REPORTABLE ZLR (60)

Judgment No. SC 64/07
Civil Appeal No. 333/06

TRAUDE ALLISON ROGERS v (1) ELIOT GRENVILLE KERN ROGERS (2) THE MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & GWAUNZA JA
HARARE, MAY 14, 2007 & MAY 27, 2008

E T Matinenga, for the appellant

J C Andersen SC, for the first respondent

No appearance for the second respondent

MALABA JA: This is an appeal from a judgment of the High Court dated 1 November 2006 dismissing with costs the action commenced by the appellant in case HC 2389/05 and entering judgment of absolution from the instance in terms of Order 11 r 79(2) of the High Court Rules 1971 on the ground that it was frivolous.

The appellant and the first respondent are the surviving children of Betty Rogers who died in Harare on 6 November 2004. The subject matter of the dispute between the two children is the validity or extent of the legal effect of the will executed by their late mother in Harare on 22 January 2004. The testatrix had on 6 January 1995 executed a will in the United Kingdom in terms of which she bequeathed her immovable property situated in that country to the two children in equal shares and named both as the

executors of the will. There was a second will executed in Harare on 23 March 1999 regulating the disposition of her estate in Zimbabwe.

On 22 January 2004 the testatrix executed a third will. On the face of it the document is regular and complete. It was executed and attested in accordance with the due formalities for giving validity to a will prescribed in s 8(1) of the Wills Act [*Cap* 6:06] ("the Act"). It is a short and simple document beginning with a general revocatory clause. The will states as follows"

> "I BETTY ROGERS of 30 Arundel School Road, 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 sole executor of this my WILL. I, GIVE DEVISE AND BEQUEATH unto my son Eliot Grenville 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 thereout of all my just debts and funeral and testamentary expenses to my son Eliot Grenville Kern Rogers.
>
> As 30 Arundel School Road, Mount Pleasant, Harare, Zimbabwe has been the home of my son Eliot Grenville Kern Rogers all artworks, furniture and equipment are his personal possessions. I am grateful to have had the use of these during my period in Harare.
>
> My reasons for the above bequests are as follows:
>
> In 1993 at the time of the death of my late husband Cyril Alfred Rogers my daughter Traude Allison Rogers was offered a one third share of the property 30 Arundel School, Mount Pleasant Harare, Zimbabwe but rejected this offer. Additionally my daughter Traude was offered the use of the property at 15 Carrington Road, Darlington, Mutare for the duration of her stay there. However the property proved unsatisfactory for her requirements. HAD it proved satisfactory I would have bequeathed it to her."

After execution the will was placed in the custody of the first respondent who resided at the same house with the testatrix. The will remained in his custody until after the testatrix's death. The appellant had been passed over in the disposition of the deceased's estate under the will.

She commenced action in the High Court on 24 May 2005 challenging its validity. The appellant alleged that the first respondent through undue influence had caused the testatrix to make the will. She claimed an order declaring the will invalid, alternatively an order that the will was applicable only to the testatrix's estate situated in Zimbabwe and had the effect of revoking prior wills dealing with such property.

Paragraphs 6 and 7 of the declaration contained the basis of the main claim as perceived by the appellant. It stated that:

> "6. The said will was executed under undue and improper pressure exerted on the testatrix by first defendant and as a consequence the testatrix was not at that time capable of executing a will of her own free will and exercising her own unfettered discretion.
>
> 7. The said will is invalid not having been executed by the testatrix of her own free will and in the premises plaintiff seeks an order from this Honourable Court to that effect."

On 20 July 2005 the first respondent, through his legal practitioners, asked for further particulars as to when, where and in what manner it was alleged he had exerted undue influence on the testatrix to obtain the execution of a will which did not express her own wishes. The reply to the request was in the following terms:

> "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." (the underlining is mine for emphasis)

The appellant was not prepared to plead the particulars of the undue influence through which she alleged the first respondent had caused the testatrix to make the will.

The alternative relief was claimed on the ground set out in paragraph 10 of the declaration as follows:

> "10. In the alternative and if it be found by this Honourable Court that plaintiffis not entitled to the relief sought in paragraph 7 above then:
>
> 10.1. Plaintiff avers that the testatrix intended her will dated 22 January 2004 to apply only to her estate situate in Zimbabwe;
>
> 10.2. The testatrix did not intend by executing the will dated 22 January 2004 to revoke the will executed by her in 1995 governing her estate situate in the United Kingdom."

When asked by the first respondent through his legal practitioners for the facts on which she alleged that the testatrix intended the will dated 22 January 2004 to apply only to her estate situated in Zimbabwe and not to her estate in the United Kingdom the appellant said:

> "The testatrix' 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."

On 10 October 2005 the first respondent filed his plea. He denied the allegations contained in paras 6, 7 and 10 of the declaration. He alleged that the will of 6 January 1995 was revoked by the will of 22 January 2004.

On 15 December 2005 the first respondent made a Court application to the High Court in terms of Order 11 r 75 of the High Court Rules 1971 ("the Rules") for the dismissal of the action on the ground that it was "frivolous or vexatious". Rule 75 provides that:

> "(1) Where a defendant has filed a plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious."

Rule 79 provides that:

> "(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.
>
> (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."

In respect of the main relief the first respondent averred that refusal by the appellant to plead the particulars of undue influence meant that there were no facts in the declaration which if proved at the trial would entitle the appellant to the relief sought. On the alternative relief he averred that the language of the will was so clear and unambiguous in expressing the intention of the testatrix to revoke all prior wills that the contention that the testatrix had no intention to revoke the will of 6 January 1995 was obviously unsustainable.

In the opposing affidavit, the appellant made reference to negative aspects of the first respondent's character and his relationship to the testatrix.

She averred that the first respondent was a single man who abused drugs and alcohol whilst remaining at all material times unemployed and dependent on his parents for financial support. She said that when he was under the influence of drugs or alcohol the first respondent became verbally and physically abusive to members of his family. Although the testatrix was ashamed of the first respondent's character and lifestyle, she lacked the courage to stop the constant placation of him because she was frightened of what he would do to her.

She accused him of developing obsessive hostility towards her. She said he warned her not to visit the testatrix at her home and threatened her with violence if she did. In para 9.3.10 of the opposing affidavit the appellant said:

> "… the cumulative effect of the state of affairs which I have summarized above and which will be elaborated upon by both me and the plaintiff's witnesses in the trial of the main action resulted in my late mother executing the will under the substantial and improper influence of the applicant to the effect that I should be disinherited and that consequently the will was not executed by her of her own free will."

The argument for the first respondent in support of the application was that the action was frivolous or vexatious because the declaration as amplified by the opposing affidavit did not contain allegations of the facts which if proved at the trial would constitute the elements of undue influence and entitle the appellant to the main relief. On the alternative relief it was argued that the language of the will was so clear

and unambiguous in expressing the intention of the testatrix to revoke all former wills made by her that the contention that she had no intention of revoking the earlier will dealing with her property in the United Kingdom confirmed the frivolity or vexatiousness of the action. The argument for the appellant was that she had set out sufficient facts which if proved at the trial would constitute the ground of undue influence on which she intended to rely.

The learned Judge found that it was not one of the facts alleged in the declaration as amplified by the opposing affidavit that the first respondent verbally or physically abused the testatrix. It was not the appellant's case that he demanded that she should dispose of the whole of her estate to him and disinherit the appellant. The fact alleged was that the first respondent did not place the testatrix under immediate threat at the time she executed the will.

The learned Judge held that in the absence of allegations of facts which if proved at the trial would amount to coercion of the testatrix's mind in order to cause the execution of the will which she was unwilling to make there was no good cause of action. On the alternative relief the learned Judge accepted the argument that the language used in the will was so clear and unambiguous in expressing the intention of the testatrix to revoke all former wills that the contention that the testatrix had no intention to revoke the earlier will dealing with her property situated in the United Kingdom was clearly untenable. For that reason he also came to the conclusion that the action was frivolous. In the exercise of the discretion the Court undoubtedly had, the learned Judge dismissed

the action and entered judgment of absolution from the instance with costs. The court *a quo* was satisfied that it was a hopeless action and that there was no reasonable ground for prosecuting it.

The question for determination on appeal is whether the decision of the court *a quo* that the action was frivolous is correct. It is important to bear in mind that it is the action in respect to which the Court must be satisfied that it is frivolous or vexatious. An action in that sense is the legal proceeding instituted by the appellant in the High Court to obtain redress of the wrong allegedly committed by the first respondent. It includes all the material facts the knowledge of which would have satisfied her that the first respondent had committed undue influence on the testatrix to obtain the execution of the will disposing of all her estate to him.

The state of the facts referred to was not only to be the reason for the action and the ground on which it was to be sustained it was the state of facts to which the principle of undue influence sought to be enforced in determining the wrongful acts committed by the first respondent applied. In short, the answer to the question whether the appellant had reasonable grounds for charging the first respondent with undue influence on the testatrix's will is fundamental to the determination of the question whether the action was correctly found to be frivolous by the court *a quo*.

Summary dismissal of an action in terms of r 79(2) of the Rules is an extraordinary remedy to be granted in clear and exceptional cases. The reason is that granting the remedy has the effect of interfering with the elementary right of free access

to the Court. The object of the rule is to enable the Court to stop an action which should not have been launched. In *Lawrence v Norreys* 39 Ch.D 213 BOWEN LJ at *p* 234 said:

> "It is abuse of the process of the court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief."

In *S v Cooper & Ors* 1977(3) SA 475 at 476D BOSHOFF J said that the word "frivolous" in its ordinary and natural meaning connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. See also *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at p 271; *Corderoy v Union Government* 1918 AD 512 at p 517; *Wood NO v Edwards* 1968(2) RLR 212 at 213 A-F; *Fisheries Development Corporation v Jorgensen & Anor* 1979 (3) SA 1331 at 1339 E-F; *Martin v Attorney General & Anor* 1993(1) ZLR 153(S).

It appears to me that a plaintiff who commences action in a Court of law when he or she has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and obviously unsustainable.

In *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41(H) at p 54 E-F it was said that:

> "A cause of action was defined by LORD ESTHER MR in *Read v Brown* (1888) 22 QB 131 as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court.
>
> In the same case, LORD FRY at 132-133 said the phrase meant everything which if not proved gives the defendant an immediate right to judgment. In *Letang v Cooper* [1965] I QB 232 at 242-3 DIPLOCK LJ (as he then was) said a cause of

> action is simply a factual situation the existence of which entitled one person to obtain from the Court a remedy against another person."

See also *Patel v Controller of Customs & Excise* HH-216-89; *Hodgson v Granger & Anor* HH-133-91; *Dube v Banana* 1998(2) ZLR 92(H).

In this case the appellant alleged specially undue influence as the ground on which she intended to rely at the trial for invalidating the will. She was required to give the necessary particulars which if proved at the trial would constitute the wrong she accused the first respondent of having committed. She, however, seems to have had no knowledge of the material facts she was required to allege in the declaration, proof of which would constitute the essential elements of undue influence and entitle her to the judgment of the Court. The *onus* was on her who was making the allegation of wrongdoing to prove on a balance of probabilities that the first respondent through undue influence on the testatrix's mind caused her to execute the will she was unwilling at the time to make. *Craig v Lamoureux* 1920 AC 349; *Finucane v Macdonald & Ors* 1942 CPD 19 at p 26.

The appellant did not appreciate the fact that undue influence is a compendious description of the facts which if alleged in the declaration and proved at the trial would constitute the wrong for the redress of which the action was commenced. Whether there has been undue influence or not is a question which must be decided by reference to the facts and circumstances peculiar to the case. As it is a question of fact undue influence may take many different forms. It may be in the form of coercion of the testator or testatrix's will so that he or she does what is against his or her own volition.

When undue influence amounts to coercion of the mind of the person who becomes the testator or testatrix it may also take an infinite number of forms depending on the facts and circumstances of each case. It does not follow that because undue influence was applied on the testator or testatrix it necessarily caused the execution of the will. That the undue influence caused the execution of the will must be established by the facts alleged. The undue influence must be shown to have been operative at the time of the execution of the will. A testator or testatrix may still make a will expressing his or her wishes notwithstanding the application of undue influence to his or her mind.

It must follow from the principle that to be undue influence there must be coercion of the will that as a ground to be relied upon at the trial; for invalidating a will undue influence must never be alleged unless the plaintiff has reasonable grounds on which to support it. That requires the plaintiff to allege in the declaration all the material facts he or she has to prove at the trial to succeed. In this case the appellant had no knowledge of the facts of what the first respondent did or said to the testatrix which if proved at the trial would amount to coercion of the testatrix's will.

In *Tristram & Cootes Probate Practice* 27ed at p 1131 a precedent is given as Form No. 266 of the kind of allegations a party alleging undue influence as the ground for invalidating a will could make if those were the facts. The importance of the precedent lies in the fact that it confirms the point that there cannot be a finding of undue influence without the facts of what the person charged is alleged to have done.

The precedent therefore supports the contention that sufficient allegations of the facts relating to the conduct complained of as undue influence must be made in the

declaration or plea. The defendant whose plea of undue influence is on Form No. 266 said:

> "For a year prior to his death the plaintiff had been living in the house of the deceased, being employed to look after him during such time as the defendant (his only son) was necessarily resident abroad. The plaintiff so took advantage of the extreme old age of the deceased and of his weak and emotional state as to assume complete domination over him and his household; she frequently contrived to keep from the deceased the letters the defendant wrote to him; she encouraged the deceased falsely to believe the defendant had abandoned him, and she persuaded him that she was the only person to whom he owed any duty' she herself gave the instruction for the alleged will and was present when the deceased purported to execute it. The defendant will allege that the influence of the plaintiff over the deceased was such that he was not a free agent and that the said alleged will was not the product of his own volition but was procured by the importunity of the plaintiff."

Conspicuous by their absence from the declaration in this case were allegations of facts on what the first respondent could have done or said to the testatrix causing her to execute the will under which he benefited. The cause of action remained shadowy.

When she was asked to give the necessary particulars of the alleged undue influence the appellant declined saying they were matters of evidence. She did not deny the fact that they were not part of the declaration or statement of claim. What she said in the opposing affidavit did not cure the defect. The clear impression one gets is that she had no knowledge of the necessary particulars of the undue influence with which she charged the first respondent.

Even if the allegations she made about the character of the first respondent and his relationship to the testatrix were made out at the trial they would not amount to

undue influence entitling her to the judgment of the Court. She needed to have made the allegation of the fact that the first respondent used his condition and the placation of him to coerce the mind of the testatrix so that she executed the will which she was unwilling at the time to make. She did not make that allegation.

There was nothing in the declaration as amplified by the opposing affidavit to induce the court *a quo* to suppose that there was any foundation for the allegation of undue influence the appellant made against the first respondent as the ground on which she intended to rely at the trial for invalidating the will. She commenced the action when she had no reasonable ground on which she intended to rely at the trial for invalidating the will. She commenced the action when she had no reasonable ground on which to support it. The action was baseless and obviously unsustainable. It was frivolous. The court *a quo* had cause to be satisfied that the action was hopeless and that there was no reasonable ground for prosecuting it further.

I turn to determine the question whether the contention that the testatrix had no intention of revoking the earlier will dealing with her property in the United Kingdom is clearly untenable. The will begins with a general revocatory clause. The clause is in terms which show that it was the intention of the testatrix to revoke all former wills made by her.(**underlining is mine for emphasis**) The language by which the intention of the testatrix is expressed is clear and unambiguous. When we are faced with such unequivocal language the question whether the will of 6 January 1995 dealing with the testatrix's property in the United Kingdom was intended to be revoked hardly arises as a matter of construction of the will of 22 January 2004.

The testatrix was of a sound mind, memory and understanding at the time she executed the will of 22 January 2004. She knew that she had made prior wills disposing of part of her whole estate in a manner inconsistent with the disposition she was about to make. To put the matter of her intention beyond doubt the testatrix described the will of 22 January 2004 as her "last will". She further provided that she was bequeathing all her residual estate both real and personal to the first respondent.

The principle applied in the case of *Re Wayland* [1951] 2 All ER 1041 to the effect that if each will deals only with property in a different country, the later will does not revoke the earlier one even if it does contain a revocatory clause is not applicable to the facts of this case. The reason is that the clear intention of the testatrix was to deal in the will of 22 January 2004 with all her property including the property situated in the United Kingdom which she had dealt with in the earlier will.

The testatrix was able to provide for the disposition of the whole of her residual estate both real and personal in the manner she did under the will of 22 January 2004 because in her mind she considered that the earlier will which dealt differently with the disposition of the property in the United Kingdom had been destroyed by the revocation. The Court must give full effect to the revocatory clause as the will which regulated the disposition of the property in the United Kingdom no longer exists.

In the circumstances the contention that in executing the will of 22 January 2004 the testatrix had no intention of revoking the will of 6 January 1995 is clearly untenable. The action which was based on such a ground was obviously

unsustainable. The learned Judge had good cause to be satisfied that the action was frivolous; exercised his discretion and dismissed it.

The appeal is accordingly dismissed with costs.

CHEDA JA: I agree

GWAUNZA JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

P Chiutsi Legal Practitioners, first respondent's legal practitioners