

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: A11/2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHERS JUDGES: NO	
(3) REVISED	☒
08/08/2024	
DATE	SIGNATURE

In the matter between:

Linda Ilene Lourens

Appellant

and

Andrimarie Mathie N.O

1st Respondent

Petronella Susanna Van Jaarsveld N.O
(in substitution of Lynn-Mari Botha N.O)

2nd Respondent

In re:

Andrimarie Mathie N.O

1st Plaintiff/Applicant

Lynn-Marie Botha N.O Jen Lievens NO

2nd Plaintiff/Applicant

Linda Ilene Lourens

1st Defendant/Respondent

The Master of the High Court, Pretoria

2nd Defendant

CORAM: MABESELE, SWANEPOEL JJ AND AMIEN AJ

JUDGMENT

Mabesele J

[1] This is an appeal against the whole of the Judgment and Order of the court *a quo* in which it granted summary Judgment in favour of the respondents. The appeal is with leave of the Supreme Court of Appeal. The respondents had sought an order against the appellant for payment of an amount of R1 000 000.00 (One Million Rand) together with interest thereon, being the money which the appellant paid to herself from the account of the deceased.

[2] It is common cause that the appellant and deceased were married out of community of property with the exclusion of the accrual system. The

deceased died in hospital on 15 June 2021. The appellant withdrew an amount of R900 000.00 from the account of the deceased shortly before his death and again an amount of R100 000.00 shortly after his death.¹

[3] The appellant's argument and opposition to the summary judgment was mainly based on the contention that an oral agreement was reached between herself and the deceased, which authorised her to transfer the funds. The grounds of appeal essentially relate to the existence and the terms of the oral agreement upon which the appellant relies and on which the appellant bases her bona fide defence.

[4] The appeal raises two issues. The first issue relates to an oral agreement, which the appellant alleges she had concluded with the deceased. Should it be found that the agreement was reached, it should then be determined to what extent the agreement was valid. The second issue relates to a bona fide defence that the appellant contends should have been sustained by the court a quo.

[5] The appellant's argument was that she and the deceased discussed on several occasions what would happen if one of them dies. The appellant had been diagnosed with cancer of the colon and the deceased was more advanced in age. During the discussions it was mutually agreed that, should it become evident one day that one of them would die, the other spouse should attend to transfer the funds held in the other spouse's bank account to avoid unnecessary financial hardships until the estate was finalised.

¹ On 15 June 2021 the sums of R500 000.00 and R400 000.00 were withdrawn from the deceased's bank account at 04h03 and 04h05, respectively. On 16 June 2021 the sum of R50 000.00 was withdrawn from the account. On 17 June 2021 the sum of R50 000.00 was withdrawn from the account

Present during the discussion was a mutual friend, Ms Max Van Zyl, who deposed to a confirmatory affidavit. The deceased then provided the appellant with his banking login details. When the appellant received news from the hospital that the deceased was gravely ill, she gave effect to his express wishes and instructions given to her long before the deceased was hospitalised.

[6] The respondents have raised three issues in the appellant's averment that an oral agreement was reached between herself and the deceased. They argue that should these issues not sustain their argument, that an oral agreement should be interpreted to constitute an agreement of donation, which contradicts the Administration of Estates Act.²

[7] The issues raised in respect of the existence of an oral agreement are outlined hereunder.

[8] The first argument by the respondent is the sporadic manner in which funds transfer was effected. They argue that no indication was given about the amount the deceased purportedly wished the appellant to receive in terms of the agreement. First, respondents argue that the sporadic manner in which funds transfer was effected warrants the circumspect consideration of the contention about the oral agreement. They argue that no indication was given about what amount the deceased purportedly wished the appellant to receive in terms of an oral agreement. It is common cause that the sums of R500 000.00 and R400 000.00 were respectively withdrawn from the deceased's bank account at 04h03 and 04h05, and again on 16

² 66 of 1965

June 2021 and 17 June 2021. I am unable to speculate as to why money was withdrawn from the deceased's account in the manner the appellant did. However, based on undisputed facts that a discussion took place between the appellant and the deceased regarding the transfer of money from the other's account in case of death, which discussion took place in the presence of a witness, it appears to me that an oral agreement was reached between the appellant and the deceased. The concern raised about the exact amount, which the deceased had not specified is of no importance.

[9] The second argument is that the agreement entitled the appellant to receive money from the deceased with no indication given by the appellant that a request for interim payments towards maintenance was submitted to the executors of the deceased. In this regard, the respondents relied on the Maintenance of Surviving Spouses Act.³ Section 2 of the Act states the following:

If a marriage is dissolved by death after the commencement of this Act, the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide, therefore from his own means and earnings.

[10] Section 2, as I understand it, refers to a surviving spouse who is in need of reasonable maintenance. Since the appellant had already acquired money from the account of the deceased to take care of herself, there was

³ 27 of 1990

no need for her to submit a request to the executor for interim payment towards maintenance.

[11] The third argument relates to a lack of indication on the part of the appellant that the wishes of the deceased were expostulated in the deceased's last will and testament. This argument is of no importance. I say so because there is no evidence to suggest that the agreement reached between the appellant and the deceased was contrary to the deceased's will.

[12] With regard to the validity of the oral agreement, the respondents contend that the agreement can only be interpreted to constitute an agreement of donation in that the interaction between the appellant and the deceased falls within the definition of a donation, as set out in LAWSA⁴ as follows:

A donation (donation mera) is, in its strict legal sense, an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby the donor without a legal obligation undertakes to give something to the donor with the intention of enriching the donor, and without the donor receiving any consideration in return of the expectation of a future advantage.⁵

[13] The oral agreement that was reached between the appellant and the deceased entailed that "should it become evident one day that one of us

⁴ At para 19

⁵ Emphasis elaborated

would die, the other spouse should attend to transfer the funds held in the other spouse's bank account." It is clear from this agreement that both parties intended for one to benefit from the other's assets. Therefore, logic dictates that the deceased expected to benefit from the agreement in the future. For this reason, the oral agreement in question cannot be interpreted to constitute an agreement of donation.

[14] A further argument raised regarding the validity of the agreement is that the agreement contradicts the Administration of Estates Act.⁶ Section 11 of the Act provides:

(1) Any person who at or immediately after the death of any person has the possession or custody of any property, book or document, which belonged to or was in the possession or custody of such deceased person at the time of his death-

(a) shall, unless the court or the Master otherwise directs, retain the possession or custody of such property, book or document, other than a document being or purporting to be a will, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate: Provided that the provisions of this paragraph shall not prevent the disposal of any such property for the bona fide purpose of providing for

⁶ 66 of 1965

the subsistence of his family or household or the safe custody or preservation of any part of such property;

(b) shall, unless the Court or the Master otherwise directs, retain the possession or custody of such property, book or document, other than a document being or purporting to be a will, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate: Provided that the provisions of this paragraph shall not prevent the disposal of any such property for the bona fide purpose of providing a suitable funeral for the deceased or of providing for the subsistence of his family or household or the safe custody or preservation of any part of such property;

(c) shall, upon written demand by the interim curator, executor or person directed to liquidate and distribute the estate, surrender any such property, book or document in his possession or custody when the demand is made, into the custody or control of such executor, curator or person: Provided that the provisions of this paragraph shall not affect the right of any person to remain in possession of any such property, book or document under any contract.

[15] In light of paragraph (c) above, it seems to me that the oral agreement concluded by the appellant and the deceased insofar as it relates to money retained by the appellant after the death of the deceased appears to be

valid. According to the agreement, the money was intended to address any financial hardships that the appellant may experience after the death of the deceased.

[16] It is trite that summary Judgments can only be granted where the court is satisfied that the plaintiff's case is reasonable. One of the ways in which a defendant may successfully oppose a claim of summary judgment is by satisfying the court by affidavit that she has a bona fide defence.⁷ All that the court enquires into is: (a) whether the defendant has fully disclosed the nature and grounds of her defence and the material facts upon which it is founded; (b) whether on the facts so disclosed, the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied about these factors, the court must not refuse summary Judgment. The defendant is neither expected to formulate her position to the claim with the precision that would be required of a plea, nor does the court examine it by the standard of a pleading.⁸

[17] The judge a quo refused to grant the appellant leave to appeal to defend the action against her on the following grounds:

First, the learned Judge was of the view that the transfer of the sum of R900 000.00 from the deceased's account into the account of the appellant, in two separate transactions, fell outside the agreement.

⁷ See, *Maharaj v Barclays National Bank Limited* 1976(1) SA 418(A)

⁸ *Ibid.*,

Second, the judge said that the agreement was finalised on 12 June 2021 when the deceased was hospitalised and lacked capacity to perform a juristic act.

[18] I pause to mention that the above reasons are not supported by the respondents, correctly so. The judge a quo had acknowledged that an oral agreement was reached between the appellant and the deceased. His concern related to the manner in which the money was withdrawn from the deceased's account. In my view, his concerns have no bearing on the agreement. The agreement was reached before the deceased was hospitalised and there is no evidence that the deceased lacked capacity to conclude the agreement.

[18] The appellant has, undoubtedly, established a bona fide defence which is good in law. Therefore, she is entitled to defend the action against her.

[20] In view of the above, the following order is made:

[20.1] The appeal is upheld with costs on scale B, including costs for leave to appeal to the Supreme Court of Appeal.

[20.2] The order of the court a quo is set aside and replaced with the following:

- (a) The respondent is granted leave to defend the action against her.
- (b) Costs are in the cause.



MM Mabesele
Judge of the High Court of South Africa



J Swanepoel
Judge of the High Court of South Africa



W Amien
Acting Judge of the High Court of South Africa

Date of hearing : 23 July 2024

Date of Judgment : 08 August 2024

On behalf of the appellant : In person

On behalf of the respondent: Adv CL Markram-Jooste

Instructed by : Drake Flemmer & Orsmond Inc