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: 526/2017

In the matter between:

MARIA MAGADALENA VAN PLETZEN	1ST Plaintiff
MAGDELT MAGDALENA KOTZE	2ND Plaintiff

and

STEPHANUS ISAIAS COETZER	1ST Defendant
PIETER HERMANUS COETZER	2ND Defendant
ZACHARIA GERHARD THEUNIS COETZER	3RD Defendant

JUDGMENT BY: **MHLAMBI J,**

HEARD ON: 23 & 24 OCTOBER 2018

DELIVERED ON: 06 December 2018

MHLAMBI, J

[1] The plaintiffs each claimed from the first defendant, payment in the amount of R 1 400 000.00[1]; alternatively, the same amount from all three defendants jointly and severally, the one paying, the others to be absolved; in the further alternative, from first and second defendants[2]; alternatively from each of the three defendants jointly and severally, the one paying the others to be absolved, judgment in the amount of R 262 419.63 together with interest and costs.

[2] The plaintiffs and defendants are the natural children of Stephanus Isaias Coetzer and Magdelt Magdalena Coetzer, who were married in community of property; the registered owners of a 5/6 share of the farm *"Bothasrand"*, a 5/5 share of the farm *"Zoetvlei"* and 5/6 share of the farm *"Aloedal"* situated in the district of Rouxville. On 16 September 1977, the married couple executed a joint will in terms of which the three farms[3] were bequeathed to the three defendants subject to the life usufruct of the testatrix, Magdelt Magdalena Coetzer over the three properties. Clause 4(ii)[4] stipulated that all three properties should be valuated at the death of the testatrix and the pro rata valuation of each of the mentioned bequests be paid out by each of the defendants to the plaintiffs in equal shares, so that all five children could inherit equally in respect of the fixed property.

[1] Pleadings bundle page 15
[2] Pleadings bundles page 16
[3] Pleadings bundles page 20
[4] Pleadings bundle page 20

[3] The testator died on 13 November 1979 and the testatrix on 17 June 2015. The testator's estate was administered and the executor of the estate discharged by the Master in terms of section 56 of the Administration of the Deceased Estates Act (the Act). The first and final liquidation and distribution account was approved and accepted by the Master in consequence of which the three farms were transferred and registered in the names of the defendants subject to the provisions of the will of 16 September 1977.

[4] The plaintiffs' main claims are based on a valuation of the three farms as at 17 June 2015 to the amount of R 8 100 000.00[5] which was reduced to R 7 000 000.00 to indicate the value of the actual land. The first and third defendants resisted the claims, pleading lack of *locus standi* on the part of the plaintiffs and that only the executor of the estate could institute a claim based on the will. They contested the correctness of the valuation attached to the particulars of claim as they alleged that such valuation included the renovations brought about by the first and third defendants on the properties after their transfer.

[5] The first and third defendants pleaded that the plaintiffs and all three defendants entered into a written agreement on 15 February 2011(the 2011 agreement) at Rouxville, in terms of which the valuation of the farms, whose proceeds would be used to pay both plaintiffs in terms of the will, was fixed and accepted by the parties[6]. In terms of this agreement, the first defendant was indebted to each of the plaintiffs in the amount of R 134 250.02

[5] Pleadings bundle page 11, para 6.2
[6] Pleadings bundle page 57

and the third defendant indebted to each of the plaintiffs in the amount of R 20 465.58. The defendants tendered furthermore to pay to the plaintiffs mora interest on the tendered amounts plus taxed costs calculated 15 court days from the date of the filing of the plea.

[6] The plaintiffs and the second defendant settled their dispute on the morning of the trial and the trial proceeded only as against the first and third defendants. At the inception of the trial, an order was sought in terms of paragraph 5 of the Rule 37 minute which entailed that all the disputes as per the pleadings, would be adjudicated upon first save the plaintiffs' valuation as computed and contained in paragraphs 6.2 to 6.7 and 9 of the particulars of claim. These would be adjudicated upon at a later juncture.

[7] Mr Benade, on behalf of the plaintiff, submitted that in his opinion, the trial revolved around two questions, namely: whether the 2011 agreement was valid and enforceable; if valid, whether it was validly cancelled in the replication.

[8] Both plaintiffs testified in support of their cases. The first plaintiff testified that the executor of the estate, one Gustav van Straaten, was duly discharged in terms of the Administration of Deceased Estates Act and that he was since deceased. An agreement was reached with the defendants in 1986 to have the farms registered in their names to serve as security with the banks. The farms were duly transferred into the defendants' names. Their mother died on 17 June 2015. The first plaintiff signed the 2011 agreement but did not regard it as binding because the rights

emanating from the will did not vest in the heirs as the parties' mother, the testatrix, was still alive. Furthermore, the defendants did not comply with the agreement or tender any payment but tried to delay payments in terms of the agreement until the summons was issued.

[9] She met the first and third defendants in July 2016 who enquired from her whether she had received the contract from Fouche attorneys. The attorneys handled the testatrix' estate. The attorney had given her an unsigned agreement (which was signed neither by the plaintiffs nor the defendants). She was not prepared to accept it unless corrections were made to certain paragraphs. Even though she signed the 2011 agreement, she was of the opinion that it was against the provisions of the will. She never demanded payment nor placed the defendants in mora in terms thereof. She only gave notice of its cancellation to the defendants by way of the replication contained in the pleadings. She rejected the defendants' offer or tender of the payment of R262 419.63 which was made to her during cross-examination. The real problem, according to her, was the defendants' refusal to pay the escalation and interest even when they were confronted with the 2016 contract.

[10] The second plaintiff confirmed her signature on the 2011 contract and the previous agreements which were concluded to enable the defendants to secure financing from the banks. She testified that the parties agreed on the day of the memorial service of the testatrix that the defendants would be given a year within which to finalise the agreement and payments due to the plaintiffs (despite

the first plaintiff's suggestion of nine months). She was the author of the "whatsapp" message of 16 June 2016 at 19:04 addressed to the first defendant which read as follows*: " Magda Kotze: Hi. Bel my asb. Wil graag weet wat met boedel aangaan. Drie jaar is nou verby en ons het 'n mondelingse ooreenkoms gehad dat alles nou afgehandel sal wees. Laat weet my asb. Ek het jou probeer bel."* She did not sign the concept agreement from Fouche attorneys as the terms were vague. The defendants refused to pay anything as indicated in their Plea on page 135 of the Exhibit bundle. According to her, the replication cancelled the agreement of 2011 due to unfulfilled promises by the defendants.

[11] She still considered herself to be bound by that agreement as at 16 June 2016 and would have accepted the suggested amount of R262 419.63. Neither a letter of demand nor a notice was given to the defendants in terms of the agreement. In cross-examination, she stated that she sent the "whatsapp" message to the first defendant as a reminder. She conceded that should the court find that the agreement was valid, she would not dismiss the offer of the payment of the amount of R262 419.63.

[12] The plaintiffs closed their cases. The defendants also closed their case without adducing any evidence. Both parties presented brief heads of argument and oral submissions.

[13] Mr Benade submitted that clause 4(ii) of the will was a modus provision in that the farms were given in legacy to the three sons subject to the modus that at the death of the mother, the sisters would be paid a certain amount of money. He relied on **Bydawell**

v Chapman[7] **and Fyfe v Estate Poynton**[8] as support for his contention that the plaintiffs' rights had not accrued to them as at the time of the conclusion of the 2011 agreement and that such agreement modified the will. Non- compliance with clause 4 of the 2011 agreement was neither pleaded in the defendants' first plea of 8 September 2017 nor in their second plea of 17 January 2018. The conduct of the defendants constituted a repudiation of the contract in the form of an anticipatory breach of the contract or **in** the form of repudiation.

[14] Should the court find that the agreement was valid, it was contended that the plaintiffs had complied with the giving of notice as required by clause 4 of the 2011 agreement in that[9]:

1. The second plaintiff testified that she sent a written whatsapp massage on 20 June 2016 to the first defendant;
2. It was clear from the email from Horn and Kumm Attorneys dated 11 July 2016 (in which a draft agreement was forwarded to Magda, the second plaintiff, for consideration) that the first and third defendants knew that the plaintiffs demanded performance;
3. The plaintiffs cancelled the agreement in their replication when they accepted the defendants' repudiation thereby cancelling the agreement.

[15] Save for the brief submissions on *locus standi*, Mr Reinders, on behalf of the first and third defendants, submitted that should the court find that the plaintiffs had a personal right against the

[7] 1953(3) SA 514 (AD) at 523F-H
[8] 1926 AD 326 at 332
[9] Plaintiffs head of arguments page 6, para 4

defendants to claim payment on the basis of the *modus,* it was common cause that during the eighties, the defendants received transfer of the property by the executor and that the executor was discharged in terms of section 56 of the Act. The executor could only have been discharged if he had completed the administration of the estate to the satisfaction of the master. The defendants became full owners of the properties on registration of the properties into their names and the amounts to be paid to their sisters (the plaintiffs') were not to be made from the estate itself but were to be received from the defendants personally. It was common cause that the parties signed the agreement and understood its implications at a time when the *modus* already existed and was contingent upon the death of the mother. The parties were free to contract and the 2011 agreement was not a redistribution agreement which the executor and the master had to confirm. It was not necessary as the estate of the deceased was finalised and the plaintiffs' claims were personal rights based on the *modus*[10]*.* The defendants had already received what they must have received in terms of the will and the only duty upon them was the payment of a certain amount on the death of the testatrix. The parties merely agreed as to how that amount would be computed and placed a value thereon as they were entitled to. There was no need for the master to approve it as there was nothing that was redistributed between the parties. I agree with this view.

[16] He submitted further that the agreement had a specific clause that required any of the parties to give the other party notice if that

[10] Webb v Davis N.O. and others 1998 (2) SA 975 (SCA) at 983

party appeared to be in breach thereof. Neither of the plaintiffs gave notice in terms of the contract of their intention to cancel it due to non-performance. In this regard I was referred to a number of decisions which stated that where a party relied on a cancellation clause, he is required to give a written notice to the other party to remedy such breach in order to succeed with the claim. The plaintiffs never complied with clause 4 of the 2011 agreement and the defendants were entitled to oppose the claims on the basis of the pleadings as they stood.

[17] It would appear that the plea of *locus standi was* either overtaken by events or was raised solely as a result of the manner the claimants' pleadings were drafted. It is common cause that both the executor and the testator had passed away and the master had approved the final liquidation and distribution account. Besides, the executor had received his discharge in terms of section 56 of the Act. It was also obvious that this part of the argument was not vigorously pursued as the main thrust of the defence was the reliance on the written agreement of 2011. I find that this argument is not pertinent to the issues at hand and shall therefore, save for what was said above, traverse it any further.

[18] Having regard to clause 4(ii) of the will, the pleadings and the submissions of all the parties, it is common cause and undeniable that a modus was created in the will in terms whereof the defendants were obliged to pay certain amounts of money to the plaintiffs upon the death of the testatrix. The immediate question that arises is whether a binding agreement between the parties arose as at 15 February 2011. The plaintiffs held the view that the

agreement was of no force and effect as it intended to alter the devolution of the estate. The authorities I was referred to in this regard by Mr Benade, do not assist the plaintiffs' case in any manner whatsoever as both are distinguishable from the present case on both facts and the law. In **Bydawell**, *supra,* the family agreement sought to vary the terms of the will and purported to effect substantial deviations from the testator's dispositions, thus jeopardising, *inter alia* potential rights of heirs. In the present case, the rights of the parties are not affected, but the manner or direction as to the equal distribution of the fixed assets to the heirs. In **Fyfe**, *supra,* it was held that a plaintiff's husband at the time of his death had no vested interest in a property which he could bequeath to the plaintiff and that he had not acquired such an interest under the terms of the family agreement. *In casu*, the plaintiffs had a personal right enforceable as against the defendants, the latter as beneficiaries who inherited under the will. As at 15 March 2011, the defendants had ownership of the properties and the plaintiffs had personal rights as against them.

[19] A family agreement cannot lawfully vary the terms of a will[11]. The terms of the agreement of 2011 are not opposed to the express provisions of the will. Beneficiaries of full capacity may freely renounce, waive or dispose of their rights under the will, and every party who so waived or disposed of his rights cannot complain. Parties may contract to render to each other the fruits of the devolution, if and when they mature or accrue, but cannot alter the devolution by contract[12].

[11] Bydawell, supra
[12] Bydawell page 523 para G-H

[20] Clause 4 of the 2011 agreement provides that should any party breach any term of the agreement and fail to remedy such breach within 7 days of having been given written notice to do so, the other party shall be entitled to cancel the agreement. The plaintiffs failed to give the required notice for the cancellation of the agreement. The reasons advanced by the plaintiffs for the termination of the agreement fall far short of a genuine desire to so cancel the agreement[13]. It was submitted in the plaintiffs' heads that such a clause did not need to be complied with when the conduct of the defendants constituted a repudiation of the contract, or was in the form of anticipatory breach of the contract or in the form of repudiation[14]and reference was made to **Metalmil v AECI**[15].

[21] The plaintiffs' case for repudiation by the defendants[16]was that since 2015 they did not perform in terms of the 2011 agreement by making payments. This is in stark contrast with the second plaintiff's testimony that the defendants were given a year's grace to fulfil their obligations. It was argued that they did not perform in terms of the said agreement within a reasonable time after June 2015 (20 months passed since June 2015 to February 2017). They neither paid after the summons was issued in February 2017 nor tendered payments in their August/September 2017 pleas in accordance with the 2011 agreement. It would seem as if the plaintiffs lost sight of the fact that the summons had to be amended twice by the plaintiffs as a result of the defendants' filing of Rule 23(1) notices to the plaintiffs' particulars of claim as being

[13] Hano Trading CC v JR 209 Investments (Pty) Ltd and Another 2013 (1) SA 161 (SCA)
[14] Plaintiffs' heads of argument page 7
[15] 1994 (3) SA 673 (AD) at 683H
[16] Plaintiffs heads page 9 para 6.3

vague and embarrassing especially in respect of the periods and calculations of the valuations, which are still in dispute. On the consideration of the plaintiffs' testimony and their conduct, it is evident that they were under a misconception as to the approach and what they expected to get from the transactions.

[22] In the light of the above, I find that the 2011 agreement is valid and enforceable. The replication and the other reasons advanced were insufficient for its cancellation.

[23] I therefore make the following order:

Order

23.1 The main claims of the plaintiffs are dismissed;

23.2 It is declared that the first and third defendants are liable for such amount still to be determined (excluding any liability of the second defendant);

23.3 Plaintiffs to pay the costs occasioned by the trial on 23 and 24 October 2018;

23.4 The matter is postponed to the next available Rule 37(8) pre-trial conference.

MHLAMBI, J

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