



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

CASE NO: 2019/15061

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

DATE: 31 May 2021

In the matter between:

DAVID ANDBOO ROYEPPEN

ERNEST JOHN ROYEPPEN

ENID CHRISTINE ROYEPPEN

EARL SAMUEL ROYEPPEN

EBRAHIM KALANE

SALAAMA KALANE

and

GLADWYN TREVOR MASHER

MANO MASHER

GLACIER FINANCIAL SOLUTIONS (PTY) LTD

HANNES NICO BEKKER NO

COLETTE MOONSAMY NO

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

Sixth Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed application in terms of which the Applicants claim interdictory relief and the removal of a beneficiary from a Will.

[2] At the outset Counsel for the Applicants and First and Second Respondent were asked whether this matter needed to be referred to oral evidence taking into consideration the differing allegations, and both parties' Counsel answered in the negative.

[3] In respect of the interdictory relief, an Order had been granted by my sister Dippenaar J on 9 May 2019, which Order operated as an interim interdict in respect of prayers 2, 3, 5 and 6¹.

[4] This Court must therefore determine whether the Applicants are entitled to final relief set out in the Notice of Motion and certain ancillary relief.

THE LAW

[5] As this is an Application and the Applicants seek final relief the principles laid out in the Plascon-Evans² case are of importance and in my view must be applied:

In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd, 1957 (4) SA 234 (C) at p 235 E-G, to be:

¹ Caselines: Section 001-187

² Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984 AD 51 @ para 8-9

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

This rule has been referred to several times by this Court (see Burnkloof Caterers Ltd v Horseshoe Caterers Ltd, 1976 (2) SA 930 (A), at p 938 A-B; Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd, 1982 (1) SA 398 (A) at pp 430-1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere, 1982 (3) SA 893 (A), at pp 923 G - 924 D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T), at pp 1163-5; Da Mata v Otto, NO, 1972 (3) SA 585 (A), at p 882 D - H)."

[6] The above exposition deals with the procedural aspects of this case and which this Court must consider when evaluating the papers.

EVALUATION AND ANALYSIS

[7] The deceased in this matter died on 12 April 2019 and is survived by 2 children, one an adult and the other, a minor.

[8] Counsel for the Applicant's main submission, related to categorising the relationship between First Respondent as an agreement for services to be rendered and as such, this agreement should be held to be unconscionable, unreasonable or unfair in terms of Section 48 of the Consumer Protection Act 68 of 2008, as

amended and accordingly, in terms of Section 52 of the said Act set aside such agreement in whole or in part.

[9] In order to succeed on this leg of the argument, the Applicants must prove on the basis of the facts pleaded by them and admitted by the Respondents, they are entitled to the relief claimed in the Notice of Motion.

[10] At this point it needs to be mentioned that the papers are replete with allegations and counter-allegations and in relation to the case sought to be made out by the Applicants, Respondents deny the facts set out by the Applicant as well as the inferences sought to be drawn from such facts.

[11] The Respondents have also denied having exercised undue influence on the deceased to do anything in terms of any documents signed by the deceased.

[12] The denials and counter-allegations contained in the papers brings about a situation wherein I am unconvinced of Applicants' case and applying the **Plascon-Evans** principles, the relief claimed by the Applicants is unsustainable on the papers.

[13] Both Applicants' Counsel and Respondents' Counsel made it clear to the Court that they do not wish this matter to be referred for oral evidence or to trial.

[14] I have taken Counsels' submissions into account regarding their view on oral evidence and am of the view that this case will be dealt with on the papers before

me. This route is taken having expressed to both Counsel why they should seriously consider referring the matter to oral evidence and both having declined my invitation.

[15] The Applicants have enjoined the Court to find that there was an agreement between the deceased and the First Respondent for services and as such the agreement falls under the abovementioned Consumer Protection Act. In my view I am unable to agree with this submission on the papers before me. As a result I find that there was no agreement in accordance with the Consumer Protection Act and hence Applicants' request to set aside 'the agreement' is dismissed.

[16] I have already mentioned above that I am unable to hold, on the papers before me, that the First Respondent unduly influenced the deceased.

[17] Counsel for the Applicants made it clear that an invalidation of the Will was not being sought but that the Applicants were requesting that the First and Second Respondents not be permitted to benefit from the Will nor the Annuity in any way. Having stated above that on the papers I am unable to decide on the facts in favour of the Applicants, taking into consideration, the **Plascon Evans** principles, the relief sought by the Applicants in this regard must be dismissed also.

[18] In the result, I am of the view that the interim Order by my sister Dippenaar J on 6 May 2019³ falls to be discharged and the application in terms of further relief from paragraph 2 to 8 of the Notice of Motion is dismissed.

³ Caselines: 001- 188 to 001-190

COSTS

[19] I was informed by both Counsel that they were acting in this matter *pro bono*.

The normal rule is that costs should follow the result and that the Court has a discretion when making an award for costs. The discretion, however, must be exercised judiciously and it is my view that in this matter any costs incurred by either party should be for their own account.

[20] Counsel for the Applicant submitted strenuously that the First and Second Respondents should pay the costs of the application should the case be decided in their favour.

[21] I have, however, for the reasons mentioned above decided that each party should pay their own costs where same have been incurred.

CONCLUSION

[20] Accordingly the following Order shall issue:

- 1) The interim Order granted by Dippenaar J dated 6 May 2019 is discharged;
- 2) The further relief claimed in the Notice of Motion is hereby dismissed;
- 3) Each party to pay their own costs where same was incurred.



ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement 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 31 May 2020.

Date of hearing: 31 August 2020

Date of judgment: 31 May 2021

Appearances:

Applicants : **Adv. T. Moloi**
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