THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 846/11

In the matter between:

BoE TRUST LIMITED NO First appellant

ILMARY KEDDY NO Second appellant

FREDERICK GORDON BROWNELL NO Third appellant

(in their capacities as co-trustees of the Jean Pierre De Villiers Trust 5208/2006)

Neutral citation: *BoE Trust Limited NO & others* (846/11) [2012] ZASCA 147 (28 September 2012)

Coram: CLOETE, MALAN, SHONGWE, PILLAY JJA AND ERASMUS AJA

Heard: 10 September 2012

Delivered: 28 September 2012

Summary: Will – interpretation of - freedom of the testation – racially exclusive provision in trust.

ORDER

On appeal from: Western Cape High Court, Cape Town (Mitchell AJ sitting as court of first instance):

1 The appeal is dismissed.

2 The costs of the appeal, to be taxed as between attorney and client, are to be paid out of the funds of the trust.

3 A copy of this judgment must be forwarded, by the trustees, to all the named charitable organisations.

JUDGMENT

ERASMUS AJA (CLOETE, MALAN, SHONGWE AND PILLAY CONCURRING):

[1] This is an appeal against the judgment and order of Mitchell AJ in the Western Cape High Court, Cape Town in which he dismissed an application to have the word ‘White’, used to identify a group of persons to benefit in terms of a trust, deleted.

[2] The appellants are the trustees of the Jean Pierre De Villiers Trust (the Trust), a trust created by the will of the late Daphne Brice De Villiers. Mrs De Villiers bequeathed some of her assets to her siblings, her nephews, her nieces and her godchild. The residue of her estate was left to the Trust.

[3] Mrs De Villiers' last will and testament, dated 14 July 2002, included the following provisions:

'3.6 The residue of my estate to my hereinafter appointed trustees, in trust, to be administered by them, in terms of the powers granted herein and for the following purposes:

The trust shall be known as the "JEAN PIERRE DE VILLIERS TRUST"

My trustees are empowered to use so much of the net income and, if found necessary, of the capital as they shall decide, to provide my retired domestic assistant PAULUS MPAI (identity number 15431), with a monthly income of R300 (three hundred rand) during his lifetime.

The remaining income shall be applied by my trustees for the provision of small bursaries to assist ***White*** South African students who have completed an MSc degree in Organic Chemistry at a South African University and are planning to complete their studies with a doctorate degree at a University in Europe or in Britain.

The selection of these students, and the size and duration of the bursaries shall, after discussions between them, be the joint responsibility of the four Organic Chemistry Professors of the Universities of Cape Town, Stellenbosch, Bloemfontein and Pretoria in consultation with Syfrets Trust Limited. The only provisos in the selection of suitable candidates are that, in addition to a competence in Organic Chemistry, such students must exhibit both the desire and the ability to benefit culturally from a period spent at such a university and that they must return to South Africa for a period to be stipulated by the Professors listed.

All surplus income shall be capitalised;

In the event that it should become impossible for my trustee[s] to carry out the terms of the trust, I direct that the income generated by the trust be used annually to provide donations equal in size to each of the following charitable organisations:

THE HEART FOUNDATION OF SOUTH AFRICA;
OPTIMA COLLEGE;
THE SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS;

BOY'S TOWN;
THE SALVATION ARMY;
MEALS-ON-WHEELS;
S.O.S. CHILDREN'S VILLAGES;
AVRIL ELIZABETH HOME;
NATIONAL SEA RESCUE INSTITUTE;
THE SOUTH AFRICAN BLIND WORKERS ORGANISATION.

Should any of these institutions no longer exist at such time, I direct that my trustee shall choose institutions with similar aims and objectives. I direct that all such donations be sent directly to the organisation concerned and not to organisations collecting on their behalf.' (My emphasis.)

[4] From a letter written by her sister, annexed to the founding papers, it is clear that Mrs De Villiers had been repeatedly advised that one of the primary objects of the trust, to bequeath bursaries to 'White' students, would possibly not be given effect to, as it was discriminatory. Notwithstanding this warning, her will retained the word. The testatrix was of course free to change her will at any time up to her death. She did not. She did however provide that should it become impossible for the trustees to carry out the terms of the trust, the income generated by the trust had to be used annually to provide donations to a number of charitable organisations. Mrs De Villiers passed away on 10 February 2006.

[5] The first stipulation, under para 3.6 of the will, that provided for the payment of a monthly income to the testatrix's retired domestic assistant Mr Paulus Mpai, has been given effect to and is still continuing. Having regard to the wording of the will itself, it is clear that the testatrix firstly wanted to provide for Mr Mpai. She made provision, in the event that the income might be insufficient, that capital could be used to satisfy this bequest. The provision for the bursary fund must therefore be separated from the bequest to Mr Mpai. This interpretation is reinforced by the fact that the section that deals with the bursary bequest, which

comes after the provision made for Mr Mpai, starts with 'The remaining income…'

[6] It can furthermore be accepted that the motivation of the testatrix to provide for bursaries in her will was the fact that her late husband was a leading applied chemist, with doctorates in chemistry from both Oxford University and the University of Pretoria. Her wish was clearly to set up this trust in memory of her late husband after whom the trust was named.

[7] In order to give effect to the bequest of bursaries for 'White South African students' the trustees, through their legal representatives, contacted the universities concerned. The enquiry was aimed at establishing whether the universities would accept the bursary bequests, on the conditions stipulated in the will. The letter from the legal representative of the appellant to the universities indicated that the bursary fund would be in an amount that exceeds R250 000.00 per annum.

[8] All the universities responded negatively as a result of the racial selection criterion attached to the bursary. The University of Stellenbosch, through its legal services department, alluded to the fact that the university has adopted a new bursaries and scholarships policy which covers the awarding and administration of bursaries to fair, non-discriminatory and equitable standards. They therefore elected to repudiate the bequest on behalf of the university. They, however, indicated that should the trust deed be amended in due course to exclude the racial discriminatory condition, they would be willing to participate in the bursary fund. The University of the Free State indicated that should the bursary be available to all races, they would gladly confirm their participation.

[9] The University of Pretoria expressed similar sentiments as the University of Stellenbosch, and stated the following:

'The University wishes to emphasise that there are many students from across the racial spectrum who, save for the "race specific limitation", would qualify for the scholarships envisaged in the will. It would therefore be remiss for the University to exclude certain segments of South African society, as reflected in the students demographics, from consideration for these bursaries on the ground as stated. . . .

The University is therefore prepared to except the bequest on the condition that the requisite steps are taken for word the "White" to be deleted from the will'.

The University of Cape Town, through the office of the registrar, noted that the bursary was for "Whites" only and responded as follows:

'While we are pleased that the testator has recognised the importance of the scholarships for doctorate study in organic chemistry, the organic chemistry professor at University of Cape Town (in his/her representative capacity) will not take part in this, but would do so with the executors and the administrators to obtain (as we believe the constitution suggest that they ought) a High Court ruling scrapping the racial restriction'.

[10] Given the attitude of the four universities, the appellants moved in the high court for a rule nisi calling upon all interested parties to show cause why the word 'White' should not be deleted from the will. The rule nisi was granted and served on the Master of the High Court and the universities concerned. It was not served on the charitable organisations. No opposition to the rule nisi was received and a final order was sought.

[11] The trustees contended that the word 'White' fell to be deleted as it was discriminatory against 'potential beneficiaries' of the bursaries contemplated in the will, on the basis of race. Consequently, they contended, the will was contrary

to public policy; the right to equality as enshrined in the Constitution; the provisions of section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act;[1] the principles contemplated in sections 3 and 4 of the National Education Policy Act;[2] and the principles set out in *Minister of Education and Another v Syfrets Trust NO and Another*.[3]

[12] The attitude of the trustees was set out in the founding affidavit as follows:

'In spite of this contingent directive being available to the trustees of the Trust, Keddy, Brownell and I are of the view that it would be prudent and preferable to rather fulfil the primary purpose behind the creation of the Trust by obtaining an order from this Court that the word "White" be deleted from clause 3.6 of the Will so that the bursary bequest is acceptable to the South African universities and can be used to assist students in the manner contemplated in the Will, than resorting to a disposal of the income to the charitable organisations.'

The attitude of the trustees and the purpose of the bursaries are noble and commendable, but neither, unfortunately, can be decisive in giving effect to the terms of the will.

[13] The matter of *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal and Others*,[4] a judgment of this court, had not been decided at the time the application was brought. Nor had it been decided at the time the court a quo gave its judgment on the application.

[14] In dismissing the ex parte application, Mitchell AJ emphasized the principle of freedom of testation, the right to property as enshrined in the Constitution and the fact that it 'includes the right to give enforceable directions as to its disposal

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[1] Act 27 of 1996.
[2] Act 4 of 2000.
[3] 2006 (4) SA 205 (C).
[4] 2010 (6) SA 518 (SCA).

on the death of the owner.' He remarked that the provisions were not clearly contrary to public policy in that the Constitution only prescribes discrimination which is unfair, and further, that there may be sufficient reason in the instant case why the testatrix specifically nominated white students as the beneficiaries of her bequest namely:

'The testatrix has thought fit to require beneficiaries of the bursary trust to return to South Africa for a period determined by the universities concerned after obtaining their doctorates. It seems at least possible that, in so doing, she was seeking to ameliorate this skills loss and indeed, to promote importation of skills obtained overseas. Certainly, it seems to me that the implementation of the bequest in accordance with its terms would have that effect.'

However, no finding was made on this point.

[15] The high court correctly found that the bursary bequest was rendered impossible as a result of the universities' stance. The high court went on to find that this eventuality was, however, expressly and in terms provided for by the testatrix in that the trust income would then go to the charitable organisations.

[16] Nearly two years after the court below handed down judgment, the appellants applied for leave to appeal. The appeal was based on the decision of this Court in *Emma Smith.* The appellants contended that if they were to be given leave to appeal 'then in view of the decision in Emma Smith, such appeal must succeed.'

[17] Mitchell AJ denied leave to appeal for the reason that *Emma Smith* did not affect his judgment regarding Mrs De Villiers' will, holding that the testatrix had

foreseen the possibility that the bursary bequest might prove impossible to carry out, and had provided an alternative to which effect had to be given.

[18] The appellants are before this court with its leave. Before the appeal was heard, this court raised the issue of non-joinder of the charitable organisations named in the will. The appellant's attorneys wrote to the charitable organisations, some of whose names had changed in the meantime.

[19] The common law rule regarding the obligatory joinder of parties is that anyone with a direct and substantial interest in a matter must be joined. The appellants concluded that the charitable organisations did not have a legal interest in these proceedings. How they reached that conclusion is beyond understanding. The relief they sought in the court below, was to alter the trust created by Mrs De Villiers. If the court below granted the relief that was sought, the charities would not receive the funds; if it did not, the charitable organisations would. They thus had a substantial interest and they should have been joined.[5]

[20] The next question is whether a letter addressed to this court, an appellate court, informing it that the charitable organisations have indicated that they abide the court's decision is enough to cure that failure by the appellants? Put differently, was the informal notice informing the charitable organisations of the proceedings and asking them if they wished to intervene (at the appeal stage) sufficient notice? Is this type of extra-judicial notice sufficient? In my view it is. Eventually each of the charitable organisations was properly informed of the nature and purpose of the proceedings and unequivocally indicated that it would

[5] *Kethel v Kethel's Estate* 1949 (3) SA 598 (A).

abide the decision of this court. The decision in *Amalgamated Engineering Union v Minister of Labour*[6] is accordingly distinguishable on the facts.

[21] I now turn to the main issue in the appeal. Should this Court uphold the appeal and allow a deletion of a word in Mrs De Villiers last will and testament based on the principles enunciated in *Emma Smith*? Can *Emma Smith* be distinguished from this case?

[22] In *Emma Smith* this court held that the Bill of Rights applies to all law (which must by now, and properly from the advent of the Constitution, be seen as trite), including the law relating to charitable trusts. It further held that in the public sphere racially discriminatory dispositions will not pass constitutional muster. It dismissed the appeal and allowed the order directing the deletion of the racially discriminatory provisions to stand.

[23] *Emma Smith* also dealt with a testamentary trust which created an educational fund to be administered by a university restricting beneficiaries to white bursars. The will considered had been executed in 1938. The exclusive nature of the will, which went further than merely identifying persons of colour, caused less funds than were available for the purpose, to be paid out. The court identified the question it had to answer as 'whether this bequest, to be administered by the university, can be allowed to stand in its racially exclusive form.'[7]

[24] It is immediately clear that the facts dealt with in *Emma Smith* are distinguishable from the facts of the instant case. The testamentary trust dealt with

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[6] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).
[7] At para 1.

there provided for the single purpose that the funds put in trust 'shall be dedicated in perpetuity for the promotion and encouragement of education.' No alternatives were stated should the terms become impossible to carry out. Indeed, the trust functioned for decades prior to being challenged in the new Constitutional dispensation.

[25] In the instant case no bursaries were ever paid; they could not be, because of the universities' stance. The giving of the bursaries as Mrs De Villiers had intended had become impossible as a result of the universities' stance. Must the alternative provided in the will be given effect to? Does Mrs De Villiers' right to dispose of her assets as she saw fit, whether we agree with her exercise of that right or not, require a court to see at least whether there is a way in which to interpret her will so as that it does not offend public policy?

[26] Section 25(1) of the Constitution provides that no one may be deprived of property, except where the deprivation is done in terms of a law of general application. What is more, it entrenches the principle that no law may permit the arbitrary deprivation of property. The view that section 25 protects a person's right to dispose of their assets as they wish, upon their death, was at least accepted in *Minister of Education v Syfrets*, although no decision to this effect was made. This view, is to my mind, well held. For if the contrary were to obtain, a person's death would mean that the courts, and the state, would be able to infringe a person's property rights after he or she has passed away unbounded by the strictures which obtains while that person is still alive. It would allow the state to, in a way, benefit from someone's death. Francois du Toit, after having done

extensive research on freedom of testation in South Africa and in other jurisdictions,[8] states the position thus:

'Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit. This principle is supplemented by a second important principle, namely that South African courts are obliged to give effect to the clear intention of a testator as it appears from the testator's will. Freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the ius disponendi) constitute basic tenets of the South African law of property. An owner's power of disposition includes disposal upon death by any of the means recognized by the law, including a last will. The acknowledgement of private ownership and the power of disposition of an owner therefore serve as a sound foundation for the recognition of private succession as well as freedom of testation in South African law.'[9] (Footnotes omitted.)

[27] Indeed, not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.

[28] But freedom of testation, and the rights underlying it, are not absolute.[10] The balance to be struck between freedom of testation and its limitations was formulated by Innes ACJ as follows:

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[8] See F Du Toit 'The impact of social and economic factors on freedom of testation in roman and roman-dutch law' 1999 *Stell LR* 232; F Du Toit 'The limits imposed upon freedom of testation by the boni mores: lessons from common law and civil (continental) legal systems' 2000 *Stell LR* 358.

[9] F du Toit 'The constitutionally bound dead hand? The impact of the constitutional rights and principles on freedom of testation in South African law' 2001 *Stell LR* 222 at 224.

[10] *Rhode v Stubbs* 2005 (5) SA 104 (SCA) para 17 & 18

'Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule of law from doing so.'[11]

[29] What is required then, firstly, and prior to any enquiry as to whether some rule of law prevents us from giving effect to those wishes, is to first ascertain what the testatrix's wishes were. Indeed, the enshrined rights to dignity and property demand it.

[30] The key to determining what the testatrix's wishes were in the instant case, is what meaning should be attributed to the word 'impossibility'. To ascertain that meaning the court may have regard to evidence outside of the wording of the will 'to fit the four corners of the will to the ground'.[12] The testatrix was informed, that it may be impossible to give effect to the educational trust she had envisaged as a result of its effect being unlawful. It is with this impossibility in mind that she included the word 'impossible' and stipulated an alternative.

[31] The appellants however, insist that this should not be the case. They argue that a distinction is to be drawn between different types of impossibility. And that what Mrs De Villiers actually meant was that her alternative arrangement would only be triggered upon, in the words of appellants' counsel, 'objective impossibility'. This would be the kind of impossibility, so the argument goes, where no South African university will ever offer the MSc in organic chemistry. I do not think this argument is correct. As I have said, the primary function of a court, in interpreting a will, is to ascertain the intention of the testator. To my mind, it is clear that the testatrix intended that, quite simply, should it prove

[11] *Robertson v Robertson's Executors* 1914 AD 503 at 507
[12] N J van der Merwe& C J Rowland 'Die Suid-Afrikaanse Erfreg' 3 ed at 478.

impossible, for whatever reason, to give effect to the provisions of the educational bequest, that the money should go to the charitable organisations. The testatrix clearly set out a general scheme in which she provided for foreseen eventualities. In my view therefore, the fact that the universities would not participate as a result of the racially exclusiveness of the bequest is an impossibility in respect of the bursary bequest. The result must be that effect has to be given to the wishes of the testatrix so that the bequest to the named charitable organisations is enforced.

[32] The court a quo ordered that the costs be paid out of the funds of the trust. I can see no reason why this should not include the costs occasioned by the appeal.

[33] In the event, the following order is made:

1 The appeal is dismissed.
2 The costs of the appeal, to be taxed as between attorney and client, are to be paid out of the funds of the trust.
3 A copy of this judgment must be forwarded, by the trustees, to all the named charitable organisations.

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NC Erasmus

Acting Judge of Appeal

APPEARANCES

For Appellant:	R J Howie
	Instructed by:
	Carter & Associates, Cape Town
	Symington & De Kok, Bloemfontein