



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: 5501/2021

In the application between:

ELAINE VAN ZYL

Applicant

and

MASTER OF THE HIGH COURT (BLOEMFONTEIN)

1st Respondent

DANE ANDREA VAN ZYL

2nd Respondent

LISA DOCHERTY

3rd Respondent

SANLAM TRUST (PTY) LTD

4th Respondent

ANDREW EDWARD LORENTZ

5th Respondent

PIERRE ULRICH VOS N.O.

6th Respondent

And in the rescission application between:

DANE ANDREA VAN ZYL

1st Applicant

LISA DOCHERTY

2nd Applicant

and

<u>ELAINE VAN ZYL</u>	1 st Respondent
<u>SANLAM TRUST (PTY) LTD</u>	2 nd Respondent
<u>ANDREW EDWARD LORENTZ</u>	3 rd Respondent
<u>PIERRE ULRICH VOS N.O.</u>	4 th Respondent
<u>MASTER OF THE HIGH COURT (BLOEMFONTEIN)</u>	5 th Respondent
<u>HERMANUS STEYN BADENHORST N.O.</u>	6 th Respondent
<u>NOORDMANS ATTORNEYS</u>	7 th Respondent
<u>KRUGER VENTER INCORPORATED</u>	8 th Respondent
<u>JEAN RAYMOND CASTRO N.O.</u>	9 th Respondent
<u>PIET HAASBROEK ATTORNEYS</u>	10 th Respondent
<u>LEGAL PRACTICE COUNCIL, FREE STATE PROVINCIAL OFFICE</u>	11 th Respondent

CORAM: VAN ZYL, J

HEARD ON: 7 MARCH 2024

DELIVERED ON: 5 AUGUST 2024

[1] In terms of the Notice of Motion the applicant is seeking the following relief:

- "1. That a Rule *Nisi* be hereby issue calling on the respondent to show cause, if any, to this Honourable Court ... why an Order should not be granted in the following terms:
- 1.1 That the Fifth-, Sixth-, Seventh-, Eighth-, Ninth-, Tenth-, and Eleventh Respondents are joined to this application as Respondents;
 - 1.2 That the Fifth-, Sixth-, Seventh-, Ninth- and Tenth Respondents be interdicted from winding up the estate of the late Daniel Johannes van Zyl ...
 - 1.3 That the Sixth-, Seventh-, Eighth-, Ninth-, and Tenth Respondents render an account of all expenses incurred up to date in relation to the winding up of the estate of the late Daniel Johannes van Zyl;
 - 1.4 That the Court Order under case number 5501/2021, granted by the Honourable Acting Judge Mpama, out of this Honourable Court on 23 November 2022 be set aside;
 - 1.5 Alternatively to 1.4 above, that the Court Order under case number 5501/2021, granted by the Honourable Acting Judge Mpama, out of this Honourable Court on 23 November 2022 be rescinded;
 - 1.6 That those Respondents who oppose this application, be directed to pay the costs of this application only in the event of their opposition, jointly and severally".
2. That the relief sought in paragraph 1.2 above shall operate as an interim Order with immediate effect, pending the final determination of this application;

3. That the applicant be granted such further and/or alternative relief as this Honourable Court deems meet.

The parties:

- [2] The first applicant, Dane Andrea van Zyl, is the daughter of Daniel Johannes van Zyl ("the deceased"). I will refer to her as "Dane".
- [3] The second applicant, Lisa Docherty, is the biological sister of the deceased. She has been nominated as the co-executor with Sanlam in terms of the 2014 Will, which Will I will deal with later herein. I will refer to her as "Lisa".
- [4] The first respondent, Elaine van Zyl, is the surviving spouse of the deceased. I will refer to her as "Elaine".
- [5] The second respondent, Sanlam Trust (Pty) Ltd, has been nominated as co-executor and co-trustee in terms of the 2014 Will to which I will refer later herein. I will refer to this entity as "Sanlam".
- [6] The third respondent, Andrew Edward Lorentz, is the brother of the deceased. He has been nominated as the co-trustee with Sanlam in terms of the 2014 Will. I will refer to him as "Lorentz".
- [7] The fourth respondent, Pierre Ulrich Vos N.O. is the duly appointed interim curator of the deceased's estate in terms of a Court Order granted on 10 September 2021, under case number 4035/2021. I will refer to him as "Vos".

- [8] The fifth respondent is the Master of the High Court, Bloemfontein to whom I will refer as “the Master”.
- [9] The sixth respondent, Hermanus Steyn Badenhorst N.O., is an attorney who is the co-executor of the deceased's estate in terms of a Court Order granted on 23 November 2022, under case number 5501/2021 (“the November 2022 Order”). At the time of the granting of the November 2022 Order Badenhorst was Dane’s attorney of record. I will refer to him as “Badenhorst”.
- [10] The seventh respondent, Noordmans Attorneys, are the attorneys of record for Elaine and the correspondent attorneys of Roma Badenhorst Attorneys. I will refer to the firm as “Noordmans”.
- [11] The eighth respondent, Kruger Venter Incorporated, is a firm of attorneys who represented Dane throughout this matter, until she formally terminated their mandate on 10 May 2023. I will refer to them as either “Kruger Venter” or (Mr) “Kruger”, depending on the context.
- [12] The ninth respondent, Jean Raymond Castro N.O., practices as an attorney at the firm of Piet Haasbroek Attorneys. He is cited in his capacity as the co-executor of the deceased's estate in terms of the November 2022 Order. I will refer to him as “Castro”.
- [13] The tenth respondent, Piet Haasbroek Attorneys, is a firm of attorneys situated in Welkom. I will refer to the firm as “Piet Haasbroek Attorneys”.

[14] The eleventh respondent is the Legal Practice Council, Free State Provincial Office, to whom I will refer as “the LPC”.

[15] I mean no disrespect by referring to the parties as set out above. It is merely done for the sake of brevity and clarity.

[15] The sixth, seventh, eighth, ninth, tenth and eleventh respondents are all new parties to this application and are cited by virtue of their direct and substantial interest in the application.

Background:

[16] The deceased signed and executed a valid Will on 17 December 2014 (“the 2014 Will”) and which made provision for, *inter alia*, the following: (i) all previous Wills were revoked; (ii) his entire estate was made over to Dane as sole heir. However, until she reached the age of 25, such benefit was to be held in trust; (iii) Sanlam and Lisa were nominated as co-executors while Sanlam and Lorentz were nominated as co-trustees of the trust to be created in terms of the said Will.

[17] Elaine and the deceased got married on 5 October 2019.

[18] Elaine contends that the deceased subsequently drafted four further Wills, each one revoking the previous one, and with the final one, hence the fifth Will, dated 5 January 2021 (“the 2021 Will”) being the Last and final Will upon which Elaine relies and which she claims revoked the 2014 Will.

[19] The 2021 Will provides, *inter alia*, for the following: (i) it was declared by the deceased to be his last Will and Testament; (ii) the deceased revoked all previous Wills made by him, hence (also) the 2014 Will; (iii) the deceased nominated and appointed Elaine as executrix and sole beneficiary/heir of his entire estate; (iv) the deceased made over to Elaine the immovable property as well as both close corporations and all their stock and assets; and (v) the remainder of the deceased's estate was made over to Elaine as sole heir/legatee.

[20] None of the subsequent four Wills, including the 2021 Will, were validly executed in accordance with the validity formalities prescribed by the Wills Act, 7 of 1953 ("the Will's Act").

[21] Elaine subsequently launched the main application, seeking the following relief:

1. That it be declared that the 2014 Will of the deceased is revoked in terms of Section 2A(c) of the Wills Act.
2. That the Master be ordered to accept the 2021 Will as the Will of the deceased for purposes of the Administration of Estates Act, 66 of 1965 and that the estate of the deceased be administered and wound up in terms thereof as contemplated by Section 2(3) of the Wills Act.
3. That the costs of the main application be paid by the deceased estate, unless any of the respondents therein oppose the main application.

[22] The main application was opposed.

[23] The thrust of the main application was eventually narrowed down to the question of authentication of the signatures on the 2021 Will. Both Dane and Elaine obtained expert opinions from respective handwriting analysts. On 25 July 2022, Daniso, J issued an order by agreement between the parties directing that the application be referred for oral evidence to be heard on 22, 23 and 24 November 2022.

[24] The aforesaid order of 25 July 2022 directed that the evidence to be heard be limited to that of the handwriting experts of both sides. The court further directed that should the court find in favour of Elaine and determine the fifth Will to be valid, she will be entitled to the relief she seeks in the main application. However, should the court find against Elaine, then her application to declare the fifth Will valid shall be dismissed.

[25] On 22 November 2022, just before the main application was to be called for the hearing of oral evidence, counsel for both parties went to the chambers of Mpama, AJ to introduce themselves. Due to the absence of a proper joint minute/report of the experts, Mpama, AJ directed that the proceedings stand down to allow the experts of both parties to hold a joint meeting and bring forth a joint expert minute/report.

[26] Both experts subsequently went to the boardroom of Noordmans where they sat together for the entire day and only on the following

day, 23 November 2022, were they able to bring out a joint expert report.

[27] Badenhorst arrived back at the offices of Noordmans at approximately 12h30 on 23 November 2022 as he was at the offices of Kruger Venter and advised that, subject to the approval of Elaine, he and Kruger Venter (per Kruger) settled the main application.

[28] On 22 November 2022 extensive negotiations took place between the respective attorneys, which process continued on 23 November 2022 and eventually a draft order was presented to Mpama, J on 23 November 2022, and Mpama, AJ was requested to make it an order of court, allegedly by agreement between the parties. It is this order, the November 2022 Order) which forms the subject matter of this application.

[29] The aforesaid order reads as follows:

- "1. The Last Will and Testament of the deceased ... dated 17 December 2014, is hereby revoked.
2. The Third Respondent is herewith discharged from the office of executrix in the estate of the late Daniel Johannes van Zyl ...
3. As executors of the estate of the deceased, the First Respondent shall appoint Hermanus Steyn Badenhorst of Roma Badenhorst Attorneys, Virginia, and Jean Raymond Castro of Piet Haasbroek Attorneys, Welkom, as co-executors of the estate of the deceased. The said executors shall not be required to provide any security in respect of the said appointment to the First Respondent.

4. The estate of the late Daniel Johannes van Zyl ... shall be administered as follows:
 - 4.1 The Applicant shall be entitled to 50% of the proceeds of the estate after the estate administration costs and expenses have been accounted for; and
 - 4.2 The Second Respondent shall be entitled to 50% of the proceeds of the estate after the estate administration costs and expenses have been accounted for.
5. The Applicant and the Second Respondent waive their respective rights in respect of their respective maintenance claims against the estate of the deceased.
6. Each party shall be liable for their own legal costs incurred towards their respective legal representatives."

(The aforesaid references to the respective parties should be read and understood as cited in the main application.)

Dane's version:

[30] According to Dane, after the court directed that a joint minute should be drafted by the experts, a series of meetings followed wherein she kept being asked to agree to things which were not acceptable to her, namely that she should share the estate with Elaine.

[31] Dane states as follows at paragraphs 1.34 and 1.35 of the founding affidavit:

"1.34 I can only describe the meetings as acrimonious and as I did not fully understand what was going on, I can state categorically that I did not agree to anything in writing and I understood that everything I did had to be agreed in writing. (My emphasis)

1.35 I refer to the meetings as they continued throughout the day and, at one stage, I, in fact, left the meetings as I was feeling unduly pressured by Badenhorst and KVI [Kruger] to accept something I was not comfortable with."

[32] At the end of the day Dane was advised that a copy of an agreement would be sent to her which would settle the matter. She consequently received a document, a copy whereof is attached to the founding affidavit as annexure "DZ3", the so-called redistribution agreement. According to Dane this document was never agreed to or signed by her.

[33] On 2 December 2022, Kruger informed her that a Consent Order was taken on 23 November 2022, granted by Mpama, AJ. A copy of the November 2022 Order is attached to the founding affidavit as annexure "DZ1".

[34] Dane continues by stating as follows at paragraphs 1.40 and 1.41 of the founding affidavit:

"1.40 I was not present at Court on the date that the November 2022 Order was taken, and at no time did I consent to this Order being taken. (My emphasis)

1.41 The November 2022 Order was taken despite my instructions that the matter must proceed on the evidence of the handwriting experts, as I maintained the view that the subsequent four Wills were not drafted by my late father, and that it was never his intention to exclude me from benefitting from his estate.”

[35] According to Dane, several communications followed, both telephonic and e-mail, in which Dane (and Lisa) informed Kruger that she (they) never gave him instructions to settle on the said terms. Dane refers to annexure “DZ4” attached to the founding affidavit, being an e-mail she sent to Kruger, in which Lisa was copied, on 3 May 2023, wherein she again brought it to his attention that the November 2022 Order was not what she agreed to. In the e-mail she also gave Kruger instructions to rescind the November 2022 Order on the basis of “*iustus error*”. Dane explains as follows at paragraph 1.45 of the founding affidavit:

“... My basis for contending this is that the Court was under the mistaken impression that the attending parties, first of all, had the mandate to reach that agreement and, secondly, that the November 2022 Order is in fact a competent order for the Court to make.”

[36] Dane points out that in terms of the 2014 Will the assets of the estate vests in the trustees of the trust until she reaches the age of 25 years old. Therefore, the trustees ought to have been consulted and ought to have given their consent to any order dealing with the assets of the estate. They never formed part of the discussions when the matter was purportedly settled and the order was taken by, purportedly, consent on 23 November 2022.

[37] The further ground on which Dane avers that the November 2022 order should be set aside, other than being in conflict with her express instructions, is that it was not competent for the Court to have granted the order and that the order is unlawful. In this regard she refers to the fact that Section 2A of the Wills Act makes provision that a court must be satisfied that a testator has intended to revoke his Will. No evidence was presented, in the form of handwriting experts, upon which the court could have based an independent decision as to the testator's true intention. This power, according to Dane, vests in the court and not in the parties.

[38] Another reason why Dane avers that the order is not competent, is that it removes Lisa as executrix and appoints Badenhorst and Castro as executors, which are powers reserved for the Master to exercise. The court cannot override that power conferred on the Master.

[39] Dane further avers that should she ultimately be successful in this application, any action taken by the current executors, Badenhorst and Castro as regards any curtailing of the business of the estate or distribution thereof, will ultimately prejudice her in creating losses which will largely be irrecoverable. She therefore submits that pending the outcome of the application as regards the rescission contemplated herein, the said Badenhorst and Castro should be interdicted and restrained from continuing with the administration of the estate.

The version of Elaine, Badenhorst and Noordmans:

[40] Elaine explains in paragraph 76.4 of the answering affidavit that while the experts were busy conducting their joint meeting on 22 November 2022, Kruger as well as Castro were also at the offices of Noordmans. She then further states as follows:

"I was also present and during the course of the day, both Lisa and Dane were also present. However, neither I, nor Lisa and Dane were personally present when the attorneys for both factions negotiated a possible settlement. What therefore happened, was that Badenhorst would make a proposal to Mr Kruger which Mr Kruger would then discuss with Dane and Lisa and he would then come back indicating that such proposal was not acceptable and making counter-proposals to Badenhorst which Badenhorst would again take up with me. This process was followed the entire day. However, I need to mention that I did leave the premises of Noordmans and so too, Dane and Lisa. However, the above process was followed on *mutatis mutandis* basis in the sense that either Badenhorst would make a proposal to Kruger Venter, which Kruger Venter would then telephonically take up with either Dane or Lisa and upon receiving instructions, he would inform Badenhorst thereof and Badenhorst will then contact me and inform me thereof. I would then provide my instructions to Badenhorst whereafter he would take same up again with Kruger Venter. This to and fro continued throughout the day as already indicated and ultimately, by close of business on 22 November 2022, the main application was still not settled."

[41] On 23 November 2022 Elaine again attended the offices of Noordmans. At that stage Badenhorst attended the offices of Kruger Venter. She then states at paragraphs 77.3 and 77.4 of the answering affidavit as follows:

"77.3 Badenhorst informed me that when he was at the offices of Kruger Venter, that he and Kruger Venter (per Mr Kruger) negotiated further in an attempt to settle the main application. This occurred while both Dane and Lisa were in the offices of Kruger Venter [although not in the personal office of Mr Kruger himself]. Eventually, Badenhorst made a proposal to Mr Kruger in the form of the draft order that was made an order of court as appears from Annexure "DZ1" to the rescission application. At that stage, Mr Kruger called in both Dane and Lisa and conveyed to them [in a private consultation room whilst Badenhorst was still at the offices of Kruger Venter] the proposal that was made by Badenhorst. After such proposal was conveyed to them by Mr Kruger, they agreed thereto whereupon Badenhorst informed Mr Kruger that he will take such proposal to myself and upon me agreeing that he will prepare a draft order and mail same to Kruger Venter (per Mr Kruger). Badenhorst then left the offices of Kruger Venter and proceeded to the offices of Noordmans.

77.4 Upon Badenhorst returning to the offices of Noordmans, the proposal [in the form as that contained in Annexure "DZ1" to the rescission application] was conveyed to me whereupon I agreed thereto. Badenhorst then typed the draft order ..."

[42] The typed draft order was e-mailed to Kruger Venter, whereupon Kruger phoned Badenhorst and confirmed that the proposed draft order is in order and may be made an order of court. At approximately 15h00 the afternoon of 23 November 2022 Elaine's counsel and the representative of Kruger Venter attended to court and obtained the November 2022 Order.

The joinder of the fifth to eleventh respondents:

[43] In my view the requested joinder should be granted, as it is evident that the relevant parties have a direct and substantial interest in the application. This will, however, exclude the fifth respondent, the Master, since the Master was already a party to the main application.

[44] Noordmans raised a special plea or point *in liminé* with regard to the misjoinder of Noordmans, on the basis that Noordmans has no direct and substantial interest in the subject matter in any of the relief sought in the rescission application. In this regard it was pointed out that Noordmans was merely the correspondent attorney of Badenhorst and only became the attorney of record for Elaine on 5 June 2023.

[45] For reasons that will become evident later in this judgment, the alleged misjoinder-issue of Noordmans will be academic and need not be adjudicated upon.

Condonation for the late filing of the answering affidavit:

[46] After having considered the condonation application, I am satisfied that Elaine, Badenhorst and Noordmans have shown good cause for me to grant condonation for the late filing of the answering affidavit.

[47] With regard to the costs of the condonation application, it is in my view evident that the circumstances which led to the late filing of the

condonation application, although duly explained and reasonable, were present on the side of Elaine, Badenhorst and Noordmans. Dane and Lisa cannot be held responsible for the circumstances explained in the condonation application.

[48] I am consequently of the view that the costs of the condonation application should be paid by Elaine and Badenhorst jointly and severally, payment by the one the other to be absolved. It would, in my view, not be fair and reasonable to also order such costs to be paid by Noordmans jointly and severally, since they were only the correspondent attorney at the time.

Grounds for rescission other than the lack of authority/consent:

[49] The grounds for rescission raised in the founding affidavit, other than the lack of authority and/or the allegation that Dane did not agree to the November 2022 Order, are grounds upon which Dane and Lisa rely to aver that the November 2022 Order is unlawful and not competent for the reasons raised in the founding affidavit. In this regard it is their case that it was not competent for the court to have made the November 2022 Order an order of court; hence, that the court erred due to the reasons in the founding affidavit.

[50] In my view those grounds raised in the founding affidavit cannot serve as grounds for purposes of a rescission application. Insofar as Dane and Lisa aver that the court erred in those respects, their remedy would be/would have been to appeal those findings. I cannot sit as a court of appeal determining whether the court erred

in those respects or not. Mr Reinders, on behalf of Dane and Lisa, duly conceded accordingly.

The merits:

[51] Mr Meintjies, on behalf of Elaine, Badenhorst and Noordmans, raised three main arguments on the basis of which he submitted that the order should not be set aside/rescinded. In this regard he dealt with the evidence and the legal principles of actual authority, ostensible authority (and estoppel) and peremption (i.e. acquiescence).

[52] In my view it is apposite to first consider the evidence presented by Dane and Lisa themselves in respect of the issue regarding consent pertaining to the November 2022 Order.

[53] As already mentioned earlier, it is Dane's case in the founding affidavit that she was not present at court on the date that the November 2022 Order was taken, she did not consent to the order being taken and she gave instructions to Kruger that the matter must proceed on the evidence of the handwriting experts.

[54] On 8 December 2022 Sanlam sent an e-mail to Kruger and Lisa referencing a letter which Dane sent to Sanlam where she intimated that "*she was coerced into accepting the points in the draft order. She was not explained anything or even explained the implications relating to this order*". This e-mail is attached to the founding affidavit as annexure "DZ.6".

[55] In an e-mail dated 3 May 2023 from Dane addressed to Kruger, in which Lisa was also copied, attached to the founding affidavit as annexure "DZ.4", Dane stated as follows:

"Die hof bevel in sy huidige vorm is nie waaroor ons ooreengekom het nie. Intendeel ons het oor en oor gese dat ons wil he die saak moet voort gaan. Dit is slegs nadat jy herhaaldelik gese het ons moet dit doen.

Soos jy weet het ons slegs die hof bevel 2 weke na die uitreiking gesien ten spyte dat ons herhaaldelik gevra het. Ons het onmiddelik ons teenkanting vir jou gegee toe ons dit sien omdat dit NIE was waaroor ons ooreengekom het nie en jyself het ook so erken.

Op grond van die voorgenoemde is dit ons versoek (en instruksies) dat die hof genader word en vra dat hierdie hof bevel terug getrek word op grond van 'iustus error'. ..." [sic] (My emphasis)

[56] In an e-mail from Dane addressed to Castro, in which Lisa was again copied, dated 4 May 2023, attached to the answering affidavit as annexure "X108", Dane *inter alia*, stated as follows:

"Soos jy weet, stem ons nie saam met die hof bevel nie aangesien dit nie was waaroor ons ooreengekom het nie. Ons het alreeds die punt aan ons regsverteenwoordiger genoem en ook instruksie gegee insake die verband en wag vir sy terugvoering. Dit sal onverskuldig wees van my om voort te gaan voordat ek sy regs opinie terug ontvang ek kan ook geen besluit maak voordat ek met hom gepraat het nie. Ek gaan NIE soos die laaste keer die dag wat ons moet onderhandel onder druk geplaas word en gedwing word om 'n besluit te maak. Dit is beter dat ek eers met my regsverteenwoordiger praat 'n dag of twee vat om

daaroor te dink en dan 'n besluit te maak. Siende waar ons is, glo ek dis nie 'n onredelike versoek nie." [sic] (My emphasis)

[57] In the replying affidavit Dane again contends as in the founding affidavit that the November 2022 Order was not by consent. She further avers as follows at paragraph 45.1 of the replying affidavit:

"The agreement had to be in writing and as is demonstrated by the re-distribution agreement, this has never been signed by me."

[58] From the aforesaid it is evident that Dane's (and Lisa's) version in support of the setting aside/rescission of the November 2022 Order, is not consistent throughout the relevant evidence. It differs from: (i) not having agreed to any order, (ii) to having agreed to a different order, (iii) to having been coerced into consenting to an order and (iv) to not having consented in writing to an order.

[59] Read with the aforesaid, it is necessary to deal with some of the main facts and circumstances which occurred after the November 2022 Order was issued.

[60] Castro applied on his own behalf and on behalf of Badenhorst to the Master on 8 December 2022 for the issuing of amended Letters of Executorship and on 14 December 2022 the Master issued amended Letters whereby Castro and Badenhorst were duly appointed as co-executors and authorized to liquidate and distribute the deceased estate.

[61] What followed thereupon was that both Dane and Lisa were involved in meetings and discussions with Castro and Badenhorst in an attempt to settle the distribution of the assets. At no stage did Dane and Lisa either object to the appointment and involvement of Badenhorst and Castro or to the fact that the discussions were in respect of the distribution of the assets, hence, in accordance with the November 2022 Order (not in accordance with the redistribution order which only came into being in April 2022).

[62] On 31 January 2023 Castro sent a letter to Dane in which the following was stated:

“3. Ons is in afwagting van jou voorgestelde lys van die verdeling van die bates, waarby ons dan sodra dit bekragtig kan word die bates dan toe sal ken in jouself asook die ander erfgenaam, elkeen onderskeidelik besit en verantwoordelikheid neem daarvoor”. (My emphasis)

This letter is attached as annexure “X85” to the answering affidavit.

[63] Kruger sent an e-mail to Castro and Badenhorst on 6 February 2023, annexure “X86” to the answering affidavit, confirming that both Castro and Badenhorst know that Kruger Venter acts on behalf of Dane and Lisa and that Dane “*wil bitter graag die verdeling van die boedel afhandel en die aangeleentheid bylê*”. (My emphasis) In addition, they requested that a round table conference be held with the co-executors in the forthcoming week. Badenhorst responded on the same day that the executors are available for a round table conference to be held on 12 February 2023.

- [64] On 6 February 2023 Dane addressed an e-mail to Kruger, annexure "X87" to the answering affidavit, which was also copied to Lisa, wherein she, *inter alia*, stated the following:

"Volgende het ek vir beide Mnr Castro en Mnr Kruger verduidelik ek gaan nie verder aangaan met die skikking tot ek weet Sentinel pensioengoes is uitgesort ..."

- [65] On 26 February 2023 Badenhorst sent a letter to Kruger and Castro confirming that Dane had still not indicated via a list setting out the assets which she would like to obtain *in specie* and once such list has been received from Dane and Elaine, the parties should attempt to conclude a provisional redistribution agreement in order to speed up the finalization of the deceased estate. This letter is attached to the answering affidavit as annexure "X92".

- [66] On 10 March 2023 Kruger sent a letter to Badenhorst and Castro, which was accompanied by a list which was authored by Dane setting out a proposed distribution of assets *in specie* between herself and Elaine. The following was stated in the said letter:

"Wat betref die voorgestelde verdeling is dit 'n ontsettende moeilike kwessie om op te los in die afwesigheid van 'n behoorlike waardasie van die BK's se ledebelang.

Ons klient meld egter dat indien u klient volstaan met die R2 000 000.00 waardasie op die BK's sy vry is om dan die besighede oor te neem onderhewig daaraan dat die R 2 000 000.00 in ag geneem word by die uiteindelijke verdeling van die geheel van die boedel (uiteeraard sal die R 2 000 000.00 moet afgetrek word by enige waarde wat geheg word aan 50% van haar aandeel in die boedel).

Ons heg hierby aan 'n informele nota geskryf deur ons kliënt ten opsigte van die voorgestelde verdeling wat sy in gedagte het, dit word met die voorbehoud aangestuur dat indien die BK ledebelang syfers die waarde van die boedel aansienlik verminder of vermeerder hierdie aangepas sal moet word". (My emphasis)

The said letter and list are attached to the answering affidavit as annexures "X94" and "X95", respectively.

[67] On 13 April 2023 Castro sent an e-mail to Badenhorst and Kruger, in which Dane was copied, attached to the answering affidavit as annexure "X101", with a proposed redistribution agreement.

[68] Subsequent thereto, on 19 April 2023, Castro sent an e-mail to Kruger and Badenhorst, to which an amended and final proposed redistribution agreement was attached. In this regard the following is stated in the e-mail which is attached to the answering affidavit as annexure "X102":

"Na aanleiding van die boedevergadering soos gehou op 13 deser en ook voorstelle en versoeke vanaf die kantore van Mnr Badenhorst namens sy kliënt, het ons nou die finale herverdeling gereed en heg ons dit hiermee vir ondertekening deur die erfgename."

[69] On 20 April 2023 Elaine and Badenhorst signed the proposed redistribution agreement. The crux of the proposed redistribution agreement was in accordance with the November 2022 Order to the effect that Dane and Elaine shall each be entitled to 50% of the

value of the deceased estate after all creditors, administration costs and expenses have been paid and accounted for.

- [70] On 24 April 2023 Kruger responded to Castro and Badenhorst that the proposed amended final redistribution agreement is not acceptable to Dane since a proper valuation of the close corporations was not undertaken, thereby making it impossible for Dane to make an informed decision. Nevertheless, Dane persisted with her previous offer as set out in the list of assets she previously suggested.
- [71] Thereupon the two e-mails dated 3 May 2023 and 4 May 2023, respectively, followed. The 3 May 2023 e-mail was addressed to Kruger, with Lisa copied therein. The 4 May 2023 e-mail was addressed to Castro and Lisa respectively. I have already dealt with these two e-mails at paragraphs [65] and [66] above.
- [72] On 10 May 2023 Dane and Lisa terminated the mandate of Kruger Venter and appointed a new attorney, Mr Mark Leathers of McNaught & Co.
- [73] On 5 June 2023 Badenhorst informed Mr Leathers that he is withdrawing as attorney of record for Elaine and that she will henceforth be represented by Noordmans.
- [74] On 5 October 2023 the present rescission application was issued by McNaught on behalf of Dane and Lisa.

Legal principles:

[75] As previously mentioned, one of the defences raised by Elaine, Badenhorst and Noordman is peremption (acquiescence).

[76] Within the context of the conclusion of a contract, the following has been held in **McWilliams v First Consolidated Holdings (Pty) LTD** 1982 (2) SA 1 (A) at 10 E – H in respect of acquiescence constituting a contract:

"I accept that 'quiescence is not necessarily acquiescence' (see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion. (See *Benefit Cycle Works v Atmore* 1927 TPD 524 at 530 - 532; *Seedat v Tucker's Shoe Co* 1952 (3) SA 513 (T) at 517 - 8; *Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd* 1960 (1) SA 531 (D) at 541; and of *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 642A - G.) I have no doubt that appellant's silence and inaction after receipt of the letter justify an inference adverse to him."

[77] In the judgment of **Schmidlan v Multi Sound (Pty) Ltd** 1991 (2) SA 151 (C) the court found as follows at 156 A - E:

"Delay is however relevant in this case, not *per se*, but because that judgment was not a mere paper tiger but was being executed albeit in minuscule monthly instalments via the s 65 proceedings in the magistrate's court. Acquiescence in the execution of a judgment must surely in logic normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment itself would. Cf *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1977 (1) SA 861 (R) at 862F - G. The alleged application for condonation is nothing but a disguised supplementing of applicant's affidavits in an attempt to explain away his doing nothing about the judgment on which monthly instalments were being paid to his knowledge and with his consent as constituting something other than acquiescence in that judgment.

On his own affidavits and annexures, including the affidavit in the so-called application for condonation and without having regard to Orman's opposing affidavit and its annexures, I am satisfied that applicant did indeed acquiesce in that judgment. True, he did so conditionally or temporarily - for as long as it suited him, for as long as execution did not become painful. The relevant passages from his affidavits have been quoted above. In my view, a litigant cannot purport to eat his cake and have it too in the matter of rescinding a judgment any more than a party to a contract is permitted simultaneously to approbate and reprobate. Public interest requires that the Court's orders should be certain and final. *Naidoo v Cavendish Transport Co (Pty) Ltd* 1956 (3) SA 244 (N) at 248A." (My emphasis)

[78] In **Nkata v Firststrand Bank Ltd** 2014 (2) SA 412 (WCC) the court followed a similar approach at paras [30] – [31]:

[30] Quite apart from these considerations, FRB and Kraaifontein Properties contend that Nkata lost the right to seek rescission when she settled the first rescission application. I think that contention is correct. Although Mr *Van Reenen* argued this aspect with reference to principles of compromise and estoppel, I think the relevant legal principles are those relating to peremption. The principles of peremption apply not only to appeals but also to the remedy of rescission (see *Sparks v David Polliack & Co (Pty) Ltd* 1963 (2) SA 491 (T) at 496D – F). The general principle is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'. In order to show that a person has acquiesced in a judgment, the court must be satisfied upon the evidence 'that he has done an act which is necessarily inconsistent with his continued intention to have the case reopened or to appeal' (*Hlatshwayo v Mare and Deas* 1912 AD 242 at 259). (My emphasis)

[31] Here Nkata initially decided to challenge the default judgment. One of the points she raised in the first application was the alleged non-compliance with s 129(1). Her conduct in settling that case on the terms I have described is entirely inconsistent with a continued intention on her part to have the case reopened by way of rescission." (My emphasis)

[79] In **Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State** (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) the following principles are stated by the Constitutional Court at para [101] of the judgment:

"[101] It is trite that the doctrine of peremption finds application across our legal landscape. The doctrine tells us that "[p]eremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against". The principle that underlies this doctrine is that "no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approbate and reprobate". Notwithstanding this, our law does allow for some flexibility where policy considerations exist that militate against the enforcement of peremption. Although the doctrine has its origin in appeals, the doctrine and its principles do apply equally in the case of rescission".

[80] Acquiescence in an order or its execution therefore bars an application for rescission.

Consideration of the merits:

[81] In the present matter, Dane and Lisa allege at paragraph 1.43 of the founding affidavit as follows:

"I contacted Cassie Kruger ("Cassie) and told him that I never gave him instructions to settle on these terms. In several communications that followed, telephonic and by e-mail, did we repeat this point to Cassie. Attached hereto marked "DZ4" is a copy of an e-mail I sent to Cassie on 3 May 2023, wherein I again bring it to his attention that he November 2022 Order was not what I agreed to."

[82] There is, however, before the e-mail of 3 May 2023, nothing in writing wherein Dane and Lisa expressed their dissatisfaction with the November 2022 Order. To the contrary, the execution of the

terms of the November 2022 started to be implemented early in December 2022 already, without any objection from Dane and Lisa. To the contrary, Dane and Lisa, especially Dane, participated actively in the process and negotiations in an attempt to reach an agreement between herself, Lisa and Elaine, pursuant to the terms of the November 2022 Order in terms whereof the estate of the deceased was to be divided 50/50 between Dane and Elaine. Dane even went as far as drafting a list to indicate her proposition as to how the specific assets were to be distributed between herself and Elaine.

[83] As already set out earlier in the judgment, the to and fro communications continued up to the point where Badenhorst set forth the proposed redistribution order which was signed by Elaine and Badenhorst.

[84] In response thereto Dane and Lisa did not dispute the validity of the November 2022 Order, but merely the proposed manner in which the assets were to be distributed on a 50/50 percent basis between Dane and Elaine. Instead, in the letter of 24 April 2023, Annexure "X106" to the answering affidavit, written by Kruger addressed to Castro and Badenhorst, it was indicated that the terms of the proposed redistribution agreement were not acceptable, but it was specifically indicated that Dane and Lisa are still willing to conclude an agreement in terms of the list previously provided by Dane. In this regard the following was stated:

“Na deeglike oorweging van die voorgestelde herverdelingsooreenkoms is dit ons kliënt se opdragte dat die terme daarin uiteengesit nie aanvaar word nie.

Uiteraard in die afwesigheid van `n behoorlike waardasie van die Beslote Korporasies is dit vir ons kliënte ook op hierdie stadium nie moontlik om `n ingeligte besluit te neem nie.

Ons kliënte volstaan by hulle vorige aanbod en verneem graag van u.”
(My emphasis)

[85] It was only on 3 May 2023 that Dane and Lisa changed their stance and instructed Kruger that the court should be approached to have the November 2022 Order “*withdrawn*”.

[86] On the same date, 3 May 2020, Castro sent an e-mail to Dane, in which Badenhorst and Kruger were copied, attached as annexure “X107” to the answering affidavit, in which Castro stated, *inter alia*, the following:

“... wil dit blyk dat herverdeling van die boedel nie kan plaasvind nie, weens u nie die terme daarvan aanvaar nie.

Soos per die vergadering gehou gister tussen skrywer en uself is daar verskeie navrae welke nog beantwoord moet word en word daar hiermee `n boedel vergadering geroep vir Vrydag, 5 Mei 2023 om 14h00 ...

Die doel hiervan is om finaliteit te gee tot alle navrae en versoeke en om die terme van die voorgestelde herverdelingsooreenkoms asook die finansiële posisie van die boedel te verduidelik. ...” (My emphasis)

[87] In response to the last-mentioned e-mail, Dane addressed the e-mail of 4 May 2022 to Castro, in which Lisa was copied, attached to the to the answering affidavit as annexure "X108", in which it was indeed indicated that Dane and Lisa gave instructions to Kruger in respect of the "withdrawal" of the November 2022 Order, but Dane at the same time stated that she was still awaiting a legal opinion from Kruger and was unable to make a decision in the meantime. In my view, the aforesaid "decision" to which Dane refers, was whether Dane and Lisa were to approach court or whether they should accept/further negotiate the terms of the proposed redistribution agreement. I consider it prudent to quote the said paragraph:

"Soos jy weet, stem ons nie saam met die hofbevel nie aangesien dit nie was waaroor ons ooreengekom het nie. Ons het alreeds die punt aan ons regsverteenwoordiger genoem en ook instruksies gegee insake die verband en wag vir sy terugvoering. Dit sal onverskuldig wees van my om voort te gaan voordat ek sy regs opinie terug ontvang ek kan ook geen besluit maak voordat ek met hom gepraat het nie. Ek gaan NIE soos die laaste keer die dag wat ons moet onderhandel onder druk geplaas word en gedwing word om 'n besluit te maak. Dit is beter dat ek eers met my regsverteenwoordiger praat 'n dag of twee vat om daar oor te dink en dan 'n besluit te maak. Siende waar ons is, glo ek nie dis 'n onredelike versoek nie."

[88] In my view the conduct of Dane and Lisa is in accordance with the above quoted authority, more specifically the following quote from the Schmidlan-judgment:

“.... I am satisfied that Applicant did indeed acquiesce in that judgment. True, he did so conditionally or temporarily – for as long as it suited him, for as long as execution did not become painful.”

[89] In the present application, as previously pointed out, Dane and Lisa, firstly, contradicted themselves in setting out their case with regard to the lack of authority. That, in itself, is already a problem for the potential success of this application.

[90] Secondly, and in addition, it is in my view evident from the facts and circumstances set out above that pursuant to the November 2022 Order, Dane and Lisa very happily and actively participated in the process of attempting to reach a settlement on the basis of which the assets of the deceased be divided on a 50/50 basis between herself and Elaine. This was “*for as long as it suited (him), for as long as execution did not become painful*”. It was only once Dane and Lisa were not satisfied with the terms of the proposed redistribution agreement, that they considered falling back on the option of having the November 2022 Order set aside/rescinded.

[91] From the events set out above, it is in my view evident and I am satisfied that Dane and Lisa, for the better part of five months after the granting of the November 2022 Order, acted completely inconsistent with an intention to have the said Order set aside/rescinded. I am therefore satisfied that they did indeed acquiesce in the November 2022 Order. Dane and Lisa consequently lost their right to seek the setting aside/rescission of the November 2022 Order.

[92] Considering this finding, the issue whether Kruger had the authority, or not, to have agreed to the November 2022 Order, has become irrelevant. I therefore deem it unnecessary to deal with the issue of authority.

[93] Other than for the joinder of the additional parties, the application therefore stands to be dismissed.

Costs:

[94] Although Mr Reinders submitted that should the application not be successful, it would be reasonable and appropriate to order each party to pay his/her own costs, I cannot agree with him. Considering the facts and circumstances of the matter, there is no reason why costs should not follow the outcome.

[95] There is, however, a further aspect of the costs that necessitates consideration.

[96] References to "the applicants" are references to Dane and Lisa and references to the "the respondents" are references to Elaine, Badenhorst and Noordmans.

[97] The answering affidavit and the respondents' heads of argument are exceptionally voluminous. The prolixity thereof burdens the reader to the extreme and completely unnecessarily so.

[98] The founding affidavit consists of 19 pages and a further 21 pages consisting of 6 annexures. On the other hand, the answering affidavit consists of 128 pages and a further 888 pages consisting of 138 annexures. The replying affidavit consists of 15 pages. The applicants' heads of arguments consist of 7 pages (Mr Reinders was not the author thereof) and I must say that some more effort could have been put into the drafting thereof. However, to the other extreme, the respondent's heads of argument consist of 129 pages. As pointed out in the replying affidavit, this is despite the following averment made at the beginning of the answering affidavit:

"Nevertheless, I shall attempt not to make this Answering Affidavit unduly prolix and shall therefore only attach such annexures that I consider to be materially relevant."

[99] I have to put it on record that it is evident that tremendous time and effort were put into the drafting of both the answering affidavit and the respondents' heads of argument. However, unfortunately much of the contents of both the answering affidavit and the heads of argument are irrelevant. Paragraph 8 up to paragraph 75 of the answering affidavit contain a "*chronology*" consisting of background facts and circumstances, which are completely irrelevant to the present dispute. That already accounts for some 56 unnecessary pages and 76 unnecessary annexures. Paragraphs 113 to 116, for instance, is another example of irrelevant averments and information in the founding affidavit. The heads of argument, in general, also contain far too much and

unnecessary detail, both with regard to the facts and the applicable legal principles.

[100] In the circumstances I consider it appropriate, fair and reasonable that the applicants are only to pay two-thirds of the costs of the application and that the respondents therefore be deprived of one-third of their costs of the application.

Order:

[101] I make the following order:

1. The sixth-, seventh-, eighth-, ninth-, tenth- and eleventh respondents are joined to this application as respondents.
2. Condonation is granted to the first respondent (Elaine van Zyl), the sixth respondent (Hermanus Steyn Badenhorst N.O.) and the seventh respondent (Noordmans Attorneys) for the late filing of the answering affidavit.
3. The first respondent (Elaine van Zyl), the sixth respondent (Hermanus Steyn Badenhorst N.O.) and the seventh respondent (Noordmans Attorneys) are ordered to pay the costs in relation to the condonation application, jointly and severally, the one to pay the other the be absolved.
4. Prayers 1, 1.2, 1.3, 1.4, 1.5, 1.6 and 2 of the Notice of Motion are dismissed.

5. The first applicant (Dane Andrea van Zyl) and the second applicant (Lisa Docherty) are ordered to pay two-thirds of the costs of the application, jointly and severally, the one to pay, the other to be absolved; therefore, two-thirds of the costs of the first respondent (Elaine van Zyl), the sixth respondent (Hermanus Steyn Badenhorst N.O.) and the seventh respondent (Noordmans Attorneys) in relation to the application, jointly and severally, the one to pay the other to be absolved.


C. VAN ZYL, J

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