the trial Judge said:

> "Op die feite van die saak is daar geen spesiale rede waarom die saak deur die Transvaalse Provinsiale Afdeling verhoor moet word nie en gevolglik sal ek verlof toestaan dat daar na die Appèlhof geappelleer word."

The trial Judge misdirected himself. In the first place, s 20 (2) (a) of the Supreme Court Act, 59 of 1959, required him to enquire whether the questions involved warranted the attention of the Appellate Division, not the Provincial Division. Secondly, there was nothing in this case that warranted the attention of this Court. It was obviously a matter appropriate for disposal by the Full Bench.

The appeal is dismissed, with costs. Such costs are to be paid out of the estate of the late

Nathan Weinstein and will include the costs of the application for leave to appeal.

C T HOWIE, AJA

HOEXTER, AR

VAN HEERDEN, AR

GROSSKOPF E M, AR

EKSTEEN, AR

CONCUR