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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBERS: 35593/2014

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

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SIGNATURE

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DATE

In the matter between:

[H.....], [J.....] [M.....]

and

H...], [S.....] [B.....]

ANNA HACQUEBORD N.O (in her capacity as nominee of Standard Executors and Trustees Limited)

SANDRA STACEY VAN SCHLOOR N.O (in her capacity as nominee of Standard Executors and Trustees Limited)

THE MASTER OF THE SOUTH GAUTENG HIGH

Applicant

First Respondent

Second Respondent

Third Respondent

COURT**Fourth Respondent**

J U D G M E N T

WINDELL J:**INTRODUCTION**

[1] This is an application regarding the interpretation of a bequest in the will of the late Bruce Edward Hobbs (*hereinafter referred to as "the testator"*). The applicant is the wife of the testator. She seeks an order declaring that the words "*Autocom (Pty) Limited*" in the testator's will dated 27 August 2013, intended to be a reference to "*Autocom **Holdings** (Pty) Limited*". In the alternative the applicant seeks an order to rectify the will by inserting the word "*Holdings*" after the word "*Autocom*".

[2] The first respondent is the testator's son. He opposed the application and submitted that the will reflects the testator's intention and that no mistake was made in the drafting thereof. He contended that the will is in accordance with the testator's instructions, and that it is capable of being carried out.

BACKGROUND

[3] It is common cause that the testator held 100% of the shares in a company known as Autocom Holdings (Pty) Limited (*hereinafter referred to as "Autocom*

Holdings”). Autocom Holdings held 100% of the shareholding in Autocom (Pty) Limited (*hereinafter referred to as "Autocom"*). The testator in consequence thereof, held no shares in Autocom.

[4] Autocom Holdings has no bank account or other assets, and is merely a vehicle for the purposes of holding the testator’s shares in Autocom. Autocom is a very lucrative trading company. In February 2014 Autocom had cash reserves in the excess of R 20 million. It holds the bank account and the cash resources. The testator was the sole director of Autocom and Autocom Holdings. Whilst the testator was alive, Autocom provided all the income for the day to day living expenses and financial requirements of the applicant and the testator.

[5] The first respondent stated that the underlying asset in Autocom Holdings (the R20 million) was intended for him. The first respondent rely upon an earlier will of the testator, dated 10 June 2002, in which the testator bequeathed in trust, to the applicant, only an amount of R1 250 000.00. At that time the applicant was not the wife of the testator and was described by the testator as his *"friend"*.

[6] The first respondent further relied upon an e-mail from the testator shortly before his death, wherein he made mention of a *"big policy"*. The first respondent claimed that it was a reference to the R20 million. It is common cause that the testator called up an investment plan in October 2013 and that R4 million was paid over to the first respondent.

THE WILL

[7] It is undisputed that the author of the will was one Teubes, a financial

consultant and planner in the employ of Standard Bank of South Africa Limited.

[8] In the will the testator bequeathed to the applicant all his motor vehicles and his immovable property in Northcliff, which was the primary residence of the testator and the applicant.

[9] The will made provision for a Testamentary Trust. The applicant is the only income beneficiary in terms of the Trust. The testator bequeathed to the trustees an amount of R 3 500 000 to be held in trust by them. He also bequeathed all the shares in, and loans to Autocom, to the trustees, subject to the Trust provisions.

[10] In terms of the Trust provisions the trustees shall:

1. Deal with the capital at their discretion in terms of the powers conferred on them in the will.
2. Retain any and all shares in and loans to the company known as Autocom for as long as the auditors of the company consider these to be reasonably sound investments.
3. Should it become necessary, to arrange for the Trust estate to be represented on the board of directors of the company.
4. Shall pay, use or apply so much of the net income and/or capital of the Trust as they in their sole discretion consider necessary or desirable for the welfare of the applicant.
5. Terminate the Trust upon the death of the applicant and pay and transfer the capital of the Trust as it then exists to the first respondent.

[11] Without making reference to any specific assets, the testator bequeathed the

residue of his estate to the first respondent.

[12] Because the testator did not hold any shares in Autocom, no effect can be given to those portions of the will which makes reference to the shares in Autocom, and it must fall into the residue of the estate. The first respondent contended that it was in any event always his father's intention to bequeath to him the shares in Autocom Holdings and that it was never the testator's intention to bequeath the shares in Autocom Holdings to the Trust, of which the applicant is the income beneficiary.

DECLARATORY ORDER OR RECTIFICATION

[13] The first respondent contended that the case made out by the applicant was squarely aimed at rectifying the will and that a declaratory order was not competent.

[14] In *Allen v Estate Bloch* 1970(2) SA 376 (C), the testator had bequeathed "*my share in stand 61 Richard Street, Selby Township*" when he did not own a share in the stand, but 130 shares in a holding company which owned the stand. After analysing the law, Corbett J (as he then was) granted an order declaring that the reference to the testator's share in the stand was intended to be a reference to his 130 shares in the holding company, finding it unnecessary to even rectify the will in those circumstances.

[15] The rectification of a will is a totally different process compared to the interpretation of the will. Notwithstanding the applicant's choice of words, I am satisfied that a declaratory order would be competent if the intention of the testator can be ascertained from the will. As is clear from the majority of the cases dealing

with the interpretation of a will, and depending on the facts and circumstances of each case, an applicant would be entitled to a declaratory order. (See *Ley v Ley Executors and Others* 1951 (3) SA 186 (A); *Ex parte Rossouw, NO* 1960 (1) SA 403 (GW); *Estate Levitas v Levitas' Minors* 1962 (4) SA 385 (T); *Will NO v The Master and Others* 1991 (1) SA 206 (C); *Ex parte Essery and Vial NNO: In re Estate Birkett* 1980 (2) SA 392 (D))

LEGAL PRINCIPLES

[16] In interpreting a will the court must ascertain not what the testator meant to do when he made his will, but what his intention is, as expressed in his will. See *Allen v Estate Bloch* supra. The intention can be derived from the language used in the will and the context of the whole document. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) Wallis JA set out the position as follows in paragraph [18]:

‘The inevitable point of departure is 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.’

[17] The will or a portion thereof may be ambiguous, either because there is a patent ambiguity arising from the language used in the will; or there is a latent ambiguity, when words that are clear become uncertain or ambiguous when they are sought to be applied to the facts on the ground. In *Ex parte Eksekuteure Boedel Malherbe* 1957 (4) SA 704 (C) at 711, Van Winsen J stated the following with reference to the matter of *Wilson N.O teen Estate Wilson 1913 K.P.A*:

'It appears to be clear that it has long been settled that extrinsic evidence is to be admitted to raise and remove latent ambiguities; that a latent ambiguity arises from a description in the will being made impossible, or uncertain in application, from collateral circumstances; and that accordingly, when a bequest is made to a person by a wrong name, evidence may be given to prove the error in description, and who was meant by the testator by the mistaken designation. The will in such case shows that the testator intended a benefit to some person whom he had erroneously or defectively described; such error is discovered, not from the will itself, but in the search for the beneficiary.'

[18] In order to clear up this ambiguity and to arrive at the testator's true intention, reference may be had not only to the will as a whole, but to all such extrinsic evidence available to the testator when he made the will (the armchair approach). See *Jowell v Bramwel-Jones & Others* 1998 (1) SA 836 (W) at 868B-E.

[19] Sitting in the testator's armchair, the court is entitled to have regard to all the material facts and circumstances known to the testator. This is not a case of equivocation and extrinsic evidence of the testator's intention is not admissible. This process is objective, not subjective. The court must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. See *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* at page 604 A-B.

[20] The court should follow a sensible interpretation with reference to the extrinsic circumstances, to ensure that the will is not rendered inoperative. It should interpret it in a "*spirit of benevolence*", even if it might do some violence to the language. In *Siebert v Barker* NO 2011 JDR 1767 (GNP), Tuchten J summarized it as follows:

'If the testator's intention is poorly expressed it may be ascribable to poor draftsmanship. In such cases our Courts have adopted a benevolent approach with a view to lending validity to testamentary dispositions rather than to have them struck down as invalid because of vagueness or uncertainty. This approach has given rise to the presumptions in favour of the validity and effectiveness of the dispositions in a will even when the words used to express them are ambiguous or obscure. *Voet* states that the ordinary meaning of a word is generally not departed from unless it is clearly contrary to the will of the testator. This principle is applicable when the retention of the ordinary meaning of the word will have the effect that the disposition becomes inutile. In cases of ambiguous language it is hence considered most appropriate to accept the meaning which will cause the disposition in question to be valid rather than to fail, provided that such interpretation is not manifestly in conflict with a legal prohibition. If something has been wrongly written in a will, it should be interpreted benevolently (*benigne*) in order to give effect to the presumed will of the testator'

CONCLUSION

[21] The words the testator used when he bequeathed the shares namely, "*shares in and loans to Autocom*", are not in themselves uncertain, but their application to the extrinsic facts, (namely that he did not own any shares in Autocom), give rise to uncertainty. This is what is described as a latent ambiguity.

[22] Having regard to the issues raised on the papers and in argument, this dispute can and should be decided only by reference to the language, the context of the will and the common cause fact that the testator did not own shares in Autocom.

[23] As in the case of the interpretation of contracts, it is imperative that the will be construed as a whole. This means that all the clauses contained therein must be read together and interpreted in accordance with the general scheme of the will. (See Corbett, Hofmeyr and Kahn, *The Law of Succession in South Africa* (2001) 2nd ed at 476-8 and the authorities cited there).

[24] The first respondent contended that the testator was an experienced businessman who was well aware of the difference between the two companies Autocom and Autocom Holdings. The testator therefore intended to make reference to Autocom and not Autocom Holdings. The first difficulty which the first respondent faces with this approach is that it leaves unexplained the unquestionable objective fact that the testator bequeathed something that he did not own.

[25] The first respondent further contended that effect can be given to the will as it stands. This is clearly wrong. Effect cannot be given to that portion of the will, since the asset is not owned by the testator. What the first respondent is in fact saying is that his father wanted to bequeath an asset he did not own; thereby ensuring that effect cannot be given to it, with the result that the asset would then fall into the residue of the estate. If it was the testator's intention to entrust the shares he owned to the first respondent, why did he not bequeath it directly to him? If the first respondent was correct, and I am of the view that he is not, it would indeed be a very strange and complicated way of dealing with ones assets.

[26] The testator's will is not a lengthy complex document. It is a simple straightforward document. When the will is read as a whole, it mainly deals with the testator's intention to make provision for the applicant. Both applicant and first respondent agree that the testator was an astute businessman. He was Autocom. The biggest asset in his estate was the shares he held in Autocom Holdings. There is a presumption in favour of the validity and effectiveness of the dispositions in a will, even when the words used to express them are ambiguous. It is clear from the contents and the context of the will that it was the testator's intention to deal

with the shares in his will. He did not bestow the shares to his son or to his wife. He made provision for a Testamentary Trust and bequeathed the shares to the trustees. He even made provision for the trustees to arrange for the Trust estate to be represented on the board of directors of the company should it become necessary. The Trust provisions further provides for the termination of the Trust upon the death of the applicant and the payment and transfer of the capital of the Trust as it then exists to the first respondent.

[27] On a careful consideration of the language and contents of the will, coupled with the fact that the testator did not own shares in Autocom, and leaving aside the subjective impressions and opinions of deponents, I have come to the conclusion that it was the testator's intention to bequeath the shares in Autocom Holdings to the trustees. It was not the testator's intention that the shares in Autocom Holdings should fall into the residue of his estate. The reference to the testator's shares in Autocom (Pty) Ltd was intended to be a reference to Autocom Holdings (Pty) Ltd. As the testator's intention is clear, it is unnecessary to consider, or to deal with the applicant's alternative claim for rectification.

[28] In the result the following order is made:

1. Declaring that the words "Autocom (Pty) Limited in clauses 1.2.3 and 2.2 of the will of the late BRUCE EDWARD HOBBS dated 27 August 2013 is intended to be a reference to "Autocom Holdings (Pty) Limited.
2. The first respondent is ordered to pay the costs of the application.

LWINDELL

JUDGE OF THE HIGH COURT

Counsel for applicant: Adv PJ Van Blerk SC

Instructed by: Martini -Patlansky

Counsel for respondent: Adv C Acker

Instructed by: Pagel Schulenburg INC

Date of hearing: 10 March 2015

Date of judgment: 17 April 2015