Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 5641/2020

Before: The Hon. Mr Justice Binns-Ward

Hearing: 14 October 2021
Judgment: 19 October 2021

In the matter between:

DONALD ANTHONY McHUGH N.O.	First Applicant
RITA MARIE KELLY N.O.	Second Applicant
ARNOLD SCHOLTZ N.O.	Third Applicant
(In their capacities as joint trustees of the McHugh Family Trust IT1516/2001)	
RITA MARIE KELLY N.O.	Fourth Applicant
(In her capacity as executrix of the Estate late John James Anthony McHugh)	

and

PAUL MICHAEL WRIGHT	Respondent

JUDGMENT
(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J:

[1] Donald Anthony McHugh, Rita Marie Kelly and Arnold Scholtz have applied for an order directing Paul Michael Wright ('Wright') to furnish security for their costs in the

proceedings he has instituted in case no. 5641/2020 in which they have been cited as respondents. They all bring the application in their capacities as the joint trustees of McHugh Family Trust ('the family trust') and Rita Kelly does so also in her capacity as the executrix of the deceased estate of the late John James Anthony McHugh ('JJA McHugh'). Wright, who lives in England, opposed the application.

[2] Wright was born out of an extramarital relationship between JJA McHugh and Frances Celine McHugh. He was given up for adoption at the time of his birth and brought up in England by his adoptive parents. JJA McHugh had four other children born of his marriage with Mary Philomena McHugh. The aforementioned Donald McHugh and Rita Kelly are two of the four offspring born of that marriage. They live in Northern Ireland. The late JJA McHugh divorced his wife at the time of Wright's birth and thereafter lived in a so-called common law marriage relationship with the aforementioned Frances McHugh until the latter's death in September 2014. It seems that JJA McHugh's four children born of his civil law marriage were all initially hostile to his partner, Frances McHugh, but, with the exception of Rita Kelly, they eventually came to accept her

[3] Wright's biological parents established contact with him during 2007, when he was in his mid-twenties. Familial relations were built up, and Wright started visiting his biological parents at their home in Northern Ireland. On occasion he also accompanied them on holiday to South Africa, where JJA McHugh had substantial proprietary interests housed in the aforementioned family trust, which is registered with the Master of the High Court at Cape Town. Wright has also enjoyed the use of a holiday house in Hermanus for his own family holidays. It is apparent from the papers that the house was owned by the late JJA McHugh in a company. The joint trustees of the family trust are the aforementioned Donald McHugh, Rita Kelly and Arnold Scholtz (the latter as representative of ASL Trustdienste (Pty) Ltd).

[4] In his founding affidavit in case no. 5641/2020, Wright testified that JJA McHugh had informed him during a conversation in September 2015, when Wright was in Ireland for the anniversary commemoration of his natural mother's death, that he had provided for Wright in his will. Wright was told that he would share equally with his half-siblings in JJA McHugh's South African assets as a co-beneficiary of a testamentary trust. He said that JJA McHugh had warned him that his half-sister Rita Kelly would probably be 'very unhappy' when she discovered that he had been made a beneficiary.

[5] According to Wright, JJA McHugh explained the scheme of his South African will to him and cautioned that Rita Kelly might prevail on her siblings to assist her in excluding him from his inheritance. He advised Wright that he should not succumb to any pressure to resign as trustee of the testamentary trust '*as it would then be extremely difficult for* [Wright] *to prevent* [his half-siblings] *from disinheriting* [him]'. Wright said that JJA McHugh had advised him that if he was pressured to '*exit the trust*' he '*should not do so for less than £1 million*'.

[6] Wright testified that JJA McHugh told him that, in the context of problems he had had with the revenue service in Ireland after a breakup with a former business partner, he (McHugh) had drafted a cession document in terms of which he would purport to cede his loan account in the family trust to his four children to put it out of reach of the tax authority. He had never got around to signing the document, which had been left undated so that it could be used if required. He advised Wright that he believed that Rita Kelly, who attended to the accounting aspects of his businesses, might still have a copy of the uncompleted deed of cession and that he was concerned that she might forge his signature on the document to circumvent the provisions of his will.

[7] According to Wright, JJA McHugh proposed that he should engage a 'signature expert' to investigate any documents that came to light after his death that had the effect of nullifying the provisions of his will. Wright averred that he had asked JJA McHugh whether there was not something he could do to pre-empt any possible dispute concerning Wright's inheritance, but that McHugh responded that he expected that there would be a dispute in the family in any event and that the best he could do was to express 'his wishes of inheritance' in his will.

[8] The late JJA McHugh died on 28 May 2016. Wright travelled from England to be by his father's side. He was at his bedside, together with his four half-siblings, when his father passed away. In terms of his last will and testament disposing of his South African estate, which was executed at Caledon on 29 January 2013, JJA McHugh left his substantial loan account claim against the family trust to a testamentary trust to be established with John-Paul McHugh (a sibling of the aforementioned Donald McHugh and Rita Kelly), Wright, Rita Kelly and Arnold Scholz nominated to be the trustees thereof. According to the terms of clause 2.2.3 of the will (which is not well drafted), '(t)*he beneficiaries* [of the testamentary trust] *shall include the following persons and trusts, namely:*

2.2.3.1. *Frances Celine McHugh;*

2.2.3.2. *The descendants of John James Anthony McHugh born from a legal marriage including adopted children;*

2.2.3.3. *Any trust formed for the benefit of the beneficiaries set out in paragraphs 2.2.3.1 and 2.2.3.2 above.*

2.2.3.4. *...*

2.2.3.5. *...*'

[9] The late JJA McHugh appointed the same persons whom he had nominated to be the trustees of the testamentary trust, including Wright, also to be the co-executors of his South African deceased estate.

[10] It will be apparent that on a literalist construction of clause 2.2.3.2 of the will Wright does not qualify to be a beneficiary of the testamentary trust. He contends, however, that the surrounding circumstances are such as to indicate that it was with reference to him that the clause includes 'adopted children'. The clause does not read entirely sensibly even on a literalist construction and, as I have noted, there are other indications that the testamentary instrument was not well drafted. There is in any event the consideration that s 2D(1)(b) of the Wills Act 7 of 1953 sv '*Interpretation of wills*' provides that in the interpretation of wills, unless the context otherwise indicates, '*the fact that any person was born out of wedlock shall be ignored in determining his relationship to the testator or another person for the purposes of a will*'. Part of the context that a court would have to consider in the current matter is the the testator's nomination of Wright, along with all his other children, as co-executor of his South African estate and co-trustee of the testamentary trust and whether any inference can be drawn therefrom. The proper interpretation of the clause will be one of the two principal issues in the action Wright intends to institute.

[11] Not long after the death of the late JJA McHugh, Wright was requested to renounce his nomination as a co-executor of the South African deceased estate. He was told that this would facilitate the more efficient administration of the estate. On the basis of that information, and after a discussion with his half-sibling, John Paul McHugh, who also renounced his nomination as a co-executor, he acceded to the request. Arnold Scholtz must also have stepped aside because Rita Kelly has ended up being the sole executrix of the

estate, and in that capacity has nominated a local address in Kleinmond as her South African *domicilium citandi et executandi*.

[12] In February 2017, Wright was approached by Guthrie & Theron attorneys to also renounce his appointment as a co-trustee of the testamentary trust. He says he was led to understand that this was because the number of trustees exceeded the maximum permitted in terms of the testamentary directions concerning the establishment of the trust. He refused to do so. He emailed the attorneys on 27 February 2017, stating '*The will states that at all times there should be a minimum of two trustees and a maximum of six trustees. We were currently at four trustees before John Paul McHugh's "informed" resignation. My father placed me as a trustee and I wish to remain a trustee.*'

[13] Wright encountered difficulty in obtaining information from Guthrie & Theron about the progress being made concerning the establishment of the testamentary trust. He eventually became so frustrated that he appointed solicitors to look into the matter. The solicitors wrote to Guthrie & Theron in this regard by email on 20 November 2018. Guthrie & Theron responded on 3 December 2018 and confirmed that the testamentary trust had not been established because the asset with which it was to be invested in terms of the will (i.e. JJA McHugh's aforementioned loan account claim) had been ceded in equal shares to Wright's four half-siblings, including Donald McHugh and Rita Kelly.

[14] Guthrie & Theron forwarded an extract from the notes to the unaudited financial statements of the family trust for the year ended 28 February 2017. The extract reflected that the trust had, as at the end of February 2016, been indebted to JJA McHugh in the amount of R89 772 139. The notes recorded that '*On 25 April 2016, the loan owing to JJA McHugh was ceded, assigned and all the rights, title and interest in and to the amount owing to him was ceded and repayable to him on demand in equal parts to* [his four children born of his marriage to Mary Philomena McHugh]'.

[15] Wright thereafter obtained a copy of the cession documents. These showed that the cession had occurred in two parts. The first deed of cession dated 21 April 2016 was a cession of the JJA McHugh's loan account in the family trust in the amount of R71 688 714 and the second deed of cession dated 25 April 2016 was in respect of all the cedent's right, title and interest in the said loan account.

[16] Mindful of the conversation he had with JJA McHugh in September 2015 concerning the possibility that Rita Kelly might forge a cession of the loan claim against the

family trust, Wright instructed his local attorneys to engage a handwriting expert to investigate the authenticity of JJA McHugh's apparent signatures on the cession documents. The attorneys procured the assistance of Mrs Yvette Palm, who has 25 years' experience as a specialist examiner of 'questioned documents'. According to her forensic report, Ms Palm's specialised training includes, amongst other courses and seminars, three years' theoretical and practical in-service training in the examination of questioned documents with the Questioned Document Unit of the forensic science laboratory of the South African Police Service, attendance at an advanced programme in forensic criminalistics, specifically directed to the examination of question documents, at the University of South Africa, and a course presented by the United States Secret Service Forensic Document Laboratory on counterfeit forensics. She has reportedly testified as an expert witness on numerous occasions in courts in South Africa, Botswana, Zambia and Hong Kong. Ms Palm compared the cedent's signatures on the two aforementioned deeds of cession, dated 21 and 25 April 2016, respectively, with each other and also with the signatures of the late JJA McHugh on his will and on the annexure thereto, which were executed on 29 January 2013.

[17] It is not necessary for present purposes to go into Ms Palm's opinion in any detail. Suffice it to say that she ventured 'conclusively' that the signature on the document dated 25 April 2016 was a tracing of the signature on the document dated 21 April 2016. Ms Palm also opined that the fact that the signature on the cession document dated 21 April 2016 was '*far superior in quality*' to that of the signature on the documents executed in January 2013, when JJA McHugh was younger and presumably in better health, suggested that the signature on the document dated 21 April 2016 '*is not an authentic signature*'. Ms Palm pointed out that '(t)*he non availability of specimen signatures of the signatory for the period 2016 restricts a full examination at this time*'. She stated that she would in all probability 'revise' her findings if such further specimens became available. The context suggests that by 'revise' the witnesss meant 'expand upon'.

[18] Ms Palm worked from the copies of the relevant documents that had been made available to Wright. She also made it clear that her degree of conviction would be assisted if the original documents were made available to her.

[19] On the basis of the evidence summarised in the foregoing paragraphs, Wright obtained an interdict prohibiting the trustees of the family trust from alienating its assets pending the determination of the action he intends to institute for the setting aside of the

cession of the loan account to his half siblings. He has also obtained an order staying the final winding up of the deceased estate until his principal claim for a setting aside of the apparent cessions and recognition as a beneficiary of the testamentary trust has been determined. The interdictory relief was granted *ex parte* in terms of Part A of Wright's notice of motion in case no. 5641/2020.

[20] In terms of Part B of the notice of motion in the principal application, which is somewhat inelegantly worded, Wright is seeking the following relief:

1. *That the Ninth Respondent* [the Master of the High Court, Cape Town] *be ordered to grant the Applicant letters of executorship within 14 days of submitting the Acceptance of Trust as executor with them in the estate of the late JJ McHugh with the reference number 7524/20174 (hereafter "the Estate").*
2. *Leave from this Honourable Court that the Applicant may institute the action alone as co-executor in the Estate.*
3. *In the alternative to prayers 1 and 2 above that the Applicant be granted leave to institute the Action on behalf of the Estate in his representative capacity as a beneficiary of the Estate;*[1]
4. *In the alternative to prayers 1, 2 and 3 above, that the relief in terms of Part A be extended until the finalisation of the action to be instituted by the Applicant in his personal capacity, within 90 days of this Order.*
5. *That the costs of Part A and Part B of this notice of motion be paid by the First to Eight (sic) respondents, jointly and severally, the one paying the others to be absolved.*
6. *Further and/or alternative relief.*

[21] Wright has alleged that this court has jurisdiction in the principal proceedings by virtue of the following features of the case:

1. The deceased estate, which he alleges is the creditor in respect of the loan account in the family trust, is registered with the Master of the High Court in Cape Town;

[1] Relief akin to the so-called '*Beningfield* exception' (after the Privy Council's advice in *Baxter v Beningfield* 8 NLR 81; [1886] UKPC 49) endorsed as part of our law in *Gross and Others v Pentz* 1996 (4) SA 617 (A) at 628.

2. The testamentary trust to be established in terms of the will of the late JJA McHugh falls to be registered with the Master in Cape Town; and

3. The family trust, which is the debtor in respect of the deceased's loan account is registered with the Master in Cape Town and the assets held in it are in this country, with most of them being in this court's territorial jurisdiction.

[22] The supporting affidavit in the application for security of costs was made by the locally based trustee of the family trust, Arnold Scholtz. Its content was anodyne and largely uncontentious. It said little more than that Wright is a *peregrinus* without assets in South Africa and that he had failed to respond to the notice in terms of Uniform Rule 47 that had been served on him. Mr Scholtz argued that as Wright had trouble securing the funds to pay his own expert (a fact disclosed in Wright's founding affidavit in the principal application), it would be unlikely that he would be able to pay any costs awarded to the trustees of the family trust or the executrix of the deceased estate. An affidavit by an attorney from Guthrie & Theron was also filed explaining the history of the administration of the deceased estate of JJA McHugh and offering a motivated opinion that the respondents' costs in the principal application would be 'considerable'. The attorney also expressed concern that it would be difficult for his clients to recover any costs awarded in their favour from Wright.

[23] None of the opposing respondents in the principal application has delivered answering papers yet. Rita Kelly, in her capacity as co-trustee and executrix, delivered a replying affidavit in the security for costs application. Her affidavit pointed out that the expense of conducting the principal proceedings would entail, apart from anything else, the travel expenses of the parties who live abroad. It seems that Ms Kelly had in mind the action proceedings that Wright seeks leave to institute in Part B of the notice of motion in the principal application. She explains that she did not deal with the merits of the issue in dispute in any detail because she was advised that they were not relevant to the application for security. She averred that the relationship between JJA McHugh and Frances McHugh had been 'tumultuous' and described Frances McHugh as an alcoholic. Ms Kelly also stated that relations between Wright and JJA McHugh were strained and, without providing illuminating particularity, referred in that regard to a dispute about a claim by Wright to a pension benefit of the late Frances McHugh.

[24] Ms Kelly averred that the cession document was prepared by an attorney at Guthrie & Theron on the instructions of JJA McHugh, who had given express instructions that Wright should be excluded as a cessionary. She shed no light on the execution of two such documents four days apart. Ms Kelly also stressed that the terms of the will, which refer to the '*descendants of John James Anthony McHugh born from a legal marriage including adopted children*' according to their literal tenor exclude Wright as a beneficiary of the contemplated testamentary trust.

[25] Ms Kelly chose not to deal with the report of Ms Yvette Palm because a copy of it had not been attached to Wright's opposing affidavit in the security application. Ms Kelly would, of course, have been aware of the report by virtue of it having been put in under a confirmatory affidavit by Ms Palm as part of the founding papers in the principal application. It is, clear, however, from what Ms Kelly did say that she denies the implication that the cedent's signature on the cession documents was forged. It would be difficult in any event for Ms Kelly to deal meaningfully with Ms Palm's report without the assistance of an equivalent expert, and I accept that it was not incumbent on the applicants in the security application to engage an expert for the purposes of these interlocutory proceedings. They were reasonably entitled to await the determination of security application before further incurring the costs of opposing the principal application.

[26] The principles by which courts determine applications for security for costs were comprehensively reviewed in *Magida v Minister of Police* 1987 (1) SA 1 (A). It is a matter of discretion, and there is no numerus clausus of factors to which a court may have regard in arriving at a decision it considers to be just in the peculiar circumstances of a given case. It has been held that the discretion is a strict or true one, and accordingly the court's decision is one that may interfered with on appeal only in narrow circumstances; see *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para 20-22.

[27] In *Magida*, Joubert JA identified that an *incola* enjoyed no right under the common law to require a non-domiciled foreigner claimant to provide security for his costs as a matter of course. Quoting from Kersteman,[2] *Hollandsch Rechtsgeleert Woordenboek* sv 'cautie juratoir', the learned judge of appeal noted that '(i)*t was a matter of practice in the Dutch courts that a Judge should hold an inquiry to investigate the merits of the matter*

[2] Franciscus Lievens Kersteman (1728-?93), a Dutch jurist who produced much of his written work whilst serving out a very lengthy prison sentence for swindling a jeweller in the Hague.

fully. The approach of the Judge was not to protect the interests of the incola to the fullest extent. He had a judicial discretion to grant or refuse the furnishing of security ... by having due regard to the peculiar circumstances of the case as well as considerations of equity and fairness to both the incola and the non-domiciled foreigner.'[3] The learned judge's review of the common law writers' treatment of the question led him to conclude that '(t)*he Dutch jurists ... certainly did not consider the dice to be loaded against a non-domiciled foreigner*.' On the contrary, the fundamental considerations were equity and justice. He referred to the following statement in *Saker & Co v Grainge*r 1937 AD 223 at 227 on which the applicants' counsel relied in the current matter, viz. '*The principle underlying this practice* [i.e. ordering *peregrini* to furnish security] *is that in proceedings initiated by a peregrinus the Court is entitled to protect an incola to the fullest extent*', and explained that it '*should be read subject to the qualification that it is only applicable after the court, in the exercise of its judicial discretion* [in accordance with the applicable principles] *had come to the conclusion that the peregrinus should not be absolved from furnishing security for costs*'.[4] Joubert JA emphasised that there was no justification '*for requiring the Court to exercise its discretion in favour of a peregrinus only sparingly*'.[5]

[28] In *Shepstone & Wylie and Others v Geyser N.O.* 1998 (3) SA 1036 (SCA) at 1045G-1046C, Hefer JA disapproved of the idea that applications for the provision of security for costs should be approached with any predisposition towards the grant or refusal of the relief. The learned judge of appeal endorsed the approach articulated by Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a- b as follows: '*The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in defence of the claim*'. It is apparent from the judgment in *Shepstone & Wylie*, which was concerned with the provision of security in terms of s 13 of the Companies Act 61 of 1973, that the appeal court saw no reason to draw a distinction in the applicable principles between an application

[3] At 11I- 12C.

[4] At 14F-G.

[5] At 14F.

under the statutory provision and one brought under the common law in terms of Uniform Rule 47 such as in the current case.

[29] The dictum in *Keary* subsequently also enjoyed the endorsement of the Constitutional Court in *Giddey* supra, in para 30. Also dealing with an application for security in terms of s 13 of the Companies Act, O'Regan J writing for the court in that case said '*The balancing exercise proposed by the Supreme Court of Appeal in Shepstone v Wylie's case ... acknowledges* [the need for the court to bear in mind a claimant's right in terms of s 34 of the Constitution[6]] *(albeit without express reference to the Constitution). On one side of the scale must be weighed the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs. Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiffs action; the attempts the plaintiff has made find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiffs action.*'

[30] The applicants contend that because the family trust is a locally registered trust and the deceased estate is locally administered they fall to be regarded as *incolae*, notwithstanding that Donald McHugh and Rita Kelly reside in Northern Ireland. They say that the deceased estate and the family trust may encounter difficulty recovering its costs from Wright, who is admittedly a *peregrinus* with no assets in this country, if the respondents are successful in opposing the proceedings instituted by him.

[31] I do not consider that it is especially important to characterise the foreign respondents in their representative capacities as *peregrini* or *incolae*. The principles that I have just rehearsed make it clear that that is not a primary consideration. I accept though that the respondents will be put to the trouble of having to have any costs order made in their favour by this court recognised by the courts in England and Wales in order to be able to execute it against Wright's assets. An English solicitor has testified, however, that that should not present any technical difficulty. I am nevertheless mindful that if the situation

[6] Section 34 of the Bill of Rights provides: '*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*'

arises executing against Wright's assets will probably entail the respondents incurring further expense in the foreign jurisdiction to obtain the required recognition of this court's order.

[32] A more fundamental consideration in my view is that it is apparent on the factual evidence that Wright may in any event not have sufficient exigible assets to satisfy an adverse costs order. His only exigible asset appears to be his residential property in England. He claims that it has a market value of approximately £218 000 and is already encumbered to the extent of about £140 000. He earns an income of £2 200 per month, which is modest. He has already had to borrow £10 000 to fund his own costs in the litigation and candidly admits that he will be unable to obtain further loans from financial institutions and will therefore be dependant on his family to provide him with financial support to proceed with the litigation. It is evident that Wright had some difficulty even to get sufficient funds together to pay for the handwriting expert's fee.

[33] In all the circumstances Wright is going to be stretched to afford his own legal costs, let alone also those of the respondents if he is unsuccessful in the litigation. That is a factor weighing in favour of the parties seeking security for their costs, but, as the principles rehearsed above show, it is not, of itself, a decisive one.

[34] It is also a factor that demonstrates that Wright's ability to pursue the litigation could well be frustrated if he were required to put up security for the respondent's costs. That is a consideration that demands careful thought in respect of his right in terms of s 34 of the Constitution. It is authoritatively established, however, that a party's right under s 34 of the Bill of Rights by itself affords no trump card against an order to put up security for costs. As the appeal court noted in *Shepstone & Wylie* supra, *'... the fact that an order of security will put an end to the litigation does not by itself provide sufficient reason for refusing it. It is a possibility inherent in the very concept of a provision like s 13* [of the 1973 Companies Act] *which comes into operation whenever it appears to the Court that the plaintiff or applicant will not be able to pay the defendant or respondents costs in the event of the latter being successful in his defence. If there is no evidence either way, the mere possibility the order will effectively terminate the litigation can plainly not affect the Court's decision. It only becomes a factor once it is established as a probability by the plaintiff or applicant.*

And even if it is established, it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order'.[7]

[35] All of the aforegoing goes to show how sensitive a balancing exercise is required in the fair determination of the current application. It drives me back to the passage from para 30 of the judgment in *Giddey*'s case quoted in paragraph [29] above.

[36] It weighs with me that Wright did not embark on the litigation frivolously. The background circumstances, at least on his version, were such that he had cause to be concerned about the genuineness of the cession of the loan claim. He had a forensic examination of the impugned deeds of cession undertaken at a cost he could not easily afford before he instituted the litigation. The result of that examination by an expert whose evidence has been accepted by the courts in a number of cases to which Wright's counsel drew attention[8] supports the conclusion that his claim, while its success is by no means guaranteed, is certainly not fanciful.

[37] It also weighs with me that the handwriting expert's opinion suggests that there is a cognisable possibility that Wright may have uncovered a grievous fraud. A rightminded court would be reluctant to make an order the practical effect whereof would be to block a proper investigation of the allegation, when it is clear that it has been seriously made. I stress that in making that observation I should not be misread to be in any way pre-empting the determination whether there was a forgery. It is clear that further investigation will occur before the trial in any action concerning the issue and, apart from any contesting expert opinion that the applicants may obtain, the evidence of the attorney whom Ms Kelly says was instructed to draft the cession documents could be decisively adverse to Wright's claim. All I am saying is that Wright has laid a cogent basis for his allegations of fraud to be tried, and a court will, in the interests of upholding the law, be reluctant to deprive a litigant who cogently alleges he is the victim of fraud of a trial of his case.

[38] Another factor that weighs with me is that the litigation is, as argued by Wright's counsel, potentially for the benefit not only of Wright personally, but also of all of others of the late JJA McHugh's descendants as the other beneficiaries of the intended testamentary trust.

---

[7] At 1046G-I.

[8] Including one of my own judgments, in *Yokwana v Yokwana* [2013] ZAWCHC 22 (13 February 2013).

[39] I also do not overlook that Rita Kelly and Donald McHugh find themselves in a conflicted position in the litigation since the allegation concerning their execution of the deeds of cession and acceptance of cession goes against them personally, and therefore gives rise to an issue that creates the potential for a conflict between their personal interest and their interests and duties in their respective representative capacities as trustees of the family trust and, in Rita Kelly's case, executrix of the deceased estate. Uninvolved trustees or executors in their position would ordinarily have abided the decision of the court because the primary issue in contestation does not affect the proprietary interests of the trust and affects the position of the deceased estate only insofar as there is a dispute between individuals who potentially stand to benefit in terms of the will. An objective executor or one acting at arm's length would ordinarily leave it to the contestants whose personal interests are primarily in issue to litigate the dispute and abide the result. The same would go for the trustees in respect of a dispute between individuals as to the ownership of a loan claim against the family trust. (Indeed, although it is peripheral to the question I must decide in this application, I think there might well be merit in the observation en passant by Mr *Brink*, who appeared for Wright, that the trustees should be earnestly considering whether they should not be applying for a so-called *Beddoe* order in the current litigation.[9])

[40] The import of the considerations identified in the preceding paragraph is that there is good reason to regard the litigation as being essentially between *peregrini* on both sides. It just happens that it is the interest in respect of which they are litigating that is sited in this country. It is debatable whether the family trust and the deceased estate, although their representatives are necessary parties in the principal case, should be playing an active part in the litigation. And even if they choose to, it is very possible that if the litigation were decided in Wright's favour certain of the trustees and the executrix, rather than the trust or the deceased estate, would be ordered to bear the costs out of their own pockets.

[41] Weighing all the aforegoing considerations in the balance I have decided that in the peculiar circumstances of the case the scales tip against ordering Wright to provide security for the applicants' costs. The application will therefore be refused.

[42] As to costs, I consider that it would be fair to both sides in the circumstances to direct that the costs of the application for security stand over for determination in the

[9] After the case of *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA), as to which see the discussion in *Stander and Others v Schwulst and Others* 2008 (1) SA 81 (C) from para 48.

principal case. Although the applicants have been unsuccessful, I do think that it was unreasonable of them to have applied for security. The incidence of the liability for the costs should follow the determination whether there was a forgery as alleged by Wright, and if there was, who was responsible for it. If the forgery is established the court seized of the principal case would be likely to hold that the persons who were party to the forgery should be personally responsible for Wright's costs, as well as any costs incurred by the representatives of the family trust and the deceased estate. On the other hand, if Wright loses in the principal case, it might well be just that the costs of this application should follow the result. The decision is therefore best left until the end of the day.

[43] An order is made in the following terms:

1. The application for security for costs is refused.
2. Costs shall stand over for determination with the principal case.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicants' counsel:	**G.C. Le Roux**
Applicant's attorneys:	**Guthrie & Theron Attorneys** **Kleinmond**
	MGH Attorneys **Cape Town**
Respondent's attorneys:	**Adam Brink**
Respondent's attorneys:	**Van Wyk Van Heerden Attorneys** **Paarl**
	Heyns and Partners **Cape Town**