

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 4334/10

Heard on 6 May 2011

Order granted on 6 May 2011

Cost order granted on 9 May 2011

Reasons granted on 10 May 2011

In the matter between

**Clive Ronald Kelly N.O**

**1<sup>st</sup> Applicant**

**Derrick Collett N.O**

**2<sup>nd</sup> Applicant**

**Louise Anne Kelly N.O**

**3<sup>rd</sup> Applicant**

**Brian Spencer Kelly N.O**

**4<sup>th</sup> Applicant**

and

**Garreth Cullen Kelly**

**1<sup>st</sup> Respondent**

**John William Kelly**

**2<sup>nd</sup> Respondent**

**Richard Cullen Kelly**

**3<sup>rd</sup> Respondent**

**Sean Kelly**

**4<sup>th</sup> Respondent**

**Cullen Kelly**

**5<sup>th</sup> Respondent**

**The Master of the High Court (KZN)**

**6<sup>th</sup> Respondent**

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## JUDGMENT

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DHAYA PILLAY, J

### **Introduction**

1) This is an application for the rectification of the last will of Olga Amy

Cronje, the testatrix. The applicants are trustees of the Olga Amy Cronje Will Trust (the Olga Trust). The third and fourth applicants (Louise and Brian)<sup>1</sup> who are married to each other are also beneficiaries of the Olga Trust. Brian, Garry (first respondent) and John (second respondent) are brothers whose mother, Dianna Constance Kelly, was the sister of the testatrix. The third, fourth and fifth respondents are Garry's major children. Garry and John are cited in the personal capacity and on behalf of their minor children.

### **The Applicants' Case**

- 2) The evidence for the applicants is that the testatrix requested her step-son, Willem Cronje (Cronje), to replace her previous will. Cronje is a chartered accountant and a tax consultant. In terms of the testatrix's first will, her three nephew's namely Brian, Garry and John were to benefit equally. It remained her wish that in her last will they should share equally in the residue of her estate. Cronje liaised between the testatrix, her attorneys and, at her invitation her three nephews, to prepare the last will.
- 3) Garry had indicated that he wished his one-third share to be bequeathed to the Panata Trust. John requested that his one-third share be bequeathed to him personally.
- 4) As for Brian, he had been in financial difficulties at the time and feared that his creditors might lay claim to his inheritance. He instructed Ramsay L'Amy Daly to prepare and forward to Cronje the trust deed of the Bonnie Trust which would receive his share of the inheritance. Besides wishing to avoid his creditors, Brian and Louise have no children. The Bonnie Trust was therefore for the benefit of Brian and Louise in the first instance. In addition, the trustees were empowered to nominate any one or more of the following as beneficiaries: children born of the marriage between Brian and Louise; Garry or any of his lawful issue; John or any of his lawful issue.

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<sup>1</sup> Consistently with the pleadings, I refer to the individuals by their first names for convenience and without intending any disrespect or offence.

- 5) Cronje expressed concerns that the Bonnie Trust, being an *inter-vivos* trust, might not protect Brian's assets adequately. On his advice to Brian, Daly, Philip Pencharz and the testatrix they resolved that Brian's share would be bequeathed to a testamentary trust.
- 6) By these bequests, the last will was to give effect to the testatrix's intention of benefitting all three nephews equally. However, this intention was not captured in the formulation of paragraph 4.2 of the last will. Michael Katz who represented the testatrix at the time did not draft her will; another attorney from his firm, Pencharz, drafted the last will. He is now late. Pencharz simply extracted the beneficiaries nominated in the Bonnie Trust deed and transposed them into the last will, without realising that the beneficiaries under the Bonnie Trust were not identical to the beneficiaries under last will. Even though Brian read the last will and, after it was signed, copied it to the three nephews, no one noticed this error. The testatrix signed the last will believing that the three brothers acquired one-third of the residue in her estate.
- 7) As the last will manifestly fails to give effect to the testatrix's wishes, it falls to be rectified. So submitted Mr Marais SC for the applicants.

### **Respondents' Case**

- 8) The respondents (excluding the Master of the High Court) resisted the application with three points *in limine* and on the merits. The points *in limine* related to the non-joinder of the executor, the non-appointment of curators *ad litem* for Garry's and John's minor children, and the *locus standi* of the applicants. On the merits, they relied on the literal interpretation of paragraph 4.2 of the last will as encapsulating the whole and true intention of the testatrix.
- 9) They alleged that the following facts precipitated the redrawing of the will:
  - a) Brian's financial difficulties.

- b) Brian's loan from the testatrix and his failure to repay it.
- c) Brian lived rent free off the testatrix.

10) As the applicants contended that the reason for revising her will was to update it and ensure that it satisfied all her nephews, the respondents allege that this is a material dispute of fact. These facts also counted against finding that the last will did not reflect the true intention of the testatrix.

11) For the rest, the affidavit by their single witness, John, is unhelpful, either because the allegations are irrelevant or unsubstantiated.

12) Accordingly, they requested that application be dismissed or adjourned for oral evidence.

### **Analysis**

13) The clause in the last will that is the subject of this application is the following:

“4.2. As to  $\frac{1}{3}$  (one-third) thereof upon a testamentary trust created pursuant to this will, the main beneficiaries of which shall be BRIAN SPENCER KELLY and LOUISE ANNE KELLY and other beneficiaries shall be any children born of the marriage between the main beneficiaries, GARETH CULLEN KELLY (or any of his lawful issue) and JOHN WILLIAM KELLY (or any of his lawful issue)...”

14) Clause 8 in the Bonnie Trust from which clause 4.2 was extracted reads as follows:

“8. **BENEFICIARIES**

- (a) The trustees may at any time and from time to time before termination of this trust by deed or deeds revocable or irrevocable, nominate any one or more of the following persons to be a beneficiary or beneficiaries hereunder, namely:

- (i) any children born of the marriage between BRIAN SPENCER KELLY and LOUISE ANNE KELLY
- (ii) GARRETH CULLEN KELLY or any of his lawful issue
- (iii) JOHN WILLIAM KELLY or any of his lawful issue”

15) Clause 4.2 is manifestly an extraction from the Bonnie Trust. The similarity corroborates the applicants. Cronje who interacted personally with the testatrix has no doubt that she did not intend to benefit John, Garry or their children from Brian’s one-third share because she testatrix had made her intention clear to him. She instructed him to liaise with her three nephews direct to establish how they wished to receive their inheritance. In the course of liaising with them Cronje discussed how each wanted to receive his one-third share. All three therefore knew that they each would receive a one-third share exclusively.

16) Cronje was therefore best placed to testify as to the testatrix’s intentions. Daly, an attorney for the Kelly family for over 35 years corroborates Cronje. Daly confirms unequivocally that John, and in particular Garry, knew full well that it was the testatrix’s intention to benefit each nephew equally. They knew the purpose of the Bonnie Trust and later the Olga Trust. They also knew that it was not the intention that they or their children would benefit in any way from Brian’s share whilst Brian and Louise survived.

17) Cronje and Daly, like the first and second applicants (Clive and Derrick), have no personal interest in the last will or in the outcome of this litigation. Clive is also an attorney. Their interest is to ensure as trustees of the Olga Trust that the beneficiaries are properly determined so that they do not discriminate amongst the beneficiaries and risk being cited for acting improperly as trustees.

18) In contrast, the respondents made no dent to the solid case for the applicants. To begin with they conceded that the testatrix wanted her three nephews to be equal beneficiaries. They could not refute the following

facts:

- a) Cronje facilitated the preparation and execution of the last will.
  - b) He did so in collaboration with Brian, Garry, John, Brian's attorney Daly and the testatrix's attorneys, namely Katz and Percharz.
  - c) It was at Brian's behest that the Bonnie Trust was created, appointing Garry as the settlor, and Garry, Paul and their children as beneficiaries.
  - d) Cronje explained the need for the testamentary trust to Brian, Daly, Pencharz and the testatrix.
  - e) Percharz made a mistake in transposing the beneficiaries of the Bonnie Trust as beneficiaries of the last will.
  - f) Brian had a close relationship with the testatrix and was in fact closer to her than Garry and John.
  - g) Brian, Pencharz and Cronje corroborate each other.
- 19) Instead of adducing evidence to counter these undisputed material facts the respondents resorted to unhelpful and unwholesome tactics.
- a) They made several bald allegations including, that it was the express intention of the testatrix to benefit Garry and John's children. They advanced no better evidence as to when and how such intention was expressed outside of paragraph 4.2 of the last will.
  - b) They baldly denied many of the applicants' assertions without establishing genuine disputes of fact. In denying that the testatrix wished to benefit spouses of her nephews, they baldly alleged without proving that she wanted only members of the Sherwell bloodline to benefit from her family's wealth. The absence of any expression of this intention in both wills denudes this assertion of any truth. Cronje and Brian also reject it.
  - c) They made bald contradictory assertions. For instance, they allege that the testatrix intended to disinherit the spouses of her nephews as evidenced by the omission of the spouses from the first will. This assertion is not born out in the last will, in which the testatrix specifically includes Louise and, which the respondents claim, is a true reflection of the testatrix's intention. They fail to note that in 1976, when

the first will was signed, none of them were married. If they genuinely believe that the testatrix intended to exclude Louise then they must also agree that because the last will includes her, it does not reflect what they believe was the testatrix's intention. They must concede that clause 4.2 is a mistake, although for different reasons.

- d) They resorted to hearsay, disparagement and sheer gossip to discredit the applicants and their witnesses. For instance, for no good reason, they mentioned that the testatrix disliked Louise and had referred to her as a "gold digger"; and that one of the testatrix's (unnamed) step-sons had referred to the testatrix as "a whore". None of this was either relevant or reliable.
- e) Most importantly, they omitted to adduce the evidence of Garry to admit or deny pertinent allegations made about his knowledge of the discussions that preceded the execution of the last will, the circumstances in which he came to be the settlor under Brian's Bonnie Trust, the alleged intention of the testatrix to benefit his and John's children, and the loan that he got from the testatrix. His silence on these matters suggests that he has something to hide. His embarrassment in challenging the bequest to Brian when Brian trusted him as settlor and beneficiary under the Bonnie Trust might be something to hide. Furthermore, openly attacking Brian might jeopardise his benefits from the Bonnie or Olga Trusts. Having to explain why his loan from the testatrix does not whittle his own inheritance but the loan to Brian does might also be uncomfortable for him.

20) Regarding the alleged dispute of fact about the reason for revising her will, there is no dispute about Brian's finances, that he did not repay the testatrix the loan or gift the testatrix gave him, or that he lived rent free with her. None of this gainsays Cronje's evidence that the testatrix asked him to replace her will. Given that it is common cause that the testatrix intended to benefit all three nephews equally, the respondents are disingenuous in suggesting otherwise.

21) I am satisfied that the applicants have discharged the onus of proving that clause 4.2 of the last will does not record the intention of the testatrix and falls to be rectified.<sup>2</sup>

22) As for the points *in limine*, the respondents' shot-gun approach has caused them to miss their targets. They abandoned the points *in limine* at the outset or soon after Mr Marais commenced his argument. Although Mr Stewart did not abandon the point about the non-joinder of the executor, he did not persist with it once the executor made it clear that he would abide the decision of the court. However, he did insist that it was a valid objection.

23) In my opinion, all the points *in limine* were not valid. As regards the non-joinder point, it was the applicants as trustees who sought the guidance of the court in managing the Olga Trust responsibly. That the Olga Trust had to receive the bequest from the executor is not disputed. Consequently, it is not the powers of the executor but of the trustees that is affected by this application. Clause 4.2 of the last will implicates the definition of the beneficiaries of the Olga Trust. The non-joinder of the executor was therefore not material.

### **Costs**

24) The applicants seek the costs of the application from those opposing it. All respondents excluding the Master opposed the application. Given the distasteful quality of the opposition, I reserved costs.

25) Furthermore, in challenging the *locus standi* of the trustees it was not clear precisely whether the respondent's objection was to the trustees, their appointment or their powers. Mr Stewart cited about 12 cases to support this objection when all it took to address his concerns, whatever they might have been, was to produce the Letters of Authority issued to the trustees. If the respondents had articulated their objection clearly, the applicants

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<sup>2</sup> *Henriques v Giles* 2010 (6) SA 51 SCA



and the court would have been spared the unnecessary research.

26) Another concern is that the quality of the defence on the merits also does not reflect favourably on the respondents' legal representatives. They are sufficiently experienced to know that bald denials do not create genuine disputes of fact. They must also know that disparagement and hearsay are irrelevant or unreliable. They should have advised the respondents accordingly and omitted such material from the pleadings.

27) Consequently, the appropriate cost order should be against those who developed the respondents' case. From the papers it is not certain to what extent all the respondents participated and sanctioned their case. It is also not clear whether the legal representatives who were responsible for the pleadings were instructed to present the respondents' case in this way. The respondents and their legal representatives know best; they can determine who should bear the applicants' costs and how such costs should be apportioned amongst themselves.

28) Finally, this litigation signals a loss far greater than the loss of a bigger slice of the testatrix's estate for the respondents. Loss of love and mutual respect amongst members of the Kelly family is hardly gratitude to the testatrix for her generosity. The parties should reflect on this before perpetuating their animosity through further litigation.

29) In the circumstances I granted an order in the following terms:

a) Clause 4.2 of the last will is rectified to read as follows:

As to  $\frac{1}{3}$  (one-third) thereof upon a testamentary trust created pursuant to this will, the main beneficiaries of which shall be BRIAN SPENCER KELLY and LOUISE ANNE KELLY **whom failing** and other beneficiaries shall be any children born of the marriage between the main beneficiaries, **whom failing, upon the remaining children of my said late sister, Diana Constance Kelly; ...**"

b) The remaining beneficiaries as described in the last will have no vested or other right to claim or demand any benefits under the testamentary trust created in clause 4.2 of the last will, and that the Applicants (as

trustees in the Olga Trust) have an unfettered discretion to distribute to the beneficiaries the benefits of the Olga Trust.

- c) The respondents shall pay the applicants' costs, jointly and severally, the one paying the others to be absolved.

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Dhaya Pillay, J

### **Appearances**

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