THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 325/2022

In the matter between:

ASSOCIATION FOR VOLUNTARY STERILIZATION OF SOUTH AFRICA **APPELLANT**

and

STANDARD TRUST LIMITED **FIRST RESPONDENT**

PROFESSOR MUSHI MATJILA NO **SECOND RESPONDENT**

ASSOCIATE PROFESSOR LIONEL GREEN-THOMPSON NO **THIRD RESPONDENT**

EDWARD LESLIE HAYNES-SMART NO **FOURTH RESPONDENT**

UNIVERSITY OF CAPE TOWN **FIFTH RESPONDENT**

MASTER OF THE HIGH COURT, CAPE TOWN **SIXTH RESPONDENT**

Neutral citation: *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* (325/2022) [2023] ZASCA 87 (7 June 2023)

Coram: PONNAN, SALDULKER and MEYER JJA and KATHREE-SETILOANE and SIWENDU AJJA

Heard: 3 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal

website and released to SAFLII. The date and time for hand-down are deemed to be delivered on 7 June 2023.

Summary: Section 21(1)*(c)* of the Superior Courts Act 10 of 2013 ─ enquiry into a determination of existing, future or contingent right or obligation ─ declaratory order ─ when competent ─ appeal fails at two related preliminary levels ─ first, no practical effect ─ relief sought in the application does not address any acts taken by the respondents ─ second, nature and extent of declaratory order ─ order sought on appeal is irredeemably vague, lacks certainty and is unclear.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie J, sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Saldulker JA (Ponnan and Meyer JJA and Kathree-Setiloane and Siwendu AJJA concurring):

[1] This appeal is against the judgment of the Western Cape Division of the High Court, Cape Town, per Allie J (the high court). The high court dismissed an application for declaratory relief brought by the appellant, the Association for Voluntary Sterilization of South Africa (AVSSA). The appeal is with the leave of this Court.

[2] The declaratory relief sought by the appellant involved the interpretation of a clause in a will (the will) executed by a Mr James Scratchley (the testator) on 16 May 1982. The testator died in 1982. In terms of the will, he bequeathed the residue of his estate to his administrators to be held in a testamentary trust, the James Sivewright Scratchley Testamentary Trust (the trust), the income of which was to be paid to Mrs Agnes Scratchley, his wife, until her death. The first respondent, Standard Trust Limited, is the sole trustee of the trust. Following the death of Mrs Scratchley, and in accordance with the testator's wishes, a committee was established comprising the Chairman of AVSSA, the Professor of Gynaecology of the Medical Faculty at the University of Cape Town (UCT), the Medical Officer of Health, Cape Town and the Dean of the Medical Faculty at UCT (the committee). The second and third

respondents, Professor Matjila NO and Associate Professor Green-Thompson NO of UCT, along with the fourth respondent, Mr Edward Haynes-Smart of AVSSA, currently make up the committee.

[3] AVSSA is a beneficiary of the trust. The will provided that the committee shall work in close collaboration with and render such financial assistance as it deems fit to AVSSA. The committee would, subject to clause 4.3.2.1 of the will, have the responsibility, in their absolute discretion and after they had been informed by the administrators of the testator's estate of the amount of income available for these purposes, to select beneficiaries and disburse to them such amounts for such purpose as the said committee may from time to time direct, in line with the object of the trust. The object of the trust was to utilise the income therefrom for the purposes described in clauses 4.3.2.1 and 4.3.2.2 of the will in such proportions as the committee may determine, it being the testator's intention that priority was at all times to be given to the allocation of the moneys for the purposes envisaged in clause 4.3.2.1 of the will. In terms of clause 4.3.2.1, the committee was obliged to apply the income of the Trust for the following purpose:

'4.3.2.1 To financially assist, to the extent that this is possible and as far as medical ethics and the Law permits and in whatever form is deemed appropriate, any established venture which has as its sole object the furtherance of the cause of Family Limitation and Planning and/or Voluntary Sterilisation in the Republic of South Africa it being my particular wish that, in this context, funds be utilised to establish Clinics (mobile or otherwise) and to disseminate propaganda and information by such means as may be available.'

[4] There is disagreement amongst the members of the committee regarding the meaning of the word 'planning' in the phrase 'Family Limitation and Planning' in clause 4.3.2.1 of the testator's will. They are accordingly not in agreement as to who should benefit from the Trust.

[5] The high court held that the appellant had not laid a basis for the relief sought. Before this Court, aside from the question of costs, the appellant seeks declaratory relief set out in paragraph 1.2 of the notice of motion. It contends that the word 'planning' in clause 4.3.2.1 of the will refers to the limiting of births, rather than the spacing and timing of births.

[6] It is common cause that the relief sought in this appeal by AVSSA is not directed against any decision taken by the committee. Thus, this Court on 19 April 2023, directed the Registrar to dispatch the following to the parties:

'In this matter, the relief sought in the application, the subject of the appeal, is not directed at any of the decisions taken or implemented by the Committee, whether in relation to the selection of beneficiaries or disbursement of monies. Accordingly:

(i) will the judgment and order sought on appeal have any practical effect or result as contemplated in section 16(2)*(a)* of the Superior Courts Act?

(ii) that aside, is the order to which the appellant confines itself on appeal not irredeemably vague?

See inter alia*: Clear Enterprises v Commissioner, SARS* [2011] ZASCA 164 paras 16-19; *Minister of Water & Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177 paras 13-14; *West Coast Rock Lobster Association v Minister of Environmental Affairs & Tourism* [2010] ZASCA 114 paras 40-45.

In the circumstances, should the appeal be persisted in, the appellant must be prepared to fully address these questions at the hearing of the matter.'

[7] Section 21(1) of the Superior Courts Act 10 of 2013 (Superior Courts Act) provides:

'21 Persons over whom and matters in relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[8] In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*,[1] Jafta JA said of s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959 (the predecessor to s 21(1)*(a)*) that:

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[1]*Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 16.

‘[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person interested in an “existing, future or contingent right or obligation” and nothing more is required (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 (4) SA 1 (A) at 14F). In *Durban City Council v Association of Building Societies* 1942 AD 27 Watermeyer JA with reference to a section worded in identical terms said at 32:
“The question whether or not an order should be made under this section has to be examined in two stages. First the court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.”.’

[9] The difficulty in this matter is that there is no decision of the committee that has been challenged. In para 9 of the second respondent’s answering affidavit, the point is made that the relief sought in the application does not address any acts taken by the committee, or by the trust, that have been implemented, whether in relation to discretionary decisions as to the selection of beneficiaries or the disbursements of amounts to such beneficiaries. The decisions of the committee therefore stand and they will continue to have consequences.

[10] In *Cordiant*, this Court said that:
‘[17] It seems to me that once the applicant has satisfied the court that he/she is interested in an “existing, future or contingent right or obligation”, the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect that once satisfied that the applicant is an interested person, “the Court must decide whether the case is a proper one for the exercise of the discretion” should be read in its proper context. Watermeyer JA could not have meant that in spite of the applicant establishing, to the satisfaction of the court, the prerequisite factors for the exercise of the discretion the court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something which would constitute the exercise of a discretion as

envisaged in the subsection (cf *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93A-E).'

In this matter the high court, having examined all the relevant facts, declined to grant the declaratory order sought by the appellant.

[11] The test for interference by this Court, as an appellate court, is set out in *Reinecke v Incorporated General Insurance Ltd*.[2] At 99B-E Wessels JA said:

'It follows, in my opinion, that counsel's contention that the Court *a quo* lacked jurisdiction to make a declaratory order cannot be upheld. In conclusion, there remains for consideration Mr Wulfsohn's alternative argument relating to the exercise of its discretionary power by the Court *a quo*, which proceeded from the assumption that the learned Judge had misdirected himself in the respect to which I have already referred to earlier in this judgment. It was submitted on respondent's behalf that, even if it appeared that the learned Judge had misdirected himself in the exercise of his discretion, this Court would not allow the appeal if the order appealed from is, notwithstanding the misdirection, clearly consistent with the proper exercise of a judicial discretion. This approach necessarily requires this Court to bring a judicial discretion to bear upon the question whether or not the case is a proper one for the granting of a declaratory order. *In the absence of misdirection or irregularity, this Court would ordinarily not be entitled to substitute its discretion for that of the Court a quo*.' (Own emphasis.)

In this case no misdirection or irregularity has been relied upon. Thus, we are not simply at large to interfere with the discretion exercised by the high court.

[12] Whilst it is correct that the absence of an existing dispute is not an absolute bar to the grant of a declaratory order, a court may decline to grant such an order if it regards the question raised before it as hypothetical, abstract or academic. This Court in *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others*,[3] has said the following:

'What *was* required was that there should be interested parties upon whom the declaratory order would be binding. In considering whether to grant a declaratory order a court exercises a discretion with due regard to the circumstances. The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. If the court is so satisfied it must consider whether or not the order should be granted. In exercising its

[2] *Reinecke v Incorporated General Insurances Ltd* [1974] 2 All SA 80 (A); 1974 (2) SA 84 (A).
[3] *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2010] ZASCA 114; [2011] 1 All SA 487 (SCA) para 45.

discretion the court may decline to deal with the matter where there is no actual dispute. The court may decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic. Where a court of first instance has declined to make a declaratory order and it is held on appeal that that decision is wrong the matter will usually be remitted to the lower court.'

[13] Importantly, what this Court said in *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services and Others*,[4] bears relevance. Ponnan JA said that absent an undisputed factual substratum, it would be extremely difficult to define the limits of a declaratory relief:

'[16] . . . Not all of the cases pending before the High Court involve the same parties. To the extent that they concern different parties any declaratory order that issues can hardly be binding on those other parties. Moreover, each of the pending applications involves different vehicles. The fallacy in the approach of the parties is that they assume, erroneously so, that what confronts us is a discrete point of statutory construction. It is not. It is first and foremost a fact-based enquiry. Any interpretive exercise to be undertaken will be inextricably linked to the facts. And, it is trite that every case has to be decided on its own facts. That is particularly the case where, as here, the one party contends that the facts advanced by the other are a "sham", "fictional" and a "stratagem" to circumvent the applicable legislation. It follows that efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance. For, as we well know, parties frequently endeavour to distinguish their case on the facts from those reported decisions adverse to their cause. Moreover, absent an undisputed factual substratum, it would be extremely difficult to define the limits of the declaratory relief that should issue.'

[14] As Kriegler J pointed out in *Ferreira v Levin NO and Others*,[5] and quoted at para 17 in *Clear Enterprises*:

'Simply put, whatever issues do arise in the pending matters none of them are yet "ripe" for adjudication by this Court. To borrow from Kriegler J in *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199:

"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, 'ripeness'. That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to

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[4] *Clear Enterprises (Pty) Ltd v Commissioner for South African Revenue Services and Others* [2011] ZASCA 164 (SCA) paras 16-19.

[5] *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC).

say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a Court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor *Sharpe* points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.".'

[15] It is trite that an order of court has to be certain and clear. Initially the appellant in its Notice of Motion sought the following order:

'1. Declaring clause 4.3.2.1 of the Will of the late James Sivewright Scratchley (Will) to mean that "The words 'Family Limitation and Planning and/or Voluntary Sterilisation in the Republic of South Africa' to mean the limiting of births, rather than the spacing and timing of births".

Properly construed what they meant was 'limiting of births' instead of spacing and timing of births. This in my view is the construction that the appellants ultimately settled upon during the debate before us.

[16] There is a presumption against tautology.[6] In their replying affidavit the appellant accepted that it may well be that the interpretation favoured by it would give rise to tautology. It was stated: 'in the sense that counselling people on the benefit of having no children, contraception or sterilization are all methods to achieve family limitation (so that to say those things after the word "limitation" involves a measure of repetition) but there is no difficulty with that. People use tautology in speech and writing all the time'. The appellant seeks to attribute to the testator's will an intention equating the use of the word 'planning' to 'limiting of births', and not family planning in the broader sense.

[17] The sum effect of what the appellant is suggesting is that we should not merely interpret the will, but that we must put a red line through the relevant

[6]See the dictum in *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd* [1984] 1 All SA 260 (A); 1984 (1) SA 61 (A) at 70A-72C.

provision and substitute in its stead the words ‘limiting of births’. That will not be an interpretative exercise, but a recrafting of the will.

[18] In the circumstances, the high court cannot be faulted for declining to issue the declaratory order sought by the appellant. It was contended that the costs order of the high court warrants reconsideration. However, it is trite that costs is in the discretion of the court below and that in the absence of a misdirection, a court of appeal will not interfere therewith.

[19] In the result, the appeal is dismissed with costs.

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H K SALDULKER

JUDGE OF APPEAL

Appearances

For the appellant:	D W Baguley
Instructed by:	Assheton-Smith Ginsberg Inc, Cape Town
	Michael du Plessis Attorneys, Bloemfontein
For the second, third and fifth respondents:	R Goodman SC
Instructed by:	Fairbridges Wertheim Becker, Cape Town
	McIntyre Van der Post, Bloemfontein