



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

19 March 2025

DATE

SIGNATURE

Case No. 39756 / 2016

In the matter between:

TERESA VAN DER MERWE

PLAINTIFF

and

LEON BOSCH N.O.

FIRST DEFENDANT

BRIAN DONALD BENNETT N.O.

SECOND DEFENDANT

GERT JOHANNES DU PLESSIS N.O.

THIRD DEFENDANT

**JOHANNES GERHARDUS VAN DER
MERWE N.O.**

FOURTH DEFENDANT

LANÉ VAN DER MERWE N.O.

FIFTH DEFENDANT

CA VAN DER MERWE

SIXTH DEFENDANT

R VAN DER KOLFF

SEVENTH DEFENDANT

LJJ BASSON

EIGHTH DEFENDANT

G JORDAAN

NINTH DEFENDANT

JG VAN DER MERWE

TENTH DEFENDANT

LANÉ VAN DER MERWE
STABILITAS BOARD OF EXECUTORS (PTY)
LTD N.O.
THE MASTER OF THE HIGH COURT, PRETORIA

ELEVENTH DEFENDANT
TWELFTH DEFENDANT
THIRTEENTH DEFENDANT

JUDGMENT

NEUKIRCHER, J

[1] The central issues in the main action revolve around the validity of two Wills of the deceased¹ dated November 2013 and March 2014. Whilst one would ordinarily assume that the latter would be the valid one as it is the most recent, the issue at hand is that it is only a copy - the original could not be located. Thus the defendants aver that the 2013 Will is the only valid last Will of the deceased.

[2] The plaintiff² contends that the March 2014 Will is valid. It appears that the contentious issue is that in the November 2013 Will the deceased's primary residence is bequeathed to the Dolf Van Der Merwe Familie Trust (the Trust), whilst in the March 2014 Will, it is bequeathed to the plaintiff.

[3] In May 2016, the plaintiff launched the main application in which she sought inter alia relief that would see the copy of the March 2014 Will being declared valid. The application was opposed by inter alia the trustees of the Trust³.

[4] On 14 October 2019 the parties, agreed to refer the matter to trial:

¹ Mr Rudolf Marthinus van der Merwe

² Who is the respondent in the Rule 28 application

³ The main application and action are opposed by the 1st to 5th, 10th and 11th defendants who are the applicants in the present Rule 28 application

- a) the notice of motion would stand as a simple summons;
- b) the plaintiff would file a declaration within 20 days;
- c) the Uniform Rules would then regulate the further proceedings and filing of pleadings.

[5] This was done and a 10 day trial date was allocated by the DJP for 6 to 17 March 2023.

[6] On 25 January 2023 the defendants served a substantial amendment in terms of Rule 28(1) - this was approximately 7 weeks before trial. Naturally, the trial could not proceed and was postponed and the defendants were ordered to pay those wasted costs.

[7] The plaintiff objected to the proposed amendment.

[8] The application for leave to amend was served on 23 February 2023 and it is this that stands to be adjudicated.

The Rule 28

[9] The amendment seeks to introduce an alleged settlement agreement concluded between the parties as follows:

- “15.8.1 the plaintiff accepted and acknowledged the validity of the November 2013 Will (in preference to the copy of the March 2014 Will) as being the last Will and Testament of the deceased.
- 15.8.2 the plaintiff undertook and/or agreed that she would not challenge or dispute the validity of the November 2013 Will;

15.8.3 the plaintiff and the defendant would honor the deceased's wishes as expressed in paragraph one of the deceased note / memo (...) and in doing so:

15.8.3.1 the plaintiff would be permitted to (continue to) occupy the residential property... for a maximum period of one calendar year from November 2014;

15.8.3.2 the plaintiff would be free of obligation to pay rent, rates and taxes, home owners association levies, and any accompanying consumption or utility charge pertaining to the residential property and/or her aforesaid occupation thereof; and

15.8.3.3 the plaintiff was permitted, until the end of January 2015, to (continue to) possess and use a VW Amorok vehicle free of charge."

[10] The defendants then plead that the Trust has complied with the terms of the above settlement agreement and:

"15.11 In the circumstances, and as a consequence of that alleged above, the plaintiff undertook and/or agreed that she would not:

15.11.1 contest and/or challenge the validity of the November 2013 will;

15.11.2 seek the relief that she does in these proceedings,
and, in so doing:

15.11.3 the dispute between the parties pertaining to the validity of the November 2013 was settled; and/or

15.11.4 the plaintiff waived, abandoned, forfeited, novated and/or compromised her right(s) to contest the validity of the November 2013 will as being the last will and testament of the deceased."

[11] It is to this that the plaintiff filed following objection:

- “1. The intended amendment renders the Defendants’ plea excipiable for the following reasons:
- 1.1 the Defendants’ plead in paragraph 15.5 that on or about 11 December 2014 and at or near Vanderbijlpark alternatively Vereeniging the plaintiff and the Dolf Van Der Merwe Trust (“the Trust”) concluded an oral, alternatively a partly oral, partly written and/or partly tacit agreement (“the Settlement Agreement”);
 - 1.2 A Trust is not a legal persona and cannot enter into an agreement or be represented by an agent. Trustees acting jointly, or a person duly authorised by each of the trustees to act on each trustees behalf, can jointly enter into an agreement. It is not alleged that the trustees jointly were parties to the agreement.
 - 1.3 As a result thereof the proposed amendment fails to establish the conclusion of a valid agreement and fails to disclose a defence, and the alleged Settlement Agreement relied upon in paragraph 15.5 is void *ab initio*;
 - 1.4 The intended amendment relied upon in terms of paragraphs 15.5 to 15.11 does not sustain a defence and is bad in law for the following reasons:
 - 1.4.1. The alleged Settlement Agreement pleaded is *contra bonos mores* as it violates the deceased's common law right to freedom of testation, thereby rendering the Settlement Agreement void and unenforceable;
 - 1.4.2 The alleged Settlement Agreement pleaded is *contra bonos mores* as it violates the deceased's Constitutional Right not to be deprived of property in terms of Section 25(1), thereby rendering the Settlement Agreement void and unenforceable;
 - 1.4.3 The alleged Settlement Agreement pleaded is *contra bonos mores*, as the Plaintiff and the Defendants’ are not authorised to

compromise and/or agree as to which Will represented the deceased's last Will and Testament and/or which Will the Master should accept, thereby rendering the Settlement Agreement void and unenforceable.

2. The Defendants' notice of intention to amend its plea, was brought at a late stage and shortly before the trial date, without any adequate explanation therefore and the Plaintiff is as a result thereof, prejudiced in her preparation for an in conducting the trial."

[12] It is, by now, settled law that:

- a) a court hearing and application in terms of rule 28 has a wide discretion which should be exercised judicially⁴;
- b) "[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."⁵;
- c) amendments will always be allowed unless the amendment is mala fide or unless it will cause an injustice that cannot be cured by a cost order⁶;
- d) there must be an explanation for the amendment and a triable issue;
- e) the amendment must facilitate the proper ventilation of the dispute between the parties⁷;

⁴ *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 694 G-H

⁵ *Moolman v Estate Moolman* 1927 CPD 27 at 29

⁶ *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 76 D-I

⁷ *Waymark supra*

- f) an amendment should not be refused simply to punish the applicant for neglect - this is because the order to pay the wasted costs occasioned by the amendment is the punishment.⁸

[13] The Court in *Zarug v Parvathie NO*⁹ set out certain relevant principles including:

- “1. That the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.
2. With its large powers of allowing amendments, the court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.
3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a bona fide mistake.”¹⁰

[14] And it is in this light that plaintiff's last objection must be viewed. The objection is that the Rule 28 came at an extremely late stage in the proceedings - some four years after proceedings commenced. The plaintiff alleges that she has been prejudiced by this late introduction of the new issue and that the explanation, for the late introduction of this issue, is simply without substance.

[15] The defendants state that they only realised when they were preparing for trial that the issue of the Settlement had not been pleaded; that there is no prejudice to the plaintiff as it had been fully canvassed in the affidavits in the initial motion proceedings; that as the trial was postponed, the plaintiff has sufficient time to prepare; that this

⁸ GMF Kontrakteurs (Edms) Bpk v Pretoria City Council 1978 (2) SA 219 (T) at 223 B

⁹ 1962 (3) SA 872 (D) at 876 A-D

¹⁰ Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) paragraph 9

issue may well be dispositive of the entire action and that any prejudice possibly suffered by the plaintiff was cured by the costs order granted in her favour when the trial was postponed in 2023.

[16] I agree with all these submissions and I find that the lateness of the Rule 28 is not a ground to refuse the amendment in circumstances where there is no new trial date, where the issue has already been canvassed in the affidavits and where the plaintiff will be given adequate time to plead to the amendment, consult and prepare for trial.

[17] As to the other grounds of objection: they must also be dismissed:

- a) firstly, the objection is that the defendants seek to bypass the provisions of the Wills Act 7 of 1953 and usurp the function of the court in determining which of the 2013 or 2014 Wills is the last Will and Testament of the deceased. The argument is that it is not legally competent for the parties to enter into a settlement agreement and/or compromise to determine which of the Wills represents the deceased's last Will and Testament;
- b) secondly, the plaintiff argues that the Settlement is contrary to a testator's common law and statutory right to freedom of testation and his constitutional right to dispose of his property in the manner he deemed fit. The argument is that third parties cannot override the testator's choice and intent, especially not by agreement;
- c) plaintiff argues that the Settlement is *contra bonis mores* as it violates the deceased's common law right to freedom of testation thereby rendering the settlement void and unenforceable;

- d) thus the plaintiff argues that the amendment fails to establish a defence and is excipiable.

[18] I disagree:

- a) firstly, an agreement concluded after the death of the deceased cannot be said to limit his freedom of testation which was exercised unhindered prior to his death;
- b) secondly, the plaintiff fails to specify the provision in the Wills Act upon which she relies for the argument set out in paragraph 17(a) - all she does is make generalised assertions and skirt the issue. The same lack of specificity applies to her argument regarding the alleged common law limitations;
- c) thirdly, parties are free to either accept or reject a donation or bequest made by a testator. The beneficiaries are also free to enter into an agreement to alter the distribution of an estate. This would achieve the very objective that the plaintiff argues is not legally competent in terms of the Wills Act or a testator's common law right to freedom of testation or his constitutional right to dispose of his property in the manner he deems fit - it would distribute the state in a manner not provided for in the Will.

[19] The fact that such a distribution agreement is permissible (which was conceded in argument) simply demonstrates the fallibility of the plaintiff's argument.

[20] In any event, at least prima facie, the Settlement simply appears to give effect to the provisions of the March 2013 Will albeit within certain timelines- I see no contentious issue arising from this. And I find no contentious issuing arising from the

fact that (if proven) the Settlement provides that the plaintiff then accepts the validity of the March 2013 Will.

[21] Such an agreement is certainly not *contra bonis mores* where:

- a) the plaintiff must discharge the onus in this regard and
- b) the court must consider the facts, circumstances and history of the matter.¹¹

[22] Thus, in my view, no valid grounds of objection exist and the defendants must be granted leave to amend.

Costs

[23] As stated supra, a court will grant an amendment if any possible prejudice can be cured by a costs order.

[24] The plaintiff seeks costs, including cost of senior counsel taxable on scale B. The defendants argue that they have already been “punished” because of the late Rule 28 when the trial was postponed at their cost. They argue that the objection is in any event untenable and that the plaintiff should consequently pay the costs of the Rule 28, including costs of two counsel, on scale C.

[25] In my view, the objection to the Rule 28 is indeed without any merit. This being so, the plaintiff is not entitled to the usual order of costs. Had there been at least an arguable case made out by her, perhaps costs could have been ordered in the cause - but there is none.

¹¹ “Courts have been reluctant to decide exceptions in regards of fact bound issues”: *Herb (Pty) Ltd and Others v Matthews and Others* (2020/15069) [2021] ZAGPJHC 693 (16 November 2021) paragraph 11

[26] But I am not of the view that the issues presented before me were so weighty or complex that the employment of two counsel was justified, or that costs on Scale C are warranted. I am of the view that costs consequent upon the employment of a senior counsel is warranted: after all, the plaintiff also had senior counsel appearing on her behalf.

ORDER

1. The applicants (defendants in the action) are granted leave to amend their plea in the action, as set out in annexure GP1 to the application.
2. The plaintiff is ordered to pay the costs of the Rule 28 application, including the cost of senior counsel which costs are to be taxed in accordance with Scale B.


B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 March 2025.

For the 1st to 5th, 10th
and 11th applicants : Adv G Amm SC
Instructed by : Cox Yeats Attorneys
For the respondent : Adv J Vorster SC

Instructed by : Tobias Bron Inc Attorneys
Matter heard on : 12 March 2025
Judgment date : 19 March 2025