IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no. 22321/2009

JOHANNES JACOBUS BRINK N.O. In his official capacity as joint-executor of the estate late Trudiana McOwen (Estate No 6903/2005)	First Applicant
EUGENE SCHOEMAN N.O. In his official capacity as joint-executor of the estate late Trudiana McOwen (Estate No 6903/2005)	Second Applicant
v	
STEPHANUS REITZ VAN NIEKERK	First Respondent
SANDRI KING	Second Respondent
THE MASTER OF WESTERN CAPE HIGH COURT, CAPE TOWN	Third Respondent

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JUDGMENT HANDED DOWN ON WEDNESDAY, 23 MARCH 2011

CLEAVER J

[1] This is an application in which the court is asked to interpret the terms of the will.

[2] The testatrix, Trudiana McOwen, passed away on 29 May 2005 and left a hand-written document in which she dealt with the distribution of her estate. The first respondent, to whom the testatrix had previously been married, was one of the beneficiaries named in the document and on 10 April 2006 an application by him for an order directing the Master to accept the document left by the testatrix as her will was granted by this court.

[3] The applicants, two attorneys at this court, were thereafter appointed co-executors of the estate of the testatrix. They had difficulty in interpreting the terms of the will and both they

and the first respondent obtained opinions from counsel in regard to the interpretation. When they and the first respondent were unable to agree on an interpretation, they brought the application before me for a declaratory order interpreting the will and for certain other relief. The opinions which the applicants obtained are included in the papers.

[4] Neither the second respondent, Sandri King, a beneficiary in terms of the will, nor the third respondent, the Master of the Western Cape High Court, opposes the application.

[5] The will was written on two pages and takes the following form:

Page One

"André Du Plessis 27 Dec 2003

As I don't have a will drawn up as far as possible you will see to it that Sandri King gets R100,000 rand plus all the contents, clothes, etc that she wants from my house.

Which I would like to be sold and the proceeds to go to Mr S R van Niekerk
Also all my investments which he has been managing. – To disperse according to his discretion"

(Signed Mrs T McOwen) *"P.T.O. →"*

Page Two

"To: Mr S v. Niekerk:

I want Mr A le Roux to receive R100,00"
(A portion is heavily scratched out and signed by T McOwen.)
"Those of my friends in need or in ministry amounts at your discretion.

The rest for Mr v Niekerk's living expenses
but particularly for the church – especially ministries to the poor the needy; ministries that truly reach out and proclaim the gospel where most needed."

(Signed by T. McOwen.)

"Garth McOwen can be given whatever he needs at Mr van Niekerk's discretion as he is a drug addict →"

[6] The applicants seek the following relief:

1. That a declaratory order be issued interpreting the last will and testament of the late Trudiana McOwen.

2. Directing that the bequests to First Respondent of the proceeds of the sale of the testatrix's immovable property, to wit 15 Hatfield Road, Three Anchor Bay, Western Cape ("the immovable property") and of the testatrix's investments were made *sub modo* with reference to the persons and institutions referred to on page 2 of the will.

3. Directing that the proceeds of the sale of the immovable property and of the testatrix's investments must be dispersed by First Respondent, in his *bona fide* discretion, to the persons and institutions referred to on page 2 of the will.

4. Directing that First Respondent personally is only a beneficiary with regard to any balance still available in respect of the proceeds of the sale of the immovable property and/or the testatrix's investments after payment had been made to the other persons and institutions referred to on page 2 of the will.

5. Directing First respondent to furnish to the executors of the testatrix's estate and the Honourable Court, within 14 (fourteen) days after the issuing of this Honourable Court's order in this application, a detailed breakdown of the payments that he intends to make to each person and/or institution from the proceeds of the sale of the immovable property and the testatrix's investments.

6. Directing that, if First respondent refuses and/or neglects to furnish to the executors of the deceased's estate and/or the Honourable Court a detailed breakdown of payments to be

made as referred to in prayer 5 above within the time period allowed, the Applicants are directed and authorised to disperse the proceeds of the sale of the immovable property and the testatrix's investments to the persons and institutions as listed in Annexure 'JC1' to the affidavit of James Maclachlan Louis Campbell filed herewith, on the basis that First respondent receives 50% of the net amount available and that the balance be distributed in equal shares to each of the other persons and/or institutions referred to."

An order for costs is also sought.

[7] The first respondent contends that the bequest of the proceeds of the house was not *sub modo* and that he is entitled to the proceeds without any restriction and has filed a counter -claim to this effect. He does not dispute that the other bequests were made *sub modo*. He disputes the applicants' contentions as to the order of beneficiaries and that the court is entitled to make the orders referred to in prayers 5. and 6. of the notice of motion.

[8] There is no dispute between counsel as to the principles to be applied when interpreting the will. The principles are set out in detail in the heads of argument submitted on behalf of the applicants which I quote hereunder with acknowledgement as to their provenance.

1. The fundamental object (the so-called 'golden rule' of interpretation) in interpreting a will is to ascertain the intention of the testator from the language used, as far as can be gathered from the will itself and from such extrinsic evidence as is admissible. Tebbutt J summarised the approach to be followed as follows:[1]

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[1] *Will NO v The Master and Others* 1991 (1) SA 206 (C) at 209F – I; De Waal et al: LAWSA (Vol 31: Wills and Succession) (First re-issue) at paragraph 376, Corbett et al: The Law of Succession in South Africa (2nd Edition) at p447, *Estate Kemp and Others v McDonald's Trustees* 1915 AD 491 at 500.

"It is, of course, the golden rule in the interpretation of wills that the Court should seek to ascertain the wishes of the testator. They are of paramount importance (see Crookes NO and Another v Watson and Others 1956 (1) SA 277 (A) at 298B). It should in the first place attempt to discover his intention from the language used in the will (see Robertson v Robertson's Executors 1914 AD 503 at 507 and Estate Maree v Redelinghuis 1943 AD 547 at 551; and the authorities collected in Corbett, Hahlo, Hofmeyr and Kahn Law of Succession in South Africa at 467 note 31). In considering the language used, the question is not what any words might mean apart from the testator's intention but what the testator meant by using them (see Leiman v Ostroff and Others 1954 (4) SA 457 (W) at 461E) or as Lord Denning remarked in Re Rowland (deceased); Smith v Russell and Others [1962] 2 All ER 837 (CA) at 844:

'... (I)n point of principle the whole object of construing a will is to find out the testator's intentions, so as to see that this property is disposed of in the way he wished. True it is that you must discover his intention from the words he used; but you must put upon his words the meaning which they bore to him. If his words are capable of more than one meaning, as they often are, then you must put on them the meaning which he intended them to convey, and not the meaning which a philologist would put on them."

2. To achieve this result, several canons (rules) of interpretation of our common law have been followed and developed by our Courts. Some of the most important rules for present purposes are:

2.1 *"The main rule of construction is to ascertain the intention of the testatrix. To this, all other canons of construction must give way".*[2]

2.2 *"In interpreting a will it seems to me that the correct method of approach is, in the first place, to attempt to discover from the language used, the intention of the testators. Having discovered this intention one may then, if necessary, proceed to affix the appropriate legal labels to the dispositions of the testators."*[3]

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2 *Gordon's Bay Estates v Smuts* 1923 AD 160 at 165.
3 *Estate Maree v Redelinghuis* AD 547 at 551.

2.3 *"The question is what the testator meant by using the particular words."*[4]

2.4 *"If there is nothing in the will from which it is apparent that the testator has used the words in which he has expressed himself in other than their 'strict and primary acceptation', and where his words so interpreted are sensible with reference to the intrinsic circumstances, they must be interpreted in their strict and primary sense, and no other." (the so-called "plain meaning" rule)*[5]

2.5 *"If the words used by the testator are clear and unambiguous, and no doubt as to the sense in which the testator intended to use them is raised by any other expressions in the will, or by any other circumstance manifestly appearing from the will itself, there is no room for rules of construction, presumptions or conjectures."*[6]

2.6 *"But the literal construction must be departed from if by necessary implication such departure is necessary to give effect to the true intention of the testator."*[7]

2.7 Unless a contrary intention is apparent from the will, common words must be given their ordinary meaning in the society in which the testator lived at the time when he made his will; technical or scientific words must be construed according to their technical or scientific meaning. Words having both a technical and popular meaning must prima facie be construed according to their popular meaning. Before evidence is given of the secondary (technical) meaning of a word, the court must be satisfied from the will itself or from the

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4 Corbett et al (supra) at 452.
5 *Van Staden NO and Others* 1984 (4) SA 507 (T) at 512E.
6 *Van Staden NO and Others* (supra) at 511C.
7 *Ex Parte Sampson and Others* 1955 (3) SA 228 (E) at 231B; *Cronje v Kruger en 'n Ander NNO* 1985 (2) SA 812 (A) at 832A – C.

circumstances of the case that the word ought not to be construed in its popular or primary signification, but according to its secondary intention.[8]

2.8 Words and phrases must be interpreted in the context of the will as a whole, including its arrangement and the general scheme it exhibits.[9]

2.9 Full effect should be given to the dominant clause which bequeaths the legacy or institutes the heir and its effect should not be modified nor its meaning strained because there are other clauses in the will which apparently require this to be done, unless it is quite clear from these other clauses that the testator so intended.[10]

2.10 In interpreting a will, the Court is entitled to have regard to the material facts and circumstances known to the testator when he made it. The Court puts itself in "the testator's armchair". The admission of "armchair" evidence does not, however, mean that the intention of the testator may be sought by reasoning or conjecture not founded upon the scheme in terms of the will.[11]

2.11 No provision may be implied into a will unless it is a necessary implication.[12]

2.12 Where a will is perfectly clear there is no room for legal presumptions. When, however, the language of the will read as a whole is not clear, the Court may

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8 De Waal et al: LAWSA (supra) at paragraph 377, Corbett et al (supra) at p455,*Campbell v Daly and Others* 1988 (4) SA 714 (T) at 719H – J.

9 De Waal et al: LAWSA (supra) at paragraph 378, *Geft NO and Others v Gelbart and Others* 1984 (4) SA 515 (C) at 521F.

10 De Waal et al: LAWSA (supra) at paragraph 379, *In re Estate van Aardt* 1925 CPD 250 at 255; *Van Staden NO and Others* (supra) at 511D – G.

11 De Waal et al: LAWSA (supra) at paragraph 380, Corbett et al (supra) at p463 and further; Allen *and Another, NNO v Estate Bloch and Others* 1970 (2) SA 376 (C) at 380A – E; *Ex parte Van Zyl* 1974 (4) SA 798 (C) at 801E – 802E.

12 De Waal et al: LAWSA (supra) at paragraph 382, Corbett et al (supra) at p476 and further, *Ex parte Grice and Another NNO: In re Edward Saunders Employees' Trust; Ex parte Grice and Others NNO: In re Estate E G A Saunders Will Trust* 1984 (3) SA 84 (N) at 96E – G.

apply certain legal presumptions when dealing with the interpretation of the will.[13]

2.13 It is presumed that every word is meaningful; that when the same word is used more than once it is always used in the same sense, unless the words are applied to a different subject or the context indicates otherwise; and, conversely, that different words stand for different things.[14]

Counsel for the first respondent also made reference to the presumption in favour of maximum benefit and minimum burden. This presumption includes the presumption in favour of immediate, as against postponed vesting, and a presumption in favour of unconditional bequests.

[9] It is necessary to say something about the background to the making of the will. The testatrix was a well-known actress in South Africa. She was a radio announcer for many years and produced the Good Hope Gospel program for Radio Good Hope. She was a devout Christian and both she and the first respondent were actively involved in church matters and spreading the gospel. She was married three times. During 1980 she was married to Anton le Roux, the beneficiary referred to in the will. Her second marriage was to the first respondent whom she married in 1990. The marriage was not successful because she was divorced from him in 2000. In August 2001 she married Garth McOwen ("McOwen") who is also referred to in the will and to whom she was still married when she died. The will of the testatrix was dated 27 December 2003 and she passed away some 16 months later in May 2005. After her divorce from the first respondent the testatrix maintained a fairly close

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13 De Waal et al: LAWSA (supra) at paragraph 382, Corbett et al (supra) at p506 and further, Tolond *NO v The Master and Others* 1990 (1) SA 801 (D) at 804 and 805.

14 Corbett et al (supra) at p457, *Kleyn v Estate Kleyn* 1915 AD 527 at 534 and 535; *Bell v Swan* 1954 (3) SA 543 (W) at 548G – H.

relationship with him in that he continued to advise her with regard to her financial affairs and her investments. The first respondent admits that for long periods he was not engaged in any formal salaried employment as he has devoted his life to the calling of Christianity over many years, but he says at the same time he also acted as business advisor to a number of persons and institutions connected to Christianity for which he was from time to time paid fees or commissions. In exchange for his devotion to the Gospel, he relied to a large extent on the assistance of friends and family who supported him because of his efforts to promote Christianity. At the time he signed his affidavit he was living in a flat at his father's residence and was financially assisted by his father, family and a family trust. He agrees that the testatrix assisted him financially from time to time.

[10] McOwen filed a claim against the estate in terms of The Maintenance of Surviving Spouses Act 27 of 1990 and it is common cause that his claim was settled after negotiations between the parties. He has no further interest in the proceedings.

[11] As far as interpreting the will is concerned, it is trite that it must be viewed in its totality. As to the manner in which the will was written, I agree with the following comments of Adv W Burger SC, one of the counsel from whom opinions were obtained, namely

"Dit is blykbaar met 'n mate van haas geskryf aangesien dit nie in 'n logiese of sistematiese vorm is nie. Sy het haar gedagtes en wense neergeskryf in die volgorde wat hulle by haar opgekom het"

To this I would add that the testatrix's use of grammar is clumsy.

[12] Page 1 of the will is addressed to Mr André du Plessis, the brother of the testatrix who is told what the testatrix wishes to be done is set out on that page. Page 2 is addressed to

the first respondent who is given instructions as to how he is to deal with the amounts bequeathed to him.

[13] The dispute revolves in large measure around the interpretation to be given to the sentence *"Also all my investments which he has been managing."*.

On behalf of the first respondent it was submitted that the word *"also"* suggests a new thought, that the absence of a full stop after the reference to S R van Niekerk is not a determining factor and that the hyphen relates only to a new sentence. With this as basis, he submitted that the word 'also', which starts with what appears to be a capital A is intended to reflect a separate and additional thought of the testatrix and not, as was contended on behalf of the applicants, to indicate a link between the proceeds of the immovable property and the investments.

[14] To start with, the interpretation advanced on behalf of the first respondent requires a strained and unusual meaning to be given to the word 'also', even if the initial letter 'A' is a capital letter. The ordinary meaning of the word is inter alia:

"In that degree; to that extent; equally.
Wholly so; in this or that very manner.
In like manner, similarly.
Further, in addition, besides, too".[15]

Since a full stop is used in three other places in the will, its absence after 'S R van Niekerk' is not insignificant. In the context of the will, the logical meaning of 'also' is in my view *"In like manner, similarly"* or *"in addition"* and is accordingly used to link the two sentences together. This is also the conclusion reached by both Adv Burger SC and Adv J A Le Roux SC in their opinions, additionally, the use of the hyphen in my view also indicates that the testatrix

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[15] Shorter Oxford English Dictionary (5th Edition) 2002 (Vol 1) at p61.

intended the dispersal to apply to proceeds of the sale of the house and her investments. The fact that 'also' may begin with a capital letter is in my view probably merely idiosyncratic and not grammatically determinative. On the first respondent's interpretation, namely that the word 'also' suggests a new and separate thought, the use of the word would have been superfluous.

[15] I do not consider that the court is entitled to have regard to the respective values of the house and investments at the time that the will was made in order to decide whether or not the interpretation should be that the proceeds of the house should go to the first respondent free of any modus, as the first respondent's counsel would have it. There is one other aspect which appears to have been overlooked by the first respondent and that is the need to have regard to the whole will when interpreting it. If the testatrix had intended the first respondent to have the proceeds of the house outright, there would have been no need for additional provision being made for him to be paid his living expenses out of the proceeds of the investments. Since I have come to the conclusion that the will can be interpreted by an analysis of the language in the document, it is not necessary to consider the application of the maximum benefit principle. In the circumstances I conclude that the interpretation of the relevant portion of the will dealt with thus far is that the proceeds of the house and the investments are bequeathed to the first respondent *sub modo*.

[16] The next issue for determination is the order in which the funds bequeathed to the first respondent are to be disbursed. The concern of the applicants stems from the difference between their interpretation of the relevant portion of the will and the interpretation advanced on behalf of the first respondent. The portion in question is the following:

"Those of my friends <u>in need</u> or in <u>ministry</u> amounts at your discretion.

The rest for Mr v Niekerk's living expenses
but particularly for the church – especially ministries to the poor the needy, ministries that truly reach out and proclaim the gospel where most needed."

In my view the interpretation proposed on behalf of the first respondent makes no sense. It is that the words require the first respondent to disburse funds to identified friends in need or in ministry first, and thereafter to disburse funds both for his own living expenses and for obligations connected to the church, ministries to the poor and needy that proclaim the gospel. I agree with the view expressed by Adv Burger, that there is no conceivable connection between the first respondent's living expenses and the words *"but particularly for the church etc"*. I also agree with his conclusion that the most rational interpretation is that the words *"but particularly for the church"* etc are a continuation of the testatrix's thoughts expressed in the words *"those of my friends in need or in ministry"* and that therefore preference should be given to *"friends in ministry"* and the church, before *"friends in need"*. The words *"the rest for Mr Van Niekerk's living expenses"* indicate clearly that his living expenses are to come under consideration only after funds have been disbursed to 'friends in need' or 'in ministry'.

[17] The relief sought in prayers 5 and 6 of the notice of motion stems from the attitude adopted by the first respondent at a time when the parties were attempting to work out an amicable settlement. The first respondent produced figures which reflected his living expenses to something of the order of R44 000 per month and on the basis of certain actuarial calculations which he had had made, he made a proposal for settlement on the strength of these figures. He also declined an invitation from the applicants to furnish them with a list of those parties whom he considered he should disperse funds to in accordance with the will, taking up the attitude, correctly in my view, that he was not obliged to furnish such a list as the will entitled him in his discretion to select the parties to whom dispersal of

the funds was to be made. As I have already indicated the applicants are not entitled to extract from the first respondent a list of the parties to whom he intends making payments. The will makes it clear that the dispersal of funds is to be effected in his discretion and clearly all dispersals are to be made by him *bona fide*. Although there is no prayer for a determination as to what the first respondent's living expenses will be, the concern which the applicants have as a result of the calculation made by the first respondent is something which I consider can and this should be addressed in the order which I propose to make. I have already indicated that whatever amount the first respondent is to apply to his living expenses is to be paid after payment has been made to *"friends in ministry"* and the church before *"friends in need"*. I consider it not inappropriate to record that any assessment of the first respondent's living expenses must be done on the basis of his living expenses at the time the will was executed. In my view this must have been the testatrix's intention.

[18] On behalf of the applicants, it was submitted that in the event of orders in terms of prayers 5 and 6 not being granted, I should consider directing that the first respondent should be ordered to furnish security for his due performance of the modus. No such application was advanced in the papers and the first respondent has not had an opportunity of dealing with the submission. In any event, I do not consider that on the papers such an order would be justified.

[19] It follows from the aforegoing that the first respondent had not made out a case for the relief which he seeks in his counter-application which, as I have stated, was for an order that the bequests of the proceeds of the house was not *sub modo*.

[20] In the circumstances the following orders will issue:

1) The first respondent's counter-claim is dismissed.

2) In respect of the will of Trudiana McOwen, an order is issued directing that the bequests to the first respondent of the proceeds of the sale of the testatrix's immovable property to wit 15 Hatfield Road, Three Anchor Bay, Western Cape ("the immovable property") and of the testatrix's investments were made *sub modo* with reference to the persons and institutions referred to on page 2 of the will.

3. The first respondent personally is only a beneficiary with regard to any balance still available in respect of the proceeds of the sale of the immovable property and/or the testatrix's investments after payment has been made to the other persons and institutions referred to on page 2 of the will.

4. For the sake of clarity, preference should be given to *"friends in ministry"* and the church, before *"friends in need"* in respect of the persons and institutions referred to on page 2 of the will and the reference to the first respondent's living expenses is a reference to his living expenses at the time of the making of the will.

5. The costs of both the applicants and of the first respondent calculated on an attorney and own client scale are to be paid out of the proceeds of the estate.

R B CLEAVER