ELLIOT GRENVILLE KERN ROGERS
versus
TRAUDE ALLISON ROGERS
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 27 September and 1 November 2006

Opposed Application

Mr *C. Andersen S.C.,* for the applicant
Mr *De Bourbon S.C.,* for the 1st respondent
No appearance from 2nd respondent

KAMOCHA J: The applicant and 1st respondent are the only surviving children of the late Betty Gray Rogers who died at Harare on 6 November 2004. The deceased made a will on 22 January 2004 in terms of which the applicant was appointed sole executor of the will and the sole beneficiary of the testatrix.

On 24 May 2005 the respondent issued summons seeking the following relief:

(a) an order declaring the will of the testatrix dated 22 January 2004 to be null and void;

(b) an order cancelling the letters of Administration granted to the applicant by the Master of the High Court;
alternatively;

(c) an order declaring the will executed by the Testatrix on 22 January 2004 as only being applicable to her estate situate

in Zimbabwe, and only having the effect of cancelling previous wills relating to such estate;

(d) an order that applicant shall pay the costs of suit.

The respondent alleged in her declaration that the said will had been executed under undue and improper pressure exerted on the Testatrix by the applicant and as a consequence the Testatrix was not, at that time, capable of executing a will of her free will and her own unfettered discretion. In the result, she concluded that the said will was invalid, not having been executed by the Testatrix of her own free will and in the premises she sought an order from this court to that effect.

The testatrix's estate had been registered with the Master of the High Court who had issued letters of administration to the applicant in terms of the said will.

The testatrix had left another will executed on 6 January 1995 which regulates the distribution of the testatrix's estate in the United Kingdom.

In the alternative, and if it be found that respondent is not entitled to the relief sought above, then;

i) she averred that the testatrix intended her will dated 22 January 2004 to apply only to her estate situate in Zimbabwe;

ii) the testatrix did not intend by executing the will dated 22 January 2004 to revoke the will executed by her in 1995 governing the estate situate in the United Kingdom; and

iii) the plaintiff sought an order to t hat effect.

In order to enable him to plead, the applicant requested for further particulars as to when, where and in what manner it was alleged that he exerted undue and improper pressure on the testatrix.

And further, on what basis it was alleged that the testatrix intended her will dated 22 January, 2004 to apply only to her estate situated in Zimbabwe and not her estate situated in the United Kingdom.

In reply to the above request for further particulars the respondent decline to provide further particulars as to the undue influence alleged save to say this:-

> "To enable first respondent to plead to plaintiff's declaration, plaintiff furnishes the following further particulars:
>
> 1. Undue and improper pressure was exerted on the testatrix by first defendant at the testatrix's home, where first defendant also resided, cumulatively over a long period of time. The undue pressure came in the form of physical, emotional and verbal harassment, the particulars of which are a matter of evidence which plaintiff is not obliged to plead at this stage.
> 2. The testatrix's will of 22 January 2004 specifically refers to the testatrix's property in Zimbabwe and says nothing about the testatrix's estate in the United Kingdom which is governed by the testatrix's 1995 will. For the rest, the basis for making this contention is a matter of evidence."

This reply prompted the applicant to file this application, in terms of the provisions of Order 11 of the High Court Rules. Order 11 Rule 75(1) provides that:

"where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious."

Order 11 Rule 79 is also relevant for these proceedings and it provides thus

Rule 79(1)

"Unless the court is satisfied, whether the plaintiff has given evidence or not, that the action is frivolous or vexatious, it shall dismiss the application, and the action shall proceed as if no application had been made.

79(2)

If the court is satisfied that the action is frivolous or vexatious, it may dismiss the action and enter judgment of absolution from the instance with costs.

Order 11 is a counterpart of the rule for summary judgment. BEADLE CJ had this to say when dealing with the provisions of the two orders in *Wood N.O. v Edwards* (1968(2) RLR 212 at 213A to F.

"Order 43 is designed to assist a plaintiff and provides that, in certain cases, a plaintiff may apply for summary judgment, the effect of which is to prevent the defendant from proceedings with his defence. Order 44 is designed to assist a defendant and provides that, in a proper case, the plaintiff may, in his turn, be prevented from proceeding with his action. It seems to me, therefore, that much the same considerations which apply in determining whether or not a court should grant a summary judgment to a plaintiff should apply in deciding whether the court, on the application by a defendant, should stay or dismiss a plaintiff's action under order 44.

> The grounds on which a court will grant summary judgment are well known. The plaintiff must satisfy the court that the defendant has not an arguable case, and it would seem to me that the same standard might appropriately be applied to applications made under order 44. If the court is satisfied that the plaintiff has not an arguable case, then his action may well be characterized as "frivolous and vexatious" and an unnecessary waste of costs, and the court would be justified in the exercise of the discretion, which it undoubtedly has, to order that the plaintiff's action be dismissed.
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> An authority for this approach is to be found in the case of *Ravden v Beeten* 1935 CPD 269, at 276 where SUTTON J quoting with approval, from a judgment in an English case, said that the action will not be dismissed unless the court is satisfied that the likelihood of the case which is going to be made out succeeding "stands outside the region of probability altogether, and becomes vexatious because it is impossible"

I shall approach this application on this basis and first deal with the respondent's alternative claim wherein she seeks an order declaring the will executed by the testatrix on 22 January 2004 as only being applicable to her estate situated in Zimbabwe, and only having the effect of cancelling previous wills relating to such estate.

The testatrix worded her will in a clear and unambiguous manner. She stated:-

> "I BETTY ROGERS of 30 Arundel School Roads, Mount Pleasant Harare, Zimbabwe HEREBY REVOKE all former wills and testamentary dispositions made by me AND DECLARE this to be my last Will.
>
> I APPOINT my son Eliot Grenville Kern Rogers of 30 Arundel School road, Mount Pleasant, Harare, Zimbabwe to be the sole Executor of this my Will. I GIVE DEVISE

> BEQUEATH unto my son Eliot Grenville Kern Rogers my fifty percent share of the property 30 Arundel School road, Mount Pleasant, Harare, Zimbabwe and one hundred percent of the property 15 Carrington Road, Darlington, Mutare, Zimbabwe to my son Eliot Grenville Kern Rogers.
>
> I GIVE DEVISE AND BEQUEATH all my estate both real and personal whatsoever after payment there out of all my just debts and funeral and testamentary expenses as to one hundred percent to my son Eliot Grenville Kern Rogers."

When the testatrix stated that "I Betty Rogers ……hereby revoke all former wills and testamentary dispositions made by me and Declare this to be my last will" can it be argued that she only referred to some wills but the others should remain extant? She even declared the will in issue to be her last will.

Further can it be argued that the testatrix only intended to bequeath to her son only her estate situated in Zimbabwe and not that situated in the United Kingdom when she stated " I GIVE AND BEQUEATH all my estate both real and personal whatsoever …. One hundred percent to my son Eliot Grenville Kern Rogers.

In my view the provisions of this will are clear and unambiguous and a court will not rectify such a will. The authority for that proposition is to be found in Corbett, Hofmeyer and Kahn, The Law of Succession in South Africa 2nd ed wherein it is stated, at pages 484 to 485, that -

> "The general principle is that, save in exceptional circumstances or under statutory authority, the courts will not authorise a variation of the provisions of a will which are capable of being carried out and are not contrary to law or public policy. No matter how capricious,

> unreasonable, unfair, inconvenient or even absurd they may be the courts have to give effect to them.
>
> ..... this general principle is based on another general principle, that a court cannot make or remake a will for the testator and cannot change the manner of devolution of the estate provided for by the testator. The testator's wishes and the scheme provided for in the will must be implemented."

I would, in the light of the foregoing, concluded that, the respondent's contention that the testatrix's will was not intended to revoke an earlier will dealing with her property in the United kingdom, is quite unarguable.

I now turn to the respondent's main claim that the will in question ought to be declared invalid as it was allegedly executed under undue and improper pressure being exerted on the testatrix by the applicant resulting in her being incapable of executing a will of her own free will and exercising her own unfettered discretion. Respondent alleged that the undue and improper pressure was exerted on the testatrix by the applicant at her home, where applicant also resided, cumulatively over a long period of time. The undue pressure allegedly came in the form of physical, emotional and verbal harassment.

Respondent emphasized in her opposing affidavit that in the main action it would not be, and had never been her case that the testatrix signed her will under immediate threat or undue influence exercised by the applicant in person at the very moment of the signing of the will. She went on to state that on the contrary, it was her case that the applicant exercised undue

and improper pressure on the testatrix over a long period of time.

The respondent set out a series of allegations in which she attacked the applicant's character. She alleged that the applicant had a dysfunctional relationship with his family, particularly with his parents when they were alive. She went on to allege that applicant had been consistently unable to live a life independent of his parents or parental homes. He was unmarried without children and had repeatedly claimed to his parents that he was a homosexual, something which they could not accept. She even alleged that applicant had for a number of years been a persistent user of illegal narcotic substances. Not only did applicant have the above problems but for a number of years he allegedly had a consistent and serious problem with alcohol.

She then arrived at the conclusion that the cumulative result of the applicant's drug and alcohol abuse and the taking of prescribed medicines had an exceedingly serious effect on his behaviour which was, at all material times, intermittently erratic, demanding and characterised by physical and verbal abuse to members of his family.

She further alleged that after the death of their father, it fell to the testatrix to bear the brunt of the applicant's behaviour which imposed an exceedingly severe strain upon her, since the two of them were living together on the same property in Mount Pleasant. Furthermore, she alleged that for many years now her relationship with the applicant, her brother, had

been very difficult because of his behaviour not only to the parents but also to herself and other members of her immediate family, and that had resulted in her and applicant, in effect, being estranged.

While the respondent made more stinging attacks about the applicant's behaviour and character she does not say that the applicant visited the testatrix with physical and verbal abuse. The respondent makes bald allegations as to the applicant's behaviour towards the testatrix.

Since the respondent's case is that the applicant exercised undue and improper pressure upon the testatrix over a long period of time has she got an arguable case at the trial in the absence of allegations that undue and improper pressure was actually brought to bear on the testatrix? Moreso when the respondent admitted that when the testatrix signed her will there was no immediate threat or undue influence brought to bear upon her by the applicant at the very movement of the signing of the will.

Respondent's counsel accepted at the hearing that indeed the respondent had a difficult case to prove but it was not impossible to prove. But, I do not agree that the test is whether or not the case is impossible to prove. The test, as I understand it, is whether or not there is an arguable case. So the court at this stage is not being called upon to find that it will be impossible for the respondent to establish undue influence in the execution of the testatrix's will but that whether or not there is an arguable case to that effect.

The respondent conceded that the numerous authorities cited by the applicant defining undue influence correctly expressed the law.

Respondent did not at any stage allege that the testatrix was not of sound mind at the time she executed her will. Mr and Mrs Hogg who were witnesses to the execution of the will stated that the testatrix knew exactly what she was doing. She appeared to be an organised competent woman. At no time did she appear not to know what she was doing. She was clear in her intention that she had gone to Mr and Mrs Hogg to make her will. At the time of the signing of the will the applicant was believed to be overseas. What sticks out like a sore thumb is that the testatrix was *compos mentis* at the time she executed her will.

Where undue influence is alleged the onus is upon the person alleging it to establish both the influence and that it was undue and that it operated at the time of execution so as to result in a will which was not intended. In Corbett, Hofmeyer and Kahn, the Law of Succession in South Africa *supra* at page 93 it is stated that:-

"Undue influence has been described as an influence which has -

> "caused the execution of a paper pretending to express a testator's mind but which really does not express his mind, but something else which he did not really mean""

In *Baudaines v Richardson* (1906) AC 169PC it was held that -

> "Actual violence need not be proved but it must be an influence relating to the making of the will itself and over bearing the mind of the testator."

In *Spies v Smith & Ors* 1957(1) SA 539(AD) the headnote reads -

> "A last will can be declared invalid where the testator is moved by artifices of a nature such as to justify their being equated, by reason of their effect to the exercise of coercion or fraud, to make a bequest which he would otherwise not have made and which, therefore, would express another person's will rather than his own. In such a case we are dealing, not with the genuine wishes of the testator, but with the substitution of the wishes of another person, and the will is not maintainable."

The headnote in *Craig v Lamoureux* (1920) AC 349(PC) reads -

> "When once it is proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges. That burden is not discharged by showing merely that beneficiary had power unduly to overbear the will or testator; it must be shown that in the particular case the power has been exercised, and that the execution of the will was obtained thereby."

In *casu* whatever the applicant's behaviour may have been it had no influence on the actual execution of the wills as set out in the above authorities. Mr and Mrs Hogg did not detect any signs suggesting that the testatrix may not have been acting freely. On the contrary they said she appeared to have approached them freely with the specific intention to execute her will; She did not go there with the applicant. Mr and Mrs Hogg even thought that he may have been overseas at that time.

I must also point out that the testatrix only died 9 months after she had executed her will. She therefore had ample time to change it if it had reflected somebody else's intentions not hers.

In the light of the foregoing it seems to me that the respondent has a very difficult and unarguable case. Her action is frivolous or vexatious.

In the result I would dismiss her action and enter absolution from the instance with costs.

P. Chiutsi Legal Practitioners, applicant's legal practitioners

Gill, Godlonton & Gerrans, 1st respondent's legal practitioners