

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 4398/2007
DATE: 28 AUGUST 2008

5 In the matter between:

MICHAEL VOLKWYN Applicant
 and

DIANA WILLIAMS 1st Respondent

THE MASTER OF THE HIGH COURT 2nd Respondent

10 SMITH TABATA BUCHANAN BOYES 3rd Respondent

JUDGMENT

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FOURIE, J

20 The applicant launched this application as a matter of urgency, seeking an order setting aside the last will and testament of the late Isaac Theodore Volkwyn and declaring an earlier will to be the testator's final will. The first and second respondents oppose the relief sought by the applicant and the only issue to be

determined at this stage is the point *in limine* raised by first and second respondents in their Rule 6(5)(d)(iii) notices.

This sub-rule provides that where a respondent intends to raise a question of law in response to an application, it may do so by way of a notice indicating the intention in this regard. It is common cause that these notices were timeously received by applicant by registered mail. The legal issue raised in the notices is one of non-joinder, the first and second respondents contend that in the light of the relief sought by the applicant it is necessary for all the beneficiaries, as well as the co-executor of the estate, who may be affected by the relief, to be joined as parties to the application.

The law in this regard is clear, any person who has a direct and substantial interest in any order which the Court might make in proceedings is a necessary party to the proceedings and must be joined as a party. This principle applies equally to proceedings relating to wills. In proceedings in which an order is claimed declaring a will invalid, as in the instant matter, the executor of the deceased estate, as well as all the beneficiaries named in the will are regarded as necessary parties. No order adverse to their interests should be given by a court without having them formally joined as parties to the proceedings; such joinder has to take

place in accordance with the provisions of Rule 10 read with Rule 6(14). In fact, in Associated Manganese Mines of South Africa Limited v Claassens 1954(3) SA768 at 776 F-G, the Appellate Division held that a Court should refuse to give a decision adverse to the interests of interested beneficiaries without having them joined as parties.

It is clear that the four children of the testator are interested parties. They are Mr Michael Volkwyn, the applicant, Mrs Diana Williams, the first respondent, Mr Roy Volkwyn and Miss Barbara Volkwyn. In addition, the co-executor, Mr M Bey, is also an interested party. Roy and Barbara Volkwyn, as well as the co-executor, have not been joined as parties. This non-joinder, as I have already indicated, precludes the Court from deciding the issue of the validity of the last will and testament of the testator, executed on 30 May 2001.

Mr Michael Volkwyn, the applicant, who appears in person, has urged me to dismiss the issue of law raised by first and second respondents. He says that the serving of the notices in terms of Rule 6(5)(d)(iii), is merely a delaying tactic.

Having regard to the legal principles to which I have already alluded, the serving of the notices by first and second respondents was the correct procedure to follow. The beneficiaries, Roy and Barbara Volkwyn, as well as the co-executor, are necessary parties and ought to have been joined by the applicant. The applicant has argued that both Roy and Barbara Volkwyn have had notice of these proceedings and do not wish to be joined. Barbara Volkwyn was also present in Court today. However, even if Roy and Barbara Volkwyn had given formal notification of their intention not to intervene in these proceedings, it would not suffice. Such notification would not amount to an undertaking to be bound by any judgment which may be given by the Court.

15 In Amalgamated Engineering Union v Minister of Labour 1949(3)
SA 637 (A) it was put as follows, at 662:

20 "Mere non-intervention, or even an intimation of non-intervention, with nothing more to it, after receipt of a notice of legal proceedings short of citation, cannot therefore, to my mind, be treated as if it were a representation, express or tacit,

that the party concerned will submit to and be bound by any judgment that may be given."

It follows that without the formal joinder of Roy and Barbara Volkwyn, as well as Mr Bey, I am precluded from deciding the merits of this application. Respondents, in particular second respondent, have urged me to finally dismiss the application; however, applicant is a layman and I am accordingly not disposed to finally closing the doors of the court for him.

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The respondents do seek a cost order in their favour. They submit, correctly in my view, that applicant was notified of the defect in the application, several months ago, but, this notwithstanding, he has seen fit to pursue the matter without seeking to remedy the defect. The first and second respondents were accordingly put to unnecessary legal costs in opposing the application. I agree that in these circumstances the respondents are entitled to their costs.

20 In the result the following order is made;

1. The APPLICATION IS STAYED PENDING THE JOINDER OF THE FOLLOWING PERSONS AS PARTIES: MR ROY

VOLKWYN; MS BARBARA VOLKWYN AND MR MARTIN

BEY;

2. The APPLICANT IS TO PAY THE COSTS OF
5 OPPOSITION INCURRED BY FIRST AND SECOND
RESPONDENTS, INCLUDING THE COSTS OF TODAY'S
HEARING.

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FOURIE, J