IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 69475/14

17/8/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

17/8/2016 .....
DATE

.....
SIGNATURE

In the matter between:

JACKIE OUTHOFF	FIRST PLAINTIFF
DR KIM OUTHOFF	SECOND PLAINTIFF
and	
MORRIS KAPLAN N.O.	FIRST DEFENDANT
MARIA DEBORAH OUTHOFF	SECOND DEFENDANT
ELAINE-MARI SEYMOUR	THIRD DEFENDANT
BARRY SEYMOUR	FOURTH DEFENDANT
THE MASTER OF THE HIGH COURT GAUTENG, PRETORIA	FIFTH DEFENDANT

JUDGMENT

HUGHES J:

[1] Maria Deborah Outhoff (born Kritzinger), the second defendant, and Cornelis Outhoff (the deceased) were married out of community of property and concluded an ante-nuptial contract on 2 April 1974. Cornelis Outhoff died on 3 August 2013, however prior to his death, he and the second defendant executed a mutual will on 18 February 2010.

[2] This is a matter that involves the interpretation of the mutual will. The first defendant is the executor of the mutual will which was lodged with the fifth defendant who opted to abide by this court's decision. The mutual will made bequests to the plaintiffs, the second plaintiff's minor children and the second to fourth defendant's. The third and fourth defendants are the children of the second defendant.

[3] Adv. Vorster, for the plaintiff's and Adv. Klopper, for the first to fourth defendants, elected not to lead any evidence in this action and closed their respective cases. The parties opted for the determination of the dispute to be on the argument presented by counsel before this court.

[4] The central issue for determination is whether on an interpretation of the mutual will, an indication of massing, can be established of the estate of the deceased and the second defendant. It was pointed out that the pivotal clauses in the mutual will are clause 3 and 4. For easy reference I set out clause 3 and 4 below:

"3. In the event of the death of either party, our entire estate will be bequeathed to the remaining party without reserve.

4. On the death of the surviving party, we hereby give and bequeath the undermentioned (sic) *bequests and legacies to the following people as stated next to their names..."*

[5] Further, Mr Vorster stated it was also vital to have regard to the anti-nuptial contract between the testator and the testatrix as reference is made to the execution of their will or individual wills in paragraph 4 thereof, which reads as follows:

"Fourth. - That each of the said intended Consorts shall be at full liberty to dispose of his or her property and effects, by will codicil or other testamentary disposition, as he or she may think fit."

[6] The plaintiffs contend that they are beneficiaries in terms of clause 4 of the mutual will and that as a consequence of massing the second defendant is obliged to either adiate or repudiate the benefits bequeathed in the mutual will. If the testatrix chooses the former she then accepts the benefits as well as the further bequest set out in the will. The choice of the latter will result in the second defendant not inheriting from the mutual will and as such she will be able to have her own will drafted.

[7] The first to fourth defendants submit that no massing has taken place and as such the second defendant is the sole heir in terms of the mutual will. She is thus entailed to make her own will as she has done after the death of the deceased. She has no duty preserving the assets of the estate of the deceased and need not adiate nor repudiates the benefits bequeathed in terms of the will.

[8] Mr Vorster argued that the age old choice for an heir or legatee to either accept (adiate) or repudiate (renunciate) a benefit bequeathed to him/ or her in a will was the obvious starting point. He pointed out that herein lies the second defendant's obligation to adiate or repudiate the benefit bequeathed in the mutual will.

[9] In determining whether there was a necessity to adiate or repudiate it is trite that the intention of the testator lies within the interpretation of the testamentary document. To this end Mr Vorster argues that when interpreting the will of a testator, even if there is ambiguity and uncertainty in that will, the well-known approach of the conventional 'golden rule', the 'plain meaning rule' and taking into account the surrounding circumstances as regards the will, even in the face of current methodology as set out in *Bothma-Batho Transport v Bothma & Seun Transport 2014 (2) SA 494 (SCA) at paragraphs [10] to [12],* the well-known benevolent approach in interpretation of wills still reigns supreme in these modern times of interpretation. He sought to place reliance on *Corbett, Hofmeyer & Kahn – The Law*

of Succession in South Africa 2nd Edition at page 448, as regards the similarities in the approach to interpretation of statutes, contracts and wills.

[10] Fortified with the above, he argued that on an examination of clause 3 the use of the words 'our entire estate' in this clause are significant having regard to the fact that the testator and testatrix were married out of community of property. The choice of these words is an indication that they chose to describe the bequest of the estate as one to the surviving spouse. This, he concludes, amounts to massing, as the surviving spouse surrenders their right in their separate estates and the mutual will deposes of both the first-dying spouse as well as the surviving spouses estates, after the survivors death. Reference was had to the writings of *Corbett at page 437*.

[11] The effect of massing, so the argument goes, is that the surviving spouse is put to an election to either adiate by accepting the benefit or repudiate by refusing the benefit. In opting to adiate the testatrix loses the freedom to vary or revoke her portion of the mutual will and she is unable to dispose of her share of the massed estate in any manner that is in variance to the terms set out in the mutual will. In opting to repudiate, the testatrix retains her separate estate and she may dispose of it as she wishes, by will or otherwise, but she forfeits her claim to any of the benefits left to her in the mutual will by the first dying spouse.

[12] Lastly, Mr Vorster pointed out that paragraph 4 of the antinuptul contract, as quoted above, illustrated that the testator and the testatrix freedom of testation had not been affected by the marriage regime and as such the second defendant was free to dispose of her property as she saw fit and she did so in the mutual will. In doing so she had exercised her power in such a manner that places her in a position to make an election, in terms of the mutual will, after the deceased's death.

[13] On the other hand, Mr Klopper submitted that the mere fact that the spouses executed a mutual will was not indicative in itself that massing had taken place. He argued that the mutual will was in line with paragraph 4 of the antinuptal contract and it was evident therefrom that massing was not intended, as each spouse was afforded the right to dispose of his or her property or estate as they saw fit. He

pointed out that this was manifested in the penultimate paragraph of the mutual will where it was said that freedom of testation was to be retained until the death of the surviving spouse:

"We reserve to ourselves the power from time to time and at all times hereafter to make all such alterations in or additions to this our Last Will as we shall think fit either by separate act or at the foot hereof...".

[14] Mr Klopper persists that there was no massing and such the second defendant had no obligation to adiate or repudiate. He further argued that from the wording of clause 3 the spouses intended that the will was to be a mutual one bequeathing to the surviving spouse the entire estate without any conditions attached. He added that this was highlighted by the use of the words 'without reserve' in clause 3. He was persistent that clause 4 was in conflict with clause 3. That clause 3 was the dominate clause, as such, clause 4 should be disregarded. The interpretation should thus be that the surviving spouse was entitled to inherit the entire estate without restriction and likewise that spouse was at liberty to dispose of her estate as she saw fit.

[15] Mr Klopper concluded his argument by saying that nowhere in the mutual will is the second defendant, as the surviving spouse, requested to make an election and thus it could not be said that massing occurred. He argued that, if there is ambiguity in the mutual will, as to whether massing had occurred, the proper approach to interpreting the will lies in the principles as is set out in *Bathma supra* and not in the benevolent approach as suggested by the plaintiffs.

DISCUSSION

[16] The principle of interpretation in these modern times has been succinctly set out in *Bathma*. I have taken the liberty to set out the relevant extract below:

> **"Interpretation**
>
> [10] In Natal Joint Municipal Pension Fund v Endumeni Municipality ***[3]*** the current state of our law in regard to the interpretation of documents was summarised as follows:

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. **The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective.** A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. **The 'inevitable point of departure is the language of the provision itself'[1], read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'**

[11] That statement reflected developments in regard to contractual interpretation in Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd; KPMG Chartered Accountants (SA) v Securefin Ltd & another and Ekurhuleni Municipality v Germiston Municipal Retirement Fund***[4]*** I return to it and to those cases only because we had cited to us the well- known and much cited summary of the earlier approach to the interpretation of contracts by Joubert JA in Coopers & Lybrand & others v Bryant,[5] that:

'The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ... ;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. . ;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and

correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[12] **That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents.**[6] Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. **Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise' [7]. Accordingly it is no longer helpful to refer to the earlier approach."**

[My emphasis].

[17] Having established the requirements to interpret a statute, document or contract I find it apt to quote section 37 of the Administration of Estates Act 66 of 1965 (the Act) which illustrate what amounts to a massed estate:

"37 Massed estates

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."

[18] From the above interpretation involves attributing meaning to the words used in a document having regard to the context in the light of the document as a whole and the circumstances attendant upon it coming into existence.

[19] In approaching to interpret the mutual will in question I am alive to that stated in *Corbertt, Second Edition at 436*, the following is stated: "In accordance with the principle, a joint and mutual will of spouses has to be read as two separate wills." The aforesaid together with my reading of section 37 of the Act, I view massing of estates to be a consolidation of spouses' property into one for the disposition of that

massed estate to take place after the death of the surviving spouse conferring on the survivor limited interest in the massed estate after the death of the first spouse.

[20] In the present case the starting point of interpretation is the mutual will its self. I agree with Mr Vorster that the will has two paragraphs that, in my view, reflect the intention of the parties that being clause 3 and 4.

[21] In my view, clause 3 is explicit that on the death of any of the signatories to the will their entire estate is bequeathed to the surviving spouse without reserve. This, in my view, is clearly the dominate clause. Consequently, the surviving spouse obtains the entire joint estate of the parties on the death of the first-dying spouse.

[22] Following on clause 3, clause 4 commences with '*On the death of the surviving party, we hereby give and bequeath the undermentioned (sic) bequests ...to the following people...*', this clause now dictates how the dispositions would be made to family members, including the plaintiff's, on the death of the surviving spouse. These two clauses direct bequest to different parties, clause 3 to the surviving spouses at the death of the first-dying spouse and clause 4 to family members at the death of the surviving spouse. That which, in my view, is notable from clause 4 is the use of the words *'We'* make the bequest on the death of the surviving spouse meaning both spouses make the bequest on the death of the surviving spouse.

[23] *Corbett at 437(supra)* states "Where the joint and mutual will of the spouses disposes not only of the estate of the first-dying spouse but also of the estate of the surviving spouse after the survivor's death, the survivor cannot take the benefits left in the will of the first-dying and refuse to deal with his or her own estate in the manner set out in the will. See *Union Government v Larkan 1916 AD 212 at 224:*

"Where, as here, one spouse with the knowledge and consent of the other, and with the view to the disposition of their estate upon new basis, bequeaths the property of the other as upon such basis, then upon the death of the testator and upon adiation and acceptance of the benefits by the survivor, the latter would be bound by the provisions of the will so disposing of his property."

In the circumstances the surviving spouse cannot seek to accept the inheritance from the first-dying spouse and not comply with the dictates of the will as regards her estate.

[24] Did the signatories to the will intend that massing materialise?
In clause 3 and 4 the words *'our'* and *'we'* are use respectively. On face value, in my view, this is an indicator that massing was intended even if we consider the fact that a joint will should be read as if each of the signatories had made individual wills. The question to be answered would be that if one was to determine whether massing was intended one must establish from the wording of the will that the testatrix disposed of the testators share of the joint estate as well as her own share of the joint estate, either at the time of the death of the testator or the testatrix. See *Theart v Scheibert and Others 2012 (4) All SA 278 (SCA) at para [21]*

[25] In *Theart (supra) at para [20]* reference was made to *Rhode v Stubbs 2005 (5) SA 104 (SCA) at para [16]–[18]* I reiterated same as regards interpretation of a mutual will as translated version of Cloeta JA in *Theart*:

"[16] When two (or more) testators make a testamentary disposition together, grammatical uncertainty frequently arises. The use of the (appropriate) first person plural does not convey unambiguously to a reader of the will whether each testator is expressing his wishes only on his own behalf, or also on behalf of the other testator(s). Our law finds a solution to the problem of interpretation to which this structural lack of clarity gives rise in the rule that mutual or joint wills of spouses married in community of property must in the first instance be read as separate wills. The person analysing such a will proceeds on the hypothesis that he or she is dealing with separate wills until the contrary clearly appears. The reason for this approach is embedded in our common law.

[17] In *Joubert v Ruddock and Others* 1968 (1) SA 95 (E) at 98F-G, Eksteen J quotes a passage from Van Leeuwen's *Censura Forensis* 3.11.6 in which he underlines the importance of the principle that a person ought to remain capable of changing his will until the end of his days, and motivates this proposition by saying (*Schreiner's* translation) ". . . there is nothing to which men are more entitled than that their power of making a last will should be free, and hence the rule; that no one can deprive himself of this power".

[18] The proposition is not correct without qualification. A testator *can* deprive himself of the right to make a will by massing, but if there is any doubt about his intention, the will must be interpreted so as to leave the greatest possible freedom of testation. That gives rise to the subordinate rule of interpretation, the presumption against massing, that applies when the golden rule for the interpretation of wills, ie to give meaning to a testator's words within the framework of a will, fails due to vagueness or ambiguity."

[26] The joint will, as per clause 3, indicates that the testator's entire estate is bequeathed to the testatrix. The words *'Our entire estate will be bequeathed to the*

remaining party without reserve' whilst in clause 4 certain bequests are then made after the death of the surviving spouse to my mind creates some confusion and as such would amount to ambiguity.

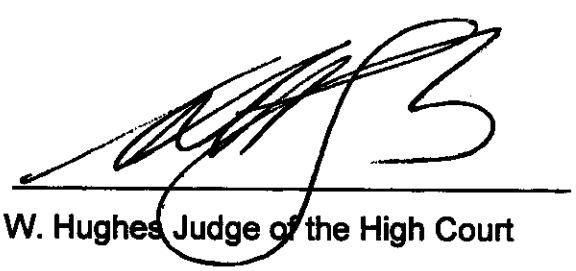
[27] It is not clear to me whether the bequests are derived from the estate of the testators or from the testatrix or from both their estates as a whole. Clause 4 said that *'we hereby give and bequeath the undermentioned (sic) bequests and legacies to the following people...'* it is not evident whether the property bequeathed was that of the testator or testatrix. It is further not evident if the bequest in this clause is derived from the consolidation of the two estates forming the joint estate from which the testatrix could make the disposition sought.

[28] It is trite that if there is doubt or ambiguity of the intention of the testator or testatrix the presumption against massing must be interpreted. See *Rhode para [18].* In the circumstances as it is not clear to me that the testators estate was consolidated with that of the testatrix in order to make out the bequest in clause 4 I have to apply the presumption against massing.

[29] In the circumstances the declaratory relief sought by the plaintiffs falls to be dismissed with costs as the presumption works in favour of the defendants.

[30] Consequently the following order is made:

[30.1] The plaintiff's action is dismissed with costs.



W. Hughes Judge of the High Court

Appearances:

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For the Plaintiffs:	Adv Vorster
Instructed by:	Jacobson Levy Inc.
For the 1st – 4th Respondents:	Adv Klopper
Instructed by:	J.J. Badenhorst Ayyorneys