

REPUBLIC OF SOUTH AFRICA



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

Case Number: 16945/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE 17/7/23	SIGNATURE

In the matter between:

RUDY LOURENCO

First Applicant

TANYA CHAMMAS

Second Applicant

and

TRACEY LOURENCO

First Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Second Respondent

CAPITAL LEGACY (PTY) LTD

Third Respondent

In re:

TRACEY LOURENCO

Applicant

and

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Respondent

ORDER

- [1] The order under this case number handed down on 07 December 2020 by this court is rescinded.
- [2] The respondent is to pay the costs of this rescission application on the scale as between attorney and client.

JUDGMENT

Fisher J

Introduction

- [1] The applicants seek to rescind a declaratory order granted by default under section 2 of the Wills Act.¹
- [2] The order declares a certain document which, on the face of it, comprises instructions and information provided to a company, Legacy Capital (Pty) Ltd (“Legacy”) which specialises in drafting of wills and the administration of estates, to be the last will of Jose Manual Lourenco (“the deceased”).
- [3] The application is brought in terms of rule 42(1)(a) in that it was essentially taken *ex parte* in that only the Master was cited.
- [4] The question to be determined is whether the applicants, on the facts, had an interest in the proceedings such that they should have been joined or at least given notice of the application.
- [5] I turn to the material fact with this question in mind.

Material facts

- [6] The deceased was the father of the applicants. The respondent is the widow of the deceased. I will refer to the first and second applicants collectively as “the

¹ 7 of 1953.

applicants” and independently as Rudi and Tanya. I will refer to the first respondent as “the respondent”.

- [7] Tanya and the respondent have been duly appointed as co-executors of the deceased estate.
- [8] In terms of the document so declared as will of the deceased, the applicants would receive no inheritance. Their contention has been that the deceased estate should devolve according to the laws of intestacy which would allow the applicants to share in the division of the estate.
- [9] It seems that there were initially discussions between the parties to the effect that the estate would devolve as if intestate. There were also attempts to agree on the distribution of assets. The first and final liquidation report was initially drawn by Legacy which was assisting Tanya and the respondent to wind up the estate.
- [10] During this administration of the estate, the relationship between the respondent and the applicants broke down over, *inter alia*, the distribution of certain assets in Portugal and amounts claimed by Rudi from the estate.
- [11] This disagreement appears to have been a catalyst for the bringing by the respondent of the main application which was launched on 13 July 2020. The application was heard on 07 December 2020 and the order granted by default.
- [12] The applicants first gained knowledge of the application on 19 February 2021 by email from a consultant at Legacy, Mr Spamer Durr who had been involved for some time in the administration of the estate.
- [13] The applicants contend that they should have been given notice of the application. They, thus, seek that the order declaring the document to be the will of deceased be set aside in terms of rule 42(1)(a) on the basis that the order was taken in their absence and that they are interested parties.
- [14] It appears that they wish, in due course, to challenge the proceedings on the basis that the document is not a will as well as on the basis that the deceased did not have the mental capacity to make any will at the time of execution due to severe ill health.

[15] It emerged from the founding affidavit in the rescission application that there is another will in existence. This is a joint will which was executed by the deceased and the mother of the applicants at a time when they were married to each other in community of property. This will was allegedly never revoked.

Arguments

[16] Mr Marumoagae, the respondent's attorney, made an able argument based on this joint will. He sought thereby to challenge the *locus standi* of the applicants. The argument raised is that, because the joint will was not revoked within the legally permitted three months after the divorce of the deceased and the children's mother, the joint will arguably remains valid in the event that the document was not declared to be the last will of the deceased. Under such joint will the children are not heirs. It is thus argued that the children had no interest in the declaration of the will and that it was their mother that had the interest.

[17] Adv Posthumus raises that the difficulty with this argument is that it is based on the concession that order was indeed taken in the absence of an interested party in the form of the children's mother.

[18] A further difficulty is that the respondent, in her founding affidavit alleged that there were no other heirs and no other interested person in relation to the declaration sought. On the respondent's own admission this is false.

[19] Adv Posthumus notes that Tanya is also joint executor of the estate. On this basis at, very least, she would have an interest *nomino officio* in proceedings relating to the instrument under which the administration of the estate would take place.

Discussion of arguments with reference to general principles

[20] On a plain reading of the rule, an applicant for rescission need not necessarily be the affected party in whose absence the order or judgment was erroneously sought or granted.

[21] Thus, the fact that it is conceded that the applicants' mother has an interest means that, even on the case of the respondent, there was an interested party in whose absence the order was taken.

[22] In general terms, a judgment is erroneously granted if there existed, at the time of its issue, a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.²

[23] The main application was brought by the respondent on the express basis that there was no party who would or could dispute the relief. This was patently false.

[24] The respondent was aware also that Tanya as her co-executor was of the impression that the administration the estate would take place in accordance with the laws relating to intestacy. The respondent must have been aware that, at least in her official capacity, Tanya had a direct and legal interest in a change in the administration of the estate.

[25] There is, to my mind, no doubt that the applicants' or at very least Tanya qua co-executor had the necessary legal interest in the subject matter of application, which could be prejudicially affected by the order of the court.³

Conclusion

[26] On the facts of this case, there can be no conclusion other than that the order was taken by stealth in the midst of a process which dictated that, at very least, there should be notice to the applicants.

Costs

[27] The respondent's assertion in the main application that there were no other interested parties was false, to her knowledge.

[28] The respondent acted in bad faith in seeking and taking the order. She also acted in breach of her fiduciary responsibilities as executor of the estate.

² *Naidoo v Matlala N.O.* 2012 (1) SA 143 (GNP) 153C-E.

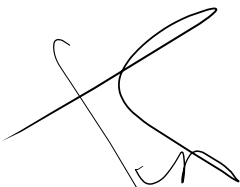
³ *De Villiers v Gjn Trust* [2018] ZASCA 80; 2019 (1) SA 120 (SCA) 128A-129C.

[29] The applicants seek costs on a punitive scale. Not only did the respondent bring the application without notice to the applicants, she also persisted in opposing the application for rescission when there was no sound basis therefor.

Order

[30] I make the following order:

- [1] The order under this case number handed down on 07 December 2020 by this court is rescinded.
- [2] The respondent is to pay the costs of this rescission application on the scale as between attorney and client.



D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard: 2 May 2023

Delivered: 17 July 2023

APPEARANCES:

For the applicants: Adv I L Posthumus

Instructed by: Marto Lafitte & Associates Inc

For the respondent:

Clement Marumoagae (with rights of the appearance at the High Court).