



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1493/2021

In the matter between:

MAGDALENA JOHANNA COETZEE
(BORN GREYLING)

1st Plaintiff

GIDEON JACOBUS GREYLING

2nd Plaintiff

and

OCKERT JACOBUS STRUWIG
(ID NO: [....])

1st Defendant

THE MASTER OF THE FREE STATE HIGH COURT

2nd Defendant

HEARD ON: 21 JANUARY 2022

JUDGEMENT BY: LITHEKO, AJ

DELIVERED ON: 3 FEBRUARY 2022

INTRODUCTION

[1] The 1st Defendant took an exception to the 1st and 2nd Plaintiffs' amended particulars of claim on the grounds that they are bad in law as they do not disclose a cause of action. The 1st and 2nd Plaintiffs' action consists of claim 1

and two alternatives thereto and the objection is directed at all these claims. In this judgement the excipient will be referred to as the 1st Defendant and the Respondents as the Plaintiffs.

THE PLEADED FACTS

- [2] The first 7 paragraphs of the particulars of claim contain the general allegations that are applicable to claim 1 and alternatives thereto and paragraphs 8, 9 and 10, which are quoted below, contain specific allegations pertaining to claim 1, the first and the second alternatives thereto respectively.

- [3] In a nutshell, the general allegations are that the Plaintiffs are the only descendants of the late Hendrina Johanna Greyling (hereinafter referred to as Greyling). The 1st Defendant, Greyling and the late Gerhardus Francois Struwig (hereinafter referred to as Struwig) are siblings.

- [4] On the 6th March 2014 Struwig executed a Will in which he bequeathed the sum of R30 000.00 to Greyling and the remainder of his estate to Greyling and the 1st Defendant.

- [5] Greyling died on the 11th February 2015 and thereby predeceased Struwig, who died on the 4th February 2018. In terms of the Final Liquidation and Distribution Account, approved by the Master who is cited as the 2nd Defendant, the Executor of the estate of the late Struwig paid to the 1st Defendant, as the sole heir, the balance of the estate in the amount of R4,181,433.39.

THE PLAINTIFFS' CLAIM 1 AND ALTERNATIVES THERETO

- [6] In addition to the above background facts, the Plaintiffs' amended particulars of claim to which an exception is taken are couched in the following terms:

“CLAIM 1.

8.1. Section 2C (2) of the Wills Act 57 of 1953 provides as follows,

“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 the death of the testator, or had not been disqualified from inheriting, or had not after the testator’s death renounce 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”.

- 8.2. A descendant is defined in terms of the **Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009** to mean a person who is a descendant in terms of the Intestate Succession Act. A descendant in terms of the Intestate Succession Act, includes a descendant of a parent of the deceased.
- 8.3. First Defendant and the late **Hendrina Johanna Greyling** are brothers and sisters of the Testator and as such his descendants. So that, as envisaged in Section 2C (2) of the Wills Act, 1953 as **Hendrina Johanna Greyling** would have been entitled to a benefit in terms of the provisions of the Will if she had been alive at the time of the death of the Testator, the descendants of that descendant (her descendants, to wit the Plaintiffs) is *per stirpes* entitled to that benefit.
- 8.4. Wherefore the benefit allocated to Hendrina Johanna Greyling in terms of clause 1.1 and 1.2. of the will (Annexure “A”) should have vested in the Plaintiffs and/or should have been paid out to the Plaintiffs by the aforesaid Executor of the Estate of the late Gerhardus Francois Struwig.
- 8.5. Wherefore the combined amount of R 30 000.00 (clause 1.1 of the will) and R 2 075 716.99 (clause 1.2 of the will, namely $R\ 4\ 181\ 433.39 - R\ 30\,000.00 = R\ 4\ 151\ 433.39 \div 2 = R\ 2\ 075\ 716.99$) should have been allocated to the Plaintiffs (representing Hendrina Johanna Greyling) with each of them entitled to R 1 052 858.49 (namely, $R\ 2\ 075\ 716.99 \div 2 = R\ 1\ 037\ 858.47 + R\ 15\ 000.00 = R\ 1\ 052\ 858.49$).
- 8.6. Wherefore First Defendant was enriched by the receipt of R 2 105 716.99 at the expense of the Plaintiffs, and which enrichment is *sine causa*”.

FIRST ALTERNATIVE CLAIM TO CLAIM 1

- 9.2. The Second Defendant by accepting the amended First and Final LDA, incorrectly allowed that the amount of R 2 075 716.99 bequeathed to the late **Hendrina Johanna Greyling**, accrued to the First Defendant, in contradiction to the intention of the late **Gerhardus Francois Struwig**. It was not the intention of the late **Gerhardus Francois Struwig** that only one half of his family should benefit from his estate.
- 9.3. The late **Gerhardus Francois Struwig** was always equally involved in the lives of both the late **Hendrina Johanna Greyling** and the First Defendant, their children and grandchildren and has been visiting the Plaintiffs on a regular basis after **Hendrina Johanna Greyling** passed away and acted as a father figure, during this period, to the Plaintiffs since both their parents passed away.
- 9.4. From the scheme of the will of the late **Gerhardus Francois Struwig** it is evident that apart from the R30 000.00 he bequeathed to **Hendrina Johanna Greyling**, since the First Defendant was financially better off than **Hendrina Johanna Greyling**, that his intention was to divide the remainder of his estate between the late **Hendrina Johanna Greyling** and the First Defendant, to divide his estate fairly between his family. The intention of the late **Gerhardus Francois Struwig** was that if either of his heirs predeceased him that the predeceased heir be represented by such heir's children, since both heirs had two children.

SECOND ALTERNATIVE CLAIM TO CLAIM 1

- 10.2. There is a rebuttable presumption in terms of the common law that it was the intention of the Testator that a predeceased heir (if such heir was appointed, as such, as a member of a class of persons, to wit a sibling or family of the Testator) must be represented (at the Testator's death) by such heir's children (who are alive at the time of the devolution of the benefits).

- 10.3 It was the intention of the Testator that the late **Hendrina Johanna Greyling**, if predeceased at the time of the Testator's death, must be represented by her children, namely the Plaintiffs.

THE EXCEPTION

- [7] The grounds of the 1st Defendant's exception to claim 1 of the Plaintiffs are the following:
- (a) Struwig expressly identified and nominated Greyling and the 1st Defendant as his specified and expressly named heirs.
 - (b) At no point did Struwig nominate a class of persons as the recipients of the inheritance.
 - (c) Section 2C (2) of the Wills Act expressly refers and applies to the descendants of a testator.
 - (d) The Plaintiffs fail to acknowledge the proper definition of descendant which is restricted to the direct biological line of the testator, i.e. the issue of the testator.
 - (e) Furthermore the nomination of an heir in the will of a testator does not render that heir a descendant of the testator.
 - (f) The Plaintiffs further incorrectly attempt to rely upon the definition of a descendant as contained in the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 which expressly only find application in respect of the Customary Law of Succession (whether testate or intestate) and which consequently has no bearing on the facts at hand as no parties to those proceedings are subject to or practitioners of customary law.
 - (g) Manifestly neither the Plaintiffs nor their mother, Greyling are the issue or within the direct biological line of the testator and are accordingly not the descendants of the testator.
- [8] The grounds whereupon the first and second alternatives claim to claim 1 are excepted to are:

- (a) The Plaintiffs reliance on a purported rebuttable presumption in terms of the common law is misplaced as no such a presumption exists. Furthermore, the Plaintiffs fail to acknowledge that there are no *indiciae* in the will to indicate that the testator intended to substitute the issue of his sister as beneficiaries to her share. The law of testate succession is clear that when a bequest or inheritance is left to more than one heir without there being any stipulation as to how it is to be divided among them, then upon the death of one heir before the share vests in him, it will devolve upon his co-legatees by *jus accrescendi* unless the testator has expressly substituted someone else for the deceased beneficiary.
- (b) It is clear that the Plaintiffs were not, on any interpretation of the will and on any of the grounds upon which the Plaintiffs rely, entitled to any inheritance in terms of the testator's will.
- (c) In the absence of the discharge of the executor in accordance with Section 56 of the Administration of Estate Act, the non-joinder of the executor of the deceased estate of the testator constitutes a material defect in the pleadings and a proper cause of action has not been disclosed.

THE LEGAL POSITION

- [9] An exception must be adjudicated on the basis of the entire pleading as it stands,¹ accepting that each and every factual averment therein is true and that upon every reasonable interpretation thereof no cause of action is disclosed.²

The particulars of claim must contain every fact, (the *facta probanda*), that is necessary for the plaintiff to prove. It is not a requirement that the particulars of claim must contain evidence (*facta probantia*), that is required to prove the fact.³ If all the facts required to prove the claim are pleaded in the particulars of claim, a cause of action is disclosed.

An objection of non-joinder or *non-locus standi in judicio* is usually taken by way of special plea, but if the fact of non-joinder or *non-locus standi in judicio* appears

¹ Salzmann v Holmes 1914 AD 152 at 156.

² Stewart and Another v Botha and Another 2008 (6) SA 310 (SCA) at paragraph [4].

³ Acsendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020 (1) SA 327 (CC) at paragraph 50.

from the summons, the defendant is entitled to except to the summons on the grounds that no cause of action is disclosed.⁴

The executor or executrix is entitled to obtain his or her discharge from the Master upon satisfactory completion of the liquidation and distribution of a deceased estate and upon being discharged, no legal proceedings shall be instituted against him or her in respect of any claim against the deceased estate or any benefit out of that estate.⁵

APPLICATION OF LAW TO THE FACTS

- [10] A perusal of the grounds upon which the exception is founded has revealed that, although they are 12, they are inextricably linked and they essentially raise only two issues, namely (a) lack of *locus standi* on the part of the Plaintiffs and (b) non-joinder of the Executor.
- [11] The 1st Defendant has a duty to show that upon every interpretation which the particulars of claim of the Plaintiffs and the will of Struwig can reasonably bear, no cause of action is disclosed. Unless the 1st Defendant succeeds in this regard, the exception cannot be upheld.
- [12] Mr. Reinders, on behalf of the 1st Defendant argued, with reference to claim 1, that Section 2C (2) of the Wills Act which is relied upon by the Plaintiffs does not find application in this matter because Greyling was not a descendant of Struwig. The corollary of this is that the Plaintiffs, who are the descendants of Greyling cannot be regarded as the descendants of Struwig. In this regard, Mr Coetzee, for the Plaintiffs urged me to ascribe to the word “descendant” a meaning given to it in the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. This act defines a descendant as a person who is a descendant in terms of the Intestate Succession Act⁶. The Intestate Succession Act defines a descendant, amongst others, as including a descendant of a parent of the deceased.

⁴ Edwards v Woodnutt, NO 1968 (4) SA 184 (R).

⁵ Section 56 of the Administration of Estates Act 66 of 1965, as amended.

⁶ Act 81 of 1987.

[13] The difficulties with defining a descendant in the manner proposed by Mr. Coetzee are, in my view, the following:

- (a) that definition originates from the Intestate Succession Act, which is applicable to intestate succession and not testate succession. It is conceivable that a word such as descendant would be given a meaning in the context of intestate succession which is wider than its ordinary meaning, which approach would not be justifiable in the context of testate succession where a testator is free to mention, and in the instant case has mentioned his preferred heirs in clear terms. There is also no principle of interpretation that requires a court to interpret one piece of legislation with reference to the other. A special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone.⁷
- (b) there is nothing in the will of Struwig that suggests that he intended the bequest to devolve to the children of his heirs in the event of them predeceasing him.
- (c) it will be repugnant to the *jus accrescendi* in terms whereof the share of a co-legatee who dies before such a share vests in him or her, devolves upon his or her co-legatees who are alive at the time of the death of the testator unless the testator expressly substitutes the deceased beneficiary with someone else.⁸
- (d) Mr. Coetzee has, in his heads of argument, referred to the Penguin Concise English Dictionary (2001) which defines a “descendant” as, “somebody or something descended or deriving from somebody or something else” and The Oxford Advanced Learner’s Dictionary (1989) which defines “descendant” as a person descended from another”. This is the ordinary grammatical meaning which does not support the argument that the Plaintiffs are descendants of Struwig.

⁷ Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society and Others 2020 (2) SA 325 (CC) at paragraph 14 and 18.

⁸ Lello and Others v Dales, N.O 1971 (2) SA 330 (A.D)

- [14] It is trite that courts must properly contextualise statutory provisions when ascribing meaning to words used therein.⁹ In the matter of Saidi (*supra*), at paragraph 36 it is stated that:

“This Court has noted that on numerous occasions that text is not everything. Unless there is no other tenable meaning, words in a statute are not given their ordinary grammatical meaning if, to do so, would lead to absurdity”.

In the context of this matter, the word descendant must be defined with reference to the will of the testator. In other words, in order to define it to mean that the Plaintiffs are the descendants of Struwig, this construction must be found to have been the intention of Struwig at the time of the execution of the will. I do not find anything in the will of Struwig which supports the argument that Struwig intended to benefit his family, i.e. 1st Defendant and his issue together with Greyling and her issue, as opposed to the only beneficiaries that he specifically mentioned in his will, namely Greyling and the 1st Defendant.

- [15] The rebuttable presumption that Mr Coetzee referred to, if it is indeed part of South African Law, also seems to be inconsistent with the *jus accrescendi* which has been applied by the then apex Court in cases such as Lello (*supra*). On the other hand, the said presumption has never been applied in any judgement but only stated in the book¹⁰ as what I consider to be an expression of an opinion.
- [16] The other issue that Mr. Reinders raised is that the Executor of the estate ought to have been joined as he or she has not been discharged in terms of Section 56(1) of the Administration of Estate Act. Mr Coetzee argues that this is an attempt on the part of the 1st Defendant to introduce evidence. An Executor retains the power to sue or be sued in his representative capacity until he has been discharged.¹¹ If an executor pays the heir or legatees more than they are entitled to, there is unjustified enrichment so the Executor may recover the excess from them by means of *condictio indebiti*. The issue whether or not the Executor has been discharged is important. The reason for this is that if he or

⁹ Saidi v Minister of Home Affairs 2018 (4) SA 333 (CC)

¹⁰ Van der Merwe, Rowland, Cronje: Die Suid-Afrikaanse Erfreg , 6th Edition, 1990 at 244.

¹¹ Section 56 of the Estates Act. See also: Wille's Principles of South African Law, 9th Edition at 1060.

she has not been discharged, the claim for unjustified enrichment is a matter to be dealt with by the Executor. If he or she has been discharged, then the Plaintiff must show that they are the beneficiaries of the late estate of Struwig in order to be clothed with *locus standi* to sue for unjustified enrichment.

CONCLUSION

[17] Having considered the allegations contained in the amended particulars of claim of the Plaintiffs and the grounds whereupon the exception is founded, and having considered the relevant legal principles, I am satisfied that the 1st Defendant has shown that on every interpretation of the particulars of claim of the Plaintiffs and the will of Struwig, no cause of action is disclosed. The Plaintiffs do not make any allegations that show that they are the descendants of the testator and for that reason their particulars of claim lack the averments which are necessary to sustain an action. The 1st Defendant's exception must therefore succeed.

THE ORDER

[18] I consequently make the following order:

1. The exception to the Plaintiffs' particulars of claim is upheld.
2. The Plaintiffs particulars of claim are struck out.
3. The Plaintiffs are given leave to amend their particulars of claim, if so advised, within 20 days of this order.
4. In the event of the Plaintiffs' failure to amend their particulars of claim within the period mentioned in 3, the 1st Defendant is granted leave to enrol the matter for dismissal of the Plaintiffs' claim.
5. The Plaintiffs are ordered to pay the costs of the exception.

M. S. LITHEKO, AJ

For the Plaintiffs:

Instructed by:

Mr. R. Coetzee

Steenkamp & Jansen Inc.

Bloemfontein

For the Defendants:

Instructed by:

Adv. S. J. Reinders

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