IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 21324/13

Date: 7 March 2014

In the matter between:

DAAN BEUKES N.O — First Applicant

R[...] A[...] H[...] H[...] — Second Applicant

and

THE MASTER OF THE HIGH COURT, PRETORIA — Respondent

R[...] M[...] H[...] M[...] — Intervening Party

and

In the counter application of

R[...] M[....] H[...] M[...] — Intervening Party

and

DAAN BEUKES N.O — First Respondent

R[...] A[...] H[...] — Second Respondent

THE MASTEROF OF THE HIGH COURT, PRETORIA — Third Respondent

JUDGMENT

BAM J

1. The first applicant in the main application is the executor of the estate of the late Mr R[...] M[...] M[...]. Initially the first applicant was also the executor in the estate of the late Ms J[...] G[...] M[...]. The second applicant is a grandson and the intervening applicant a son of the two deceased. The intervening party replaced the first applicant as executor of the estate of Ms M[...].

2. The main application is aimed at the review of a ruling by the Master that the estate of the late Mr M[...] should devolve intestate and an order is sought that the said will should be confirmed and slightly amended. The intervening party seeks an order for the setting aside of the Master's ruling and that the will should be confirmed and slightly amended, but differently from the way sought in the main application.

3. The main issues in this matter turn upon the inheritance of the estate of the late R[...] M[...] M[...] who passed away on 5 July 2009. At the time of his death Mr M[...] was married to Ms J[...] G[...] M[...], who subsequently passed away on 9 August 2010.

4. Mr M[...] left a will signed on 29 October 2008. It is in type written form and entitled: LAST WILL AND TESTAMENT OF R[...] M[...] M[...]. The parties are at loggerheads in regards to the question whether the will is indeed in law a valid will, the interpretation of certain clauses ofthe will, and including, what the intention of the testator was.

5. It is of importance that on the same date, 29 October 2008, Ms M[...] similarly attested to a will entitled: LAST WILL AND TESTAMENT OF J[...] G[...] M[...]. Save for the names of the two testators, the two wills are exact copies of one another. Ms M[...] attested to the testament of Mr M[...] as a witness and *vice versa* Mr M[...] signed as a witness to the testament of Ms M[...].

It appears that there can be no question that both testators were acutely aware ofthe contents of the respective wills. This is in any event corroborated by the fact that the two wills were drafted by the same person, Mr C[...] A[...] H[...] M[...] H[...], a grandson of the two deceased, who co-signed the two wills as a witness and whose name is mentioned in paragraph 6.4 in both wills.

6. Although the will of Mr M[...] were at some time amended by hand to reflect that it was actually a joint will of the two testators, the amendment reflecting that purported situation does not comply with the requirements of such amendment in that it was not attested by the testator's signature. However, save for the lack of technical compliance to the requirements of a joint will, it is clear that both testators were of the same intention as to how and in what manner their estates should devolve. There can be no doubt that the two testators were ad idem in all respects. Accordingly, but for the lack of the formal requirements of a joint testament, it was clearly the intention of both testators to let their estates devolve in exactly the same way. Therefore, in regards to the testators' intention, it can be inferred that they actually intended to jointly decide

about the devolvement of their estates.

7. On 27 September 2010 the first applicant in the main application, a practicing attorney and appointed executor of the estates of Mr and Ms M[...], forwarded the Liquidation and Distribution account, referred to as the liquidation and distribution account of the joint estate of the said deceased to The Master. After having received the said account The Master made the following ruling:

"(3) The provisions of the Will of the Late Mr RM M[...] dated 29 October are not applicable in this estate. The estate must devolve intestate. Though Mrs M[...] signed the will as a witness and disqualified in terms of Section 4(A)(1), when read with section 4(A)(2)(b) is entitled to inherit intestate. Therefore this estate should devolve as follows: Mrs M[...] is entitled to her half share in terms of marriage in community of property, together with child's share in terms of Intestate Succession Act 81 of 1987. The remaining child's share must be bequeathed to the late Mr RM M[...] and Mrs M[...]' children or their issue by representation in terms of the Intestate Succession Act."

8. The effect of the Master's ruling is that the assets of Mr M[...]' estate should be divided amongst all the heirs who would be entitled to inherit intestate.

9. It is indeed correct that Section 4(A)(1) of the Wills Act, No 7 of 1953, provides that a witness to a will, in this instance as far as the testament of Mr M[...] is concerned, Ms M[...] and the grandson of the testator, the aforementioned C[...] A[...] H[...] H[...] shall be disqualified from receiving any benefit from that will. However Section 4(A)(2)(a) of the said Act provides that a court may declare such a witness to be competent to receive a benefit from that will if the court is satisfied that such person did not defraud or unduly influence the testator in the execution of the will.

10. The ruling by the Master that Ms M[...], in terms of the provisions of section 492(A)(2)(b) was disqualified to inherit anything in terms Mr M[...]'s will but that she would have been entitled to inherit intestate, is *prima facie* correct in law. The disqualifying provision in that section is however subject to a possible court order in terms of section 4(A)(2)(a). This latter subsection provides as follows:

> *"Notwithstanding the provisions of subsection (1)-*
>
> *(a) A court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if a court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will;"*

11. Section 4A(1) is further subject to the provisions of section 4A(2)(b) of the Act, which reads as follows:

"A person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession."

12. The applicants in the main application, not satisfied with the ruling by The Master, as alluded to above, applied for an order to review and set aside the said ruling by The Master, and to substitute the ruling with the following paragraph:

"Mrs M[...] is entitled to her half share in terms of the marriage in community of property. The remaining 50% (fifty percent) share in the Estate late R[...] M[...] M[...] (Estate number 2[...]) should devolve to R[...] A[...] H[...] H[...]."

Alternatively that par 6.3 of the will be deleted and substituted by an amended paragraph 6.3, reading as follows:

"*6.3 The remainder of my estate shall devolve in equal shares upon my grandsons and should my spouse J[...] G[...] M[...] become deceased before or after me, then and in that event, I bequeath my share in the house in equal shares to my grandsons, C[...] A[...] H[...] H[...] and R[...] A[...] H[...] H[...]."*

13. The Master did not oppose the application and it can be assumed that The Master abides the Court's decision.

14. A provisional order was granted and a Rule *nisi* issued. Subsequently, as referred to above, an intervening party, R[...] M[...] H[...] M[...], a son of the late Mr and Ms M[...], opposed the application in the main application and lodged a counter application seeking an order that the ruling by the Master should be set aside and replaced with an order that reads as follows;

"That the estate of the late R[...] M[...] M[...] devolves testate upon his spouse, the late JOY GLADYS Miles, subject to the provisions of Section 4A(2)(b) of the Wills Act, no 7 of 1953."

15. Should the main application succeed it will have we implication that Mr M[...]' estate will devolve upon one or both grandsons of the two testators mentioned in clause 6.3 of Mr M[...]'s testament.

16. The counter application lodged by the intervening applicant includes a prayer for the following declarator:

"That the Estate ofthe late R[...] M[...] M[...] devolves testate upon his spouse, the late J[...] G[...] M[...], subject to the provisions of Section 4A(2)(b) ofthe Wills Act, No 7 of 1953."

17. In the event ofthe counter application succeeding it will mean that Mr M[...]' estate will devolve testate. Ms M[...]' estate will then, in terms of the provisions of section 4A(2)(b) inherit the share ofthe estate to which Ms M[...] would have been entitled in terms ofthe law relating to intestate succession. In this regard the applicable subsection Section 1 ofthe Intestate Succession Act, No. 81 of 1987, provides as follows:

"1. *intestate succession -*

(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and -(d) is survived by a spouse as well as a descendant-

(i) such spouse shall inherit a child's share ofthe intestate estate or so much ofthe intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and

(ii) such descendant shall inherit the residue (if any) ofthe intestate estate;"

18. Clause 6 ofthe will, dealing with the inheritance ofthe estate reads as follows:

"I hear by leave and bequeath my estate, means and effects, whether in possession or expectancy, and where-so-ever situated, nothing excluded and after settlement ofthe Estate's liabilities and expenses, as follows:

6.1 My share of our house shall devolve upon my surviving spouse currently at: 6[...] K[...] Street, S[...], H[...].

6.2 In the event ofthe my surviving spouse not having adequate income to maintain the lifestyle to which she is accustomed; she shall receive a comfortable and adequate income from the assets of R[...] Family Trust and this duty shall be administered by the trustees.

6.3 Should my spouse J[...] G[...] M[...], predecease me, the whole of my estate shall devolve in equal shares upon my grandsons C[...] A[...] H[...] H[...] and R[...] A[...] H[...] H[...]."

6.4 Should my grandsons C[...] A[...] H[...] H[...] and R[...] A[...] H[...] H[...], predecease me I bequeath the residue of my estate to in equal shares to their heirs.

6.5 With reference to clauses 17 and 27 of the Trust deed I request that the assets of the R[...] Family

Trust be left in full to my abovementioned grandsons in equal shares.

6.6 1 hereby appoint C[...] A[...] H[...] H[...] to take my place as Trustee of the R[...] Family Trust. If he is not available, I then appoint R[...] A[...] H[...] H[...] in his place."

19. It was submitted by Mr Meijers, appearing on behalf of the applicants in the main application that it was the intention of Mr M[...] that his estate should actually devolve upon the two grandsons mentioned in clause 6.3 of his testament. It was argued by Mr Meijers that from the wording in paragraph 6.1 it is clear tht Mr M[...] did not have the intention that the whole of his estate should devolve on his spouse, Ms M[...]. Not surprisingly, Mr Gouws, appearing for the intervening party, disagreed.

20. Both parties were however in agreement that this Court should set aside The Master's aforementioned ruling, however, as alluded to above, with a totally different result in mind.

In regards to the ruling of The Master, I am in agreement with the submissions by the parties that the Maters Ruling should be and set aside and that an order should be made that Mr M[...]' estate should devolve testate. I will revert to this issue herein below.

21. Firstly it is of cardinal importance to determine what the intention of Mr M[...] was pertaining to the question about the devolvement of his estate. It has been re-stated over many years that the *'Golden Rule'* in this respect is as follows:

"[T]he golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used." See *Robertson v Robertson's Executors* 1914 AD 503 at 507.

22. In considering this question it must be kept in mind that Ms M[...]' testament of the same date pertaining to clauses 6.1 to 6.4 reads exactly the same, save for the interchanging of the names of the two testators. It appears therefore that although the two testators did not contemplate to make a joint will, they were ad idem in regards to their intention with the devolvement of the estate. It would not have made a difference which testator would have been the first to pass away. The surviving testator would have benefitted in the same way from the other's will.

23. The original, now aggrieving, clause 6.3 (of both wills) is in my view clear and unambiguous. In regards to the will in question, it is clearly stated that in the event of Ms M[...] *predeceasing* Mr M[...], the whole of the testators' estate would have devolved upon the mentioned grandsons, in equal shares. In view thereof that Ms M[...] did not predecease Mr M[...], it follows that it was clearly the intention of Mr M[...] that Ms M[...] should inherit the whole estate. There is no other possible interpretation. Accordingly any contention that Mr M[...]'s intention was that the estate should devolve upon the two grandsons is without any substance.

24. Mr Meijer's contention that it was not Mr M[...] intention that Ms M[...] should inherit the whole of the estate, based on the wording of clause 6.1 in regards to the devolvement of the testators half share in the house to the surviving spouse, is in my view evenly without substance. The correct interpretation of clause 6.1 seems to be that the testator, realizing that one half of the residence already belonged to Ms M[...], he only had to specify in the will how his share in the residence should devolve. Although this clause is not on its own absolutely clear, it has to be read in context, and what is expressly stated in clause 6.3.

25. What remains is the question whether Ms M[...], after having attested to Mr M[...]' will as a witness, was without any remedy disqualified to inherit testate from that will. In this regard the provisions of section 4A(2)(a) becomes relevant. There is no reason why the provisions of the said section should not be made an order of court in favour of the deceased Ms M[...]. There is no suggestion that Ms M[...] defrauded Mr M[...] or that he was unduly influenced by her.

See *Theron and Another v Master of the High Court [2001J3 All SA 507 NC* at 516 a -f.

26. The question arising however is whether in the event of this Court making an order in terms of Section 4A (2)(a) declaring that Ms M[...] was entitled to inherit testate from the will of Mr M[...], whether the provisions of section 4A(2)(b) will be applicable. The implications of the latter sub-section is clear. If it is indeed applicable Ms M[...]' right to inherit testate from Mr M[...]' will would have been limited in terms of the provisions of section 1 of the intestate Succession Act No. 81 of 1987. This is apparently what The Master had in mind in making the abovementioned ruling.

27. In my view court order made in terms of section 4A(2)(a) entails that the right of an affected person, like Ms M[...], to inherit testate from the will of Mr M[...] will not be limited at all. This will in any event be consistent with the intention of Mr M[...] that Ms M[...] should inherit the whole estate. In this regard I am in respectful agreement with what is stated by the learned authors *M J DE WAAL* and *M C SCHOEMAN-MALAN* in their publication *ERF REG,* at pl29, where the following appears:

> *"Daar is nie 'n beperking op die bedrag wat wat 'n person kan erf indien die hof horn ingevolge artikel 4A(2)(a) bevoeg verklaar om te erf nie. Indien die persoon egter sou verkies om slegs sy intestate deeI ingevolge artikel 4A(2)(b) te neem, is daar nie 'n hofbevel nodig soos in artikel 4A(2)(a) vereis nie."*

28. It follows that Ms M[...] was in law entitled, after having inherited the whole estate in terms of the will after the death of Mr M[...], to do with the estate whatever she was inclined to do. It appears that she in fact made another will bequeathing her entire estate to the intervening applicant.

29. The relief claimed by the applicants in the main claim, save for the setting aside of the Masters ruling,

cannot succeed. The order sought by the intervening party, including the setting aside of The Master's ruling, succeeds. There is no reason why the order as to costs should not follow the result of the finding on the merits.

30. Accordingly the following order is made:

(1) The main application, save for the order in (2)(i), is dismissed with costs.

(2) The counter claim of the intervening party succeeds to the following extent:

(i) The Master's ruling in the matter of the Estate Late Roger Mervyn Miles, dated 25 October 2012, is set aside.

(ii)In terms of the provisions of Section 4A(2)(a) of Act 7 of 1953 the late Joy Gladys Miles is declared to have been competent to receive a benefit from the testament of the late Roger Mervyn Miles dated 29 October 2008.

(iii) The whole of the estate of the late Roger Mervyn Miles devolved testate upon his spouse, the late Joy Gladys Miles.

(3) The applicants in the main application are ordered to pay the costs of the intervening party, jointly and severally, the one paying the other to be absolved.

AJ BAM

JUDGE OF THE HIGH COURT

5 March 2014