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

CASE NUMBER: 43528/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

THEODOR WILHELM VAN DEN HEEVER N.O

FIRST PLAINTIFF

JOSHUA MUTHANYI N.O

SECOND PLAINTIFF

and

MARIA POULOS N.O

FIRST DEFENDANT

MARIA PAULOS

SECOND DEFENDANT

PERICLES VALASIS

THIRD DEFENDANT

JOANNE VALASIS

FOURTH DEFENDANT

PETER VALASIS

FIFTH DEFENDANT

THE MASTER OF THE SOUTH GAUTENG HIGH COURT

SIXTH DEFENDANT

Neutral Citation: *Theodor Wilhelm Van Den Heever N.O and Another v Maria Poulos N.O* (Case No: 43528/2015) [2023] ZAGPJHC 344 (18 April 2023)

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] This case concerns adiation (acceptance) or repudiation (renouncement) of a benefit to a person nominated to receive an inheritance, by virtue of the terms of a will. Adiation occurs where a person nominated to receive an inheritance chooses to accept the inheritance. Repudiation, on the other hand, occurs where a person elects to refuse the inheritance. Upon the death of the testator, a beneficiary will have to make an election either to adiate or repudiate the terms of the will.
- [2] An application was issued out of this Court under case number 2015/43528 (“the application”). In the application the current plaintiffs were applicants and ultimately, subsequent to joinder, the first to fifth defendants were cited as first to fifth respondents.
- [3] The application was subsequently referred to trial on 26 March 2018 by Van Der Linde J. The order reads as follows:
1. The matter is referred to trial.
 2. The Notice of Motion is to be served as summons in the trial.
 3. Costs are to be costs in the cause.
- [4] The plaintiffs seek the following order:

1. That the renunciation of any benefit by the insolvent, Nicholas Valasis, in the deceased estate of the late Lulu Valasis is declared invalid and of no force or effect;
2. That the insolvent, Nicholas Valasis, adiated his right to the benefit bestowed unto him in terms of the Will;
3. That, with retrospective effect, the right to the inheritance became an asset in the estate of Nicholas Valasis;
4. That the right to the inheritance is an asset that vests in the trustees of the insolvent estate of Nicholas Valasis;
5. That the first defendant is to draw a liquidation and distribution account in the deceased estate of Lulu Valasis in accordance with the provisions of the Will;
6. That the liquidation and distribution account as per prayer 5 be drawn and lodged with the sixth defendant within six months after the order;
7. That the dividends in terms of the liquidation and distribution account as set out in prayer 5 above be paid out within 2 (two) months subsequent to the confirmation of the liquidation and distribution account by the sixth defendant;
8. costs of the suit.

[5] The second, third, fourth and fifth defendants are joined in this action insofar as they may have a potential interest in the outcome of the matter.

[6] The first, second and sixth defendants do not oppose the order sought and elected to abide by the Court's decision.

- [7] However, the third, fourth and fifth defendants (“the defendants”) oppose the action.

The Parties

- [8] The first plaintiff is Theodor Wilhelm van den Heever N.O, the joint trustee in the insolvent estate of Nicholas Valasis (“the insolvent”). He is an adult male and professional insolvency practitioner employed by D&t Trust (Pty) Ltd.
- [9] The second plaintiff is Joshua Muthanyi N.O., the joint trustee in the insolvent estate of the insolvent. He is an adult male and professional insolvency practitioner employed by RNG Trust CC.
- [10] The first defendant is Maria Poulos N.O., an adult female businesswoman cited in her capacity as the executrix of the deceased estate of the late Ms Lulu Valasis (“the deceased estate”).
- [11] The second defendant is Maria Poulos, an adult female businesswoman. She is the daughter of the late Ms Lulu Valasis and sister of the insolvent.
- [12] The third defendant is Pericles Valasis, an adult male, the son of the insolvent and grandson of the late Ms Lulu Valasis.
- [13] The fourth defendant is Joanne Valasis, an adult female, the daughter of the insolvent and granddaughter of the late Ms Lulu Valasis.
- [14] The fifth defendant is Peter Valasis, an adult male, the son of the insolvent and grandson of the late Ms Lulu Valasis.
- [15] The sixth defendant is The Master of the South Gauteng High Court, being the statutorily appointed entity overseeing the administration of deceased estates.

Issue for determination

[16] The question before me is whether the insolvent, Mr Valasis, adiated or renounced his benefit in terms of the will of his late mother, Ms Lulu Valasis.

[17] Furthermore, in the event that the court finds that he adiated the benefit, whether the benefit falls within his insolvent estate.

Factual Matrix

[18] On 12 September 2001 the late Ms Lulu Valasis executed her Last Will and Testament ("the Will").

[19] Eleven years later, on 17 October 2012, Ms Lulu Valasis passed away.

[20] The following represents the material terms of her will:

"3. I hereby appoint as my sole and universal heirs all my estate and effects, whether movable or immovable, corporeal or incorporeal situate in the Republic of South Africa whether the same may be in possession, reversion, remainder or expectancy, nothing whatsoever excepted, my children in equal shares, NICHOLAS VALASIS and MARIA POULOS (born VALASIS), subject to the proviso in paragraph 4 hereunder.

4.1 Regarding the immovable property situate at [...], Melrose, Johannesburg ("the property"), the said property is registered in terms of its Title Deeds as follows:

4.1.1 50% (50 per centum) of the property is registered in the name of Maria Poulos (born Valasis);

4.1.2 50% (50 per centum) of the property is registered in the name of Lulu Valasis;

4.1.3 In respect to the property Mari Paulos shall retain her share in and to the property as described in the Title Deed and in regard to my

50% (fifty per centum) share in and to the property I appoint my son, Nicolas Valasis, as my exclusive heir.

4.2 Regarding Valasis Investments CC (Registration No. [...]) (“the Corporation”) I direct that my 50% (fifty per centum) interest in and to the Corporation shall vest with my son Nicholas Valasis and to this end I appoint my son as my exclusive heir thereto.”

- [21] Prior to the passing of Ms Lulu Valasis, during early 2012, the insolvent and Mr Ahmad concluded a building agreement in terms of which the insolvent had to attend to the construction of certain buildings for Mr Ahmad. However, during May 2012, Mr Ahmad terminated the agreement due to disputes arising due to various material defects relating to the construction of the buildings. As a result, the dispute was referred to arbitration.
- [22] On 19 November 2012 Hirschowitz Attorneys (“Hirschowitz”) reported the estate of late Ms Lulu Valasis to the sixth defendant (“the Master”). On 15 February 2013 the second defendant and the insolvent were appointed as executors of the estate of their late mother.
- [23] On 27 November 2013, Mr Cook, the arbitrator, informed the insolvent and Mr Ahmad that he would hand down his award in the arbitration proceedings on 4 December 2013. Mr Cook, furthermore stated that the award would not be handed down if the arbitrators’ fee in the amount of R228 000.00 due to him was not paid in full.
- [24] Subsequently, on 3 December 2013, Mr Cook received correspondence from Mr Vaios Kokkoris (“Kokkoris”), acting on behalf of the insolvent, whereby it was suggested that the insolvent would be able to pay the arbitrators’ fee as he stood to inherit an amount not less than R100 000.00 from the estate of his late mother, Ms Lulu Valasis.
- [25] As a result of the correspondence received from Kokkoris, Mr Cook delivered the award on 4 December 2013. In terms of the award the insolvent was

ordered to pay an amount of R1 513 589. 66 to Mr Ahmad by the end of December 2013.

[26] During February 2014, the insolvent and Mr Ahmad entered into settlement negotiations in order to settle the disputes between them. The second defendant ("Ms Paulos") was also a party to the settlement discussions. However, on 25 March 2014 Kokkoris informed June Marks, the attorneys acting on behalf of Mr Ahmad, that the settlement offer by Ms Paulos was withdrawn due to friction between the parties.

[27] Wright J on 26 March 2014 made the arbitration award an order of Court and enforceable as such.

[28] On 1 April 2014 the insolvent signed a document titled "RENUNCIATION OF BENEFITS" ("the first renunciation of benefits"), informing the Master as follows:

"I hereby renounce all benefits bequeathed to me under the Last Will and Testament of my late mother, Lulu Valasis. I understand, having taken legal advice, that my said inheritance and the proceeds thereof will devolve upon my lawful issue by representation *per stirpes*, the same being for their benefit. As at the date hereof my children are:

- Pericles Valasis, identity number:[...];
- Joanne Valasis, identity number:[...]; and
- Peter Valasis, identity number:[...]."

[29] On 9 June 2014 Mr Ahmad launched an application for the sequestration of the insolvent and on 20 August 2014 a final order for sequestration was granted by Wepener J.

[30] On 22 August 2014 the first defendant and the insolvent in their capacities as executors of the deceased estate signed the first and final liquidation and distribution account, recording *inter alia* the following:

19.1. Nicholas Valasis having renounced the benefits bequeathed to him under the Will, the assets are accordingly awarded *in testatio* to the lawful issue of Nicholas Valasis, i.e., the third, fourth and fifth defendants, in equal one-third shares and to Maria Poulos (born Valasis), the major daughter of the deceased, as follows:

19.1.1. To the third, fourth and fifth defendants a one-third share each in the following assets:-

19.1.1.1. The deceased's 50 % interest in and to Valasis Investments CC in terms of clause 4.2 of the Will;

19.1.1.2. The deceased's 50 % share in and to the immovable property described as Section 16 in the Scheme known as Portman Place in terms of clause 4.1.3 of the Will;

19.1.1.3. One-half of the remainder of the assets of the estate in accordance with the provisions of clause 3 of the Will, being assets A3 and A5.

19.1.2. To the Second Defendant a one-half share of the remainder of the estate in accordance with the provisions of clause 3 of the Will.

[31] On 2 September 2014 the first renunciation of benefits together with the first and final liquidation and distribution account was lodged with the Master, under cover of a letter on the letterhead of Hirschowitz Attorneys, on behalf of the first defendant. The first liquidation and distribution account was drafted in terms of the first renunciation distributing the bequest to the defendants.

[32] On 9 September 2014 the Master informed the first defendant that:

1. The first renunciation of benefits cannot be accepted because the renunciation cannot have a condition;
2. As it stands, the distribution account cannot be accepted since it was done in terms of the renunciation;
3. The account falls to be amended accordingly in terms of the Will and the beneficiaries should be accordingly advised.

[33] On 25 November 2014 the first plaintiff was appointed as trustee of Mr Valasis's insolvent estate.

[34] On 10 December 2014 the insolvent prepared a second renunciation of benefits ("the second renunciation of benefits"), recording that:

"I, the undersigned, Nicholas Valasis, hereby renounce all benefits bequeathed to me under the Last Will and Testament of my late mother, Lulu Valasis."

[35] On 22 January 2015 a second liquidation and distribution account was filed with the Master wherein the entire estate was to be distributed to Ms Paulos.

[36] The plaintiffs objected to the first liquidation and distribution account lodged at the Master on the basis that the renunciation of the benefits by the insolvent on 1 April 2014 was done *in fraudem legis* and therefore that the inheritance of the insolvent vested in his insolvent estate.

[37] On 17 June 2015 the trustees of the insolvent estate conducted an inquiry in terms of section 152 of the Insolvency Act, Act 24 of 1963 ("the section 152 inquiry").¹ During the inquiry the plaintiffs interrogated the evidence of the

¹ Section 152(2) of the Insolvency Act provides that:

insolvent, Ms Paulos and Mr Hirschowitz, amongst others. The transcripts of the inquiries are before this court.

[38] As a result, on 9 December 2015 this application was launched by the plaintiffs, in terms of the second liquidation and distribution account whereby the entire estate was to distributed to Ms Paulos.

[39] A third liquidation and distribution account was lodged on 11 February 2016 with the Master. In terms of the third liquidation and distribution account the renounced bequest was to be distributed between the defendants.

Evidence by the First Plaintiff

[40] Mr van den Heever, the first plaintiff (“Van den Heever”) was the only witness to testify during the plaintiff’s case. He was appointed as one of the trustees in the insolvent estate of the insolvent.

[41] The evidence presented by the witness was not disputed, and his evidence to a large extent followed the sequence of events as referred to earlier in this judgment.

[42] The salient points of his evidence can be summarised as follows;

If at any time after the sequestration of the estate of a debtor and before his rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent’s estate or the administration of the estate.

- 42.1. The insolvent was appointed as executor of his late mother's estate on 15 December 2013 and he remained in the position until his sequestration in August 2014, thus for 1½ years.
- 42.2. Following the demise of Ms Lulu Valasis the insolvent resided rent-free at [...], Melrose Arch, the sectional title apartment ("the Melrose Arch property") of which 50% was bequeathed to him. Ms Paulos gave the insolvent permission to reside in the property.
- 42.3. The insolvent was the sole beneficiary of income generated by Valasis Investments CC's property, [...], Yeoville ("the Yeoville commercial property"). He further received a monthly stipend from Ms Paulos in order to support himself financially.
- 42.4. Based on evidence tendered during the section 152 inquiry, neither one of the three beneficiaries mentioned in the first renunciation, namely the defendants, had any relationship with their father, the insolvent, as they were estranged since their parents' divorce. Furthermore, none of them had knowledge of the first renunciation of his inheritance, or of their nomination as heirs to the estate of their late grandmother.

[43] Van den Heever referred to the two letters written on behalf of the insolvent which according to the witness, was the most cogent evidence, illustrating the insolvent's adiation. The letters were written on 3 December 2013 by Messrs Hirschowitz and Kokkoris, the content of which will be discussed fully here under. The witness stated that in terms of the letters the insolvent confirmed that he was an heir in the deceased estate. Furthermore, he confirmed the monetary value of the inheritance he would receive. Van den Heever testified that Kokkoris acting on behalf of the insolvent gave an undertaking that the arbitrators' fee would be paid on final winding up of the deceased estate and such fact was confirmed by Hirschowitz acting on behalf of the executors. Therefore, the witness testified that the insolvent adiated his inheritance and thus the inheritance fell into his insolvent estate.

- [44] During cross examination it was put to the witness that the deceased estate has limited realizable value in the unit being the Melrose Arch property as well as in Valasis Investments CC owning the Yeoville commercial property, and that the witness was holding the defendants at ransom for the debt owing by the insolvent.
- [45] It was further put to the witness that the Yeoville commercial property, which is held in Valasis Investments CC, is an heirloom and thus has sentimental value for the family which is far greater than the monetary value thereof.
- [46] The witness denied the above statements made during cross examination by the defendants. He stated that as trustee he was acting in the interests of the creditors and the inheritance of the insolvent forms part of his estate. He indicated that he would meet with all parties, which include the family and Ms Paulos to discuss the way forward, if the Court finds in the plaintiff's favour.
- [47] The statement made to the witness regarding the fact that the insolvent renounced his inheritance as far back as February 2014 during settlement discussions was denied by the witness. He testified that he only came into the picture after being appointed as trustee of the insolvent estate on 25 November 2014. He further stated that following the investigations conducted by him, he launched the application because the insolvent adiated his inheritance on 3 December 2013 and therefore the inheritance forms part of the insolvent estate.

Evidence by the Defendants

- [48] No evidence was presented in the defendant's case.

Legislation and Case Law

[49] When a testator in his/her will bequeaths an inheritance or legacy and at the same time imposes a burden upon the beneficiary, the beneficiary is put to an election whether to accept the inheritance or legacy or to decline it. "Election" is a technical term which signifies the choice open to the beneficiary to accept a benefit or to reject it.²

[50] Legatees have no obligation to receive an inheritance; they have the choice to accept or reject what has been bequeathed. In this context,

[1] adiation refers to the acceptance of a benefit; and

[2] repudiation (or renunciation) refers to the refusal to accept a benefit, or the rejection or renunciation thereof.

[51] Acceptance of a benefit under a will, generally referred to as "adiation", is the act of a beneficiary in signifying an intention to take the benefit. A beneficiary is not obliged to accept a benefit under a will. However, if he accepts the benefit, he incurs any liability which may be involved in it. The general rule is that a person is assumed to have adiated unless he expressly repudiates. Nothing express or explicit is required by way of acceptance. The effect of adiation is that the legatee acquires a vested personal right against the executor for delivery of the asset, once the estate has been liquidated.

[52] The effect of repudiation is enunciated in the relevant provisions of the Wills Act and the Intestate Succession Act. Section 2C of the Wills Act 7 of 1953 (as amended) of which the counterpart in intestate succession is s 1(6) and (7) of the Intestate Succession Act 81 of 1987 (as amended) reads as follows:

"(1) If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.

² LAWSA 2011 para 218; Van der Merwe and Rowland 1990 414.

(2) If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), *per stirpes* be entitled to the benefit, unless the context of the will otherwise indicates.”

[53] The effect of repudiation by a legatee depends on the provisions of the will and the particular circumstances. If the will makes provision for substitution, effect has to be given to that.

[54] Once an election is made either to adiate or to repudiate, it is irrevocable.

[55] The court may in exceptional circumstances accord a beneficiary relief if he/she has made his/her election in ignorance of his/her rights. (*restitutio in integrum*) The courts have dealt with such elections in two ways. On the one hand, it has been held that the election is a form of waiver and unless a party had with full knowledge of his rights made the election, his election is to be treated as not being an election at all. On the other hand, it has been held that the court can, in proper circumstances and depending on whether the ignorance is excusable (*iustus et probabilis*), grant relief by way of *restitutio in integrum*.

[56] In *Oxenham v Oxenham's Executor*³ the court confirmed that where a beneficiary made the election “in excusable ignorance of his or her rights” such election can be revoked. The following was said:

“Relief may in exceptional cases be accorded... if the ignorance which led him to elect is in the circumstances excusable... when it is *iustus et probabilis*.”

[57] It is however important that each case must be decided on the facts and circumstances before the court.⁴ The Supreme Court of Appeal in *Wessels NO*

³ 1945 WLD 57 page 63.

⁴ *Le Roux v Ontvanger van Inkomste* [2009] ZAFSHC 27.

*v De Jager en 'n Ander*⁵ held that an insolvent heir does not acquire a right to accept or reject an inheritance, but merely a competence to accept or reject such inheritance. The Court further held that an insolvent heir acquires a right only if he/she accepts an inheritance and that a *curator* of an insolvent estate accordingly acquires no right in this regard. It is clear from the decision in the *Wessels* case that a repudiation of an inheritance is merely a refusal to accept a right to an inheritance and that it does not amount to a disposition of such inheritance. It is further clear that only upon acceptance of an inheritance by an insolvent heir, does a right fall upon a *curator* of an insolvent estate.

Evaluation

[58] In the present case the decision or election to accept or repudiate the benefit by the insolvent in terms of the will of his late mother is of crucial importance. As De Waal has pointed out⁶ no one has a fundamental right to inherit and a potential beneficiary who is nominated in a will has no more than a *spes* or hope of inheriting. Thus, the exclusion of a beneficiary from a will does not ordinarily result in the deprivation of any existing right *per se*. However, an heir or legatee of an unconditional bequest in terms of a will obtains a vested right on the death of a testator which becomes enforceable by way of a claim at the time when the liquidation and distribution account is confirmed.⁷

Appointment as Executor

[59] Ms Lulu Valasis passed on 17 October 2012 and soon thereafter on 19 November 2012 Hirschowitz was instructed by Ms Paulos and the insolvent to wind-up the deceased estate. Subsequently, on 15 February 2013, Ms Paulos and the insolvent were appointed as executors of their mother's deceased estate.

⁵ 2000 (4) SA 924 (SCA).

⁶ J de Waal 'The Law of Succession and the Bill of Rights' Bill of Rights Compendium (2012) 3G 19-3G 20 cited in *King v De Jager* 2017 (6) SA 527 (WCC) at para [59], *Harvey No V Crawford NO* 2019 (2) SA 153 (SCA) at para [64].

⁷ *De Leef Family Trust & Ors v CIR* [1993] ZASCA 46; 1993 (3) SA 345 (A) at 358C-E.

[60] The primary duties of an executor are succinctly set out in Meyerowitz, *Administration of Estates and Estate Duty*,⁸ which states that:

“The executor acts upon his own responsibility, but he is not free to deal with the assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the will and in terms of the law, which prescribes his duties and the method of his administration and makes him subject to the supervision of the Master in regard to a number of matters”.

[61] The learned author also states⁹ that an executor is ‘not a mere procurator or agent for the heirs, but is legally vested with the administration of the estate. He adds that “[i]mmediately after Letters of Executorship have been issued to him, the executor must take into his custody or under his control all the property in the estate which are not in the possession of any person who claims to be entitled to retain them under any contract, rights of retention or attachment.”

[62] *Lockhat’s Estate v North British and Mercantile Insurance Co Ltd*¹⁰ is authority for the proposition that the duty of an executor is to obtain possession of the assets of the deceased and to realise such of the assets as may be necessary to pay off the debts of the deceased, but also to distribute the assets and the money that remains after expenses have been paid, among the heirs. Where there are co-executors, Meyerowitz¹¹ points out that “*all of the executors must exercise their functions and duties jointly, and or share equal responsibility for the administration of the estate and are liable for one and other’s acts. If one of the executors refuses to join in the administration of the estate ... The remaining executors must seek relief from the court by obtaining an order compelling the co-executor to do the specific required, or dispensing with his concurrence, or removing him from office...*”

⁸ 2004 edition, para 12.20.

⁹ At para 12.20.

¹⁰ 1959 (3) SA 295 (A) at 302.

¹¹ At para 12.20

[63] As executors of the deceased estate Ms Paulos and the insolvent were to collect all the assets and liabilities of the deceased, and to account for all the assets and liabilities in a liquidation and distribution account to be filed with the Master. It is important to note that acceptance of an appointment under a will as executor, does not necessarily amount to adiation, hence a person is entitled to accept such appointment while at the same time repudiating benefits under the will.

[64] In the case of *Eyssell and Another v Barnes N.O. and Others*,¹² McLaren J held that the power to adiate or repudiate does not vest in the executor, but in the heirs of a person who has the right to elect whether to adiate or repudiate, but dies without having exercised that right.¹³

[65] Therefore, the appointment of the insolvent as executor of the deceased estate does not amount to adiation of his inheritance.

Hirschowitz and Kokkoris letters

[66] In the present matter, I have to ascertain the status of the correspondence dated 3 December 2013 by Hirschowitz and Kokkoris to the arbitrator, Mr Cook.

[67] Counsel for the plaintiffs argued that the contents of the two letters, written respectively by Hirschowitz and Kokkoris, unequivocally recorded the fact that the insolvent was;

67.1. An heir in the deceased estate,

67.2. That his share of the estate would be in excess of the arbitrators' fee,
and

¹² 2000 JOL 23413 N.

¹³ This latter view is also held by Corbett, Hahlo, Hofmeyr & Kahn, *The law of succession in South Africa*, page 15 and also by the Registrars of Deeds at the Annual Conference (see RCR 29 of 2008).

67.3. That he unconditionally undertook to pay the arbitrators' fee from his inheritance once the estate was wound-up.

[68] The plaintiff therefore asserted that the only way in which the insolvent could have given an undertaking to pay the arbitrators' fee, was if he had accepted his inheritance. As such both the letters presupposed that he adiated.

[69] Counsel for the defendants argued that in order for the insolvent to adiate the benefit from the deceased estate, he needed to have the necessary legal knowledge that he had the power to adiate or renounce the benefit. It was further contended that from the statements made by the insolvent, his children and Ms Paulos, he did not have such knowledge and therefore, without the knowledge, no election could have been made to adiate or renounce the benefits.

[70] The defendants argued that the Hirschowitz letter suggested that the insolvent was not properly informed about his rights and the letter merely indicated the following;

70.1. It was anticipated that the insolvent would receive a share or benefit from the estate of his late mother. The implication was that there was no guarantee that he would in fact receive a share, he might even inherit nothing.

70.2. The letter did not set out how much, or what, the insolvent stood to inherit, it only mentioned that the share the insolvent would receive was anticipated to exceed the amount owing to the arbitrator. It was further unknown whether the R100 000.00 was in liquid assets, or whether property had to be realised prior to the amount being paid.

[71] A similar argument was raised by the defendants in regard to the Kokkoris letter. It was contended that the letter simply stated, in the passive voice, that payment would be made to the arbitrator after the estate was wound-up. Had

the insolvent adiated his inheritance, or intended to pay the arbitrators' fee out of the proceeds of his inheritance, he would have unequivocally stated so.

[72] Counsel on behalf of the defendants asserted that the insolvent did not know he had an option to adiate or renounce benefits from the deceased estate and he believed that the inheritance would pass to him as a matter of course. It was only in early 2014, after he obtained legal advice, that he became aware of the election and at that stage he made his renunciation clear in writing on 1 April 2014.

[73] Nevertheless, counsel for the defendants contended that the insolvent as early as 22 January 2014 highlighted the fact that he had already renounced his inheritance and this was confirmed during the settlement discussions and meeting of 22 February 2014. It was argued that the renunciation of the inheritance was mentioned to Mr Ahmad during the said meeting, and the fact was confirmed on 20 February 2014, alternatively, the defendants argued that the renunciation was confirmed in writing on 1 April 2014.

[74] The wording and the context of the letters by Hirschowitz and Kokkoris are of importance in dealing with the question pertaining to whether the insolvent in terms of these letters adiated his benefit in terms of the will. Furthermore, the correspondence by the arbitrator, Mr Cook must be read in conjunction with the above.

[75] On 27 November 2013, Mr Cook, the arbitrator forwarded the following correspondence to Mr Ahmad, the insolvent and Kokkoris acting on his behalf;

“Dear Sirs,

Notice is hereby given in terms of section 25(l) of the Arbitration Act No. 42 of 1965 that I shall hand down my Award in the abovementioned matter on Wednesday 4th December 2013 in my offices at 16:00 hours.

The parties or their representatives are to be present at the handing down of the award.

Should either party elect not to be present an electronic copy will be sent to such party and a fully signed Award can be collected from my offices at any time after handing down of the Award.

In this regard the parties attention is drawn to paragraph 5.5 of the minutes of the preliminary meeting, where the parties agreed to be jointly and severally liable for the arbitrators fees, and further in paragraph 5.6 of the minutes of the preliminary meeting the parties further agreed that they shall be responsible for the arbitrators fees on a 50/50 basis.

In terms of Section 34 (4) of the Arbitration Act No. 42 of 1965 the following provisions applies.

“The Arbitrator Or Arbitrators or and Umpire may withhold his or their Award pending payment of his or their fees and of any expenses occurred by him or them in connection with the Arbitration with the consent of the parties, or pending the giving of security for payment thereof”.

Please be advised that my Award will not be handed down until my fees are paid or security provided therefore.

My fee account is enclosed herein.

The total fee due is R228,000.00 and must be paid or secured in full.

Yours Faithfully

C.D. Cook

ARBITRATOR”

[76] Mr Kokkoris, attorney representing the insolvent replied on 3 December 2013 as follows;

“Dear Sir

Re: Arbitration M. Ahmad and Ms T Warman/ N Valasis

1. We enclose herewith a letter received from Hirschowitz Attorneys, a copy of which is annexed hereto and is self explanatory.
2. Mr Valasis has instructed me to advise you that upon the winding up of the estate, the sum of R100 000.00 will be paid to you in compliance with your letter dated 27th November 2013.

Yours faithfully
Kokkoris Attorneys
V Kokkoris”

[77] The enclosed letter by Hirschowitz referred to, read as follows;

“3 DECEMBER 2013
KOKKORIS ATTORNEYS

RE ARBITRATION - N VALASIS AND ANOTHER - ARBITRATOR
COOK

We confirm that our firm is assisting the executors in winding up the estate of the Lulu Valasis, Estate No. [...].

The executors being Maria Poulos and Nicholas Valasis. Both the executors above are heirs in the estate.

That it is anticipated that the share which Nicholas Valasis will receive from the estate will be in excess of R100,000.00.”

[78] As a general rule, documents must be interpreted having regard to ordinary grammatical meaning of the language, unless they lead to absurdity. Wallis JA

in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁴ framed the following approach towards the interpretation of documents:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the 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 the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

[79] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*¹⁵ Willis J continued;

“Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise’. Accordingly, it is no longer helpful to refer to the earlier approach.”

¹⁴ 2012 (4) 593 (SCA) at para [18].

¹⁵ 2014 (2) SA 494 (SCA) at para [12].

[80] Finally, in the recent case of *Novartis*¹⁶ Lewis JA maintained that the process of interpretation is to ascertain the intention of the parties or the legislature. In *Endumeni* Willis JA had considered the terminology inappropriate since the enquiry is restricted to ascertaining the meaning of the language of the provision itself.¹⁷ Nonetheless in both cases, the Supreme Court of Appeal (“the SCA”) described the process as requiring the words used to be read in the context of the document as a whole and in the light of all relevant circumstances.¹⁸ In both cases the SCA confirmed that reliance can no longer be placed on the outcome of earlier cases which restricted the enquiry to the words used read with reference only to the internal context of the document as a whole, and without regard to the external context of the factual matrix at the time of its conclusion.

[81] An implication of renunciation is that a debtor who is approaching insolvency or who has already been sequestrated may prevent his creditors from claiming his potential inheritance merely by repudiating it. If, however, the beneficiary has already exercised his competence by adiating, rights to property will have been created and the inheritance will therefore form part of the insolvent estate. Where a testator has failed to make specific provisions in his will providing for substitution and if a designated beneficiary should be insolvent when the inheritance vests in him, the heir may still achieve the same result by simply repudiating that inheritance.

[82] I have to decide what the insolvent, Hirschowitz and Kokkoris objectively intended from what has been written in the above stated correspondence. In

¹⁶ [2015] ZASCA 111

¹⁷ *Endumeni* at para [20]–[24].

¹⁸ *Novartis* at para [29] referring to the passage cited earlier of Wallis JA in *Bothma-Batho* at para [12] and *Endumeni* at para [19]:

“It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.”

other words, what would a reasonable person understand when reading the contents. I have to consider the circumstances and the background against which the text was produced. Evident from the reading of the correspondence and the factual context thereof, was that the insolvent required an amount of R100 000.00 to pay a contractual obligation, namely the arbitrators' fee. Needless to say, he did not have the amount available, but anticipated that following the winding-up of the deceased estate he would be in a position to pay the arbitrators' fee.

[83] Moreover, both the letters were produced by attorneys. First and foremost, Hirschowitz acted on behalf of the executors, Ms Paulos and insolvent and they indicated, explicitly that the insolvent was an heir to the deceased estate and that he would be in a position to comply with his contractual obligation towards the arbitrator once he received his inheritance. Furthermore, Kokkoris acting on behalf of the insolvent confirmed the facts contained in the Hirschowitz letter and referred to it as self-explanatory.

[84] Furthermore, the language used in the light of the ordinary rules of grammar and syntax, can convey only one intention and purpose, namely that the insolvent would receive a benefit, of at least R100 000.00, following the winding-up of the deceased estate, which benefit would be sufficient to pay Mr Cook, the arbitrator. Mr Cook undoubtedly understood that the benefit the insolvent would receive was substantive to account for his fee and as a result of the assurance by Hirschowitz and Kokkoris, Mr Cook delivered the award on the following day, 4 December 2014.

[85] Furthermore, the message embedded in the text contained in the letters intended some legal consequence to follow from it, namely that the insolvent was an heir and he adiated his benefit in terms of the will of his late mother. The defendants are patently attempting to attach meaning to the contents of the letters exchanged with Mr Cook which were absent.

[86] In my view, the only inference to be made on the contents of the letters was that the arbitrators' fee would be paid once the estate of the late Ms Lulu

Valasis was finally wound-up, thus the insolvent adiated his inheritance through such action.

[87] It is evident that during a meeting and correspondence that followed between Mr Ahmad represented by June Marks attorneys and the insolvent, represented by Mr Kokkoris in January 2014 the insolvent indicated to Mr Ahmad that he was unable to satisfy the arbitration award against him and that he would renounce his inheritance. Does this indication to Mr Ahmad amount to a renunciation of his inheritance? In order to answer the question, I will refer to the sequence of correspondence in this regard.

[88] It is important to note that on 7 January 2017, the insolvent was advised that Mr Ahmad would apply to have the arbitration award made an order of Court after which execution and sequestration would follow in order for the inheritance already adiated by him to form part of the insolvent estate. In reply on 10 January 2014 Kokkoris stated the following;

“Dear Mr Ahmad

We are in receipt of your previous emails, contents whereof have been noted.

Unfortunately(*sic*) Mr Valasis does not have the funds to effect payment of your award.

We have requested him to give us aa complete list of his assets and we shall revert back to you once we have received same”

[89] June Marks replied and forwarded an email on 13 January 2014 at 12h45 read as follows:

“Dear Madam

Your client has stated he is unable to make payment of a debt which is an act of sequestration. This is sufficient for a sequestration application.

We suggest you consult the insolvency Act and authorities in this respect.

Should you wish to dispel this the onus is on your client to provide proof of his assets as soon as possible.”

[90] On the same date Kokkoris stated the following;

“Dear Madam

1. We are in receipt of your email dated 13th January 2014.
2. We deny that there is an admission of insolvency or an act of insolvency in our email to your office of the 10th January 2014. Although our client does not currently have the funds to pay your client, until such time as his assets are(*sic*) realised, he cannot be deemed to be insolvent as alleged by yourselves.
3. We further deny that there is any admission of fraud in our email to you of 10th January 2014.
4. In the interim all our clients(*sic*) rights are reserved.”

[91] On 22 January 2014 Kokkoris forwarded the following email to June Marks;

“Dear Madam

1. The above matter refers.
2. Our client’s assets are as follows:
 - (a) [...], Mpumalanga valued at approximately R300 000.00;

- (b) a BMW motorcycle, Reg No [...], valued at approximately R40 000.00 (i.e. motor cycle upon which our client had the accident and there are outstanding repairs of approximately R34 000,00)
- (c) a BMW motorcycle, Reg No [...](value approximately R20 000.00);
- (d) a 1996 MG motor vehicle, Reg No MGF [...]
- (e) an Audi motor vehicle, Reg no [...](outstanding repairs of approximately R33 000.00)."

[92] Following a meeting between the parties on 27 February 2014 June Marks stated the following;

"WITHOUT PREJUDICE

Dear Mr Kokkoris

We refer to our meeting. Our client is. prepared to stay the sequestration application against your client under the following circumstances:

1. The amount of R200 000.00 be paid to our client immediately;
2. Your client to provide us with a copy of the will of your client's deceased mother;
3. Then provided the saleable value of the property is greater than the balance owing to our client (plus the interest at 15.9%) the property be sold;
4. We are kept fully informed of the process;
5. Your client pay(*sic*) all legal costs.

You will of course understand that should my client progress to sequestration the transfer of your client's part ownership of various properties to close corporation and family members will be scrutinised as well as the movements of funds."

[93] It seems following the above-mentioned email further discussions followed of which I am not privy to, however on 25 March 2014 Kokkoris forwarded an email to June Marks stating as follows;

"Dear June,

The counter offer made by your client is not acceptable to my client. Due to the friction that has now arisen between my client and his sister, his sister has withdrawn her offer of R200 000.00.

Accordingly your client must proceed as he deems fit."

[94] It is interesting to note that the impression created in the correspondence was that the insolvent and Ms Paulos were attempting to settle or come to an agreement on the outstanding amount due to Mr Ahmad. At all relevant times the correspondence was handled by legal counsel namely, June Marks on behalf of Mr Ahmad and Kokkoris on behalf of the insolvent. During the period of nearly three months, from 7 January until 25 March 2014, Kokkoris never placed on record that the insolvent renounced his inheritance. Oddly, on 1 April 2014 a written renunciation was sent to the Master, wherein the insolvent renounced his inheritance, which was an attempt to change the insolvent's adiation of his inheritance *ex post facto*.

Failure to adduce evidence

[95] In *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*¹⁹ the following was said on failure to call a witness;

“The learned Judge a quo drew an inference adverse to the plaintiff from its failure to call Gerson as a witness, notwithstanding the fact that he was available and in a position to testify on the crucial issue in the case, i.e. what was discussed at the meeting which took place on 4 August 1972. Before this Court, it was submitted on the plaintiff’s behalf that he had erred in doing so. We were referred to a number of authorities which set out the principles governing the question in issue. See, e.g., *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) in which WATERMEYER CJ stated (at 749, 750): “It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore ss 285 and 286.) But the inference is only a proper one if the evidence is available and if it would elucidate the facts.’ See also *Botes v Mclean* 2019 (4) NR 1070 (HC) para 143.”

[96] Counsel for the plaintiffs argued that if the defendants were genuine in their belief that adiation did not occur, they were at liberty to call the insolvent to testify to that, after all, it was he who initially attempted for them to become heirs in his stead. The defendants relied on the evidence of the insolvent in their answering affidavits to such an extent that he filed a confirmatory affidavit. Counsel for the plaintiffs argued that there was no reason why he could not repeat the evidence under oath and be subjected to cross-examination.

[97] The plaintiffs further contended that insolvent would have been able to elucidate the facts contained in Ms Poulos’s answering affidavit, as he also deposed to a confirmatory affidavit in this regard during the initial application.

¹⁹ 1979 (1) SA 621 AD.

[98] Once it is accepted that the evidence of the plaintiff constitutes the proven facts, the probabilities are overwhelmingly in the plaintiff's favour. The following facts were proven by the plaintiffs;

98.1. The insolvent was appointed as executor of the estate of his late mother on 2 February 2013.

98.2. Prior to his appointment as executor of the deceased estate, he was involved in arbitration proceedings relating to a claim for damages.

98.3. On 3 December 2013, Hirschowitz and Kokkoris informed the arbitrator, Mr Cook, that the insolvent was an heir in the deceased estate and he stood to inherit an excess of R100 000.00.

98.4. During February/March 2014 settlement negotiations between Ms Paulos, the insolvent and Mr Ahmad regarding the damages award handed down on 4 December 2013 fell through.

98.5. On 1 April 2014 the insolvent in writing renounced his inheritance in terms of the will, the first renunciation.

98.6. The insolvent was finally sequestrated on 20 August 2014.

98.7. On 9 September 2014 the Master indicated that the first renunciation dated 1 April 2014 could not be accepted due to the condition that the insolvent's inheritance and proceeds would devolve on his three children, the defendants. Evidently, it was clear that the Master was not prepared to accept the first renunciation signed by the insolvent

98.8. Three months later, on 10 December 2014, the insolvent prepared a second unconditional renunciation of his inheritance.

[99] It is evident that the insolvent, as an heir, knew that on the date of his late mother's passing, or shortly thereafter, that he would receive a benefit from the deceased estate, and he accepted the inheritance. He clearly took possession

of the deceased estate in that he was appointed as an executor, he furthermore, instructed his attorney, Mr Kokkoris to notify the arbitrator, Mr Cook, that on final winding-up of the deceased estate, he would be in a position to pay the agreed arbitrators' fee.

[100] I am of the view that an adverse inference is to be drawn from the defendant's failure to call the insolvent. I have regard to the following circumstances²⁰ in the present matter;

100.1. The insolvent is a central witness to the dispute between the plaintiffs and the defendants, his evidence is crucial in the matter.

100.2. He denied the version by the plaintiffs that he adiated the benefits in the deceased estate, he deposed to a confirmatory affidavit to the answering affidavits of the defendants.

100.3. The evidence contrary to his version calls for an answer.

100.4. Furthermore, the initial application was referred to trial for the sole purpose to test the parties' allegations made in their affidavits, when given the opportunity to place evidence before the trial court, the defendants chose not to call the insolvent, the person on whose evidence their entire case is based.

[101] The insolvent was the only person to verify that he did not adiate the benefit as asserted by the plaintiffs as early as 3 December 2013. He could have explained the events giving rise to his renunciation.

[102] I therefore conclude that the only probable reason for not calling him as a witness, was that it was feared that his evidence would expose facts unfavourable to the defendant's case. The material facts by him in his confirmatory affidavit filed, ought to have been testified to during the trial. I find that his failure to testify can rightly be held against the defendants.

²⁰ *Pexmart CC and Others v H Mocke Construction (Pty) Ltd and Another* 2019 (3) SA 117 (SCA).

Restitutio in integrum / “in excusable ignorance of rights”

[103] The court may in exceptional circumstances accord a beneficiary relief if he has made his election in excusable ignorance of his rights. A beneficiary’s ignorance may take various forms. The beneficiary may not know that he is entitled to elect²¹ or he may not appreciate the legal consequences of his adiation²² or his repudiation.²³ The mere fact that the beneficiary thought adiation would be of greater benefit to him than it turns out to be is not a sufficient reason for granting the relief.²⁴

[104] The defendants argued that the plaintiffs have not shown that the insolvent adiated, and their reliance on the letters dated 3 December 2013 by Hirschowitz and Kokkoris does not assist them, as the letters do not show an unequivocal intention to adiate. Furthermore, they asserted that the insolvent did not, at the time know that he had a right to make an election either to adiate or to renounce the benefits.

[105] It is generally accepted that a beneficiary will accept a benefit of a deceased estate, therefore, there are no formalities attached to adiation. However, where a benefit comes with an obligation, adiation is required to be in writing. Counsel for the plaintiffs argued that the insolvent experienced financial difficulties prior to his mother’s passing, he also resided at the Melrose Arch property which was also indicative of his adiation of the benefit bequeathed to him.

[106] Ms Paulos and the insolvent were appointed as executors of the deceased estate, in terms of the will the insolvent stood to inherit amongst others the 50% share in the Melrose Arch property. Ms Paulos owned 50% of the said property. In terms of section 26 of the Administration of Estates Act as

²¹ *Harvey v Estate Harvey* 1914 CPD 892, *Van Wyk v Van Wyk’s Estate* 1943 OPD 117.

²² *Ex parte Nel* [1965] 3 All SA 268 (T); 1965 3 SA 197 (T).

²³ *Ex parte Estate Van Rensburg* [1956] 3 All SA 373 (C); *Bielovich v The Master* [1992] 2 All SA 384 (N).

²⁴ *Oxenham v Oxenham’s Executor* 1945 WLD 57.

executors they were required to take all immovable property and assets into their control and upon final winding-up of the estate distribute the assets in accordance. Therefore, the argument by the defendants that the insolvent resides at the Melrose Arch property with the permission of Ms Paulos is neither here nor there, the fact of the matter is, that since the demise of his late mother the insolvent was benefitting from the deceased estate in residing at the Melrose Arch property rent free.

[107] The insolvent was also benefitting from the 50% members interest in Valasis Investments CC bequeathed to him. During the section 152 enquiry the averments in this regard were vague and without substance, namely, that Ms Paulos would collect all rental relating to the Yeoville property and after all expenses were paid, she would donate a monthly stipend to the insolvent in order to financially support him.

[108] In my view, all the facts show that on 3 December 2013 the insolvent made an election to adiate his inheritance in the estate of his late mother, Ms Lulu Valasis. Only after he realised, during February/March 2014, that his inheritance would form part of his insolvent estate, he renounced his inheritance. As stated in law, once an election is made, either to adiate or renunciate, such election is irrevocable.

Order

[109] As a result, the following order is made:

1. The renunciation of any benefit by the insolvent, Nicholas Valasis, in the deceased estate of the late Lulu Valasis is declared invalid and of no force or effect;
2. The insolvent, Nicholas Valasis, adiated his right to the benefit bestowed unto him in terms of the Will;
3. With retrospective effect, the right to the inheritance became an asset in

the estate of Nicholas Valasis;

4. The right to the inheritance is an asset that vests in the trustees of the insolvent estate of Nicholas Valasis;
5. The First Defendant is to draw a Liquidation and Distribution Account in the deceased estate of Lulu Valasis in accordance with the provisions of the Will;
6. The Liquidation and Distribution Account as per prayer 5 be drawn and lodged with the Sixth Defendant within 6 (six) months after this order;
7. The dividends in terms of the Liquidation and Distribution Account as set out in prayer 5 above be paid out within 2 (two) months subsequent to the confirmation of the Liquidation and Distribution Account by the Sixth Defendant;
8. Costs of suit including cost of one counsel to be paid by the Third, Fourth and Fifth Defendants, jointly and severally, the one paying the other to be absolved.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 18 April 2023.

DATE OF HEARING: 20, 21 & 23 February 2023

DATE JUDGMENT DELIVERED: 18 April 2023

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