INAPPROPRIATE ASSISTANCE TO DRAFT CLIENT'S WILL

Ditmar and Others v Lotter NO and Others (5296 / 2020) [2021] ZAWCHC 41 (5 March 2021)

Bequeathing assets to heirs is a very emotional and important act for any individual. If the testator suffers from an illness such as dementia, when is the last moment that he could still dictate his wishes? The judgment tells a story in which it appears that a longstanding financial advisor of a deceased person had assisted him with his will and financial planning in a way to benefit himself. Apart from instinctive disapproval of such conduct, the other consequence is an invalid will. The judgment is a reminder of how important it is to get proper and timely assistance with drafting your will.

The Judgment can be viewed here.

FACTS

Whilst he was still alive, Mr Von Ditmar lived in South Africa. His only family appeared to be his nephews and nieces, all who lived overseas. In terms of a will executed in 2011, they were the beneficiaries of his assets.

Mr Von Ditmar was a wealthy man and, according to the facts, appeared to put a lot of trust in his financial advisor, one Heiberg, who was a financial adviser with a well-known financial services company.

During 2014 Mr von Ditmar developed dementia.

Later, in 2017, he executed his wills with the assistance and on the advice of Heiberg. Heiberg's offices prepared the documents. Shortly thereafter, Heiberg successfully brought an application for the appointment of a curator for Mr Von Ditmar, due to the advanced stage of this dementia. In that application, Heiberg alleged that it became evident that Mr Von Ditmar's physical and cognitive abilities were rapidly deteriorating and his dependence on him (Heiberg) had accordingly become vastly increased.

The last wills (2017 wills) included a bequest to Heiberg of R8,7 million, with a balance of some R13 million for his nephews and nieces to share.

The nephews and nieces had launched an application to have the 2017 wills of their late uncle declared to be invalid and set aside. They based their argument on the allegation that in 2017, Mr Von Ditmar was no longer capable of executing a valid will. They had three doctors and various friends of the late Mr Von Ditmar to corroborate their argument.

The present matter was an opposed application for security for costs of the main application, at the instance of Heiberg. *(Applying for security for costs is an application that is allowed when, amongst other things, a litigant is a foreigner and there are concerns that, depending the outcome, the foreigner will not or cannot perform in terms of the envisaged order. In other words, if a cost payment is made, the foreigner may not abide thereby.)*

The nephews and nieces disputed that it was necessary for them to provide security for costs and that it was just a method for Heiberg to gain an unfair advantage and that his application was not *bona fide* (in good faith).

HELD

- Heiberg had no claim for security from the nephews and nieces, who fall to inherit (at the least) the residue in and to the deceased estate which amounts to some R13 million, excluding the R8,7 million bequest to

Heiberg. This amount by far exceeds any possible award of costs in the main application, and hence, to ask them for security of costs upfront, was not warranted.

- In any event, the nephews and nieces stated that the Court could rather put in place an order directing that they would not be entitled to take their share in and to the estate, until such time as any costs award, as Heiberg might obtain against them, has been extinguished.

- The response to this offer by Heiberg bears scrutiny: The executor had produced a draft estate account which confirmed the value of the estate. Heiberg's suggestion that there may be unknown creditors who have significant claims which would neutralise the R25 million net value in the estate was far-fetched. Heiberg in any event was the late Mr Von Ditmar's financial advisor and the deceased was entirely reliant on him. Besides, Heiberg also launched an application for the deceased's curatorship. The ostensible fears that there may be creditors waiting in the wings was simply not sustainable.

- The application by Heiberg therefore had to fail.

- Regarding costs: the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. When awarding costs, a court has a discretion, which it must exercise after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.

- A successful litigant falls to be indemnified for the expense put through in unjustly having to defend litigation. The nephews and nieces submitted that the current application had no merit and amounted to an abuse of the court process and that a punitive cost order was warranted.

- The Court agreed, especially taking into account that: prior to the execution of the disputed wills, Heiberg openly discussed the deceased's then last will with the nephews and nieces and confirmed that they were the major beneficiaries; that having previously openly discussed the deceased's will with them, after the execution of the disputed wills, Heiberg adopted a convenient bulwark to the effect that he is no longer sanctioned to discuss these issues with them; Heiberg launched an application for the appointment of a curator to the deceased, but failed to disclose the fact that he assisted in providing certain information in connection with the disputed wills. These are the very wills in which the deceased left the bulk of his estate to Heiberg.

CONCLUSION

In all the circumstances of the matter, the counter application failed and a punitive costs was issued against Heiberg.

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