

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: 12863/2024

Before the Hon Madam Justice Slingers

Hearing: **05 May 2025**

Judgment Delivered: **05 June 2025**

In the matter between:

MARK RICHARD ANDERSON

First Applicant

CHRISTINE ANN ANDERSON

Second Applicant

and

FRANCOIS DU PLESSIS N.O.

First Respondent

THE MASTER OF THE HIGH COURT

Second Respondent

BARBARA McGAVIN ROLFE

Third Respondent

SIMON ROLFE

Fourth Respondent

ANDERSON STRATHERN TRUSTEE COMPANY LTD

Fifth Respondent

This judgment is handed down electronically by circulation to the parties' legal representatives' email addresses. The date of hand-down is deemed to be 05 June 2025.

JUDGMENT

SLINGERS J

Introduction

[1] Harold John Anderson ('HJA') and Karin Renate Anderson ('KRA') executed a joint last will and testament ('joint will') during their marriage as KRA stood to

inherit her German family's accumulated wealth following her mother's death. The applicants, who are the children of HJA and KRA, allege that their parents agreed on the future planning for the joint estate to *inter alia* ensure that KRA's accumulated family wealth remained in the family.

- [2] After KRA's death the German authorities refused to accept the joint will as valid and binding. This caused HJA to institute proceedings in the District Court of Kassel. In support of this application, HJA deposed to a sworn affidavit wherein he stated that KRA and he had drawn up a joint will dated 23 June 2001 in Kassel. He went on to depose that the testamentary disposition complied with the requirements of the German Civil Code in terms of Section 26(1) Nos. 1, 2 and 4 of the Introductory Act to the German Civil Code. In terms of the testamentary disposition, he had become the sole heir of the deceased KRA.
- [3] HJA explicitly states in his sworn statement that he has accepted the inheritance which included real estate property in Italy. Consequently, HJA requested that he be granted a copy of the certificate of inheritance applied for below, with an apostille, for use in Italy.
- [4] On 28 April 2003, the District Court of Kassel found the joint will dated 23 June 2001 to be effective as a joint will on account of the applicant's South African citizenship and that there is a binding effect in terms of the Berlin will according to Section 2269 of the German Civil Code .
- [5] HJA's sworn statement evidences his election to accept the benefits under the joint will.

- [6] After 28 April 2003 HJA dealt with the joint estate assets entirely as if they were part of his estate¹.
- [7] It is common cause that HJA commenced a relationship with and married the third respondent. The fourth respondent is the third respondent's son from a previous marriage.
- [8] On 17 October 2018 HJA executed a new last will and testament. In terms of this will and testament, HJA nominated the first respondent as executor of his estate and provided for the third respondent to be the sole beneficiary of his entire estate. In 2021 HJA executed a further last will and testament which addressed HJA's assets situated within the United Kingdom and the Channel Islands. Both the applicants and the third respondent are beneficiaries in terms of this will and testament.
- [9] HJA passed away on 20 May 2023 and on 5 July 2023, the first respondent was appointed as the executor of HJA's estate in South Africa in accordance with his 2018 will and testament.

The applicant's case

- [10] It is the applicants' case that massing and adiation occurred in respect of the joint will of KRA and HJA. This follows firstly from the undisputed fact that KRA and HJA consolidated their property into a single unit for joint disposition after the death of the first dying spouse. And secondly from HJA's acceptance of the benefits under the joint will as evidenced by HJA's affidavit filed in support of his

¹ Founding Affidavit p 17 paras 40 – 43

case in the District Court of Kassel to have the validity and binding effect of the joint will and testament recognized².

[11] The applicants do not seek to set aside the 2018 will and testament, nor do they seek to have the first respondent removed as executor in terms thereof. The applicants do seek an order directing:

- (i) the second respondent to accept the joint last will and testament of Harold John Anderson and Karin Anderson, dated 23 June 2001 to be the last will and testament of Harold John Anderson in relation to his South African estate;
- (ii) the second respondent to accept as executor(s) of the late Harold John Anderson's South African estate such executors as may be nominated by the beneficiaries under the joint will and that such executor(s) be appointed in the place of the first respondent but only insofar as it pertains to the 2001 last will and testament;
- (iii) such executors shall wind up and distribute the estate of the late Harold John Anderson to the extent that such estate forms part of or is derived from the massed estate under the joint will as at the death of Karin Anderson in 2022; and
- (iv) to the extent that any assets in the South African estate of the late Harold John Anderson were amassed after the death of Karin Anderson and were not derived from the massed estate under the joint will, such assets be dealt with in accordance with the provisions of the last will and testament

² *Holmes v Executor v Rawbone* 1954 (3) SA 703 (AD)

executed by the late Harold John Anderson on 17 October 2018 at Plettenberg Bay.

- [12] It is the applicants' case that in terms of South African law of succession, once a party executes a joint will with his/her spouse, and massing and adiation has occurred on the death of that spouse, then the surviving testator is bound to the terms of the joint will and cannot, after the death of said spouse, seek to renege on that joint will.
- [13] The joint will continue to apply to the massed estate and the surviving testator is bound to respect the terms of the joint will. Only the new assets acquired after the death of the spouse may be dealt with in any subsequent will. However, the massed estate must be distributed in terms of the joint will.

The respondents' case

- [14] The first, third and fourth respondents filed a notice to oppose. However, only the third and fourth respondents (**'the respondents'**) filed an answering affidavit and actively opposed the application as the first respondent subsequently filed a notice to abide.
- [15] The grounds on which the respondents opposed the application fluctuated. Before the institution of legal proceedings and at the stage of the parties' legal representatives exchanging correspondence, the respondents accepted the validity of the joint will in German law. However, they disputed that the joint will could be enforced in South Africa on the basis that it was unconstitutional as it would restrict and limit the testator's freedom of succession and that it would

disinherit the third respondent.³ This was based on a legal opinion they obtained which advised that:

'22. *I am thus of the view that the 2001 – joint will of the late Mr. and Mrs. Anderson (which in any event only dealt with their assets in Germany and Italy) has no bearing on the late Mr. Anderson's South Africa estate or on the validity and enforceability of his South African will.'*

[16] The applicants provided the respondents with a contrary legal opinion in support of their case that South African laws recognize the binding nature of previous joint wills where adiation and massing occurred. The respondents expressed their disagreement with this opinion.

[17] In their answering papers, the respondents raised seven points *in limine*, which were that:

- (i) the applicants failed to comply with peremptory provisions of Rule 41A;
- (ii) the joinder of the 4th respondent constitutes a misjoinder as he has no interest in the relief sought;
- (iii) the application does not comply with the provisions of Rule 6(5)(b)(iii);
- (iv) the annexures to the founding affidavit have not been marked according to the identification of the same reflected in the founding affidavit;
- (v) the annexure, assumably to be MA 24 and part of the annexure assumably to be MA 4 referred to in the founding affidavit were illegible;

³ Paragraphs 19 and 20 of the opinion on page 53

- (vi) the relief sought in terms of paragraphs 1, 2 and 3 of the Notice of Motion is untenable in law;
- (vii) the 5th respondent has not waived service of the motion in terms of the court rules and that the applicants have, as far as the 5th respondent is concerned, not complied with the prescripts of Rule 4(3) and Rule 5(11); and
- (viii) the facts relied upon by the applicants for the relief sought are premised entirely on unsubstantiated allegations, and inadmissible hearsay and unauthenticated evidence.

[18] These points were not pursued in argument at the hearing of the matter.

[19] The respondents do not dispute the following in their answering affidavit:

- (i) HRA inherited the massed estate⁴; and
- (ii) massing and adiation occurred upon the death of KRA which resulted in HRA inheriting the joint estate and enjoying the benefits thereof.⁵

[20] During the hearing of the matter, the respondents argued that the hearing could not proceed and that the application stood to be dismissed with costs due to the failure of the second respondent, the Master of the High Court to actively participate in these proceedings.

[21] The answering affidavit also raised the alleged non-compliance of the 2001 joint will with the South African formalities.

⁴ Paragraph 26 of the founding affidavit, page 13 read with paragraph 15 of the answering affidavit, page 103

⁵ Paragraph 44.2 and 44.3 of the founding affidavit, page 19 read with paragraph 25 of the answering affidavit, page 106.

Non-compliance with Uniform Rule 6(9)

[22] The respondents took the point *in limine* that the provisions of Uniform Rule 6(9) had not been complied with that the non-participation of the second respondent in the proceedings prevented the hearing thereof.

[23] Uniform Rule 6(9) provides that:

'A copy of every application to court in connection with the estate of any person deceased, or alleged to be a prodigal, or under any legal disability, mental or otherwise, shall before such application is filed with the registrar, be submitted to the Master for consideration and report; and if any person is to be suggested to the court for appointment as curator to property, such suggestion shall likewise be submitted to the Master for report. Provided that the provisions of this subrule do not apply to any application under rule 57 except where that rule otherwise provides.'

[24] In the commentary to Erasmus, it has been noted that the objective of Uniform Rule 6(9) is to avoid applications being enrolled only to be postponed so that a court can have the advantage of the Master's assistance. The commentary goes further to note that the subrule does not operate when the Master's involvement is neither legally necessary nor of assistance to the court.

[25] In the present matter, the Master of the High Court has been cited as the second respondent and has been served with the application. It is undisputed that on 18 September 2024 the second respondent penned an email wherein it stated that the current application must be finalised before the executor would be able to proceed with the liquidation and distribution account. Thus, the court does have the input of the second respondent. Furthermore, the relief sought is of such a

nature that while it does require the second respondent's compliance, nor does it require his assistance.

- [26] In the circumstances, there is no merit to the point *in limine* based on the alleged non-participation of the second respondent.

Constitutionality of the last will

- [27] In the respondent's heads of argument, they accept that massing does not *per se* result in the unconstitutional limitation of the right of testation.⁶⁶ Consequently, I need not deal with this aspect further.

Lack of compliance with the formalities required by SA law

- [28] Section 3*bis*(1)(a) of the Wills Act, Act 7 of 1953 provides that

'A will, whether executed before or after the commencement of this section, shall-

(a) not be invalid merely by reason of the form thereof, if such form complies with the internal law of the state or territory-

(i) in which the will was executed;

(ii) in which the testator was, at the time of the execution of the will or at the time of his death, domiciled or habitually resident; or

(iii) of which the testator was, at the time of the execution of the will or at the time of his death, a citizen.'

- [29] In *Tomlinson v Zwirchmayr*⁷ the court found that the common law position which required compliance with either the *lex loci actus* or *lex situs* had been codified by section 3*bis* of the Wills Act. Thus, a last will and testament would be valid

⁶⁶ Paragraph 26.3 of the respondent's heads of argument

⁷ 1998 (2) SA 840

even where it failed to comply with the requirements of the *lex situs* but complied with the requirements of the *lex loci actus*.

- [30] Therefore, based on the decision by the District Court of Kassel on 28 April 2003 that the joint will was valid and binding read with section 3*bis* of the Wills Act, there is no merit in challenging the validity of the joint will on the grounds that it failed to comply with the formal requirements of South African law.

Two wills

- [31] The respondents argued there cannot be two valid wills in respect of an estate. The respondents relied on section 2(3) of the Wills Act and section 14(1) of the Administration of Estate's act to support this submission. In contrast, the applicants argued that there is no statutory obstacle or prohibition against two wills being valid and applicable to the administration of a single estate, but rather that there is a statutory prohibition against two estates.
- [32] As set out above, HJA executed a 2018 and a 2021 will and testament to address different assets, some of which are located in different jurisdictions. The third respondent is a beneficiary in terms of both the 2018 and the 2021 wills. The first respondent has been appointed as the executor in terms of the 2018 will.
- [33] It would be absurd to accept that because the assets are located in different jurisdictions that HJA had multiple estates which required winding up on his death. The fact that a testator has assets located in different jurisdictions does not detract from the fact that his assets constitute a single estate which has to be administered by his testamentary documents.

- [34] It is apparent by the appointment of the first respondent as executor in terms of the 2018 will that the respondents accept the validity of both the 2018 and the 2021 will. This fact is destructive to the respondents' argument that there cannot be multiple valid wills applicable to the administration of an estate.

Massing and adiation

- [35] Section 37 of the Act states as follows—

“If any two or more persons have, by their mutual will, massed the whole or any specific portion of their joint estate and disposed of the massed estate or of any portion thereof after the death of the survivor or survivors or the happening of any other event after the death of the first-dying, conferring upon the survivor or survivors any limited interest in respect of any property in the massed estate, then upon the death after the commencement of this Act of the first-dying, adiation by the survivor or survivors shall have the effect of conferring upon the persons in whose favour such disposition was made, such rights in respect of any property forming part of the share of the survivor or survivors of the massed estate as they would by law have possessed under the will if that property had belonged to the first-dying; and the executor shall frame his distribution account accordingly.”

- [36] The following are the requirements for statutory massing—

- (i) the first dying testator must have died on or after 2 October 1967, being the date on which the Administration of Estates Act 66 of 1965 came into operation;
- (ii) there must be two or more persons as parties to the mutual will;

- (iii) the parties must make a mutual will (a mutual will is a joint will in which two or more testators have mutually benefitted one another in the same document);
- (iv) the parties must mass the whole or part of their separate estate assets into a consolidated unit, and this unit must be disposed of in the mutual will;
- (v) the mutual will must grant the survivor 'a limited right' in respect of any property which has been massed;
- (vi) the disposition of the massed estate must take place sometime after the death of the first dying;
- (vii) the survivor must adiate on the death of the first dying.

[37] The undisputed facts of the matter are:

- (i) KRA died in 2002;
- (ii) there were two parties to the joint will, namely KRA and HJA;
- (iii) KRA and HJA executed a joint will;
- (iv) KRA and HJA consolidated their separate estates into a single unit, which would be administered in terms of the joint will;
- (v) HJA was granted and received benefits in terms of the joint will;
- (vi) the disposition of the consolidated estate occurred after the death of KRA, as the first dying spouse; and
- (vii) HJA elected to receive benefits in terms of the joint will after the death of KRA.

- [38] Thus, on the undisputed facts it has to be accepted that the statutory requirements for massing have been met. In any event, the respondents did not deny or contest the issue of massing in the answering affidavit. On the contrary, they accepted that both massing and adiation had occurred.
- [39] Furthermore, they did not dispute that the massed estate was part of the current estate.
- [40] It is trite that the acceptance of any benefit under the will of the first dying amounts to adiation and that this adiation prohibits the survivor from altering or revoking his or her own dispositions in terms of the joint will in regard to the massed estate.⁸ Once an election to adiate (or repudiate) is made, it is irrevocable.⁹
- [41] In terms of South African law, a survivor cannot accept the benefits left to him or her in terms of a testamentary document of the first dying and then thereafter refuse to deal with his own estate in the manner set out in that testamentary document.¹⁰
- [42] Thus, adiation of any benefit under the will of the first dying amounts to adiation which prohibits the survivor from altering or revoking his or her own disposition in the joint will in so far as it pertains to the massed estate.¹¹
- [43] When HJA accepted the inheritance, as set out in his sworn statement filed in the District of Kassel, he adiated. Thus, HJA's ability to deal with that portion of his estate which formed part of the joint estate was limited as a result of his election to accept his inheritance under the joint will.

⁸ *Holmes' Executor v Rawbone* 1954 (3) SA 703 (AD)

⁹ Corbett et al *The Law of Succession in South Africa* 2nd edition, page 455

¹⁰ *Union Government v Larkan* 1916 AD 212 at 224

¹¹ Corbett et al, *The Law of Succession in South Africa* 2nd edition, page 439

[44] Given that both massing and adiation have occurred, there is no reason to hold that the terms of the 2001 joint will were not binding on HJA and does not apply to the disposition of the joint estate to the extent that it existed at the time of the death of KRA and has continued to grow and accumulate since then. To the extent that HJA acquired a new estate, those assets would be regulated by the provisions of the 2018 Will. To find otherwise would be contrary to the principle of fairness and would allow a party to resile from an obligation to perform in terms of a promise after receiving benefits under that promise.¹²

[45] Therefore, based on the facts and the applicable legal principles, the applicants have established that:

- (i) massing and adiation in terms of the 2001 joint will occurred;
- (ii) the joint will and testament is valid and binding in South Africa.

[46] Furthermore, the respondents have failed to establish any factual or legal grounds to show that the applicants are not entitled to the relief they seek.

[47] In the circumstances, I make the following orders:

- (i) the second respondent is directed to accept the joint last will and testament of Harold John Anderson and Karin Anderson, dated 23 June 2001 to be the will and testament of Harold John Anderson in relation to his South African estate;
- (ii) the second respondent is directed to accept as executor(s) of the late Harold John Anderson's South African estate such executors as may be nominated by the beneficiaries under the joint will and that such executor(s) be appointed in the place of the first

¹² Applicant's heads of argument

respondent but only insofar as it pertains to the 2001 last will and testament;

- (iii) such executors shall wind up and distribute the estate of the late Harold John Anderson to the extent that such estate forms part of or is derived from the massed estate under the joint will as at the death of Karin Anderson in 2022; and
- (iv) to the extent that any assets in the South African estate of the late Harold John Anderson were amassed after the death of Karin Anderson and were not derived from the massed estate under the joint will, such assets be dealt with in accordance with the provisions of the last will and testament executed by the late Harold John Anderson on 17 October 2018 at Plettenberg Bay;
- (v) the costs of the application shall be born by the third and fourth respondents jointly and severally, one paying to absolve the other, such costs shall be costs on a party party scale on Scale C.


SLINGERS, J
S.G. 2025