IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 16790/2006
DATE: 07/02/2007

UNREPORTABLE

In the matter between:

W. J. PRETORIUS	Applicant
And	
G H J COETZEE N. O.	First Respondent
LCSWART	Second Respondent
A F SWART	Third Respondent
E SCOTT	Fourth Respondent
A BODENSTEIN	Fifth Respondent
THE MASTER OF THE HIGH COURT	Sixth Respondent
ABSA TRUST LIMITED	Seventh Respondent

JUDGEMENT

LEDWABA J

[1] On the 21st September 2006, I made an order that

applicant's application is dismissed with costs. Due to serious

time constraints and heavy work load I did not furnish reasons for the order. My reasons appear from what follows.

[2] This is an opposed application in terms whereof applicant has applied for a rectification of a joint will signed by him and his deceased wife. The Respondent made an application to strike out annexure 'WJP 10'. However having considered the application, I am of the view that, annexure 'WJP' 10 was an important document and in exercising my discretion, I dismissed the application to strike it out.

[3] The effect of the relief sought by the applicant is that if the application is successful, applicant would inherit the deceased's half share of unit 6 of the scheme known as Peacehaven, a flat situated at Scottburgh (the flat). The joint will as it is entitles the deceased's children, first, second and third respondents, to inherit the deceased's half share of the flat.

[4] The facts which are common cause herein are the following:

4.1 On 4th May 1968 applicant and his first deceased wife,

who died on 15th January 1995, made a joint will.

Their estate was by the seventh administered

respondent

.

4.2 Applicant and the deceased (the second deceased's

wife), were married to each other in community of

property on 18th July 1995.

4.3 On 4th September 1996 the flat was registered in the

deceased's name.

4.4 In November 2001 the applicant and deceased

instructed the seventh respondent to prepare a joint

will. The joint will was drawn by one, Mr Mulder.

Applicant and deceased signed same on 16 November

2001.

[5] The issue to be decided is whether the joint will correctly reflects the intention of the testator and the testatrix. Clause

2 of the will being the clause which the applicant wants to be rectified reads as follows:

"TESTA TRISE EERSTERWENDE

Indien ek, die ***TESTATRISE*** *die eersterwende is, bemaak ek my boedel aan my kinders gebore uit 'n vorige huiwelik of, indien 'n kind my nie oor/eef nie, dan aan sy of haar afstammelinge by wyse van plaasvervulling".*

[6] Applicant wants the clause to be changed or rectified and it should read as follows:

"TESTARISE EERSTERWENDE

Indien ek, die TESTARISE, die eerstewende is, bemaak ek my boedel soos volg:

2.1 *My hefte van die onroerende eiendom bekend as*

Eenheid Nr 6 *soos getoon en volledig beskryf in*

Deeltitelplan Nr SS 55/88 *in die skema bekend as*

Peacehaven ten aansien van die land en gebou of geboue gelee te Scottburgh, Scottburgh/Umzinto

Noord Plaaslike Oorgangsraad area en in die Suid-Natal
Gesamentlike Raad area van welke eenheid die

vloerarea, oreenkomstig die gemelde deeltitelplan 61
(een en sestig) vierkante meter groot is en 77

onverdeelde aandeel in die gemeenskaplike eiendom in
die skema toegewys aan die gemelde eenheid

ooreenkomstig die deelnemenskwota geendosseer op
die genoemde deeltitelplan, gehou kragtens Akte van
Oordrag Nr ST2396/92, geleë te No 6 *Peacehaven*

Vakansiewoonstelle, hoek van Marine Terrace and

Cordinerstrate, Scottburgh, Kwazulu-Natal aan die

TESTATEUR.

2.2 *Die volle balans van die boedel aan my kinders gebore*

uit 77 *vorige huwelik of, indien* 77 *kind my nie oorleef*
nie, dan aan sy of haar afstammelinge by wyse van

plaasvervulling.
”

[7] Applicant submits that he and the testatrix (deceased)

bequeathed to the Applicant half share of that flat, be

further supported by the contents of clause 8 of the joint will which reads as follows:

“NOT A

Ons plaas op record dat die bates in die boedel, uitgesluit die bankrekening in naam van die testatrisel afkomstig is uit die gemeenskaplike boedel van die testateur en sy vooroorlede gade en is die erfenis uit gemelde boedel vrygestel van die huweliksgoedere bedeling ingevolge die bepalings van die testateur se vooroorlede gade se testament"

[8] It was argued on applicant's behalf that there is no other reasonable inference that can be drawn from the insertion of clause 8, other than that save for, the deceased bank account, that all the estate was to be bequeathed to the applicant.

[9] It was further argued that the wording of clause 1.2 viz.:

“Dit is my wens dat my kinders die tesatriese sal toelaat om die vakansie woonstel te Scottburg te gebruik vir 14 *dae per jaar vir vakansieskoolkinders”,* confirms the submission made

by the applicant concerning the intention of the parties,

otherwise such a clause would not have been inserted.

[10] Applicant further made reference to the contents of

annex'ure "WJP 10" being the application form wherein the

contribution of each party was indicated.

[11] First and second respondents opposed the application and

submitted that they are entitled, in terms of the joint will, to

inherit the half share of the deceased to the flat.

[12] It is trite law that a party seeking rectification should prove,

on a balance of probabilities, that the alleged discrepancy

between intention and expression was due to a mistake.

What the testator intended should form part of the will.

[13] As a point of departure, my understanding of the matter, is

that the applicant seeks a rectification because the wording

and general meaning of the joint will does not entitle him to

inherit the half share of the deceased's to the flat.

[14] It should also be kept in mind that the applicant and the deceased were married in community of property and it does not make much difference as to who paid for the flat. Clause 8 is factually incorrect because the first will between the applicant and his first deceased wife did not state that applicant's inheritance is excluded from the joint estate should applicant marry in community of property.

[15] It is trite that the contents of the will are *prima facie* evidence of what the applicant and the deceased approved. An application to rectify the contents of the will should be allowed only, after carefully scrutinising the evidence, the court is satisfied that indeed there was a mistake of what the testator clearly intended to form part of the will.

[16] In **Bardopoulos & Macrides vs. Miltiadous 1947 (4) SA 860 (W) at 863-864,** the court held that: "*A party seeking to obtain rectification must show the facts entitling him to obtain that relief in the clearest and most satisfactory manner... where the common intention is to be shown not by*

any writing but by verbal evidence, the Courts may have

great difficulty in determining whether there was a mistake
in the written contract.."

[17] In further elucidation of this principle, Christie in his book,

'The Law of Contract in South Africa', 5th edition, at

page 330:

"... *in cases of this kind the evidence must be scrutinised as*
it is easy to conceive of attempts by heirs being made

dishonestly to prove mistakes in wills".

[18] Although it is clear that clause 8 of the will is a mistake, such
a mistake does not, in my view, justify that clause 2 be

rectified.

[19] In the book **'Law of Succession',** 2nd edition by Corbett

Hofmeyer, Kahn, on page 497-498:

"*Before a court will rectify a will it will require proof:*

,

grounds or justification for the rectification sought by the applicant
. *(a) that the alleged discrepancy between intention and expression was due to a mistake; and*

(b) of what the testator intended should form part of the will.

[22] I make the following order:

Applicant's application is therefore dismissed with costs as I have ordered.

The onus is on the party seeking rectification to prove these requirements on a balance of probabilities".

[20] I agree with the view expressed therein that as a general rule *causa* is treated as irrelevant but a mistake in relation to it has no legal consequences. In my view, the mistake in clause 8 should not and cannot spoil the legacy clearly set out in clause 2 of the will.

A. P. LEDWABA
JUDGE OF THE HIGH COURT

[21] It remains an established principle that rectification is necessary or justified only if the intention of the testator cannot be verified from the will itself. In this matter, the clear intention of the testator can be established from the *prima facie* wording of the will. In my view, there are no