

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

11/8/15

CASE NO: 68894/2013

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	11.08.2015 DATE

In the matter between:

NEDBANK LIMITED

Applicant

and

RICCARDO ROSSER VALENTE

First Respondent

RONALD MENDELOW N.O

Second Respondent

LAZARUS LEDWABA N.O

Third Respondent

**THE MASTER OF THE HIGH COURT,
PRETORIA**

Fourth Respondent

EVAN ROSSER VALENTE

Fifth Respondent

JUDGMENT

MATOJANE J

- [1] This matter concerns the interpretation of clause 6.3 of the Will of the late Emily May Valente ("the deceased") and the protection it may afford to heirs, First Defendant ("Riccardo") and Fifth Respondent ("Evan"). Riccardo insist that his inheritance enjoys protection against any attachment by a creditor.
- [2] The Applicant, Nedbank is the creditor of Riccardo and has attached Ricardo's moveable assets and intends to execute against his estate including the rights, which he has against the executors.
- [3] Nedbank seeks a declaratory order that Riccardo was not disinherited in consequence of the attachment (by the Fifth Respondent) of his claims as against the deceased estate and that Nedbank is entitled, notwithstanding clause 6.3 of the deceased's will, to satisfy its claim against Riccardo by levying execution against any claim vesting in him against the deceased estate.
- [4] Only the First, Second and Third Respondents filed affidavits in opposing the relief sought.

Application for postponement

- [5] On the eve of the trial, Riccardo launched an application for postponement of the hearing of this matter. I refused the application and indicated that I will provide my reasons as part of the judgment and there are the reasons.
- [6] This Application was served on Riccardo on the 20 November 2013. Ricardo served notice of intention to oppose the application on Nedbank on the 27 November 2013 and accordingly his answering affidavit was due on 19 December 2013. Riccardo filed his answering affidavit on 12 February 2014 two months out of time.
- [7] Riccardo did not serve his Notice to oppose and answering affidavit on the Second and Third Respondents ("Trustees"). The Trustees became aware of Riccardo's answering affidavit when Nedbank furnished it to them.
- [8] Nedbank served a copy of the updated index on Riccardo on October 2014 and its Heads of Argument and Practice Note on 15 September 2014. The Trustee's Heads of Argument was served on Riccardo on 15 October 2014.
- [9] The Notice of Set down was served on Riccardo on 17 December 2014. On 15 January 2015 Riccardo's attorney addressed a letter to Nedbank indicating that they have not yet received the Trustees' answering affidavit. On 16 January 2015 Nedbank provided

Riccardo with the required documents electronically and indicated that the Trustee's answering affidavit is voluminous and requested that they tender payment of the reasonable copying costs thereof after which same will be provided.

[10] Riccardo now alleges that he was unaware of the Trustees' answering affidavit and supplementary affidavit and that he is unable to file Heads of Argument. If Riccardo and his attorneys had read the replying affidavit as they should have, they would have seen that there was an answering affidavit from second and third Respondents, secondly, the updated index that was served on 1 October 2014 shows clearly the Second and Third Respondent's answering affidavits and thirdly, the Heads of argument of the Applicant, Second and Third Respondents received by Riccardo on 15 October 2014 makes it clear that there was an answering affidavit of the Second and Third Respondents.

[11] In my view, the application for postponement is mala fide as Riccardo is seeking to delay the hearing of this matter in an attempt to frustrate Nedbank and the Trustees.

Factual background

[12] On 23 March 1994 the deceased signed her Last Will and Testament in terms whereof Riccardo and his brother Evan were appointed sole heirs of her estate in equal shares. The deceased nominated Evan,

Riccardo and Cronin as the co-executors and administrators of her estate. The deceased, Evan and Ricardo were all directors of U-Valente (Pty) Ltd.

[13] By fraudulent means Riccardo forged the deceased signature on an Agreement of Sale and fraudulently removed Evan as a Director of U-Valente. Riccardo signed a power of Attorney on behalf of U-Valente authorising the registration of a covering bond mortgage bond over the property in favour of Imperial Bank, Nedbank's predecessor, securing a loan of R6 million. Imperial Bank agreed to lend U-Valente the sum of R6 million without knowledge of the existence of winding-up proceedings.

[14] In terms of the Order handed by the Supreme Court of Appeal the bond registered in favour of Nedbank was set aside and Nedbank lost all security enjoyed in respect of the facility made available to U-Valente of R6 million in consequence of the fraud perpetrated by Riccardo.

The issue

[15] The central issue to be determined is whether clause 6.3 of the testator's will has the effect of disinheriting Ricardo.

[16] Clause 6.3 of the Will provides that:

"No rights or hopes of any beneficiary under this will and no part thereof shall be attachable by any creditor of the beneficiary or vest in the trustee in Insolvency and if prior to a payment being made or asset being delivered to a beneficiary his assets are attached by any creditor or his estate is sequestrated (whether provisionally or finally), the rights or hopes of that beneficiary under this will in respect of any amounts not already paid or assets not already delivered shall immediately and entirely thenceforth cease and determine and those rights and hopes shall thereupon, subject to the provisos below, devolve upon and vest in such other parties as would be entitled thereto if the beneficiary had died at the time of such cessation and determination provided that –

6.3.1 The beneficiary shall not be obliged to repay to my estate any amount paid or advanced to him from my estate."

[17] On Nedbank's interpretation clause 6.3 provides for a suspensive condition denying a beneficiary the right to benefit from a Will should that beneficiary be sequestrated on *dies cedit*. It is common cause that Riccardo was not sequestrated on *dies cedit*.

[18] On the interpretation contended for by Second and Third Respondents, clause 6.3 contains a resolute condition which has the effect of disinheriting the First Respondent upon his assets being attached by a creditor. Second and Third Respondents submit in their heads of argument and in court that clause 6.3 addresses the situation where " If prior to a payment being made or asset

being delivered to a beneficiary" his assets are attached by a creditor, in such an event, the beneficiary loses his inheritance and it devolves upon other parties – under the gift over. The trigger event contemplated, the argument goes, is one, which arises after the death of the testator but before distribution under the account.

[19] First and Second Respondent argues that this interpretation is fortified by clause 6.3.1 which provides that a beneficiary shall not be obliged to repay to the estate any amount previously paid to him from the estate, therefore, according to the Respondents, the testator contemplated an event arising after death which gives effect to the disinheritance. This makes the provision in clause 6.3 in such circumstances, a resolute condition, not a suspensive condition.

[20] The moveable property belonging to Ricardo and his rights title and interest in the estate and rights under the will of the deceased were attached in execution of a costs order in the winding up proceedings of U-Valente. By virtue of this attachment, respondents argue, the provisions of clause 6.3 of the Will came into effect with the consequence that Ricardo is divested of all of his rights under the will.

[21] The Second and Third Respondent submit that the issue of the First Respondent's disinheritance has been determined by this Court in a

final judgment in proceedings to which Nedbank was a party and which were referred to by Nedbank in its founding affidavit as "the Executors application". In terms of the judgment, Executors were authorised to procure payment of their costs by appropriating the amount of such costs from the cash resources of the estate and allocating such appropriation to that portion of the estate which, but for the provisions of clause 6 of the Will, would have vested in and became payable to Riccardo.

[22] The relief that was in issue in the Executors application had to do with the fraudulent transfer of the property by Riccardo and had nothing to do with the disinheritance of Riccardo. The question of disinheritance was never raised nor considered by the court. The court merely ruled that they could procure payment of their costs from the estate.

Discussion

[23] It is not permissible for a testator to include a clause or a condition in a Will, which will have the effect of preventing creditors from pursuing an inheritance in the estate of the beneficiary once that beneficiary has acquired rights to the inheritance. In **Badenhost v Bekker NO en Andere**¹ the court stated:

¹ 1994 (2) SA 155

"Ek oorweeg eerstens die effek van daardie gedeelte van die testament wat bepaal sat die applikantedie uitgeslote bates erf 'vry van die skulde van Badenhost. Dit is duidelik dat n erflater nie regsgeldig kan bepaal nie dat n eftlating nie vir beslaglegging vatbaar sal wees nie of dat dit, indien die begunstigde se boedel gesekwerstreer word, nie deel sal vorm van sy insolvente boedel nie".

- [24] On *dies cedit*, the rights to investment vests in and form part of the estate of the bebeneficiary. **Mars: The Law of Insolvency in South Africa.**² States:

"A testator cannot prevent an inheritance from forming part of the insolvent estate of his heir by a provision in the will that the bequest remain unenforceable during the period of sequestration. This can only be achieved by the testator if he has created a gift over. For example, the testator may include a provision in his will stating that if the heir is an unrehabilitated insolvent at the time of the testator's death, the bequest must accrue to another person, or the testator must allow the executors of the estate discretion to divert the inheritance to another person. In such cases the insolvent heir's trustee will have no rights regarding that inheritance. Where an insolvent's father bequeathed his estate to his son, subject to a proviso that if, at the time of the testator's death, the son happened to be insolvent, the proceeds of the estate should go into a trust until the son is rehabilitated, the court held that the

² 9th ed, p 188.

inheritance could not be placed beyond the reach of the insolvent's creditors and that the provision in the will was a *nudum praeceptum*. The inheritance accordingly vested in the insolvent estate in terms of s 20 (2). Assets bequeathed exclusively to one of two spouses in a marriage in community of property will vest in the joint insolvent estate. If an heir repudiates an inheritance either before or during the insolvency of that heir, the inheritance will be excluded from that insolvent estate"

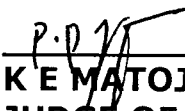
[25] It follows therefore that Second and Third Respondent's contention that Riccardo has been disinherited because some of his assets had been attached prior to his inheritance being delivered to him is not correct.

[26] Nedbank is accordingly entitled, notwithstanding clause 6.3 of the deceased Will to satisfy its claim against Riccardo by levying execution against any claim vesting in him against the deceased estate.

[27] In the alternative, and in my view, it cannot be said that the testatrix could have contemplated that the fulfilment of her directions will be rendered so utterly unreasonable by the fraudulent conduct of Riccardo. Accordingly, necessity justify the variation of the deceased Will not to disinherit him.

[28] In the result the following order shall issue: It is declared that:

- 27.1 The First Respondent was not disinherited in consequence of the attachment (by Fifth Respondent) of his claims as against the deceased estate;
- 27.2 Nedbank is entitled, notwithstanding clause 6.3 of the deceased Will, to satisfy its claim against the First Respondent by levying execution against any claim vesting in it against the deceased estate.
- 27.3 The First Respondent is ordered to pay the costs for the application for postponement.
- 27.4 The Respondents are to pay the costs of the action.



K E MATOJANE
JUDGE OF THE HIGH COURT