IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 5296 / 2020

In the matter between:-

JOAKIM PEKKA WALTER VON DITMAR	First Applicant
ANNIKKI VON DITMAR	Second Applicant
MARTINA VON DITMAR	Third Applicant

and

KAREN LOTTER N O (*In her representative capacity as nominee of Sanlam Trust (Pty) Ltd, the executors of Estate Late Jan Hendrik Adolphe Zipes - Estate No. 018934/2019)*	First Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Second Respondent

ROUEN HEIBERG Third Respondent

YUSUF MARKS Fourth Respondent

CRAIG BROWN Fifth Respondent

Coram: Wille, J

Heard: 24th February 2021

Delivered: 5th of March 2021

JUDGMENT

WILLE, J:

Introduction

[1] This is an opposed application for security for costs at the instance of the third respondent. The third respondent seeks security for costs in the sum of R500 000,00. This security is to be posted by the applicants by payment into the third respondent's attorneys' trust account. In the alternative, an order is sought that the amount and the form of the security be determined by the registrar of the court. The parties shall be referred to as cited in the main application.

[2] The applicants have launched an application[1] to have the last two wills[2] of their late uncle declared to be invalid and set aside.[3] The applicants all reside overseas. The deceased resided in South Africa and his estate is accordingly located in South Africa. Neither the first respondent[4], nor the fourth respondent[5], oppose the relief sought in the main application. Furthermore, the applicants seek an order that the deceased's will dated the 14th of December 2011, be revived.

[3] The applicants have also cited the three beneficiaries connected with the disputed wills[6], all of whom also reside in South Africa. The main application is opposed by the third respondent. It is so that the applicants are foreign litigants.[7] The third respondent is a local litigant.[8] The applicants take the view that the third respondent is seeking to gain an unfair advantage in his quest for security for costs and that his application is not bona fide.

Factual Matrix

[4] The third respondent was previously a financial advisor employed by Sanlam[9] and whilst in that capacity, he provided financial assistance to the deceased from time to time. To this end, the third respondent assisted the deceased in the drafting of the disputed wills. The third respondent is also recorded as being the intermediary in connection with the wills.

[5] The deceased executed the disputed wills during 2017. In terms of the disputed wills

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1 The main application
2 Dated the 27th of January 2017 and the 2nd of June 2017
3 The disputed wills.
4 The executrix
5 The Master of the High Court
6 None of whom are family members
7 The applicants are 'peregrini' litigants
8 The third respondent is an 'in cola' litigant
9 The executrix is a nominee of Sanlam Trust (Pty) Ltd in her representative capacity

the deceased left (80%) of his shareholding in and to Chester Surrey Investments (Pty) Limited to the third respondent. This represents a value of more than R8,7 million.

[6] Curiously, the third respondent maintains that he furnished Sanlam with information for the drafting and content of the disputed wills, but in the same breath, he contends that there is nothing untoward about his actions in this connection. He attempts to justify his conduct by asserting that he was the deceased's financial adviser. This, despite the inclusion of a provision in the disputed wills, that benefits the third respondent in an amount of approximately R8,7 million.

[7] Besides this, during this time the third respondent brought an application for an appointment of a curator[10] to the deceased. In that application the third respondent alleges that it became evident that the deceased's physical and cognitive abilities were rapidly deteriorating and his dependence on the third respondent had accordingly become vastly increased.[11]

The Applicants' Case

[8] The applicants contend for the position that they have put up compelling evidence to the effect that the the deceased was significantly cognitively impaired. This, prior to 2017. They rely, inter alia, on evidence from the applicants themselves, friends of the deceased and no less than three medical practitioners. Of equal importance, is their reliance on certain

[10] For the appointment of a *curator bonis* to the deceased
[11] Towards the latter part of 2017

correspondence emanating from the third respondent himself. .

[9] Their case is that on a conspectus of the evidence, it overwhelmingly suggests that the deceased was suffering from dementia as he had been diagnosed with dementia in 2014. Accordingly he was unable to conduct his own affairs. The proposition is that the applicants have established solid and good prospects of success in the main application.

The Third Respondent's Case

[10] The third respondent raises a shield in the form of a negative avowal. In support of this, the third respondent relies on the evidence of a neurosurgeon to the effect that it cannot be stated definitively that the deceased did not have the mental capacity to complete the disputed wills during 2017. This report was compiled by the said neurosurgeon without any prior examination of the deceased,. The third respondent also attempts to rely on the evidence of two unqualified persons in this connection. By the same token, this evidence is unappealing and in any event appears to signal that at least by August 2017, the deterioration in the deceased's mental condition was somewhat marked.

Discussion

[11] It is now part of our accepted and settled law that as a matter of right, the third respondent in circumstances akin to these, has no claim for security from the applicants. The

legal position is that the appropriate test involves a large measure of judicial discretion.[12] It is so that each case must be decided on its own peculiar facts having regard to the principles of equity and fairness. Further, when exercising this judicial discretion, thereby invoking the principles of equity and fairness, there are certain constitutional imperatives that find application.

[12] The starting point of the constitutional inquiry is section 34[13], which provides that disputes that can be resolved by the application of law, should be decided in a fair and public hearing before a court. This constitutional requirement is clearly weighted in favour of the applicants in this case. In *Giddy*[14], the court was concerned with section 13 of our now repealed previous company legislation.[15] In this context, the court set out the inquiry as follows:[16]

> *'In my view there can be no doubt that in exercising its discretion in terms of s 13, a court must bear in mind the provisions of s 34 and weigh them in the light of other factors laid before it. The balancing exercise proposed by the Supreme Court of Appeal in Shepstone & Wylie's case (adopted from the English case Kearny Developments Ltd v Tarmac Construction Ltd and Another) acknowledges this (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*

[12] Barker v Bishops Diocesan College and others *2019 (4) SA 1 (WCC) at [26]*
[13] The Constitution of the Republic of South Africa
[14] Giddey NO v J C Barnard and Partners *2007 (5) SA 525 (CC)*
[15] The Companies Act No 61 of 1973
[16] Giddey NO v J C Barnard and Partners *2007 (5) SA 525 (CC) at para [30]*

must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs'

[13] The judicial discretion that I must exercise is a discretion in the narrow sense.[17] This means a judicial evaluation of the facts and circumstances before me in this specific case. The third respondent seeks an order that he be awarded security for costs in an amount of R500 000,00 by payment into the third respondent's attorneys' trust account, alternatively, that the amount and form of the security be determined by the registrar of the court. This on the basis that the applicants are *peregrini* and own no assets in South Africa.[18]

[14] It is not disputed that the applicants fall to inherit the residue in and to the deceased estate. The estate conservatively has a net worth of R25 million. Whilst the estate assets are valued at R33 million, there are liabilities in the form of estate duty, the legal costs of curatorship and the costs of the administration of the estate. The applicants are entitled together to total vested claims in the sum of R13,4 million. Furthermore, this excludes the value of the shares to which the third respondent asserts his entitlement.

[15] The applicants accordingly collectively stand to potentially receive an amount of approximately R13,4 million from the estate by way of inheritance. This, even in the event that the third respondent is successful in the main application. This by far exceeds any possible award of costs in the main application.

[16] The applicant argues that no order for security for costs should be granted for the

[17] A 'strict' discretion
[18] Further, if they do own assets, they may be readily liquidated and the proceeds removed from the country

following reasons: that on the third respondent's own version he used his position as financial advisor to the deceased so as to include a significant benefit for himself: that this falls to be viewed with unease: that on the third respondent's own version, a mere few months after executing the disputed wills, the deceased was significantly cognitively impaired and that the applicants have established sufficient persuasive evidence to prove that the deceased was not of sound mind when executing the disputed wills in 2017.

[17] In the alternative, the applicants have offered[19] to have a court order put in place directing that they not be entitled to take their aliquot share in and to the estate, until such time as any costs award, as the third respondent might obtain against them, has been extinguished. The effect of this offer, is to provide the third respondent with the security that any costs awarded to him will be paid. I am of the view, that by adopting this stance, the applicants have managed to establish the equality threshold required between litigants in accordance with the decided authorities on this issue.

[18] The response to this offer by the third respondent bears scrutiny. The first respondent has produced a draft estate account[20], which confirms the value of the estate. This exhibits that there is no risk on this score, to the third respondent. The suggestion that there may be unknown creditors who have significant claims which would neutralise the R25 million net value in the estate is simply far-fetched.

[19] I say this because the third respondent was the deceased's financial advisor and the

[19] The 'offer' - (This offer was essentially in the same terms as the order granted in this judgment)
[20] Liquidation and Distribution Account

deceased was entirely reliant on the third respondent. Besides, herein lies the rub! The third respondent also launched an application for the deceased's curatorship. The ostensible fears that there may be creditors waiting in the wings, is simply not sustainable.

[20] The offer at the instance of the applicants, also features in it an element directing that any costs awarded in the third respondent's favour, be paid by the executrix from the residue of the estate due to the applicants, as a primary obligation. This in the form of a ranking in preference. Furthermore, in a belt and braces approach, the applicants propose that should the estate residue appear to be insufficient to meet any costs award in favour of the third respondent, then in that event, the third respondent shall be entitled to revisit his security application.

Costs

[21] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[21] The last thing that our already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[22]

[22] It is so that when awarding costs, a court has a discretion, which it must exercise after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct

[21] Union Government v Gass *1959 4 SA 401 (A) 413*
[22] Socratous v Grindstone Investments *(149/10) [2011] ZASCA 8 (10 March 2011) at [16]*

of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.

[23] No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances.[23] Costs follow the event in that the successful party should be awarded costs.[24] This rule should be departed from only where good grounds for doing so exist.[25]

[24] Regrettably, the disputed wills of the deceased did not receive any mention in the curatorship application at the instance of the third respondent. The third respondent's rejection of the reasonable and practical offer by the applicants, is also unfortunate. A successful litigant falls to be indemnified for the expense put through in unjustly having to defend litigation. The applicants submit that the current application has no merit and amounts to an abuse of the court process.[26] This, submit the applicants, calls for a punitive cost order. On this I agree, albeit to a limited extent.

[25] I have formed this view for, inter alia, the following reasons: that by the time the deceased executed his disputed wills he was (87) years old: that the third respondent was the deceased's financial adviser while he was an employee with Sanlam: that the third respondent assisted the deceased in the drafting of the disputed wills: that in the deceased's previous wills the vast majority of his estate was left to the applicants and nothing was left to the third respondent: that notably, a small bequest was made to a friend who had already

[23] *Fripp v Gibbon & Co* 1913 AD 354 at 364
[24] *Union Government v Gass* 1959 4 SA 401 (A) 413
[25] *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 3 SA 692 (C)
[26] Particularly in view of the offer

passed away during August 2016 and that the deceased was first diagnosed with dementia during 2014.

[26] Of equal importance is: that prior to the execution of the disputed wills, the third respondent openly discussed the deceased's then last will with the applicants and confirmed that they were the major beneficiaries: that having previously openly discussed the deceased's will with the applicants, after the execution of the disputed wills, the third respondent adopts a convenient bulwark to the effect that he is no longer sanctioned to discuss these issues with the applicants.

[27] This is exacerbated by the fact that when the third respondent launched an application for the appointment of a curator to the deceased, he failed to disclose the fact that he assisted in providing certain information in connection with the disputed wills. These are the very wills in which the deceased left the bulk of his estate to the third respondent.

[28] To an extent, the respondents own version euthanizes the suggestion that the deceased may have, in the last years of his life, racked up such large debts as to negate any equity in his estate. In short, the third respondent's rejection of the offer was unjustified.

[29] In all the circumstances of the matter, I hold the view that a punitive costs order in this matter is warranted for some of the reasons set out in my judgment. I am not persuaded that any costs order should now be granted for the costs incurred by the third respondent until he received the reasonable and practical offer from the applicants legal representatives.

[30] That having been said, it must have dawned on the third respondent shortly after the filing of the applicants' offer, that the arguments that the third respondent had propounded in support of his security application were doomed to failure. It is for this precise reason that a portion of the costs awarded in this matter will be on the scale as between attorney and client.

Order

[31] In the result, the following order is granted:

1. That the applicants shall not be entitled to receive any benefit from the estate of the late *Jan Hendrik Adolphe Zipes* (Estate Number 018934/2019), until such time as any and all costs award(s), (if any), granted in favour of the third respondent in the course of the main application, as taxed or agreed, have been paid on the applicants' behalf by the executrix, being the first respondent herein.

2. That the first respondent is directed not to distribute any benefit from the said estate to the applicants until such time as any and all costs award(s), (if any), granted in favour of the third respondent in the course of the main application, as taxed or agreed, have been paid on the applicants' behalf and the first respondent is directed to pay any such costs award as a first charge against any benefit due to the applicants.

3. That the first respondent shall proceed to advertise the estate in order to ascertain if any other creditors seek to lodge claims against the estate but shall otherwise desist from finally winding up the estate pending the outcome of the main application.

4. That in the event of it appearing to the third respondent that creditors have lodged claims against the estate that will have the effect of diminishing the net value of the estate to such a degree that the share of the residue due to the applicants will be insufficient to cover any costs award that may be granted in his favour, the third respondent shall be entitled to set this application down afresh, duly supplemented as far as may be necessary.

5. That the third respondent shall be liable for the costs of this application for security for costs, on the scale as between attorney and client, as from the 1st of September 2020, including the costs of and incidental to the opposed hearing on the 24th of February 2021.

6. That the costs of and incidental to the application for security for costs, on a scale as between party and party, from the inception of the application, until the last day of August 2020, shall stand over for determination in the main application.

7. That the application for security for costs is postponed *sine die*.

8. That a copy of this order shall be served on the first respondent forthwith.

E. D. WILLE

(Judge of the High Court)