Rens v Edelstein NO and another
[2014] JOL 32286 (GP)

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Case No:	50959 / 2013
Judgment Date(s):	16 / 09 / 2014
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Marked as:	Unmarked
Country:	South Africa
Jurisdiction:	High Court
Division:	Gauteng North Division, Pretoria
Judge:	Potterill J
Bench:	S Potterill J
Parties:	Trevor Andre Rens (At); Alan Robin Edelstein NO (In His Capacity as Executor in the Estate Late Douglas Stephen Rens – Estate No. 11791/2010) (1R), Alan Robin Edelstein NO (In His Capacity as Sole Trustee of the Douglas Stephen Rens Family Trust – No. IT 7680/1997) (2R)
Appearance:	Adv L Kok, Motla Conradie (At); Adv MC Maritz SC, Le Grange Attorneys (R)
Categories:	Application – Civil – Substantive – Private
Function:	Confirms Legal Principle
Relevant Legislation:	

Key Words

Trusts and Estates – Succession – Wills – Interpretation of – Test – Rectification of wills

Mini Summary

The applicant launched this application in his personal capacity and in his official capacity as co-executor of a deceased estate. The respondent acted in his capacity as executor in the deceased estate and in his capacity as sole trustee of the family trust of the deceased. He filed a counter-application that it be declared on a proper interpretation of the will that the property fell in the remainder of the estate ie to the family trust. The dispute between the parties concerned the interpretation of two clauses of the will, setting out special bequests.

Held that in interpreting the will, the true test was to ascertain the wishes from the testator as expressed in the will from the language used. Where the testator's words, as *in casu*, are clear from the plain grammatical meaning and syntax a court can have regard to the material facts and circumstances known to the testator when making the will to ascertain if these clear and unambiguous words set out the object of the bequest as expressed in the will. The conclusion is

thus that a court cannot interpret the language of a will to give effect to something the testator may have intended but which he has not expressed at all.

Applying that approach, the Court found that the interpretation contended for by the applicant had to be accepted.

That meant that the counter-application had to be dismissed. The Court also refused an alternative counter-application for rectification of the will. Rectification is only granted on a balance of probabilities if the will does not express the true intention of the testator and there is reliable evidence to show what the testator's intention was.

The relief sought by the applicant was thus granted.

POTTERILL J:

[1] The applicant is applying for the following relief:

> "1.
>
> It is declared that the full extent of the original Farm:
>
> *REMAINING EXTENT OF PORTION 2 OF THE FARM HAMMANSKRAAL NO. 112*, Registration Division JR, Gauteng, measuring *499.8195* (*FOUR HUNDRED AND NINETY NINE point EIGHT ONE NINE FIVE*) hectares, held under Deed of Transfer No. T143896/1998 dated 9 December 1998, which now has been subdivided into two portions, being held as follows:
>
> *The First portion*:
>
> THE REMAINING EXTENT OF PORTION 2 OF THE FARM HAMANSKRAAL [*sic*] 112, REGISTRATION DIVISION JR, GAUTENG;
>
> Measuring: 284,4800 (Two eight four comma four eight zero zero) Hectares;
>
> Held by Deed of Transfer T 143896/1998.

> *AND*
>
> *The Second Portion*:
>
> PORTION 76 (A PORTION OF PORTION 2) OF THE FARM HAMANSKRAAL [*sic*] 112, REGISTRATION DIVISION JR, GAUTENG;

Measuring 192,7734 (One nine two comma seven seven three four) Hectares;

Held by Certificate of Registered Title T 84177/2011;

Has been bequeathed as a special bequest to *Trevor Andre Rens* in terms of paragraph 5.4.1 of the Last Will and Testament of the Late Douglas Stephen Rens dated 20 March 2010 and that both

portions are to be allocated to *Trevor Andre Rens* in the Second and Final Liquidation and Distribution Account of the Estate of the Late Douglas Stephen Rens, Estate Number 11791/2010 and be transferred to him in accordance with such Second and Final Liquidation and Distribution Account.

2.

The Applicant is, by virtue of the above order, entitled to the proceeds of all consideration paid by Eskom Holdings SOC Limited in respect of the granting of servitudes registered over any of the properties.

3.

Costs of the Application to be paid out of the deceased Estate of the Late *Douglas Stephen Rens*, Estate Number 11791/2010."

[2] The applicant launches this application in his personal capacity and in his official capacity as co-executor of the estate of the late DS Rens.

[3] The respondent is Alan Robin Edelstein in his capacity as executor in the estate of the late Douglas Stephen Rens and in his capacity as sole trustee of the Douglas Stephen Rens Family Trust.

[4] The Master filed a report that it abides by the Court's decision.

[5] The respondent has filed a counter-application that it be declared on a proper interpretation of the will Portion 76 falls in the remainder of the estate; i.e. to the family trust. In the alternative that the will be rectified by adding words to clause 5.4.1 effectively excluding Portion 76.

[6] The application revolves around a dispute between the applicant and the respondent about the interpretation of clauses 5.4, 5.4.1 and 5.4.3 of the will. These clauses set out special bequests and read as follows:

"5.4

To my son, *Trevor Andre Rens*, or failing him, then his issue *per stirpes*:

5.4.1

REMAINING EXTENT OF PORTION 2 OF THE FARM HAMMANSKRAAL (*sic*) *NO. 12*, Registration Division JR, Gauteng, measuring *499.8195* (*FOUR HUNDRED AND NINETY NINE point EIGHT ONE NINE FIVE*) hectares, held under Deed of Transfer No. T143896/1998 dated 9 December 1998.

5.4.2

. . .

5.4.3

It is my intention, during my lifetime, to transfer the said properties referred to in this Clause to my son, *Trevor Andre Rens*, and insofar as I achieve this, it will be regarded as an advance on his inheritance."

[7] The following common cause chronology serves as background to this application:

7.1

The Remaining Extent of Portion 2 was on instructions of the testator to be subdivided into two portions. On 3 July 2008 the Minister granted consent for such subdivision under the subdivision of Agricultural Land Act, into portions 112 and 76;

7.2

In February 2009 the subdivision was approved by the Surveyor-General;

7.3

A deed of sale was drafted for Portion 76. This portion was to be bought by Deon de Klerk as a nominee for a company to be formed. The deed of sale was not dated but was seemingly concluded in March 2009. The deed of sale was subject to suspensive conditions that township approval rights be obtained with [*sic*] 18 months from date of conclusion of the contract. Mr Rens, the deceased, would in terms of this contract receive 20 % of the shareholding in the company;

7.4

Gordon Leath, director and conveyancer of the firm Edelstein and Bosman instructed a valuer, AJ Boshoff, in September 2009 to attend to the valuation of the properties. The valuation conducted by Boshoff did not include a valuation of Portion 76. It did include a valuation of Portion 51 of the farm Hammanskraal 112 JR;

7.5

The deceased drafted the will in issue on 11 March 2010. René Zers (neé Rens) in terms of the will received a special bequest of R250 000. Natalie Anne de Klerk, the youngest of the four Rens siblings, in terms of the will inherited a farm valued at ± R18 million;

7.6

A second deed of sale was drafted but nothing came from it. This contract was signed on 1 June 2010 with the seller being identified as Douglas Stephen Rens and the purchaser as Hammanskraal Residential

Properties (Pty) Ltd. Mr De Klerk signed on behalf of DS Rens. It was not denied that this contract was drafted and/or finalised on 2 December 2010;

7.7

The deceased died on 25 June 2010;

7.8

Three executors were appointed, the applicant, Mr Edelstein (first respondent) and Deon de Klerk, who resigned as executor on 6 July 2012 after the filing of the first and final liquidation and distribution account. If De Klerk had not resigned the first respondent would have been compelled to take action against De Klerk;

7.9

On 26 September 2010 the suspensive condition was not met and the contract was thus null and void;

7.10

The certificate of registered title and servitudes in favour of Eskom were registered on 25 November 2011;

7.11

Portion 2 was subdivided subsequent to the death of the applicant's father and in fact was only obtained on 25 November 2011;

7.12

The Certificate of Registered Title pertaining to the subdivision was registered on 25 November 2011;

7.13

Edelstein in his personal capacity and at his own expense on 6 July 2012 requested a legal opinion from Fine SC on the interpretation of the disputed

clause. He did not present to Fine SC that there was a second contract of sale or that the subdivision was not finalised at the time of the execution of the will.

[8] In a nutshell the respondent is of the opinion that Portion 76 should fall in the Family Trust and the applicant submitted that Portion 112 and Portion 76, ie the full extent of the farm prior to subdivision, was bequeathed to him in terms of clause 5.4.1 of the will.

[9] At the start of the hearing the applicant raised a point *in limine* that the respondent has the duty to begin. This was necessitated by the respondent's counter-application for rectification of the will due to the respondent's averred mistake made when drafting the will. Mr *Maritz*, on behalf of the respondent, welcomed this approach.

[10] On behalf of the respondent it was argued that the correct approach for the interpretation of the will is set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603 paragraph [18] [also reported at [2012] JOL 28621 (SCA) – Ed]:

"[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The inevitable point of departure

is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] It was submitted that the factual matrix *in casu* supports the version of the respondent and furthermore must be accepted in terms of the *Plascon-Evans* rule:

"A final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that it is justified in rejecting them merely on the papers" (*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) [also reported at [2009] JOL 22975 (SCA) – Ed]).

[12] The factual matrix is that at the date of the execution of the will Portion 76 was already sold. At the time of executing the will the time for the fulfilment of the condition had not yet lapsed and the deed of sale was still in force. Portion 76 was not available for distribution amongst the testator's heirs/legatees and he would not have seen it to be so. This is specially so because as he would have a 20% shareholding in a company which would undertake a township development on the property.

[13] The second factual matrix relied on was that in September 2009 the testator had instructed the respondent that Portion 2 of the farm (excluding Portion 76 as well as the remaining extent of Portion 2 of the Farm Hammanskraal) be transferred to the

applicant as a donation *inter vivos* as an advance on the applicant's inheritance. This donation was to be facilitated as the applicant could not pay the transfer fees for such transferrals. Attorney Leith from the respondent's office was given the necessary instructions and he instructed the town planner, as well as Robert Buckley to survey and draw the diagrams and to AJ Boshoff to attend to the valuation of the properties for donations tax. The properties were not transferred because of the delay caused by Eskom in regard to the registration of servitudes over the properties. From these facts the only purpose inferred can be that the legacy was to cover the eventuality of the testator passing away before the donation was given effect to. Thus the will and the donation related to the same properties, ie Portion 112 excluding Portion 76 and Portion 2 of the Farm Hammanskraal.

[14] The third factual matrix was that the testator never espoused the principle that his children be treated equally. The will supported this contention wherein Mrs René Zerf only inherited R250 000 and Natalie de Klerk inherited ± R18 million. Both the affidavits of Mrs Zerf and De Klerk confirm that their father was emotional and not a fair man. The supposition by the applicant that his father would thus not want him to inherit
± R4 million (excluding Portion 76) versus ± R9 million if Portion 76 is included, is not a

probability. Furthermore the applicant received substantial benefits from the testator during the latter's lifetime.

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[15] In the will the extent of the Remaining Extent of Portion 2 of the Farm Hammanskraal is reflected as 4009,8195 hectares, which is the extent of the property before the exclusion of Portion 76. There is thus a latent ambiguity between clauses 5.4.1 and the "said properties" in clause 5.4.3. It was argued that it cannot be said that clause 5.4.3 was a mistake because Portion 76 was sold and the donation *inter vivos* expressly excluded Portion 76. The recordal of the hectares in clause 5.4.1 was thus the mistake.

[16] The applicant on the other hand argued that at the time of the drafting of the will and the death of the testator the subdivision of the property was pending. The proposed subdivided property Portion 76 was sold subject to the suspensive conditions which were not fulfilled at the time of the execution of the will. The second deed of sale suddenly appeared and this alerted the applicant that there is a problem with the respondent's interpretation of the will.

[17] It was argued that the factual matrix did support the applicant. There is nothing illogical that the applicant would receive the entire Portion 2 if the sale did not go through. It is correct that Portion 76 could not be transferred to the applicant while the sale was pending, but this did not lead to the conclusion that the testator laboured on the misconception that he could not dispose of the entire property in his

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will while the sale was pending. This is specifically so when it is common cause that the testator was an astute businessman who would have understood the tenuous nature of the suspensive condition in the deed of sale. Thus if the sale had gone through only a smaller portion of the farm would have been available for distribution after his death. If the sale did not go through then there was no intended development of Portion 76 to proceed with and the applicant would receive the entire Portion 2. Of importance was that the testator when executing his last will and testament was very aware of the fact that Portion 76 was still part of Portion 2 at the time.

[18] It was argued that the donation *inter vivos* does not factually support that Portion 76 was not to be part of the applicant's inheritance. It was an unwarranted conclusion that the donation *inter vivos* prior to the execution of the will was as an undisputable fact identical to the inheritance. The applicant denied that he could not pay transfer fees. There was further no indication in the will that it was the understanding of the testator when he executed the will after he perused the will. Mr De Klerk did not in his affidavit support the contention that the testator indicated or instructed that Portion 76 should be excluded from the bequest. Furthermore if regard is had to clause 5.4.3 then the testator specifically specifies as follows:

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"And insofar as I achieve this it will be regarded as an advance on his inheritance."

These words indicated that the testator contemplated the possibility that the subdivision may not take place prior to his death or at all.

[19] It was submitted that I should follow the golden rule for the interpretation of wills as set out in *Aubrey-Smith v Hofmeyr* 1973 (1) SA 655 (C) at 657G–H:

". . . in construing a will the object is not to ascertain what the testator meant to do but his intention as expressed in the will."

And further:

"Consequently where his intention appears clearly from the words of the will, it is not permissible to use evidence of surrounding circumstances or other external facts to show that the testator must have had some different intention. At the same time no will can be analysed *in vacuo*. In interpreting a will

the Court is entitled to have regard to the material facts and circumstances known to the testator when he made it: it puts itself in the testator's armchair."

Pertaining to the law relating to the rectification of the will I was urged to follow the matter of *Henriques v Giles NO* 2010 (6) SA 51 (SCA) [also reported at [2009] JOL 23688 (SCA) – Ed]:

"[15] South Africa has no legislation on the rectification of wills and the ambit of our courts' powers to rectify mistakes in a will has been the subject of considerable judicial disagreement. While there has never been any dispute in regard to the court's power to correct clerical errors or an erroneous description of a beneficiary or a benefit in a will, or to delete from a will words or provisions included in it by mistake, there were conflicting decisions concerning the court's power to rectify a will by inserting words or provisions which have been omitted in error or by substituting the correct words of provisions for incorrect ones which have been mistakenly included in a will. It is now generally accepted that the South African court do have this latter power.

[16] Rectification is an equitable remedy, the purpose being to give effect to the true intention of the relevant parties *or of a testator or testatrix concerned*. A court will rectify a will where, due to a mistake, be it on the part of the testator or testatrix or on the part of the

drafter, the will does not correctly reflect their testamentary intention. The applicant for rectification must establish that (a) the alleged discrepancy between expression and intention was due to a mistake; and (b) what the testator or testatrix really meant to provide. *The onus, which must be satisfied on the balance of probabilities, is on the party seeking rectification*" (my emphasis).

[20] *In casu* clause 5.4 with its two subsections is clear and unambiguous. When clause 5.4 is read with the other provisions in the will there is simply no patent ambiguity. The respondents however aver that there is a latent defect if the will is interpreted in a factual matrix at the time of the drafting of the will.

[21] I am however not convinced that the applicant's insistence that the will be interpreted in terms of the *Natal Joint* matter, *supra*, is correct because there are important differences between a will and a contract/document which will affect the process of interpretation. Contracts afford two or more parties to a contact an opportunity to explain clauses. On the other hand a will is a unilateral juristic act emanating from the testator. Furthermore at the time of the interpretation of the will the testator is beyond reach. In contracts the subjective intent is not that important as a contracting party is held to their intentions as expressed wherein as in the

interpretation of a will the courts will have to resort to unravelling the testator's subjective intention from his objective manifestation. Searching for the probable intention of the testator "does not mean that the intention of the testator may be sought by reasoning or conjecture not founded upon the scheme and the terms of the will" (*Lello and others v Dales NO* 1971 (2) SA 330 (AD) at 335C).

[22] In interpreting the will the true test is thus to ascertain the wishes from the testator as expressed in the will from the language used (*Robertson v Robertson's Executors* 1914 AD 503 at 507). Where the testator's words, as *in casu*, are clear from the plain grammatical meaning and syntax a court can have regard to the material facts and circumstances known to the testator when making the will to ascertain if these clear and unambiguous words set out the object of the bequest as expressed in the will. The conclusion thus is that a court cannot interpret the language of a will to give effect to something the testator may have intended but which he has not expressed at all. In *Cuming v Cuming* 1945 AD 201 at 213 armchair evidence is defined as follows:

"The general rule is that, in construing a will, the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken

to have used the words in the will, and then to declare what is the intention evidence by the words used with reference to those facts and circumstances which were (or to ought to have been) in the mind of the testator when he used those words."

This armchair rule does not imply that the intention of the testator may be sought by reasoning or conjecture not founded upon the scheme in terms of the will, but it is permissible and sometimes essential to read and interpret the will in the light of the relevant circumstances existing at the time of its making.

[23] I cannot agree with the submission by Mr *Maritz*, on behalf of the respondent, that the *Plascon-Evans* rule as confirmed in the *Zuma* matter, *supra*, is relevant in this stage of the interpretation of the will. There is no *bona fide* factual dispute as all the facts the Court would have to rely on pertaining to the factual matrix are in fact common cause. The dispute revolves around the interpretation of the will on these common cause facts.

[24] It is common cause that the testator was an astute businessman and had amassed a small fortune during his lifetime. On this characteristic of the testator I find it difficult to accept that he signed the will with such a blaring mistake not expressing

his intention. He intended to transfer two properties to the applicant while still alive, if he did not succeed in doing so then the applicant would inherit the properties. He knew the first property mentioned in paragraph 5.4.1, Portion 2 was in the process of being subdivided. He knew it would be sold subject to the subdivision being granted and subject to the suspensive condition that township approval rights be obtained within 18 months of date of conclusion of the contract. As an astute businessman I am satisfied that he knew that the suspensive condition was indeed a tenuous one. I am also satisfied that the testator knew that Portion 76 was a reality in 2008 when the Minister granted consent to the subdivision despite the conditions in the approval. He accordingly in 2010 could sell Portion 76 as Portion 76 was in existence and the agreement of sale pertaining to this portion was valid. At the time of the drafting of the will the suspensive condition of approval for a township development had not lapsed. The natural result of the suspensive condition not being met is that the contract is null and void. This was also set out contractually where it was stated in paragraph 4.1 of the agreement of sale that if the contract was cancelled the property shall revert to the seller (testator) at no costs to the seller whatsoever. I cannot from this factual matrix infer or interpret that the testator intended Portion 76 to upon a lapsing or cancelling of a contract to revert to the trust. From the agreement of sale it was clear that Portion 76 was sold with the specific purpose to establish a township. The contract forbade any self-development; the business plan was to sell the erven. If this did not happen, as it did not happen, while in life or after his death then clause 5.4.1 would act as the

catch-all phrase; the applicant would inherit the property *in toto*. If the testator did not want the applicant to inherit Portion 76 then he simply should have said so. He was very much alive to the subdivision and the contract of sale and despite this he does not express in his will that even if the contract is cancelled the applicant is not to inherit Portion 76. This factual matrix does not sufficiently exclude the probability of an opposite intention having existed in the mind of the testator at the time of drafting the will. This opposite intention being that if the business did not get off the ground then the applicant would inherit the whole Portion 2.

[25] I am also not convinced that the "second deed of sale" has no relevance to the factual matrix. The respondent placed much reliance on the original deed of sale as indicative of the factual matrix supporting their contention. The second deed of sale pops up to extend the suspensive condition of the first contract. It is admitted by Mr Deon de Klerk that he drafted this

contract, ie the person who would benefit from the sale. The testator did not sign the second deed of sale and the first deed of sale the testator specifically provided and contracted to the suspensive condition of 18 months and there is nothing to suggest that he would have wanted it extended. The sudden appearance of the second deed of sale is indicative thereof that the original deed of sale was desperately being kept alive to keep Portion 76 out of the picture. This fact supports the interpretation that Portion 76 would revert back to the applicant if it was not solved [*sic*: sold?].

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[26] The second factual matrix relied upon are the preparations for the *donatio inter vivos* of the applicant pertaining to the same properties as those mentioned in the will, however excluding Portion 76. It was thus argued that it is indicative that the testator did not intend the applicant to inherit Portion 76. This *donatio* was not achieved prior to the testator's death. Clause 5.4.3 of the will wherein it is stated that it is the testator's intention to during his lifetime transfer the said properties was not achieved. There is nothing to indicate that the testator intended the *donatio*, full well-knowing that the *donatio* would perhaps not be fulfilled in his lifetime, to exclude Portion 76 in the will. The testator's words simply do not govern its supposed intention that if the *donatio* is not effected the inheritance excludes Portion 76. A court may not in interpreting a will on mere conjecture i.e. he did not want the applicant to inherit Portion 76 as in life the testator had financially assisted the applicant ascertain the true intention of the testator.

[27] I am not judicially persuaded that the expressed words taking into account the preparations for the *donatio inter vivos* wrongly reflected the intention of the testator. If the sale agreement lapsed, as it did, there is no sale and consequent "business plan" for Portion 76. There is nothing to exclude the proposition that if that was the *de facto* situation, the applicant should not inherit Portion 76. Portion 76 would revert back to the testator upon lapsing of the contract and there is nothing to

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countenance that the applicant would then in terms of clause 5.4.1 step into the testator's shoes.

[28] In terms of the clear and unambiguous words of the will the proper description and extent of the property is set out in clause 5.4.1. It was argued that the extent is neither here nor there but I cannot accept this argument. Upon reading the will one could perhaps glance over the description of the property as being "technical", but one would most certainly be alerted to the extent as being (big). This would draw attention that the whole portion is described and not to the exclusion of Portion 76. Knowing that there was subdivision and an agreement of sale it was the simplest thing to exclude Portion 76 from the will. This was not done and I cannot find that the expressed words do not express the intention of the testator. From this it follows that prayer 2 of the application must be granted.

[29] There is an alternative counterclaim requesting that the will of the testator be rectified by the addition of the following at the end of clause 5.4.1:

"But excluding Portion 76 (a portion of Portion 2) of the farm Hammanskraal 112, Registration Division JR, Gauteng, measuring 192.7734 hectares."

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[30] Rectification is only granted on a balance of probabilities if the will does not express the true intention of the testator and that there is reliable evidence to show what the testator's intention was. *In casu* the rectification entails the alteration of the provision of an unambiguous will to render it appropriate in the circumstances; thus variation of the will.

[31] For ease of reference I will continue to in the counter-application for rectification still refer to the respondent herein as the applicant and the applicant as the respondent as in the original application.

[32] I agree with the contention on behalf of the applicant that rectification should precede the interpretation of a will because a court must know what words the testator deemed to have intended to gather the testator's intentions from the will. This does however not bar the Court from adjudicating the application for rectification. The respondent must prove on a balance of probabilities that the alleged discrepancy between intention and expression was due to a mistake and that the testator intended that this "discrepancy" should form part of the will (*Will NO v The Master and others* 1991 (1) SA 206 (C) at 213H–I).

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[33] The respondent sets out that at the beginning of March 2010 and later in paragraph 88.1 that it was specifically on 16 March 2010 he was instructed to draft a will. A consultation was arranged and in attendance was the testator, the applicant and Deon de Klerk. He has a clear recollection of the discussions at this meeting. At that consultation the testator knew that Portion 76 was sold and was not available for distribution amongst his legatees and heirs. He further sets out:

> "8.2
>
> A consultation for such purpose was arranged with me to take place on 16 March 2010.
>
> . . .
>
> 8.4 During the course of the discussion involving the four of us *inter vivos* donation of the immovable properties to the Applicant and in respect of which Gordon Leith had received instructions to give effect thereto, was raised. Deon then pointed out to the Testator that it would be prudent to include a provision in the Will to the effect that such properties are to be bequeathed to Applicant just in case there was a delay in the transfer and the Testator passed away before such transfer was effected. Deon pointed out to the Testator that he was getting on in years and that this would protect the Applicant's position. The Testator agreed with this

suggestion. He then asked both the Applicant and Deon to leave the office and he thereafter continued the discussion in respect of his Will with me alone.

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8.5

After having taken full instructions, I went to the office of my secretary, LINDA PARKINSON, and dictated the Will to her there and then.

8.6

I was, of course, fully aware of exactly what properties were to be transferred to the Applicant *inter vivos* and that my partner, Gordon Leith, was attending to. Both the Testator and I were fully aware of the fact that Portion 76 was not to form part of such *inter vivos* donation but was expressly excluded therefrom.

8.7

In dictating clause 5.4.1, I read the property description of the Remaining Extent of Portion 2 from the title deed including the extent of 499.8175 hectares. In my dictation it, however, slipped my mind to add the qualification to clause 5.4.1 that Portion 76, measuring 192.7734 hectares, was excluded.

8.8

The express wording of clause 5.4.1 of the Will is, accordingly, the result of an inadvertent mistake on my part as the draftsman thereof

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in that I omitted to add at the end of the clause the words 'but excluding Portion 76, measuring 192.7734 hectares'.

8.9

The Applicant was present when the Testator's intention in this regard was communicated to me (as his Attorney) for purposes of drawing the Will and he knows full well that the Testator did not intend Portion 76 to form part of the Applicant's legacy."

[34] In response thereto the applicant stated under oath that on 16 March 2010 he was in fact with Stanley Rens, his Co-Director in Renbro Properties (Pty) Ltd and attended to the auditors Messrs JA Roets and Associates to discuss and sign the financials of the company. The appointment was at 10am at the auditors' offices in Silver Lakes. He attached e-mails confirming that he did not travel in his own vehicle but travelled with Mr Rens. He accordingly disputed that

the respondent's memory serves him as well as he submitted in the papers. He reiterates that the testator never ever discussed the provisions or proposed provisions of the will in his presence.

[35] The applicant noted that directly after the consultation the respondent went to his secretary and dictated the will. He found it difficult to comprehend that the

respondent could under those circumstances have made the alleged mistake of failing to exclude Portion 76 from the bequest.

[36] I am guided by the principles as set out in *Henriques v Giles NO, supra*.

[37] A party cannot contend that there is no *bona fide* dispute of fact if the opposite party is not in the position to deny certain facts; the applicant cannot under oath submit that the respondent did not make a mistake when drafting the will. The applicant, as he did, can at most submit that he would find such a mistake surprising under the circumstances. Furthermore, the applicant denies and reiterates that he was not present at the meeting of 16 March 2010 where the *donatio* and the inheritance was discussed with the testator; whereas Mr De Klerk confirmed that the applicant was present at this meeting. The applicant denied that the inheritance was ever discussed with him. I am satisfied that pertaining to the rectification there is a *bona fide* factual dispute on the papers before me. If that is so then of course the principles of *Plascon-Evans* (*supra*) have to be invoked and the applicant's version (as respondent) pertaining to the attendance of the meeting must be accepted. The respondent's version that the applicant was present when the instructions were given by the testator in regard to clause 5.4 and that the applicant accordingly has at all times known full well that Portion 76 would not form part of his legacy

(at paragraph 3.2 of the answering affidavit) and he is in fact opportunistic is thus in dispute and the applicant's version must be accepted. These facts are however coupled with the respondent's averment that he made the mistake when drafting the will. Both Mr *Maritz* and Mr *Kok* alluded to oral evidence being led if there is a factual dispute. On behalf of the applicant it was submitted that the counter-application of rectification should fail as the respondent chose to bring such an application and must stand and fall thereon.

[38] The general rule of practice is that an application for oral evidence should be made prior to argument on the merits. The judgment in *Kalil v Decotex* (*Pty*) *Ltd and another* 1988 (1) SA 943 (A) at 981F–G ushered in a new approach which permitted counsel for an applicant to present his case on the footing that the applicant was entitled to relief on the papers, but to apply in the alternative for the matter to be referred to evidence if the main argument failed. The exceptions to this general rule have thus been widened, but they remain exceptions. In *De Reszke v Maras and others* 2006 (1) SA 401 (C) [also reported at [2003] JOL 10929 (C) – Ed] the Full Court found the following at 412 paragraph [31]:

> "[31] Had the various deponents on both sides been called to testify, and their evidence been tested under cross-examination, it may be that

> the deceased's alleged lack of testamentary capacity (either altogether or at the relevant times) would not have been proved. On the affidavits, however, there is in my view clearly a *bona fide* dispute of fact on this issue at least. If we accept the respondents' version in this regard, as the general rule requires us to do, then it would follow that (on the first issue) the deceased could not have formed the requisite intention. The application would for this reason have had to fail. In any event oral evidence would, in my view, probably have shed light on the deceased's intentions during the relevant period, given the overlapping nature of the issues" (the other issues being whether Annexure A was his will and whether he revoked his 1999 will).

[39] On appeal the Full Court in the *De Reszke* matter, *supra*, declined any further oral evidence as it should have been done at the hearing itself. I am satisfied that due to the nature of the *bona fide* factual dispute pertaining to rectification that oral evidence should be led and I want to circumvent a situation akin to the *De Reszke* matter. The respondent must, if he so chooses, tell this Court how this important mistake came about. The respondents' election of bringing this counter-application as an alternative leading to a postponement for oral evidence can always be marked with disapproval with an appropriate costs order, if appropriate, at a later stage. *In*

casu I am satisfied that the rectification issue is in dispute and should be referred to trial for oral evidence.

[40] The respondent filed an application to strike out certain passages and certain paragraphs from the applicant's founding and replying affidavits. The reason was set out as that it constituted irrelevant and/or scandalous and/or vexatious matter which was inherently prejudicial to the respondent if it was permitted to stand. At the hearing I indicated that it is not necessary to argue it because I will not rely on any scandalous, vexatious or irrelevant facts in coming to a finding. I did however rely on one fact that the respondent wanted to be struck out. This was the second deed of sale because it is common cause that such an agreement of sale existed. On these papers I accept that the respondent did not draft such deed of sale and nothing further needs be inferred from pertaining to how it came about for me to come to a finding. It did however come about and I took cognisance thereof.

[41] I am not asked, nor is it necessary in this application, to pronounce upon the respondent's professional conduct. Some of the criticism against the respondent is set out as an explanation as to when and why the applicant became aware of the dispute pertaining to the interpretation of the will. This is relevant especially as the respondent himself avers that the applicant's "belated conclusion is nothing other

than pure optimism on his part" (at paragraph 38.2). This is very much the pot calling the kettle black. I cannot find contentions that the respondent as executor and as the draftsman of the will should have brought this application as being irregular or vexatious or scurrilous. The applicant had requested him to do so. As executor the respondent had certain duties and the applicant has submitted that the respondent should have done so. I agree that the paragraphs under the heading perceived intimidation and threats is not *in toto* relevant to the dispute. On the whole I cannot on the affidavits find that the allegations justify the applicant's deprivation of costs nor can I exercise my discretion to grant attorney and client costs to the respondent.

[42] In the applicant's heads and supplementary heads counsel attacked the respondent's conduct and behaviour and submitted that it reflected negatively on the respondent's professional integrity and credibility. Counsel did not do so once but did so over and over. He referred to suspect incidents impacting on the integrity of the respondent. Despite the respondent's denial that he drafted the second deed of sale it was submitted that the document was drafted in the respondent's office on the date and time specified thereon. Counsel also alluded to coercion between the respondent and De Klerk pertaining to the second deed of sale, executor's fees and that the Master was not informed by the respondent of De Klerk's resignation but it was held over until after the first and final liquidation distribution account was advertised. Counsel also submitted that if the respondent made a mistake as

set out in the alternative counter-application when drafting the will why did the respondent then not immediately apply for rectification but persisted that the will is to be interpreted as they alluded to. Counsel for the respondent accordingly requested costs to be granted on an attorney and client scale and to be paid *de bonis propriis* by counsel.

[43] Counsel for the applicant defended his stance as that he had a duty to approach the applicant's matter fearlessly and apologised if he overstepped the boundaries.

[44] The next question thus is whether counsel should pay the costs *de bonis propriis*. I agree that in the heads of the counsel there are instances of attack on the respondent's professional conduct and integrity that overstep the boundaries. In *Hopf v The Spar Group* (*Build It Division*) *and another* [2007] 4 All SA 1249 (D) [also reported at [2006] JOL 18306 (D) – Ed] the principle that *de bonis propriis* costs can be awarded against counsel was confirmed. It was however emphasised that it would only be done in serious cases where dishonesty, wilfulness or negligence in a serious degree was displayed. Nevertheless, in the exercise of my discretion, I decline to award attorney and client costs against counsel. It is a special order not readily made. Counsel must however refrain from overstepping the boundaries when serving a client.

[45] I accordingly make the following order:

1.

It is declared that the full extent of the original Farm:

REMAINING EXTENT OF PORTION 2 OF THE FARM HAMMANSKRAAL NO. 112, Registration Division JR, Gauteng, measuring *499.8195* (*FOUR HUNDRED AND NINETY NINE point EIGHT ONE NINE FIVE*) hectares, held under Deed of Transfer No. T143896/1998 dated 9 December 1998, which now has been subdivided into two portions, being held as follows:

The First Portion:

THE REMAINING EXTENT OF PORTION 2 OF THE FARM HAMANSKRAAL [*sic*] 112, REGISTRATION DIVISION JR, GAUTENG;

Measuring: 284,4800 (Two eight four comma four eight zero zero) Hectares; Held by Deed of Transfer T 143896/1998.

AND

The Second Portion:

PORTION 76 (A PORTION OF PORTION 2) OF THE FARM HAMANSKRAAL [*sic*] 112, REGISTRATION DIVISION JR, GAUTENG;

Measuring 192,7734 (One nine two comma seven seven three four) Hectares;

Held by Certificate of Registered Title T 84177/2011;

Has been bequeathed as a special bequest to *Trevor Andre Rens* in terms of paragraph 5.4.1 of the Last Will and Testament of the Late Douglas Stephen Rens dated 20 March 2010 and that both portions are to be allocated to *Trevor Andre Rens* in the Second and Final Liquidation and Distribution Account of the Estate of the Late Douglas Stephen Rens, Estate Number 11791/2010 and be transferred to him in accordance with such Second and Final Liquidation and Distribution Account.

2.

The applicant is, by virtue of the above order, entitled to the proceeds of all consideration paid by Eskom Holdings SOC Limited in respect of the granting of servitudes registered over any of the properties.

3.

Costs of the Application to be paid out of the deceased Estate of the Late *Douglas Stephen Rens*, Estate Number 11791/2010.

4.

The counter-application is dismissed with costs.

5.

The alternative counter-application of rectification is referred to trial. The counter-application for rectification stands as a simple summons and the applicant therein must file his declaration within 15 days hereafter if he wishes to pursue this counter-application. The costs of the referral are to be adjudicated at the trial.