

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

2 | 3 | 2017

Case No. 41851/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
2/3/2016	1 May
SIGNATURE	DATE
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In the matter between:

ESTHER ORTONE

Plaintiff

and

KAREL BELMER

Defendant

JUDGMENT

GCABASHE AJ

Introduction

[1] This dispute concerns an outstanding payment, plus interest, that the Plaintiff claims is due to her in terms of a conditional bequest made in a Will.

[2] This Court wishes to point out at the outset that the parties' legal representatives were requested to submit their heads of argument on or before 12 January 2017. Despite enquiry after that date, the legal representative of the Defendant has failed to submit heads of argument. This judgment is thus premised on the transcription of evidence that was requested by the court for the benefit of all parties, the record as filed, the notes made in court during the hearing and the heads of argument filed by the Plaintiff's legal representative.

Background

[3] The essential background facts are that the Plaintiff was the life partner of one **KAREL BELMER**, who died at Pretoria on 29 October 2011 ("the deceased"). He was the father of the Defendant, who was his eldest son. It is common cause that the deceased's Will was executed on 25 January 2011, that it records the wishes of the deceased, and that it has not been contested.

[4] The salient part of the bequest, which is recorded in the Afrikaans language, is found in clauses 1,1 and 1.2, and read as follows:

“Ek maak my bedoel soos volg:

- 1.1 Aan my seun KAREL BELMER, my aandele in SUNNY SHADES (Pty) Ltd, sowel as enige bedrae aan my verskuldig deur gemelde maatskappy onder leningsrekening.
- 1.2 Die bemarking in 1.1 is onderhewig aan betaling deur my seun KAREL BELMER van 'n jaargeld van R5000 (Vyf Duisend Rand) per mand uit die inkomste van sy erfenis aan my lewensmaat ESTHER ORTONE (id ...), vir 'n periode van 5 (Vyf) jaar gereken vanaf datum van my afsterwe.
- 1.3 ...”

[5] In addition to the above the Defendant also inherited 25% of the member's interest in a close corporation, Vexma CC, and 20% of the proceeds of two life insurance policies in the amount of R440 000. The Defendant also inherited a mint and stamp collection from the deceased. The Plaintiff too received specific bequests from the deceased.

[6] The Defendant accepted the bequests in the deceased's Will. The shares in Sunny Shades 1991 (Pty) Ltd (“Sunny Shades”) were transferred to the Defendant on 1 November 2011, and on 30 November 2011 he was appointed the only director of the company.

The claim

- [7] The dispute regarding the outstanding money that the Plaintiff claims is due to her arises from her interpretation of clause 1.1 and 1.2 of the deceased's Will. The Plaintiff's primary claim is that the bequest of the company to the Defendant was subject to him paying to her an amount of R5000 per month from the income from his entire inheritance, and not only from the bequest made under clause 1.1 and 1.2 of the Will.
- [8] Her secondary and alternative claim is that the deceased bequeathed Sunny Shades to the Defendant subject to the latter paying to her, from the income of the company only, an amount of R5000 per month for a period of 5 years. The date of payment in respect of the main and alternative claim was to be calculated from the deceased's date of death. The total amount of that payment, had it been made, would have been R300 000.
- [9] On 4 June 2015 the Plaintiff issued Summons for the payment of R265 206.72 plus interest in respect of the monetary payment arising from the two bequests in clause 1.1. and 1.2 of the Will of the deceased. The quantum of the claim is thus R265 206.72 plus interest, irrespective of whether the Plaintiff succeeds on the main or alternative claim.

The Plaintiff's case

[10] The main issue to be determined is whether it was the intention of the deceased that the Defendant pay the sum of R5000 per month to the Plaintiff from the income generated by the operating profits of Sunny Shades only, including any income generated from the business, assets, goodwill and/or personnel of the company.

[11] In the alternative, the Plaintiff's claim was that once the Defendant accepted the bequest of the shares in Sunny Shades, the he became liable to fulfil the obligation imposed from his entire inheritance under the Will.

[12] The company at the centre of this dispute, Sunny Shades, was originally established in 1975. The deceased bought the company in or about 1990 and was its only shareholder and director. The Plaintiff worked with the deceased. The company was located at Plot 7 De Waal Street, Pretoria. Its primary object was to manufacture awnings for, *inter alia*, windows, doors, and carports.

[13] The Plaintiff lived with the deceased from 1986 to 2011. They never married but lived together as husband and wife for approximately 25 years. It is common cause that the deceased regarded the Plaintiff as

his life partner. The Defendant was approximately 20 years old when the Plaintiff and the deceased started to live together.

[14] The testimony of the Plaintiff was that the company manufactured all types of awnings, including indoor roller blinds, folding arms, expandable awnings, carport covers, domes over doors and windows, PVC and shade netting. In essence, it manufactured canvass covers for any structure that needed cover to block the sun.

[15] The company's logo was "*We convert sun to shades*". It had a distinct trademark which was registered in or about 1993. This logo was used on all the company's documents and labels, and it was stitched onto all the products that were manufactured by the company. The company regularly advertised its products in a local publication called "Die Huisvriend".

[16] Though the Plaintiff worked with the deceased from 1990, she did not earn a salary. She was principally responsible for the administrative and human resource functions of the company. These responsibilities included placing orders, issuing invoices, and doing book-keeping for the company.

[17] The Defendant started working for the company in or about 1992. In the view of the Plaintiff, the deceased did not want the Defendant to get

ownership of the company without paying for it, hence the formulation of the conditional bequest as recorded in clauses 1.1 and 1.2 of the Will.

[18] At the time of the deceased's death in October 2011 the company had approximately 15 employees. The Plaintiff continued to work for the company until December 2011. The business continued to operate under the guidance of the Defendant, until about September 2012 when it stopped trading and the Defendant applied for an order of liquidation.

[19] The reason advanced by the Defendant for the application to liquidate the company was that it was insolvent as a consequence of a debt owed to the South African Revenue Service, which ranked as a preferred creditor. A provisional order of liquidation was granted on 6 June 2014 and on 22 August 2014 the provisional order was made final. In the Plaintiff's view, the Defendant had applied for and obtained the liquidation of Sunny Shades in order to fraudulently avoid honouring the terms of the deceased's Will with respect to the R5000 per month payment to her.

[20] Even after the liquidation, the Defendant continued to operate the business from the same premises and in the same manner that it had always operated from. Part of this dispute relates to the liquidation of

Sunny Shades and whether, despite the liquidation, it in fact continued to operate after the 22 August 2014, though under a new name, and continued to generate income from the business, assets, goodwill and/or personnel of the company as established and operated by the deceased.

[21] The testimony of the Plaintiff was that at the time that the Defendant took over the operations of the company, the latter was fully aware of the true financial position of the company, i.e. that it was a going concern, and that provision had been made for any outstanding debts.

[22] The Defendant made payment of R5000 per month to the Plaintiff for approximately 5 ½ months. The total sum received by the Plaintiff from the Defendant was R34 793.28. The last payment made to the Plaintiff by the Defendant was on 29 June 2012. The Plaintiff testified that she asked the Defendant on numerous occasions to honour the terms of his father's Will. The Defendant failed to respond to her or to pay the outstanding balance of R265,206.72.

[23] When asked about the company ceasing to do business in September 2012, the Plaintiff testified that this was not correct, as she continued to see the vehicle used to do the installation of awnings on numerous occasions after September 2012. In addition, up to about April 2015 she was aware that the company continued to use the trademark that

the deceased had registered for Sunny Shades. It also continued to advertise its services using the factory and website details that had originally been registered under Sunny Shades. Detailed evidence of these continuing activities by the company was led in court.

[24] The Plaintiff explained that the name of the company changed in or about September 2015 to that of “Sun Cover System CC – Manufacturing division of Sunny Shades and Canobrella” (“Sun Cover Systems CC”). The sole member of this new entity was the common-law partner of the Defendant, one Ms. Charmain Lizelle Venter (“Venter”), who, to the knowledge of the Plaintiff, was a nurse by training. However, the testimony of the Plaintiff was that for all intents and purposes, this new entity continued to be the alter ego of Sunny Shades as it continued to rely on the business, assets, goodwill and personnel of Sunny Shades.

[25] With respect to staff, the Plaintiff testified that some were asked to leave the company in December 2014, but that to her knowledge about 7 or 8 staff members continued to work for the company.

[26] With respect to what was communicated to the general public about the operations of the company, the Plaintiff testified that up to April 2015, advertisements placed in the local marketing publication “Die Huisvriend” still used the original logo, telephone number, factory

details, and website address of Sunny Shades. Her further testimony was that in July 2015, other than changing the telephone numbers of the company, the advertisement placed by Sunny Shades in this publication continued to use the same reference details that had been used by the company from inception.

[27] The Plaintiff dismissed the reason advanced by the Defendant for not paying her, i.e. that Sunny Shades was insolvent. She told the court that her view was that the Defendant was to pay her out of his entire inheritance, and not only from the income generated by Sunny Shades. She also stated that if this Court found that the Defendant was to make the payment out of the profits generated by Sunny Shades, the Defendant continued to advertise under the name Sunny Shades until September 2015. It followed that up to about September 2015 there must have been income generated by Sunny Shades.

[28] Under cross examination the Plaintiff persisted in her view that the word "income" as used by the deceased in clause 1.2 of the will did not only relate to the bequest made in clause 1.1, i.e. to the company Sunny Shades. She was also adamant that the inheritance mentioned in the Will referred to the Defendant's entire inheritance from the deceased.

[29] A lengthy debate then ensued with respect to what the financial condition of Sunny Shades was when the Defendant inherited it. The proposition that was put to the Plaintiff was that Sunny Shades was in fact in debt. The Annual Financial Statements of the company were traversed. The extent of the outstanding VAT that was due was debated as was the overdraft that the company had to settle.

[30] The Plaintiff disputed the propositions put to her regarding the insolvency of Sunny Shades at the time that the Defendant took ownership of it. She pointed to the fact that there were insurance policies that had specifically been taken by the deceased to settle the overdraft and the outstanding VAT payment of Sunny Shades, and that she had asked that the insurance policy be paid into the account of Sunny Shades. As a consequence, an amount of R275 000 was paid into the account of Sunny Shades in 2012 to clear the overdraft of R272 000.

[31] When challenged under cross examination that she failed to inform the Defendant of the outstanding VAT and overdraft amounts when she left the company in December 2011, the Plaintiff stated that she did not have to inform the Defendant because she knew how closely the Defendant worked with his father. As a consequence, the Defendant was aware of those outstanding amounts and knew that his father had taken out insurance policies to ensure that these would be settled.

[32] She also stated that the Defendant knew about the outstanding VAT claim for the same reason, i.e. his close working relationship with the deceased. She disputed the Defendant's allegation that Sunny Shades could not take orders or continue to trade because it did not have a VAT certificate as a consequence of the outstanding VAT payment.

[33] She persisted in her view that the liquidation of the company had been obtained fraudulently, explaining that the deceased had run the business for 20 years without the company experiencing any major liquidity problems. She was resolute that there was no bank overdraft and that provision had been made for the outstanding VAT payment.

[34] When re-examined and shown a statement on the account of Sunny Shades, the Plaintiff read the contents thereof into the record. This statement recorded that Momentum Policy had paid an amount of R275 534.00 and another for R1 214.84 into the account of Sunny Shades on 21 June 2012. This gave the account a credit balance of R16 929.00. The Plaintiff confirmed that this amount cleared the overdraft.

[35] She also confirmed as correct the observation made in the Annual Financial Statements of February 2013 that the company had access to

adequate resources to continue in operational existence for the foreseeable future.

Plaintiff's witness

[36] The next witness to be called ought to have been Ms Letta Kganyago who worked for Sunny Shades as a stitcher for 15 years. The Defendant agreed to the admission of her evidence and she was excused.

[37] Her evidence was placed on record, i.e. that she continued to work for the company until December 2014. Her services were terminated in January 2015. It was further stated that she confirmed that during the time she was employed by the Defendant, the company continued to use all the stationary and machinery that they had previously used in Sunny Shades when the business was operated by the deceased.

[38] After this statement was read into the record, the Plaintiff closed her case.

The Defendant's case

[39] The Defendant confirmed that he was in a relationship with Ms. Venter. He also confirmed that his current occupation was that of manufacturing and installing sun control products, mainly roller blinds, and that he had been in this business since he started working with his father in 1991 at Sunny Shades. At the time that he worked at Sunny Shades, his job description was that of manufacturing and overseeing the installation of awnings, and he did some marketing for the company.

[40] The Defendant confirmed that the Plaintiff worked at Sunny Shades from 1990 when the business was acquired, and that she was responsible for the administration and the accounts of the company.

[41] On being questioned about what he had inherited from his father, the Defendant stated that he had inherited the company Sunny Shades, a quarter of the shares of Vexma Properties, a plot on which was located a small factory from which they manufactured, 20% of two life policies, a coin and stamp collection.

[42] The contents of the second liquidation and distribution accounts were traversed with the Defendant, and the Defendant confirmed that the total recorded therein regarding what he inherited from his father was the amount of R440 009.53. What he received, however was R62 000 of which R47 000 was paid into his bank account. This was due to the

fact that the outstanding overdraft of Sunny Shades of R140 000 was deducted from what was due to him.

[43] The Defendant's testimony was that when he took over running Sunny Shades, the banks would not extend any overdraft to him unless they had the financial statements of the company. These he only obtained in March and June 2012. When he presented these to the bank he was advised that the company was a "sinking ship" and that he could not get an overdraft. It was then that he decided to liquidate the company. He also testified that it was largely due to the outstanding South African Revenue Services payment that the company had to be liquidated, as this debt could not be paid.

[44] In clarifying the position, the Defendant stated that the 2010 statements were received in March 2012, the 2011 statements were prepared in 28 June 2012, and the statements up to 29 February 2012 were prepared on 28 June 2012. In addition, he testified that of his total inheritance from his father, the only asset that could produce an income, within the meaning of clause 1.1 of the Will, was Sunny Shades.

[45] With respect to the outstanding VAT payment, the Defendant testified that, contrary to what the Plaintiff had testified about his knowledge of the outstanding VAT payment, he only found out about the outstanding

payment in early 2012. The Auditors of the business then advised him that he could no longer trade as Sunny Shades or issue VAT invoices. He stopped trading as Sunny Shades in or about July 2012.

[46] After consulting a lawyer, he was advised to liquidate the company. He was also advised that if he did not accept the legacy in 1.1 of the Will, he would not be able to accept any of the other legacies in the Will.

[47] It was only on 24 February 2014 that he received the share certificates for Sunny Shades stating that he was registered as a Director.

[48] In disputing the evidence of the Plaintiff that he fraudulently attempted to escape from his obligations under the Will, the Defendant stated that the reason that he stopped paying the Plaintiff R5000 per month was because he obtained legal advice that as Sunny Shades had been liquidated, he no longer had to pay this amount.

[49] Under cross examination the Defendant confirmed that Ms Venter was a nursing sister and that she joined him at Sunny Shades in January 2012 to take care of the financial and administrative side of the business. She had not been involved in Sunny Shades until January 2012.

[50] The reason that she was the only member of the newly registered Sun Cover System CC that took over from Sunny Shades was that he was told that he could not operate under his name due to the outstanding VAT payment due from Sunny Shades. When challenged about the legal cogency of this argument the Defendant insisted that this was what he was told by the South African Revenue Service.

[51] The Defendant's responsibilities at Sun Cover Systems CC included manufacturing and installing the products they made. He stated that he was simply an employee at Sun Cover Systems CC, and did not earn a fixed salary. He stated that after the Sunny Shades account was frozen he did not earn income with which to pay the Plaintiff R5000 per month.

[52] When the Plaintiff's counsel took the Defendant through the financial statements that had been traversed earlier during the Defendant's examination in chief, the Defendant stated that:

[52.1] he had no idea how the value of Sunny Shades had been determined by the Auditors;

[52.2] he was aware that in order to evaluate the business he had to look at the financial statements;

[52.3] the value attached to Sunny Shades in the liquidation and distribution account was derived from the financial statements of Sunny Shades;

- [52.4] he had no idea on whether the zero value of Sunny Shades was determined from the financial statements of the company ending 31 October 2011;
- [52.5] the accumulated loss for 2011 was R61 916.00, and that the outstanding VAT was R335 778.00;
- [52.6] he had no idea whether the VAT amount of R335 778.00 had already been taken into consideration in the calculation of the assets and liabilities of the company;
- [52.7] the Auditors had obtained the information on which the annual financial statements were drawn from the company;
- [39.8] he had no idea how the recorded levies in the amount of R513 109.00 were quantified;
- [52.9] he admitted that the record showed that the levies for 2009 were in the amount of R7 000.00 and those for 2008 were R21 566.00, and the 2010 levies were R1 755.00, but that he did not know what these were levies for;
- [52.10] he could not explain why the levies for 2011 were in the amount of R513 000.00, and agreed that the figure did not make sense;
- [52.11] had the R513 000.00 not been deducted from Sunny Shades the company would have had a substantial profit and been able to make the R335 778.00 VAT payment and still make a profit;
- [52.12] the financial statements of October 2011 were wrong;

[52.13]he agreed that the VAT calculation of R335 778.00 was an incorrect figure as it could not possibly reflect 14% of the income of Sunny Shades for the year ending October 2011;

[52.14]the figures that had been relied on could not be trusted or relied on by this Court, even in relation to the calculation of the assets and liabilities of Sunny Shades;

[52.15]after his father died he continued with the business under the name of Sunny Shades until July 2012, and immediately thereafter changed the name of the business to Karel trading as Sunny Shades, making the same awnings, until March 2013 when Sun Cover Systems CC was started;

[52.16]until March 2013 he continued to utilise all the resources of Sunny Shades to run the business;

[52.17]Sun Cover Systems CC only started operating in May 2014, as recorded by the Registrar of Companies, and as put to him by the Plaintiff's counsel;

[52.18]in fact he continued to use the logo, description of the company, telephone numbers, and so forth of Sunny Shades until April 2015 as evidenced by the advertisements placed in the local trade publication;

[52.19]it was only in September 2015 that Sun Cover Systems CC advertised in its own name;

[52.20]it was correct that the two Momentum polices taken out by the deceased settled the outstanding overdraft and left a credit balance of R16 900.00;

[52.21]the total assets he received according to the liquidation and distribution account was R440 091.00;

[52.22]he received an amount of R650 000 as part of his inheritance from the deceased.

[53] Under re-examination the Defendant persisted with his version that R140 000 had been deducted from his inheritance. On being questioned by the court, he agreed that in the face of the documentary evidence traversed during cross examination, those funds could not have been used to settle the outstanding overdraft as the Momentum Polices had settled the overdraft. The only other explanation offered by the Defendant at this point was that the funds were deducted for operational purposes.

The interpretation of the Will

[54] The correct interpretation of clause 1.1 and 1.2 as well as the proven facts and the credibility of the Plaintiff and the Defendant play a central role in the analysis of the evidence tendered, its weighting, and the findings and conclusions arrived at by this Court. Each aspect will be addressed below.

An interpretation of clause 1.1 and 1.2 of the Will

[55] The first observation is that it is clear that the intention of the deceased was to bequeath something of value to his children. The Defendant got the bulk of his estate, including the largest asset in that estate, the company Sunny Shades. This bequest was made subject to, or on condition that he pays to the Plaintiff the amount of R5000 per month for a period of 5 years. There is no dispute in this regard. In this instance, the Defendant testified that he accepted the condition in the deceased's will, hence the payment of R5000 for approximately 6 months after his father's death. This acceptance by the Defendant of the bequest is in accordance with the principle that a bequest cannot accrue unless the condition is met.

[56] The real issue that arises in respect of the interpretation of the deceased's bequest, is whether the intention of the deceased was that the Defendant was to make the payment of R5 000 per month from the income of Sunny Shades or from the total income the Defendant derived from all the assets inherited from his father, which assets went beyond the bequest of Sunny Shades.

[57] It is trite that where the intention of a testator is clear and manifest, a court must give effect to it. Where there is some ambiguity, the grammatical and ordinary sense of the words used, as well as the

weight of probability within the context of the disposition made are relevant factors. What is critical is that the interpretation accorded to a disposition in a Will should not lead to an absurdity, to repugnance or to any inconsistency with the intention of the testator.

[58] The context of the making of the Will of this testator is that he bequeathed to his son a company that he had been operating from about 1990, i.e. for over 20 years. When he started operating this company, the Plaintiff was his life partner and worked with him in the business. The business was a going concern when he bequeathed it to his son. Provision was made for any VAT and overdraft obligations that might become due.

[59] In other words, from the context, this bequest was the most significant in the deceased's estate. The expectation was that the company would continue to be operated as a going concern. The evidence of the Plaintiff was that the deceased did not simply want to give the Defendant the company for nothing, but rather wanted him to earn it.

[60] The deceased must have been aware that the Defendant could elect to dispose of the company by selling it or in any other manner monetising the legacy his father had left him. Neither of these options was intended to compromise the Defendant's ability to comply with the

condition that the Defendant pay to the Plaintiff the R5000 per month stipulated by the deceased.

[61] Guidance in this regard can be found in the judgment of Wallis J in **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹ where the following point is made:

“[17] 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a

¹ 2012 (4) SA 593 (SCA)

contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad

meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”

[62] The deceased did not say that the Defendant must pay the R5000 per month “*from the income of Sunny Shades*”, nor did he use the words “*from the income of his legacy in paragraph 1.1*”. This Court finds that in the context of formulation of clause 1.1 and 1.2, it would be absurd to confine the use of the word inheritance to the company Sunny Shades.

[63] Counsel submitted that the use of the word “inheritance” is used in three clauses of the deceased’s Will, i.e. paragraphs 1.2, 1.9 and 7, and that this use of the word clearly refers to the entire inheritance, not

a specific item or legacy. This Court finds that this proposition is consistent with an interpretation of the Will that does not lead to absurdity. It is also consistent with the evidence tendered by the Plaintiff, which the Court accepts, that the deceased wanted the Defendant to earn Sunny Shades.

- [64] In its interpretation of clauses 1.1 and 1.2, the Court has taken into consideration the grammatical and ordinary sense of the words used, the structure of the Will, which places clause 1.1 and 1.2 within the same contextual interpretation, and the weight of probability.

Finding

- [65] The finding of this Court is that the payment of R300 000.00 by the Defendant to the Plaintiff over a five-year period from the date of the deceased's death is not limited to the bequest made in clause 1.1, i.e. the income generated by Sunny Shades. The Defendant is to pay the amount of R5000 per month to the Plaintiff from the whole of his inheritance. This finding is consistent with the interpretation of the Will in its totality.
- [66] If I am wrong in the above interpretation and analysis of the effect of clause 1.1 and 1.2, I in any event find that the Defendant could and ought to have continued to pay the Plaintiff R5000 per month from the

income of Sunny Shades and/or Sun Cover Systems CC. I say this for the reasons set out below.

[67] It became apparent under cross examination that when the Defendant inherited Sunny Shades, the company was liquid, and operated as a going concern. There was no cause to apply for its liquidation. This Court accepts that the Annual Financial Statements that the Defendant relied on in bringing the liquidation application were flawed in the extreme. This Court is also of the view that the Defendant was aware of the true status of the company, but deliberately attempted to make it appear to have insurmountable debts so as to discontinue the payments to the Plaintiff.

[68] The fact that the Defendant appears to have deliberately set about finding a way to avoid making the payment to the Plaintiff cannot remove the obligation that arises from the vesting of the inheritance left to him by the deceased. In any event, the assertion that the company ceased trading does not tally with the establishment of Sun Cover Systems CC.

[69] It is clear from the evidence tendered that the establishment of Sun Cover Systems CC was intended to be and in fact became the alter ego of Sunny Shades. As Sun Cover Systems CC the company continued to generate an income for the Defendant. The Defendant

ought to have continued to pay the Plaintiff R5000 per month from the income generated from Sun Cover Systems CC because it was the *alter ego* of Sunny Shades.

[70] A further material aspect that was traversed in evidence was the payment of the outstanding VAT that was due to the South African Revenue Services. Under cross examination the Defendant conceded that the VAT amount of R335 778.00 was an incorrect figure as it could not possibly represent 10% of the income of Sunny Shades for the year ending October 2011. This Court finds that the quantification of the outstanding VAT for the period ending October 2011 was grossly exaggerated.

[71] The question of the amount for the payment of levies was disputed by the Plaintiff. The Defendant conceded that he could not explain why the quantification of the levies for the period 2011 was in the amount of R513 000.00 as opposed to, by way of example, R21 566.00 in 2008, R7 000.00 in 2009, and R1 755.00 in 2010. The basis on which the Defendant concluded that Sunny Shades was insolvent and therefore had to be liquidated, is highly suspect and flawed in material respects. Had the amount of R513 000.00 not been deducted from the books of Sunny Shades, the company would have had a substantial profit and been able to comfortably settle the company's outstanding debts and pay the R5000 per month due to the Plaintiff.

[72] It is an established fact that until March 2013 the Defendant continued to use all the resources of Sunny Shades to operate the business. It is also an established fact that until April 2015 he continued to use the logo, description of the business, telephone numbers and related tools of trade of Sunny Shades to generate income for the company. The fact Sunny Shades was liquidated on 22 August 2014 and that the Defendant continued to trade under different company names, does not detract from the established facts that those entities, including Sun Cover Systems CC, were the *alter ego* of Sunny Shades.

[73] This Court is satisfied that the evidence of the Plaintiff with respect to the intention of the deceased and the financial health of the company as at December 2011 is more credible than that of the Defendant. The Defendant was a poor witness who evaded answering material questions put to him, often resorting to saying he acted on advice. The probity of his evidence is suspect. This Court has not difficulty in rejecting his version in so far as it conflicts with that of the Plaintiff.

[74] In this regard, guidance is found in the analysis of the SCA in the judgment in **SFW Group Ltd & Another v Martell Et Cie & Others**²:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual

² 2003 (1) SA 11 (SCA)

witnesses; (b) their reliability; (c) the probabilities. As (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b), and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more

convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”³

Conclusion

[75] Had the Defendant honoured his father’s condition he would have continued to pay the R5000 per month to the Plaintiff from the income generated by Sunny Shades which later became Sun Cover Systems CC, as this is what was intended by clause 1.1 and 1.2 of the Will.

[76] In other words, the Defendant could not escape the condition that gave rise to the obligation that the deceased placed on him once he accepted the bequest of Sunny Shades as part of his overall inheritance.

[77] In the premises I find that that the intention of the deceased was to bequeath the company Sunny Shades to the Defendant subject to him paying to the Plaintiff an amount of R5000 per month from the income from his entire inheritance. If this conclusion is wrong, I find that the Defendant deliberately avoided paying the Plaintiff money that he was obliged to pay to her from the business, assets, goodwill and/or personnel of Sunny Shades. That Sunny Shades was converted into a

³ Id at para [5]

new entity called Sun Cover Systems CC is irrelevant. The fact is that the business itself continued to be that of Sunny Shades.

[78] In the premises I grant judgment in favour of the Plaintiff as claimed.

Order

[79] I make the following order:

1. the Defendant is directed to pay to the Plaintiff:

1.1 the sum of R265,206.72;

1.2 interest at a rate of 9% per annum on every amount of R5000 which was payable to the Plaintiff as of 29 June 2012, from the date that it was payable to the Plaintiff until date of final payment.

2. Costs of the action



GCABASHE AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Counsel for the Plaintiff: Adv. HM Barnardt

Instructed by: Daan Beukes Attorneys, Pretoria

Attorney for the Defendant: Mr. JP Krayshaar

Instructed by: Witz & Wiltz Attorneys

Date of Hearing: 24 – 25 November 2016

Date of Judgment: 2 March 2017