

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2023-101371

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
<u>12/06/2025</u> DATE	_____ SIGNATURE

In the matter between:

BRENDAN DE MOOR

First Applicant

GRAEME PAVEL DE MOOR

Second Applicant

And

JOHN GUNNEL N.O.

First Respondent

SALLY ANN VENDEL N.O.

Second Respondent

SALLY ANN VENDEL N.O.

Third Respondent

MEGAN JANE VENDEL N.O.

Fourth Respondent

JOHN GUNNEL

Fifth Respondent

SALLY ANN VENDEL

Sixth Respondent

JANE MEGAN VENDEL

Seventh Respondent

THE MASTER OF THE SOUTH GAUTENG HIGH

Eighth Respondent

Neutral Citation:

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J

Introduction

[1] This judgment is about the Rules of Court on Joinder of parties to the proceedings. The applicants seek to join the first, second, third, and fourth respondents in the main action, asserting their substantial interest in the dispute over the Will and Testament of the late Mr. Phillip De Moor (“the deceased”) who executed the will on the 20th of September 2021 before his passing away. The applicants contend that they seek to join the respondents as the fifth, sixth, seventh and eight respondents in the main action. The application was signed and filed in May 2024. However, the new firm that signed it, Human and Human Attorneys, came on record formally in July 2024.

[2] the three respondents oppose the application, and the opposing sworn statement has been filed by Ms. Sally Ann Vendel, the executrix of the estate of the deceased. She is cited twice in the papers as the second and the third respondent in her representative capacity and this is surprising as I do not know whether it is print or drafting error.

Background

- [3] The applicants are the plaintiffs in the main action and are challenging the validity of the last will and testament of the deceased. They seek that the will of the deceased to be reviewed and set aside. In addition, they seek that the deceased be declared by court in the action proceeding to have died intestate. The first three defendants defend the action.
- [4] The material provisions of the disputed will provide that the residue of the deceased's estate is to be left in trust for the sole benefit of the deceased's wife, namely, Ms. Jill Pamela De Moor. The nominated trustees are John Gunnel, Sally Vendel, and Megan Vendel. Should she pre-decease him, the residue of the trust is to be left in equal shares to the deceased's two sons, namely, Brendan and Graeme, the applicants in these proceedings and the plaintiffs in the main case. For convenience's sake, the parties will be referred to as in the main case. The plaintiffs raise several grounds for attacking the will such as the fact that the deceased did not have the capacity to do a will as he was too frail and had scored 12/30 in the cognition test to appreciate the consequences of his action at the time the will was executed. They contend in the main action that he could not have had the capacity to execute the will as he was in the frail centre care for the aged.
- [5] In the action proceedings, the first three defendants are all cited in their personal capacity by the plaintiffs who state that they are the biological sons of the deceased. The plaintiffs state in their particulars of claim that the first and the second defendants are nominated as the executors of the Will of the deceased.

- [6] The pleadings in the main action were exchanged culminating in the special plea of misjoinder and the first and third defendants complained that they have no interest in the matter as they are not the joint trustees with the second defendant in the administration of the deceased's estate. The second defendant in the main action lamented that she was cited in her personal capacity instead of her representative capacity. She contended that she has no personal interest in the litigation.
- [7] Following the special plea, the applicants sought to amend their pleadings by citing the second defendant in her representative capacity and continued with citing the other two defendants in their personal capacities. The second defendant objected to the amendment notice on grounds stated in the notice of objection. The plaintiffs replaced their legal representatives by a new firm in July 2024.
- [8] The plaintiffs in the action proceedings filed Notice of Withdrawal of Joinder application against the first and the third defendants in October 2024 and refused to tender costs on the ground that they did not incur any costs in the matter. This is strange as the Notice of Intention to Defend clearly states that the legal representatives represent all three of them in the action proceedings.
- [9] On THE 30th of October 2024, the three defendants in the action proceedings, filed Notice of Exception. There is no record of the Exception proceedings being finalized, which likely led to the amendment application.

Bases for joinder

- [10] The basis for joining the first respondent in the main action, is that he is a trustee created in terms of the Will of the deceased. The first respondent is cited both in his personal and representative capacity as the trustee of the estate of the deceased. He is also cited as the fifth respondent in his personal capacity. The applicants contend that he has interest in the action proceedings.
- [12] The basis for seeking to join the second respondent is that she is an executrix of the estate of the deceased and that she has interest in the action proceedings. She is also cited as the third respondent in her capacity as the trustee of the trust created in terms of the Will of the deceased. She is also cited as the sixth respondent in her personal capacity. The applicants contend that she has an interest in the action proceedings.
- [13] The fourth respondent is cited in her capacity as the trustee of the trust formed in terms of the Will of the deceased. She is, furthermore, cited as the seventh respondent in her personal capacity. The applicants contend that she has an interest in the action proceedings.
- [14] The applicants contend that from the reading of the Will, the respondents have been enjoined with wide powers by the deceased and consequently, so the contention goes, the respondents have a substantial interest in the outcome of the litigation in the action proceeding. Consequently, so they argue, the respondents must be joined in the action.
- [15] The Master of the High Court is cited as the eighth respondent and has not participated in this application.

Basis for opposition of the joinder and misjoinder

- [16] The first respondent firstly, challenges the legality of the sworn statement on the ground that the commissioner of oaths did not initial each page of the founding sworn statement. Secondly, the contends that his citation in the matter both in his representative and personal capacity is inappropriate because he repudiated his nomination as a trustee before the institution of the proceedings. Furthermore, it is contended on his behalf that because the trust was never formed, it is premature to cite him in the matter and the relief sought against him is therefore incompetent. He is neither a joint trustee of the estate because the disputed Will nominates only one trustee, namely, the second respondent. He has no personal interest in the outcome of the main litigation. Consequently, so it is averred, he has no material and personal or representative interest in the outcome of the action proceeding and that he should not have been cited in the main action proceeding.
- [17] As far as the second respondent is concerned, she disputes that she has personal interest in the action because the disputed Will clearly nominates her as the trustee. She contends that it is inappropriate that she is cited in her personal capacity because she has no material and personal interest in the outcome of the main litigation. She states furthermore that it is inappropriate for the applicants to cure the misjoinder by way of a joinder application because citing her through the joinder application amounts to substitution and the joinder is intended to introduce two new parties.
- [18] Furthermore, so she contends, citing her in her capacity as the trustee of the estate is premature as the trust has not yet been formed. Accordingly, so she contends, she has no material and substantial interest in the outcome of the litigation in her personal and her representative capacity as the

trustee of the deceased's estate and that the application to join her in those two capacities should be dismissed.

[19] As regards the proposed joinder of Megan Vendel, in her capacity as the executrix of the estate, it is contended this is incompetent. The submission is that the third respondent is not nominated as an executrix of the estate in terms of the Will and for that reason alone, so the submission goes, it is incompetent to cite in that capacity.

[20] Furthermore, she is cited in her personal capacity, but no averments have been made against her and therefore, so the argument goes, no cause action exists against her in her personal capacity. Accordingly, she has no material and substantial interest in the outcome of the litigation in her personal capacity. Furthermore, so it is contended, it is premature to cite her as the trustee and that this is inappropriate because the trust has not been established.

[21] The respondents contend that it is peremptory when the Will is challenged that all the beneficiaries be joined because the real dispute is between the plaintiffs and the beneficiaries. They contend that the applicants have failed to cite all the beneficiaries and that the proceedings are therefore irregular.

The issues for determination

[22] The issues for determination can be summarised as follows: -

- (a) Whether the commissioning of the founding affidavit is proper;
- (b) Whether there is a misjoinder of a party which renders the proceedings irregular.
and
- (c) Whether the second respondent should be joined as a defendant in the main action.

I will deal with each issue in relation to the legal principles applicable to each issue as set out below.

The legal principles

Commissioner of oaths

[23] The commissioning of sworn statements is regulated by section 7 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963(the Act) and the Regulations¹ promulgated in terms thereof. Section 7 of the Act provides as follows: -

“Any commissioner of oaths may, within the area for which he is a commissioner of oaths, administer an oath or affirmation to or take a solemn or attested declaration from any person: Provided that he shall not administer an oath or affirmation or take a solemn or attested declaration in respect of any matter in relation to which he is in terms of any regulation made under section ten prohibited from administering an oath or affirmation or taking a solemn or attested declaration, or if he has reason to believe that the person in question is unwilling to make an oath or affirmation or such a declaration.”

[23] Regulation 4 provides as follows: -

(1) Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

(2) The commissioner of oaths shall—

¹ REGULATIONS GOVERNING THE ADMINISTERING OF AN OATH OR AFFIRMATION [Updated to 23 April 1982]

- (a) sign the declaration and print his full name and business address below his signature; and state his designation and the area for which he holds his appointment, or the office held by him if he holds his appointment *ex officio*.”

[24] In this case, the point *in limine* raised is that the commissioner of oaths did not initial each page of the sworn statement. In *Department of Correctional Services v Baloyi*², was faced with the challenge of the authority of the person who signed the sworn statement as a commissioner of oaths and Molahlehi J (as then was) held as follows:

“[3] In order to satisfy the status of an affidavit, the founding affidavit has to comply with the requirements set out in regulation 4 of the Regulations. Regulation 4(1) reads as follows:

"(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration."

[4] Regulation 4 (2) of the Regulations reads as follows:

"(2) The commissioner of oaths shall –

- (a) sign the declaration and print his full name and business address below his signature; and
- (b) state his designation and the area for which he holds his appointment, or the office held by him if he holds his appointment *ex officio*."

[5] The appointment or designation of a Commissioner of Oaths is done by the Minister in terms section 6 of the Act. The designation is done on the basis of the office which a person occupies, such as an attorney or a police officer.”

² [2016] JOL 36586 (LC)

[25] It was submitted on behalf of the respondents that the commissioner must initial each page of the document and affix their signature and details at the end.

Misjoinder

[26] Rule 10 of the Uniform Rules regulates how parties may be joined to the proceedings and states as follows: -

- “(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.
- (2) A plaintiff may join several causes of action in the same action.
- (3) Several defendants may be sued in one action either jointly, jointly or severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

[27] The approach on whether or not to join a party to the proceedings is whether the court's order may affect the interests of third parties.³ The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject matter in the

³ *Erasmus Superior Court Practice D1-124*; See also *Amalgamated Engineering Union v Minister of Labour* 1949(3) 637 (A) at 657; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226F -227F, *Electrical Solutions(Pty) Ltd v City of Johannesburg Metropolitan Council* 86870/19) [2021] ZAGPPHC 146 (16 March 2021) para 76.

matter of the litigation which may be affected prejudicially by the judgment of the court.⁴

[28] Under common law, the court has the inherent power to order joinder of further parties in an action which has already begun to ensure that persons interested in the subject matter of the dispute and whose rights may be affected by the judgment are before court.⁵

[29] The objection on the ground of misjoinder should be taken *in limine* and if not then taken it cannot be ordinarily raised subsequently.⁶

[30] It is trite that in proceedings to declare a will invalid, it is peremptory to cite not only the executor but also the beneficiaries because the real dispute is between the plaintiff and the beneficiaries.⁷

Joinder

[29] I now deal with the legal principles applicable to joinder, that is, whether the second defendant who is cited in her personal capacity in the main action can through this application be joined as both in her personal capacity and representative capacity.

[30] Rule 30 (3) states as follows:

“If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.”

⁴ *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176H-I; *In re BOE Trust Ltd and Others* NNO 2013 (3) SA 236 (SCA) at 241H-I

⁵ *Esquire Electronics Ltd v Executive Video* 1986(2) SA 576 (A) at 590J- 591C

⁶ *Rabinowitz and ANOTHER NNO v Ned-Equity Insurance Co Ltd* 1980(3) SA 415 (W) at 419E

⁷ *See Kethel v Kethel's Estate* 1949 (3) SA 598(A) at 603 para 1

[31] The adjudication of a rule 30 application entails two stages⁸. First, the court must determine whether the proceeding or step complained of was indeed irregular. If it was, "the Court is empowered to set it aside, wholly or in part. The court, however, has a discretion. . . . It is entitled in a proper case to overlook an irregularity in procedure that does not cause substantial prejudice to the party complaining of it ,..".⁹

[32] In *Afrocentrics Projects and Services (Pty) Limited t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Limited and others*¹⁰ Kollapen J confirmed the approach on Rule 30(3) and said the following: -

“[26] Rule 30(3) contemplates a two-stage process. A court must first satisfy itself that the proceeding or step is irregular or improper. If it is so satisfied, it has the wide power to set the proceeding aside in its entirety or in part, grant leave to amend or make any order as it deems fit. These are, no doubt, wide powers. Following its conclusion that a step or proceeding is irregular or improper, a court however, is required to make an order.

[27] Court orders are required to bring a level of certainty to the proceedings and directions issued by a court must not be contained in the judgment but in the concluding order.¹¹ In *Ntshwaqela* the Appellate Division held that the order with which the judgment concludes is:

" . . . the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it."¹²

[28] A court must effectively dispose of the dispute that has come before it, and in doing so, it must act in accordance with its powers relative to the matter at hand. This is after all what provides the certainty and finality that parties seek when they bring a dispute to a

⁸ *Beecham Group Plc v Colgate-Palmolive Company* [2013] JOL 30997 (GNP) at para 19.

⁹ See *Harms Civil Procedure in the Supreme Court*, B30.8.

¹⁰ [2023] JOL 57251 (CC) at para 26.

¹¹ *Administrator, Cape and another v Ntshwaqela and others* [1989] ZASCA 167, 1990 (1) SA 705 (A) [also reported at [1990] 2 All SA 34 (A) – Ed] ("*Ntshwaqela*") at 716B–C.

¹² *Id* at 716B.

The discussion and reasons

[26] I now consider the issues raised starting with the alleged invalid sworn statement. of the document. The basis of the point by the respondents is that the commissioner of oaths has failed to initial each page of the document. I disagree with the submission. The commissioner of oaths is Suzzane Chitty, a Solicitor who signed the affidavit in Edinburgh, Scotland. Section 8 of the Act permits the Minister to appoint a person holding any office outside of the Republic to be appointed as a commissioner of oaths. It has not been suggested by the respondents that the solicitors in Scotland do not fall in that category. The only attack is that each page of the affidavit has not been initialled by the commissioner. In my view, the defence must fail because the section 4 does not speak of initialling each page of the affidavit by the commissioner when commissioning the affidavit.

[27] Turning to the misjoinder of the sole beneficiary to the will of the deceased, being the mother to the plaintiffs, it is improper not to have cited her in the main action because the real dispute is with her and none of the parties cited to sought to be sighted. This failure in my view, constitutes a serious irregularity because as the sole beneficiary of the entire estate, she is entitled to participate in the proceedings challenging the will that benefits her.

[28] Furthermore, after receiving the answering sworn statement and after it was brought to their attention that the trust has not been registered, the plaintiffs withdrew their action against the first, third and fourth respondents in their capacities the trustees. The notice of withdrawal is

silent on withdrawal against those parties in their personal capacities and it is difficult to understand why the silence. The Notice is also silent about withdrawal of the action against the executrix in her personal capacity.

[29] No costs were tendered for withdrawal against the three parties mentioned in the Notice of Withdrawal and the Notice states that they have not incurred any costs. There is no basis why such contention is made. The statement fails to appreciate that the parties were cited in their personal and representative capacities. It follows in my view that their costs ought to have been tendered.

[30] Furthermore, it is not clear what the aim of the plaintiffs is with regards to the parties cited in their personal capacities as the defendants have no personal interest in the litigation. This is so because, firstly, they are not the beneficiaries of the estate. Secondly as regards their citation as the trustees, this is impermissible because the trust has not been formed and registered. The plaintiffs did not in their replying sworn statement, gainsay what the defendants contended regarding the non-registration of the trust. Thirdly, the only party that ought to be cited is the executrix, which is the second defendant but only in her official capacity and not her private capacity or as a trustee.

Conclusion

[29] The amendment sought as it stands, creates not only confusion, but unacceptable to the parties cited. As already indicated, of the cited parties, the only party with the real interest in the executrix, that is the second

defendant but only to the extent that she should be cited as such and in no other capacity. The rest of the parties who remain cited their personal capacities have no interest in the proceedings because the will does not make them the beneficiaries of the estate of the deceased. To cite them in their personal capacities as the plaintiffs have done is impermissible.

[30] Lastly, failure to join the sole beneficiary of the estate constitutes serious irregularity. However, because I have no application to declare the proceedings irregular in terms of Rule 30A, I will not say more on the point.

[31] It follows therefore, under the circumstances that the application for amendment of the pleadings must fail insofar as the parties cited are cited in their personal capacities.

[32] The only amendment allowed should therefore be that the second defendant/respondent should be cited in her representative capacity as the executrix and not in her personal and her capacity as the trustee.

Order

[31] The following order is made:

- a) The citation of the second respondent in her capacity as the executrix is granted;
- b) The citation of all the parties in their personal capacities is refused,

- c) The citation of the second respondent in her capacity as the trustee is refused;
- d) The applicants are ordered to pay the costs of withdrawal of the legal proceeds against the first, third and fourth defendants/respondents on the party and party Scale B.
- e) The applicants are ordered to pay the costs of the application on the party and party Scale B.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 14 April 2025

DATE JUDGMENT HANDED DOWN: 12 June 2025

APPEARANCES

Counsel for the Applicant:	Adv S Van Dyk
Instructed by:	Human and Human Incorporated

Counsel for the 1 st – 7 th Respondents:	Adv Z Hoosen
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