THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 560/2011
Reportable

In the matter between:

CHRISTELLE RAUBENHEIMER	**Appellant**
and	
GERDA RAUBENHEIMER	**First Respondent**
STEPHANUS PETRUS RAUBENHEIMER	**Second Respondent**
JAN HENDRIK HAGEN	**Third Respondent**
MASTER OF THE HIGH COURT NORTH GAUTENG	**Fourth Respondent**

Neutral citation: *Raubenheimer v Raubenheimer* (560/2011) [2012] ZASCA 97 (1 June 2012)

Coram: Mpati P, Nugent, Cachalia, Leach and Wallis JJA

Heard: 11 May 2012

Delivered: 1 June 2012

Summary: Will – construction – bequest of immovable property subject to a usufruct without identifying a beneficiary – properly construed the testator intended to create a fideicommissum, the fideicommissary being identified by necessary implication – failure to attach list of specific bequests referred to in the will not rendering the will void for vagueness – the will intended by the testator to be his final will and should be accepted by the Master under s 2(3) of the Wills Act 7 of 1953 despite a failure to comply with statutory formalities.

O R D E R

On appeal from: North Gauteng High Court, Pretoria (Preller J sitting as court of first instance):

(1) The appeal succeeds, with costs.

(2) Paragraph 1 of the order of the court a quo is set aside and substituted with the following:

'1 (a) The application in convention is dismissed.

(b) The fourth respondent (the Master) is ordered to accept the will dated 30 March 2006, annexure 'GR2' to the founding affidavit in the application in convention, as the will of the deceased for the purposes of the Administration of Estates Act 66 of 1965.'

J U D G M E N T

LEACH JA (MPATI P, NUGENT, CACHALIA AND WALLIS JJA CONCURRING):

[1] It is a never-ending source of amazement that so many people rely on untrained advisors when preparing their wills, one of the most important documents they are ever likely to sign. This is by no means a recent phenomenon. Some 60 years ago, in *Ex Parte Kock NO*,[1] a high court decried the number of instances in which wills had to be rejected as invalid due to a lack of compliance with prescribed formalities and the regularity with which the courts were being approached to construe badly drafted wills, before urging intending testators 'in their own interests as well as in the interests of those whom they intend to benefit when they die . . . to

[1] *Ex Parte Kock NO* 1952 (2) SA 502 (C) at 516E-H.

consult only persons who are suitably trained in the drafting and execution of wills and other deeds containing testamentary dispositions'. Despite this, the courts continue all too often to be called on to deal with disputed wills which are the product of shoddy drafting or incompetent advice. This is another such case.

[2] On 28 March 2006, Dr S P Raubenheimer, a medical practitioner of Pretoria (the testator), who was at the time married to the appellant and had two children born of a previous marriage, signed a document dated 30 March 2006 which purported to be a fresh will (a copy of the document in question being annexure GR2 in the papers). In it the, inter alia, replaced an earlier will he had executed in 2002 and nominated Jan Hendrik Hagen as the administrator of his deceased estate. This document had been prepared for him by Mr Hagen, a Cape Town insurance broker and investment advisor.

[3] The document GR2 bears the signatures of the testator and two persons who allegedly witnessed the testator's signature. However they had not in fact done so. Hagen had been the testator's insurance broker and financial advisor for some years. In December 2005 the deceased asked Mr Hagen to prepare his will. After various subsequent discussions between the two of them, Mr Hagen went to see the testator at his consulting rooms in Pretoria on 30 March 2006, taking with him a draft will for signature. The testator was extremely busy and kept him waiting until approximately 7pm before seeing him. The testator then read through the draft and indicated his approval. When Mr Hagen asked about a list of specific bequests which the testator had undertaken to prepare to attach to the will, the testator replied that he had simply not had enough time to prepare it but that he would do so in due course and furnish it to Mr Hagen at some later stage.

[4] Section 2(1)(*a*)(i)-(iii) of the Wills Act 7 of 1953 prescribes that for a will to be valid it must be signed by the testator in the presence of at least two competent witnesses who attest and sign it in the presence of the testator and of each other. Aware of this, Mr Hagen attempted to ensure that the testator complied with these formalities and, when the testator indicated that he was happy with the draft and wished to sign it, told him this had to be done in the presence of two witnesses. He suggested they should go to a restaurant managed by the testator's business

partner, which was conveniently situated in the same building, to do so. This the testator refused to do, saying that he did not have the time and that, in any event, as he and his business partner had recently become embroiled in a business dispute, he did not want him or anyone else in the restaurant to act as a witness. Mr Hagen, completely improperly, then suggested that the testator should sign the will and that he would 'attend to the witnessing thereof in my offices'. The testator duly proceeded to sign the will which Mr Hagen then took back to Cape Town where, two days later, he had two of his employees sign it as if they had witnessed the testator signing in their presence.

[5] On the death of the testator, some three years after the events described above, the Master of the North Gauteng High Court, oblivious at the time of the circumstances under which the will had been signed and witnessed, accepted it as being the testator's last will and testament and, acting in terms of its provisions, duly appointed Mr Hagen as executor of the deceased's estate. However, the first and second respondents, the testator's two children (for convenience I shall refer to them as 'the respondents' because Mr Hagen and the Master, both of whom were cited as respondents in this court, have played no part in the appeal) had their reservations. On 2 July 2009, their attorney sent Mr Hagen an e-mail requesting him to provide certain information in regard to the will. This led to a slew of correspondence before, on 11 February 2010, the respondents learned of the circumstances under which the will had been signed.

[6] This led to the respondents instituting proceedings in the high court seeking an order declaring, first, that the will was null and void by reason of a failure to comply with the necessary statutory formalities and, second, that the deceased had died intestate. The appellant opposed the relief sought on the basis that an order should issue under s 2(3) of the Wills Act directing the Master to accept GR2 as the will of the testator for purposes of the Administration of Estates Act 66 of 1965. In the alternative, the appellant sought an order that the testator's earlier will of 2002 be accepted as the testator's last will.

[7] The matter came before the high court which, on 31 March 2011, held that GR2 was void for vagueness, and granted the respondents relief in the terms they

sought. Although not specifically dealt with in the judgment, the effect of the high court's decision, albeit implied, was to dismiss the appellant's counter application; including the appellant's alternative contention that the 2002 will should be accepted in the event of GR2 being found to be void. With leave of the high court the appellant now appeals to this court.

[8] In seeking to support the high court's decision, the respondents raised two main contentions, first, that the appellant had failed to establish a case under s 2(3) of the Wills Act ie that the testator had intended it to be his will, and, second, that even if the testator had intended the document to be his will, it was void for vagueness as held by the court a quo. This will of course involve a process of interpretation to ascertain whether the testator's testamentary intention can be determined from the provisions of the document.

[9] Crucial to the debate on both these issues are clauses 2 and 3 of the will which read as follows:

'2.

I bequeath my estate to my spouse, CHRISTEL RAUBERHEIMER [the appellant]. She shall have a usufruct over our residence in Pretoria until her death or remarriage.
See the attached list of specific bequests.

3.

In the event of my spouse dying before me or simultaneously with me or within 30 (thirty) days of me, the bequest to her will lapse and I bequeath my estate to my children. The inheritance of a child who dies before me shall devolve on his/her descendants by representation or, upon having no descendants, then on my remaining children or their descendants by representation.'[2]

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[2] This is my translation of the original Afrikaans which reads:

'2.

Ek bemaak my boedel aan my eggenote, CHRISTEL RAUBENHEIMER. Sy sal vruggebruik hê op ons woning te Pretoria tot afsterwe of hertroue.
Sien aangehegte lys van spesifieke bemakings.

3.

Indien my eggenote voor my of gelyktydig met my of binne 30 (dertig) dae na my sou sterf, dan verval die bemaking aan haar en bemaak ek my boedel aan my kinders. Die erfenis van 'n kind wat voor my te sterwe kom sal oorgaan op sy/haar afstammelinge by representasie, staaksgewyse of by gebrek

[10] Turning first to the debate in respect of whether the document is to be taken as the testator's last will, under s 2(3) of the Wills Act[3] a court asked to make an order must first be satisfied that the testator who drafted or executed the relevant document intended it to be his will.[4] The respondents' contention is that as the testator failed to attach the list of specific bequests referred to in clause 2, it was necessary to infer that he did not intend the document to be his will until such a list was attached. Consequently, so the respondents argued, as no list was ever attached, the document in the form it was signed was not intended by the testator to be his final will, and the appellant had thus failed to establish an essential requirement for the issue of an order under s 2(3).

[11] There is no merit in this argument. The testator had instructed Mr Hagen to draw a will for him and had thereafter held several discussions with him as to what he wanted to achieve in his will. It was pursuant to this that Mr Hagen drafted GR2 which the testator proceeded to sign after having read it and indicating that he was satisfied as to its provisions. The document was headed 'testament' and was signed by the testator, quite deliberately, on each of its three pages above the word 'TESTATEUR' (testator). Moreover he did so after Mr Hagen had told him that it needed to be witnessed to comply with the statutory formalities for wills. The only reason it was not properly witnessed was due to the testator's hard-headedness in refusing to do the necessary before his business partner with whom he had fallen out and Hagen's willingness to arrange to have two of his employees append their signatures as if they had witnessed the testator's signature.

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aan afstammelinge, dan op my oorblywende kinders of hulle afstammelinge by representasie, staaksgewyse.'

[3] It reads: 'If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).'

[4] See eg *Van Wetten & another v Bosch & others* 2004 (1) SA 348 (SCA) para 14 and *De Reszke v Maras & others* 2006 (2) SA 277 (SCA) para 11.

[12] From this it is clear that the testator knew that there was no list of specific bequests annexed to the will when he signed it. And although he stated that he would prepare one in due course, his failure subsequently to attach such a list to the document does not mean he did not intend it to be his will. All it means is that he did not subsequently vary the terms of the document. Whether this was due to a failure to take proper care of his affairs or a decision against making any such specific bequests is neither here nor there.

[13] I accordingly have no difficulty in concluding that the testator intended GR2 to be his will at the time he signed it. Indeed I have no doubt that if he had been asked at any time thereafter whether he had a will, he would have replied in the affirmative, having GR2 in mind in doing so.

[14] I turn to the second issue, namely, whether the provisions of clause 2 rendered the will void for vagueness. The respondents argued that the failure to attach the list of specific bequests to the will, taken together with the testator's failure to identify the beneficiary upon whom the common home was to devolve (whom it was argued was clearly not the appellant) resulted in it being impossible to identify which of the testator's assets he had intended the appellant to inherit as beneficiary of the remainder of his estate or to know upon whom the testator intended to bestow ownership of the common home.

[15] The first of these difficulties seems to me to be met by what I've already said, namely, that the failure to attach a list of specific benefits merely means that the testator for some reason did not make any such bequests. It is therefore not a factor which in any way renders vague the testator's bequest of his estate to the appellant.

[16] The effect of the testator, after bequeathing his 'estate' (boedel) to the appellant, proceeding in his next breath to extend to her what he referred to as a 'usufruct' over the matrimonial home until her death or remarriage, without identifying the person in whom ownership of the home should vest, is more complex. The appellant argued in the court a quo that the clause should be interpreted as providing for a bequest of the common home to the respondents, subject to her enjoying a usufruct until her death or remarriage. Indeed in her notice of appeal the

appellant contended that the court a quo had erred in not construing the will in that way. However, in this court, represented by counsel who had not appeared for her in the high court, the appellant changed her stance to contend that the clause could not be so construed and that the failure to nominate a beneficiary in respect of the common home resulted in it falling into the estate bequeathed to her, so that it devolved upon her free of any restrictions as to her ownership.

[17] At the outset, it is necessary to consider whether the testator in fact intended to create a usufruct over the common home. The word 'usufruct' is often loosely used, and its use in a will does not necessarily mean that a testator appreciated its legal significance. As is pointed out by the learned authors of Corbett et al *The Law of Succession in South Africa* (2ed) at 369 -370, with reference to numerous authorities:

'Where the testator has clearly conferred only a life interest upon a beneficiary, the problem may arise as to whether a usufructuary or a fiduciary interest was intended. This can be a matter of some difficulty. The mere use by the testator of the terms 'usufruct' or 'usufructuary' is not conclusive: there are many instances where a life interest described in the will as being a usufruct has been held to be in truth fiduciary in nature. Conversely, the use of the terms 'fideicommissum' or 'fiduciary' does not necessarily provide the final answer: in spite of this the life interest may be construed as being merely usufructuary. While the terms 'usufruct' (or 'usufructuary') or 'fideicommissum' (or 'fiduciary'), as the case may be, would normally indicate prima facie the type of life interest intended by the testator, this indication must yield to the intention to be gathered from the will as a whole. Testators sometimes use terms such as these without a full appreciation of their legal signification and here it is safer to have regard to the general scheme of the will than to the testator's use of legal terminology.'

These comments are all the more appropriate where, as here, the will was drafted by a person not trained in the law. Bearing this in mind, and having regard to certain of the other provisions of the will, I turn to consider whether the testator in fact intended to create a usufruct over the common home.

[18] Importantly, in both clauses 2 and 3 of the will, the testator made a bequest of his 'estate' (boedel), the bequest in clause 3 being subject to that in clause 2 failing. The dominant clause is clearly the bequest of the testator's estate, by which an heir

is instituted. Consequently 'its effect should not be modified nor its meaning strained' unless a contrary intention is clearly indicated by other provisions in the will.[5] There are no such contrary intentions in the present case. Indeed as there was no specific bequest of a 'usufruct' in clause 3 of the will, the bequest of the estate in that clause clearly includes the matrimonial home, and there is no reason to interpret the 'estate' bequeathed in clause 2 any differently. As such a bequest is one of ownership of the property, it is irreconcilable with the appellant acquiring no more that a usufructuary interest over the matrimonial home. Consequently, whatever may have been intended by the testator providing for a 'usufruct' over the matrimonial home, it was not a usufruct in its true legal sense.

[19] This conclusion does not mean that the testator necessarily intended full and unrestricted dominium in the common home to pass to the appellant. That the contrary is the case is clear from his provision that she was to enjoy the property only until her death or remarriage, implying that upon the occurrence of the first of those events the property should pass to another. Accordingly, in my view, in clause 2 of the will the testator created a fideicommissum over the property without expressly identifying the person upon whom it should devolve on the appellant's rights as fiduciary coming to an end.

[20] In *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 180 Watermeyer JA, in dealing with a similar failure, said:

' . . . if the ownership of property is bequeathed to a beneficiary, then any curtailment of the rights of ownership appearing in the will, such as a prohibition against alienation or a conditional deprivation of the rights of enjoyment, is of no legal effect unless a third party is indicated in whose favour such curtailment is to operate.'

The reason for this is that '(u)nless a testator indicates . . . some person who shall be entitled to the subject-matter of the bequest if and when the event occurs, the prohibition hangs in the air; there is no one to enforce it . . .' [6]

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[5] *Ex parte Melle & others* 1954 (2) SA 329 (A) at 334 applied in *Schaumberg v Stark NO* 1956 (4) SA 462 (A) at 468.

[6] Per Van den Heever JA in *Aronson v Estate Hart* 1950 (1) SA 539 (A) at 552.

[21] By extending a ‘usufruct‘ over the common home until the appellant’s death or remarriage, the testator obviously intended that she was not to alienate the property. But in considering the effect of the testator’s failure to specifically nominate a beneficiary to whom ownership of the common home was to pass after the appellant, it should be remembered that, like any other testamentary provision, a disposition to a beneficiary may be necessarily implied from the terms of the will. In doing so, a court is guided by the same principles as those applied when implying tacit terms into a contract[7] – it applies the well-known ‘bystander test’ in the light of the express terms of the will and the relevant surrounding circumstances and considers whether it a term ‘so self-evident as to go without saying’.[8] Although a court must guard against making a will for a testator and thereby doing violence to the concept of the testator determining the destiny of his or her estate, when a beneficiary can be identified by this process it will not hesitate to ensure that effect is given to the testator’s implied intention.

[22] Of course in determining a testator’s intent, the terms of the will as a whole must be considered. It is clear from clauses 2 and 3 that the testator intended only the appellant and, failing her, the respondents in equal shares or their children by representation, to inherit from him. No other person is mentioned as a potential beneficiary and, most significantly, in clause 3 the testator did not burden the bequest of his estate to the respondents with what he incorrectly referred to as a usufruct as he did the bequest to the appellant in clause 2. From this the inference is irresistible that he intended ownership of the common home to pass to the respondents without any limitation on their dominium in the event of their inheriting. No reason presents itself for concluding that the testator could have intended a person other than the respondents from ultimately acquiring the common home if the appellant initially inherited the property but not if the respondents did so.

[23] In interpreting a will, a court must if at all possible give effect to the wishes to the testator. The cardinal rule is that ‘no matter how clumsily worded a will might be, a will should be so construed as to ascertain from the language used therein the true

[7] Cf *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H-137D.

intention of the testator in order that his wishes can be carried out'.[9] In the present case, in the light of what I have set out above, despite the poor wording of GR2, I am satisfied that clause 2 creates a fideicommissum over the common home with the appellant as the fiduciary until her death or remarriage whereupon the property is to pass to the respondents or their children as presented in clause 3.

[24] To summarise my conclusions:

(a) The will GR2 was intended by the testator to be his will and should be accepted as such by the Master under the Administration of Estates Act 66 of 1965.

(b) The testator's failure to attach a list of specific bequests to GR2 does not render it void for vagueness.

(c) The provisions of clause 2 of GR2 similarly do not render it void for vagueness.

(d) The court a quo therefore erred in concluding that GR2 was void for vagueness and that the testator died intestate.

(e) Clause 2 of GR2 provides for the appellant to inherit the entire estate of the testator subject to there being a fideicommissum over the common home to endure until the appellant's death or remarriage whereupon the property is to devolve upon the respondents or their children.

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[25] That brings me to consider the question of costs. The court a quo directed the costs of the present parties to be paid out of the estate. The appellant did not seek to appeal against that order which must stand. However, the appellant has succeeded in this court as the effect of this judgment will be that she will inherit the entire estate, subject of course to the fideicommissum over the common home. The respondents have argued against this, and although they have to a limited extent succeeded in obtaining a benefit from of the estate, it seems to me to be wrong in principle that the estate should bear the costs of the appeal which, effectively, would be paid by the successful appellant who has inherited the estate. In these circumstances it is appropriate for the respondents to bear the costs of the appeal.

[26] The order of the court a quo must be set aside. Strictly speaking the appeal was brought against paragraph 1 of the order, (paragraph 2 being the order for costs

[9] Per Steyn J in *Masters v Estate Cooper* 1954 (1) SA 140 (C) at 143H-144A.

against which there is no appeal). In that regard it must be inferred that although no mention was made of the counter application, the costs order granted by the court a quo encompassed both the application in convention and the counter application.

[27] The following order is therefore made:

(1) The appeal succeeds, with costs.

(2) Paragraph 1 of the order of the court a quo is set aside and substituted with the following:

‘1 (a) The application in convention is dismissed.

(b) The fourth respondent (the Master) is ordered to accept the will dated 30 March 2006, annexure ‘GR2’ to the founding affidavit in the application in convention, as the will of the deceased for the purposes of the Administration of Estates Act 66 of 1965.’

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L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	L W de Koning SC Instructed by: Laubscher Attorneys, Pretoria Schoeman Maree Incorporated, Bloemfontein
For 1st & 2nd Respondent:	J J Botha Instructed by: Tim du Toit & Kie Attorneys, Lynnwood Naudes Attorneys, Bloemfontein