

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case Number: 11852/2006

Date: 7 May 2010

In the matter between:;

HULDA BOTES **1st PLAINTIFF**

ELIZABETH SCHEEPERS **2nd PLAINTIFF**

PAUL HEYNS **3rd PLAINTIFF**

VS

ALBERT JOHANNES SWART **1st DEFENDANT**

MAGDALENA PETRONELLA ROUX **2nd DEFENDANT**

JACOBUS EGNATIUS DE WET SWART **3rd DEFENDANT**

CLARA ISABELA SWART **4th DEFENDANT**

JOACHEMINA CATHARINA ELIZABETH BRITTER **5th DEFENDANT**

GERDA SWART **6th DEFENDANT**

ANNA CATHARINA SUSANNA SWART **7th DEFENDANT**

THE REGISTRAR OF DEEDS, PRETORIA **8th DEFENDANT**

JUDGMENT

Delivered on: 07 May 2010

POTTERILL J,

[1] In this case no evidence was led. The pleadings are in Afrikaans and the argument was respectively in Afrikaans and English. The parties agreed what the common cause facts and issues in dispute are and these were formulated in English; I accordingly found it convenient to proceed with the judgment in English.

[2] The first to third Plaintiffs are requesting a declaratory order with the following content relevant to the issues currently to be decided:

“1.1 eerste tot derde eisers gesamentlik geregtig is op ‘n halwe onverdeelde aandeel van die resterende gedeelte van die plaas Klipfontein 23.

2.2 eerste tot derde eisers afsonderlik elk geregtig is op ‘n derde van ‘n halwe onverdeelde aandeel van die resterende gedeelte van die plaas Klipfontein 238;

2.3 eerste tot sewende verweerders gesamentlik geregtig is op ‘n halwe onverdeelde aandeel van die resterende gedeelte van die plaas Klipfontein 238;

2.4 Eerste tot sewende verweerders elk afsonderlik geregtig is op ‘n sewende van ‘n halwe onverdeelde aandeel van die resterende gedeelte van die plaas Klipfontein 238.”

[3] Prayers 2-6.2 of the summons were by agreement between the parties separated from the quoted paragraph 1 of the summons supra. I ordered such separation in terms of rule 33(4) and postponed those prayers *sine die*.

[4] The defendants pleaded that the court order did not amend the will to the extent that the plaintiffs and defendants inherit *per capita* and not *per stirpes*. They also filed a counterclaim with alternatives in essence requiring the Court to declare that the Court Order did not amend the will.

[5] The parties agreed that the following matters are common cause:

5.1. The late Catharina Elizabeth Linnekamp [previously Muller, born Erasmus] (hereinafter referred to as “the testatrix”) and Pieter Emelius Swart (hereinafter referred to as “the executor”) and Joachemina Catharina Elizabeth Goosen [previously Swart, born Muller] (hereinafter referred to as “Goosen”) were the co-owners of the farm called Klipfontein No. 95 (hereinafter referred to as “the farm”).

5.2. In terms of the Deed of Transport No. 11338/1936 dated 1 July 1936, the testatrix held an undivided % share in the farm.

5.3. In terms of the Deed of Transport 11339/1936 dated 1 July 1936, the executor and Goosen jointly and as a result of their marriage in community of property, held an undivided % share in the farm.

5.4. On 15 November 1942 the testatrix signed and executed a valid will.

5.5. On 7 May 1947 the testatrix signed and executed a valid codicil to the will.

5.6. In terms of the will read with the codicil thereto, the testatrix *inter alia*:

(a) Bequeathed her % share in the farm to all her great grandchildren born or to be born from the marriages of her grandchildren born to her daughter Goosen; and

(b) Nominated Pieter Emelius Swart as executor of her deceased estate.

5.7. The bequest of the % share in the farm Klipfontein to the great grandchildren was *per capita*.

5.8. The testatrix passed away on 24 August 1951.

5.9. Pieter Emelius Swart accepted the nomination as executor and was validly appointed as executor in terms of Letters of Administration No. 5745/1951 issued by the Master of the High Court on 18 December 1951.

5.10. The great grandchildren of the testatrix are the First, Second and Third Plaintiffs, the First to Sixth Defendants and the late Pieter Emelius Swart (who is not the executor and substituted by the Seventh Defendant) the ultimate beneficiaries of the farm in respect of the will.

5.11. On 21 May 1953 the marriage in community of property between the executor and Goosen was terminated and the joint estate was divided by this Honourable Court.

5.12. On 26 September 1956 the executor applied to this Honourable Court under petition for the partition of the farm.

5.13. In terms of the petition the executor applied to this Honourable Court for an order, *inter alia*:

(a) Authorizing the executor to transport the % undivided share of the farm to Gerhardus Jacobus Muller Swart, in trust for his children born or to be born out of his marriage and Johan Wilhelm Heyns, in trust for his children born or to be born out of his marriage with Catharina Elizabeth Nicolina Heyns [born Swart];

(b) Consenting to and authorizing the Deed of Partition, annexure "D."

(c) Authorizing the Registrar of Deeds to register the Deed of Transport and Deed of Partition.

5.14. On 22 November 1956 and as a result of the above petition, this Honourable Court granted an order.

5.15. On 30 April 1957 this Honourable Court on application varied and changed the above order.

5.16. At the time the petition was launched (22 September 1956) the Third Defendant was already born on 26 October 1955. Also at the time the averments contained in paragraph 10(1) of the petition was factually incorrect in that the Third Defendant had already been born at the time when the affidavit was prepared, signed and the petition presented to court;

[6] The following matters are in dispute:

6.1. Was the testamentary bequest of the testatrix to her great grandchildren, one *per capita* or *per stirpes*?

6.2. If *per capita*, did the court orders of 22 November 1956 and 30 April 1957 or the registration of the Deed of Division (Partition), alter the regime to one *per stirpes* on an interpretation thereof?

6.3. If yes, was this alteration valid or binding as against the Defendants or otherwise competent for the court to make?

[7] It is common cause that the testatrix's will read with the codicil is a bequest *per capita*, i.e. a $\frac{3}{4}$ share in the farm to all her great grandchildren conceived or to be conceived. The question in paragraph 6.1 need not be decided by this court. The usufructuaries in respect of the farm are now deceased and the litigants are thus to receive their shares of the farm. It is the extent of these shares that brought this dispute before the court. The question is are the shares in accordance with the will in that each of the ten great grandchildren share 10% equally or based on the interpretation of the Court order the three plaintiffs are to receive 50% and the seven defendants 50% of the farm. The plaintiffs are submitting that the court order did amend the shares to 50% for the plaintiffs and 50% to the defendants. The defendants contend that the court order did not effect this change and all the great grandchildren are to receive a tenth.

[8] The petition that led to the court orders sets out that Pieter Emilius Swart in his personal capacity and in his capacity as executor brought the petition. Mrs Goosen (daughter of the deceased), Mr Swart (grand-son of the deceased) and Mr and Mrs Heyns (granddaughter and her husband) filed affidavits in support of the petition. It is explained that the deceased and Mr Swart are the co-owners in undivided shares of the farm. The deceased is the registered owner of the $\frac{3}{4}$ of the undivided share of the farm and he is the registered

owner of % of the undivided share of the farm. He was married to the daughter of the deceased, but they divorced. The daughter then married Mr Goosen. The property between Mrs Goosen and him must be divided, but before this can be done there must be a division of the property between him and the great grandchildren inheriting the % of the farm. Paragraph 6 sets it out as follows:

“Voordat die gesegde een-vierde aandeel tussen U Petisionaris en die gesegde Goosen verdeel kan word, moet daar verdeling geskied tussen u Petisionaris en die erfgename van die Oorledene , sodat u Petisionahs se geregistreerde een-vierde-aandeel, wat tans onverdeel is, ‘n afsonderlike eiendom kan word.”

Paragraph 12 of the petition then reads:

“U Petisionaris is van voornemens om in sy persoonlike hoedanigheid, ‘n akte van Verdeling met die gesegde GERHARDUS JACOBUS MULLER SWART (in sy hoedanigheid as die vader en natuurlike voog van die kinders gebore ofte word gebore uit sy huwelik, en met die gesegde JOHAN WILHELM HEYNS (in sy hoedanigheid as die vader en natuurlike voog van sy kinders gebore ofte worde gebore uit sy huwelik) aan te gaan, ‘n konsep afskrif van welke Akte van Verdeling hieraangeheg word gemerk “D. ”

And in paragraph 13 the following is said:

“Kagtens die gesegde Akte van Verdeling sal die plaas KLIPFONTEIN Nr 95, distrik Middelburg soos volg verdeel word:-

(a) Aan u Petisionaris, in sy persoonlike hoedanigheid, Seker gedeelte 1 van die plaas KLIPFONTEIN Nr 95 gelee in die distrik Middelburg groot 547.2414 morges soos sal blyk uit kaart LG. Nr A. 4901/54.

(b) Aan die gesegde Gerhardus Jacobus Muller Swart, in trust vir sy kinders gebore of nog te worde gebore uit sy huwelik en aan JOHAN WILHELM HEYNS, in trust vir sy kinders gebore of nog te worde gebore uit sy huwelik en aan JOHAN WILHELM HEYNS, in trust vir die kinders gebore of nog te worde gebore uit sy huwelik, seker Resterende gedeelte van die plaas Klipfontein, Nr. 95, gelee in die distrik Middelburg, groot as sulks 1642.3319 morges, onderhewig aan ‘n serwituut van Uitspanning groot 1/75ste van 2189 morges 344 vierkante roede. ”

The petitioner then sets out that the division would be fair and to the advantage of all the yet unborn and minor great grandchildren. The reason for this being that according to the attached appraiser's valuation the

portion he would receive would be less in value because his % would not have the dwelling on it. An appraiser's valuation is attached in support of this submission.

Annexure D reads as follows:

"a) Genoemde PIETER EMILIUS SWART 'n 1/4de aandeel kragtens Akte van Transport Nr 11339/1936, gedateer die 1ste Julie,1936;

b) Genoemde GERHARDUS JACOBUS MULLER SWART in trust vir sy kinders gebore of te worde gebore uit sy huwelik, 'n 3/8ste aandeel kragtens Akte van Transport te worde geregistreer;

c) Genoemde Johan Wilhelm Heyns in trust vir sy kinders gebore of nog te gebore worde gebore uit sy huwelik met CATHERINA ELIZABETH NICOLINA HEYNS (gebore Swart) 'n 3/8ste aandeel kragtens Akte van Transport te worde geregistreer."

[9] The plaintiffs thus argue that the reference to the 3/8 shares was directing that each of the two groups of great grandchildren's is to receive a 50% of the farm. The Court order reads:

"1. Dat die applikant hierby in sy voornede hoedanigheid gemagtig word om die drie-vierde aandeel in die plaas KLIPFONTEIN Nr.95, distrik Middelburg te transporteer aan Gerhardus Jacobus Muller Swart, in trust vir sy kinders gebore uit sy huwelik, en aan Catherina Elizabeth Nicolina Heyns, gebore Swart, in trust vir die kinders gebore uit haar huwelik met Johan Wilhelm Heyns;

2. Dat die Akte van Verdeling, aanhangsei "D" goedgekeur en bekragtig word; en

3. Dat die Registrateur van Aktes, Pretoria, gemagtig word om voornoemde transport en die verdelingstransport in terme van die gesegde Verdelings Akte te registreer."

[10] The plaintiffs further argue that I must interpret this order in accordance with the principles as set out in **Firestone South Africa (Pty)Ltd v Genticuro A.g.** 1977(4) AD 298 at 304 D and specifically:

"The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules...Thus as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it."

I was also referred to **Administrator, Cape, and Another v Ntshwaqela And Others** 1990 (1) SA 705 on 716 B-C;

“Similarly, the order with which a judgment concludes has a special function: it is the executive part of a judgment which defines what the Court requires to be done or not to be done, so that the defendant or respondent, or in some the world, may know it.”

It is submitted that the order is unambiguous and. accordingly no extrinsic evidence is admissible. The order must be interpreted as amending the will to bequeath the farm to the great grandchildren per stripes.

[11] The defendants argue that the order did not amend the will. This is so on analysis of the documents. Annexure D only reflects that each of the two groups of grandchildren are to hold a 3/8 share of the farm. This document was however flawed in that it incorrectly reflects the granddaughter’s husband as acting on behalf of the children born from his marriage to the granddaughter and not herself being cited as the correct party on behalf of the children. The document then registered as the “Akte van Verdelingstransport,” despite the content of Annexure D, correctly reflects Catharina Elizabeth Heyns as a party and not her husband. This document nowhere records a 3/8 division between the groups of great grandchildren. The % of the farm is transferred to the both groups of great grandchildren and no mention of portions is made. The transfer of the property in terms of the “Akte van Transport” reads as follows:

“NOU DERHALWE sedeer en transporter hy, die genoemde Komparant, in sy hoedanigheid voormeld, onder hierdie Akte in voile en vrye eiendom aan en ten behoeve van:

1) GERHARDUS JACOBUS MULLER SWART IN TRUST VIR SY KINDERS GEBORE OF TE WORDE GEBORE; en

2) CATHARINA ELIZABETH NICOLINA HEYNS (gebore Swart) getroud buite gemeenskap van goedere met JOHAN WILHELM HEYNS;

IN TRUST VIR HAAR KINDERS GEBORE OF TE WORDE GEBORE;

Hulle Erfgename, Eksekuteurs, Adminstrateurs of Regverkrygendes:

S E K E R DrieA/ierde (3/4 de) aandeel van die Plaas Klipfontein Nr 95, gelee in die distrik MIDDELBURG

It is argued that the Court order and the amendment thereto were obtained By Mr Swart in his personal capacity to separate his undivided % portion of the farm and in his capacity as executor to finalize the estate of the testatrix. The two grandchildren could take transfer of the property in their representative capacities for

the children born and to be born. This is borne out by the documents that followed the court orders.

The defendant in turn referred me to the Firestone-matter supra on p304 E-F reiterating that the court's judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. Only if then the meaning of the judgment or order is clear and unambiguous no extrinsic fact or evidence is admissible.

[12] I am required to interpret the amended Court order and to declare whether the order does in fact change the testator's bequeath to the great grandchildren inheriting the farm from *per capita* to *per stirpes*. The nature of the dispute before me requires me to interpret the order not in isolation; I must read the will and compare it to the court order to come to a decision. The court did not give reasons as the petition was granted *ex parte*. I must at least consider the documents that the plaintiffs handed in as bundle D; the petition and annexures thereto and the 56-57 court orders. These documents must be interpreted as a whole to come to a conclusion. I can not find these documents to be extrinsic evidence. I must interpret them on their ordinary grammatical meaning. In the words of Judge Mahomed in **Battiss And Another v Elcentre Group Holdings Ltd And Others** 1993(4) SA 69 on p72 at F "*This approach (with reference to the approach set out in the Firestone matter supra) is, however, in no way inconsistent with the proposition **that the proper meaning of the words in any particular order by a Court must be ascertained by reference to its context and the objects sought to be achieved by the terms of the order.***"

The Petitioner acted in his personal capacity and as executor. According to the petition the object in his personal capacity is to divide his % share of the farm from the ³A share so that in turn the % share can be divided between him and his ex-wife.

In paragraphs 11 of the petition he stated that the children of respectively Swart and Heyns are in terms of the will to inherit a % share of the farm. In paragraph 13 he is thus asking for a division of the farm between himself and the two children born from the testatrix as trustees for the great grandchildren born or still to be born. No mention of portions is made.

In prayer (a) of the petition he as executor is requesting the court to grant him permission to transport the % share of the farm to Gerhardus Muller Swart in trust and Johan Wilhelm Heyns in trust for their children born or still to be born. This clearly is the object. There is no request or implied request to amend the terms of the will.

Prayer (b) of the order is also granted. In terms hereof the "Akte van Verdeling, aanhangsel D goed(ge)keur en bekragtig." Annexure D then proposes to divide the farm in accordance with the objects set out in the petition. In fact it does this. It states that the division will be such that Swart will get a 1/4 share, the other

Swart will get 3/8 of the farm in trust for the children born or still to be born and Heyns will get a 3/8 share of the farm in trust; this just boils down to half each of the % of the farm. There is no allocation of portions to the great grandchildren and the order does not purport to do so. The court order is in accordance with the will. The court order did not amend the bequest to the great grandchildren from per capita to per stirpes. In context the order fulfilled the purpose of the petition.

[13] A Court does not have the jurisdiction to grant an order that has the effect of varying a will. In **Bydawell v Chapman, NO And Others** 1953 (3) SA 514 (A) the court found that the court does not have the jurisdiction to lawfully vary the terms of a will by incorporating an agreement in an order of court. If such an order is granted it is a nullity. In **Ex Parte Kruger** 1976(1) SA 609 (O) the court on p611 found the following:

“Na oorweging is ek van mening dat indien die ondertiawige aansoek toegestaan sal word ‘n wysiging aangebring sal word in die betrokke testament wat ‘n erfopvolging tot gevolg sal hê strydig met wat deur testateurs bepaal is. Die hof het geen magtiging of regsbevoegdheid om ‘n bevel te verleen wat ‘n wysiging van die testament meebring nie. ”

The plaintiffs argued there may have been special circumstances that swayed the court to grant such an order and this court can not speculate what that may be. Such special circumstances must be set out in an *ex parte* application and no such circumstances are set out in the petition. On the construction of the court orders of 1956 and 1957, incorporating Annexure D, in context the court was not asked to amend the will contra the courts legal capacity to do so.

My interpretation of the order is fortified by what transpired with the execution of the order. As set out in the Administrator Cape-matter supra the order is the executive part of a judgment which defines what the Court requires to be done or not to be done, for all the parties to know and understand.

If regard is then had to the documents in plaintiffs Bundle D the order was executed in terms of the will and order, the one not contradicting the other. The “Akte van Verdeling” states on p3 thereof:

“.kragtens ‘n Bevel gedateer te Pretoria op die 33 ste dag van November, 1956, ooreengekom het om genoemde grond te verdeel ooreenkomstig hulle repektiewe belange daarin en elkeen afsonderlik transport te neem van sodanige onverdeelde gedeeltes”

and then Swart and Heyns are referred to as holding a % share of the farm, not in 3/8. The “Akte van Transport” refers to the orders and the will and then transfers to Swart and Heyns in trust for the children born or to be born:

“SEKER Drie/Vierde (3/4de) aandeel van die Plaas KLIPFONTEIN Nr. 95, gelee in die distrik MIDDELBURG;”

The parties also interpreted the order as I do.

[14] I accordingly find that the testamentary bequest of the testatrix was not on an interpretation of the court orders of 22 November 1956 and 30 April 1957 altered to a regime of *per stirpes*.

[15] This finding does then not require me to make a finding whether such an alteration would be binding as against the Defendants or otherwise competent for the court to make. I do however *obiter* comment on this question below. The *functus officio* principle is entrenched in our law, however if a court made an order *ultra vires* then that order need not be taken on appeal; **S v Liao** 2005 SACR 498 on 501 g-h. The Supreme Court of Appeal in fact in **S v Absalom** 1989 (3) S A 154 (A) on 164E-GF found that such an order can “eenvoudig geignoreer word.” In the Liao- matter supra on p502 c-d the court found that court decisions are valid until they are set aside, but it need not be done on appeal. It can be done collaterally by any competent court. The defendant can raise it as a defence.

[16] The plaintiffs argued that even if they were unsuccessful they must not be held liable for costs. The argument was that they came to court on a court order and can not be penalized for doing so. I can not agree with this argument, they came to court on the interpretation of the court order that was in issue. I find that the normal rule that costs should follow the order must apply.

[17] I accordingly make the following order:

17.1. I accordingly find that the testamentary bequest of the testatrix was not on an interpretation of the court orders of 22 November 1956 and 30 April 1957 altered to a regime of *per stirpes*.

17.2. The plaintiffs are to carry the costs, the costs to include the costs of two counsel.

S. Potterill Judge of the High Court

Delivered on: 7 May 2010

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