IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held in Mbabane **Case No. 66/22**

In the matter between:

STEPHNEE PATRICIA SNYDERS (NEE BENNETT)	**1st Appellant**
LILLY BENNETT	**2ND Appellant**
AND	
ESTATE LATE DICK RICHARD BENNETT	**1ST Respondent**
JOYCE BENNETT	**2ND Respondent**
MASTER OF THE HIGH COURT	**3RD Respondent**
NATIONAL COMMISSIONER OF POLICE	**4TH Respondent**
ATTORNEY GENERAL	**5TH Respondent**

Neutral citation: *Stephnee Patricia Snyders and Another vs Estate Late Dick Richard Bennett and four others [2022] SZSC...33(16th August,2023..)*

Coram: MJ Dlamini JA, MD Mamba JA, RJC AJA.

Heard: 29 May, 2023

Delivered: 16 August, 2023

Summary: Law of Succession – Schepensdoms-recht – Intestate succession – Whether grandchild entitled to inherit from grand-parent in intestacy where the parent of the grandchild predeceased grand-parent – Will – validity of – Delay in challenging validity of will – Estate finally liquidated and assets distributed. Appeal dismissed. No order as to costs.

JUDGMENT

MJ Dlamini JA

Introduction

[1] The 1st Appellant alleges to be a grand-daughter of the deceased Dick Richard Bennett and the 2nd Appellant is a daughter of the said deceased. 1st Appellant says that her father was Patrick Bennett a son of the deceased, and the said Patrick predeceased his deceased father, Dick Richard Bennett. As a result, 1st Appellant says that she was raised by the deceased grandfather. On the records, when all these things happened, birth certificates and all, were not found. It was said in argument that these allegations were common cause at the hearing *a quo*.

[2] Even though the judgment of the court *a quo* does not repeat 2nd Appellant as an Applicant, there is evidence on record that she had in fact applied successfully to join the proceedings which had been launched by the 1st Appellant alone. 2nd Appellant then ought to have been reflected as a party to the proceedings on the judgment. The joinder was

granted by the Learned Mavuso J. on 13 September 2021 and the judgment was delivered on 4 August 2022.[1]

Background

[3] The deceased had left a valid will in which he bequeathed all of his property to members of his family excluding the two Appellants. The Appellants were aggrieved. So they challenged the validity of the will, claiming *inter alia* that the deceased was so sickly at the date alleged signature of the will that he could not have signed it. The authenticity of the signature was thus questioned, demanding that graphologists be brought into the matter of the evidence, and authenticity of the signature. Evident on the founding affidavit is the clear implication that the will was fraudulent. It was the Appellants' assertion that but for the will, they stood to benefit in deceased's estate in intestacy.

[4] At some point during the hearing in this Court Appellants' counsel sought to introduce another ground of appeal based on the font used in the Will, it being argued that the said font was not in use at the time of the execution of the impugned Will. For obvious reasons such a ground could not be sustained; it had not been a ground *a quo* and had not been properly introduced into the proceedings, nor was it in fact a recorded ground of appeal. The point had to be abandoned. If sustained, no doubt, further expert evidence would have been required.

[5] As a result of the exclusion of the 2nd Appellant referred to above, the proceedings below seem to have gravitated towards a point raised by Respondents *in limine* whether 1st Appellant had a standing to challenge the validity of the Will. In this regards, it was argued that 1st Appellant could not benefit from deceased estate even in intestacy. The judgment *a quo* reads:

> *"[11] Joyce Bennett, the second Respondent, deposed to the Respondents' answering affidavit in which [?] raised two points* in limine. *The first point was to challenge the*

[1] The judgment has some typographical glitches which it is hoped will not be allowed in future.

locus standi *of the Applicant to institute the proceedings. She contended that the Applicant was not a beneficiary in the intestate estate of the late Dick Richard Bennett or under the will and testament which was sought to be set aside. It was contended by the 1st Respondent that the Applicant's father, Patrick Bennett, did not stand to benefit in the intestate estate nor in terms of the last will and testament. The final argument is that Applicant has no interest in the estate of the late Dick Richard Bennett.*

...

[14] The 1st Respondent also annexed to her affidavit the affidavit of Senior Attorney, Mr. Luke Malinga. Attorney Mr. Malinga stated that he knew the late Dick Richard Bennett of Hhelehhele area, in the Manzini Region, that during the month of October 1986, he, Bennett had sought his services in the drawing up of his Last Will and Testament.

[15] Attorney, Mr. Malinga confirmed that he drafted the Last Will and Testament as instructed and the now deceased, Dick Bennett signed it. Lastly, he confirmed that the signature appearing on the copy of the Will annexed and marked 'DRVI' is that of Dick Richard Bennett.

...

[23] The Applicant has described himself (sic) as the granddaughter of the now deceased Dick Richard Bennett. Her father was the late Patrick Bennett who was the deceased's son. It is common cause that Patrick predeceased Dick Bennett. It seems proper then that the Applicant is not an intestate heir of the late Dick Bennett and does not have a direct interest in the estate... Even if the Will were to be found invalid, a question that does not arise in this matter, it would be of no consequence to the Applicant."

[6] In paragraph 20 of his judgment, the Judge *a quo* observed that the estate of the deceased was wound up in 2004 and there was no estate to challenge on the 17th September 2020 when these proceedings were instituted. In other words, there was too long a delay in instituting the proceedings and no justifiable reason had been submitted in condonation. Further, in paragraph 21, the learned Judge stated that there was not enough evidence before Court to warrant the Court to order investigation into the authenticity of the impugned will: "An investigation into the authenticity of the will at this stage would, quite frankly, serve no useful purpose as the estate has been wound up to finality" for "... I think it common sense that a deceased estate ceases to exist...once the Master of the High Court has approved the liquidation and distribution account and distribution of all the assets has been completed. At law, once the estate of a deceased person has been wound up it ceases to exist", the Learned Judge *a quo* concluded. In the result, the Judge found that 1st Appellant had failed to show that her rights would be adversely affected by the outcome of the litigation and that the application was moot as the validity or otherwise of the deceased's will would have no practical effect. The application was on these considerations dismissed with costs.

Before this Court

[7] On appeal to this Court, the Appellants contended that:

> *"1.1 The court a quo erred in law and in fact in finding that the Appellants had no direct and substantial interest in the relief they sought despite the fact that the second appellant was a biological daughter of the deceased [Patrick] Bennett who in law was legally entitled to be a beneficiary of the estate of the late Dick Richard Bennett and was only excluded by the impugned will which was being contested. Further, that the first appellant was a granddaughter of the late Dick Richard Bennett.*
>
> *1.2. The Court a quo erred in law and in fact in finding that the Appellants' rights would not be affected by a refusal of the court to grant the relief which relief was*

sought for the object to have the impugned will of the late Dick Richard Bennett to be subjected to forensic examination so as to ensure that the impugned will was not fraudulently executed.

.....

1.4. The Court a quo erred in law in finding that the estate of the late Dick Richard Bennett had been legally wound up such that any finding regarding the validity of the will could not change the status quo. Yet an estate can only be legally wound up where a valid will has been used and not a fraudulently executed will."

8] The Appellants were accordingly of the view that the Court *a quo* erred in dismissing the application in the circumstances. They pleaded for the appeal to be upheld with costs.

General

[9] On the issue of the authenticity of the will and the delay in challenging it, it was argued for the Appellants that "there was no document that was available which contained a signature of the late Dick Richard Bennett", but such a "document has been discovered at the National Archives, which document contains an undisputed signature of the late Dick Richard Bennett. A forensic examination of the will is desired to be conducted using such a document". The document with an undisputed signature of the deceased was the signature on a letter of May 1973 to the Master of the High Court purportedly signed by the deceased. There was no explanation why this letter could not be found earlier. On its face, the signature is pretty much similar to that on the impugned will. The Appellants wanted the Court to order the 4th Respondent to facilitate the forensic examination of the signatures with their South African counterparts. As already highlighted, such an exercise, even assuming all relevant requirements were met, would be of not much value when the

estate had long been finally liquidated and distributed. Since at the time the will had not been formally challenged, the Master was entitled to assume that it was valid.

[10] The Appellants also argued that the Court *a quo* erred in holding that the Appellants had "no direct" interest to legitimately contest the will. In this respect, Appellants pointed at second Appellant being a biological daughter of deceased and as such a beneficiary in intestacy: "... if there was no valid will, in accordance with Roman – Dutch common law as applicable in the Kingdom of Eswatini, the Appellants would have been beneficiaries in the estate of the late Dick Richard Bennett *ab intestato*. The finding of the Court *a quo* that they have no direct and substantial legal interest has prejudiced the Appellants and is not legally correct", the Appellants contended. As to the relevant 'legal interest' required for a direct and substantial interest the case of **Meshack Dlamini** [23] was cited and the cases referred in that case.

[11] On the question of first Appellant being an intestate heir, reference was again made to **Sikhumbuzo Dlamini** [4] and argued that the Court *a quo* "wrongly applied the Roman Dutch Common law ---when it held at paragraph 23 of the judgment that 'the applicant is not an intestate heir of the late Dick Richard Bennett' due to the fact that first appellant's father Patrick Bennett had predeceased the late Dick Richard Bennett". In the **Sikhumbuzo Dlamini** case the following statement was quoted:

> *"It is abundantly clear from this exposition of the law under Roman Dutch Law that grandchildren are entitled to inherit from their grand-parents* ab intestato *where their parents have predeceased the grandparent. Even great grandchildren are entitled to take from their great grandparents under the principle of representation* per stirpes. ... *Clearly therefore a grandchild has a right in Roman*

---

[33] **Meshack Dlamini v Sandile Thwala and Others,** Civil Case No. 3210/2010 (High Court) at paragraph 15.

[4] **Sikhumbuzo Dlamini v The Quadro Trust and 8 Others,** Civ. App. Case No 12/2016 at para [24] – [26].

Dutch law to inherit from his grandparent. The same goes for great grandchildren as well as their descendants".

[12] In the **Meshack Dlamini** case Mamba J, as he then was, (sitting with Maphalala PJ and Annandale J, as they then were) in the said paragraph 15 stated that generally speaking legal standing referred to: *"Whether a particular litigant has a right or is entitled to appear in court and bring a particular litigation seeking a specified relief or redress or vindicate a specified right in respect of a specified issue. In order to succeed, the litigant must show or establish that he or she has a direct and substantial interest in the matter and outcome of the litigation. This must be a legal interest. A mere financial interest which is an indirect one is not enough. This direct and substantial interest is the same as that required of a party who applies to intervene or to be joined in proceedings already pending before the court."* The learned Judge went on to refer to a decision of Corbett J. (as he then was) in **United Watch and Diamond Co. (Pty) Ltd and Others v. Disa Hotels Ltd and Another** 1972 (4) SA 409 at 415 B-H.

[13] On the other hand, the second Respondent contended that the 1st Appellant was not a beneficiary in the intestate estate of the deceased. In the result, the standing of the 1st Appellant to contest the will was questioned. Strangely, second Respondent even went on to state that *"the Applicant is unknown to me and was not known to my husband as she did not reside in Eswatini. I only know that her father died in about 1979, predeceasing my husband."*[5] Further, the 2nd Respondent averred:

> *"16.2. Applicant's father predeceased my husband and was not a beneficiary in my late husband's estate. Further, it was not my late husband's (sic) to provide for all his grandchildren as alleged or at all. After all, Applicant is a major, a married woman who is working and has never been provided (for) by my late husband during his lifetime."*[6]

---

[5] 2nd Respondent's *Answering Affidavit*, para 9 (at p 84 of Record)

[6] As above, para 16 at p 89

[14] The Court *a quo* accepted that 1st Appellant was a granddaughter of the deceased, and went on to observe.[7] *"....Her father was the late Patrick Bennett who was the deceased's son. It is common cause that Patrick predeceased Dick Bennett. It seems proper then that the [Appellant] is not an intestate heir of the late Dick Bennett and does not have a direct interest in the estate... Even if the will were to be found invalid, it would be of no consequence to the [Appellant]."* The Court *a quo* was also of the opinion that the *"[Appellant] (was) not the proper person to institute these proceedings. It has been held in decided cases that an applicant must have a direct and substantial interest in the relief claimed, and a direct and substantial interest means a legal interest".*

[15] As to whether X, by predeceasing his own father, Y (X's child) became disentitled to inherit in intestacy in his grandfather's estate, Magagula AJA in **Sikhumbuzo Dlamini** stated as follows at paragraph [26]:

> *"Clearly therefore a grandchild has a right in Roman Dutch law to inherit from his grandparent by representation where his parent predeceased the grandparent.... The appellant is therefore a lawful beneficiary and has a right to take from the estate of his grandmother, the late Eunice Mumsy Inskip. The learned Judge* a quo *clearly misdirected himself in finding that the appellant was not a lawful beneficiary."*

[16] In the above quoted paragraph, learned Magagula AJA was, as it were, reacting to what Learned Mlangeni J. had stated *a quo* in the same matter, where the latter had said:

> *"19. Against the background where applicant vaguely asserts* locus standi, *the respondents, in common cause, vigorously argue the opposite. Where the applicant has failed to assert that a grandchild has a legal right to inherit from a grandparent, the respondents have asserted that this is not the case; that in intestacy it is only biological children of the deceased who have a legal right to*

[7] See Judgment *a quo*, para [23]

inherit. It is in this context, perhaps that the case of ***Green v Fitzgerald and Others*** *1923 AD 100 is not very helpful to the cause of the applicants. For one thing, in that case there was a will; for another thing it sought to define the extent of interest of illegitimate children. It does not deal with the interests of grandchildren in the estate of their departed grandparents. It is my view that such interest is too remote to found locus standi. If grandchildren had such a right what argument would be there to exclude great grandchildren?"*

"20. Applicant's deceased father.... died before his interest in the mother's estate could vest in him, hence there is nothing that he can pass on to his children."

[17] Justice Mlangeni's stand point is founded on the principle that: *"Succession is conditioned on survivorship. No person can succeed as an heir or legatee unless he or she survives the deceased person. One who has predeceased ....the deceased cannot take any benefits from the estate...."* Justice Magagula also cited authorities and was supported by his learned Brothers. It would seem that Justice Mlangeni followed the *Aasdomsrecht* system of Roman Dutch law which was prevalent in North Holland and Friesland. As we shall see below, that system did not become part of our system of intestate succession.

[18] We have intimated above that the judgment of the Court *a quo* did not consider the situation of the 2nd Appellant who was a daughter of the deceased. The 2nd Appellant had successfully applied to join the proceedings as far back as 13th September 2021, and the hearing of this matter below is shown as 4th March 2022. And these proceedings in the Court *a quo* were instituted by 1st Appellant in October 2020. How 2nd Appellant was left out at first hearing *a quo* only to be joined on appeal has not been explained. In their notice of appeal. both Appellants are cited but no reference to 2nd Appellant is to be found in the grounds of appeal. This is so even as 2nd Appellant is not cited or mentioned as a party in the judgment appealed. But, curiously and without much explanation, the 'Appellants' heads of argument' are on behalf of both Appellants. Under paragraph 1.2 of their heads, it is stated for the Appellants: *"On the 4th of August 2022, the High Court of Eswatini*

delivered a judgment which the Appellant (sic) are of the view that certain matters were not considered." On the facts, under paragraph 2.1 it is stated that the deceased *"[was] a biological father of the second appellant (Lilly Bennett). The first appellant is a granddaughter"* to the deceased. Throughout the heads of argument, reference is made to 'appellants'. The appeal is then argued as if the two appellants were the applicants in the court *a quo,* which is not correct, on the face of the judgment.

[19] In their brief heads of argument under 'grounds of appeal', it is then stated: *"3.1. The appellants contends (sic) that the court* a quo *erred in law in finding that they had no direct interest despite the fact that the second appellant is a biological daughter of the late Dick Richard Bennett ...3.2. The appellants contends (sic) that the court* a quo *erred in law in finding that appellants will not be adversely affected by a refusal of the relief...; 3.3. The appellants contends (sic) that the court* a quo *erred in law in that the second appellant was not an intestate heir to the estate of the late Dick Richard Bennett".* These grounds are substantially the same as the grounds set out in their notice of appeal. The grounds and the argument on appeal have shifted to depend heavily on the 2nd Appellant based on her being a biological daughter of the deceased who, but for the will, ordinarily would benefit from her father's estate *ab intestato.*

[20] It should be noted however that the grounds of appeal and the written heads of argument do not quite reflect what the Court *a quo* had stated in dismissing 1st Appellant's application. The judgment reflects that the Court *a quo* only had 1st Appellant before it. Although technically joined, 2nd Appellant was excluded and not considered as a party by the Court *a quo.* The 2nd Appellant cannot be a party on appeal without the judgment *a quo* being reopened to include and consider her specific circumstance. Remitting the case for the 2nd Appellant to the High Court would be ineffectual as the estate in question has long been distributed. As the learned Judge *a quo* observed, these proceedings were instituted too late for any practical purpose.

[21] To the extent that the judgment appealed from may be relevant to 1st Appellant, the **Sikhumbuzo Dlamini** case (supra) was cited before us. Sikhumbuzo (the appellant) was a grandchild of one Mumsy Inskip (the deaceased). Sikhumbuzo's father had predeceased Mumsy Inskip. Sikhumbuzo believed that he was a lawful beneficiary in Inskip's estate and as such had a legal interest. He challenged to assert that interest. It would appear that Ms. Inskip died intestate. Sikhumbuzo was opposed and *in limine* it was stated that as a grandchild of a child who predeceased his own mother (Ms. Iinskip) he had no such legal interest as he asserted. Further, it was alleged, that Sikhumbuzo was born out of wedlock. Accordingly, so it was argued, Sikumbuzo had no *locus standi* to institute the proceedings. At the High Court, Sikhumbuzo was dismissed (per Mlangeni J), the court stating, *inter alia*, that it was only biological children of the deceased who had a legal right to inherit and that any interest that a grandchild might have in that estate (was) too remote to found *locus standi*". In other words, a grandchild had no right to benefit from the estate of his deceased grandparent: *"If grandchildren had such a right what argument would be there to exclude great grandchildren"*, the Learned Judge *a quo* quipped. In paragraph 20 of the judgment in the High Court, Mlangeni J. had stated that Applicant's deceased father died before his interest in the mother's estate could vest in him, hence there was nothing that he could pass on to his children, indicating that succession was conditioned on survivorship.

[22] On appeal, however, Sikhumbuzo was successful. Reading from Corbett *et al*, [8] this Court observed: *"Today it is settled law the* Octrooi *became law at the Cape. Accordingly* Schependomsrecht*....is the law of intestate succession of South Africa"*. In terms of this statement of the law, where there is no surviving spouse, *"the first order of succession, consisting of the deceased's descendants, inherits. If the deceased's children are alive, they share the inheritance in equal parts. If one or more of the children have predeceased the intestate, their share or shares devolve upon their children and further descendants by representation"*. This Court unanimously held that *"[26] .... A grandchild has a right in Roman – Dutch law to inherit from his grandparent by representation where his parent*

[8] The Law of Succession in South Africa by Corbett, Hahlo, Hofmeyer and Kahn at 584

predeceased the grandparent.... The appellant [i.e. Sikhumbuzo] is therefore a lawful beneficiary and has a right to take from the estate of his grandmother, the late Eunice Mumsy Inskip. The learned Judge a quo clearly misdirected himself in finding that the appellant was not a lawful beneficiary".

[23] The holding of this Court in the **Sikhumbuzo Dlamini** case reflects our Roman-Dutch Common law in this area of our civil life. The Court referred to section 3 of the General Administration Act, 1905 which reads: "The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time, be modified by statute, shall be law in Swaziland". In my opinion, the slight drawback of section 3 is that it does not tell at what point of its growth and development from its birth place in Holland, via its transplant at the Cape is the reader expected to anchor and direct his focus.

[24] The historical background to our Roman-Dutch common law of intestacy is recorded somewhat differently by the various authorities. But there is agreement on the core principles. Gibson [9] provides the following account:

> "**Sources of the Law of Intestacy**. *The law of intestate succession in South Africa is derived from the Political Ordinance of Holland of 1st April, 1580, sections 19 to 29, and an interpretation of the same made by an Edict of the States of Holland of 13th May, 1594, together with a modification in accordance with portion of the 3rd section of a* Placaat *of 18th December, 1599. These enactments were decreed to be in force in South Africa by a charter granted by the States General to the Dutch East India Company on 10th January, 1661, which was confirmed by the Governor-in-Council on 19th June, 1714.*
>
> *The above laws conferred a right of succession on intestacy on the blood relations of a deceased person but none on a surviving spouse, because marriage in*

[9] Gibson JTR, **Wille's Principles of South African Law,** 6th Edition (1970) pp 258 – 261.

community of property being the almost universal rule, such a spouse ipso facto took half of the joint estate.

Original Principles of the Law of Intestacy. *The main principles of our law of intestate succession are derived from a combination of two somewhat conflicting systems which prevailed in early times in the Netherlands, the* Aasdoms-recht, *the law of North Holland and Friesland, and the* Schepensdoms-recht, *the law of South Holland and Zeeland. Under both systems the property of an intestate person went in the first place to his descendants and, failing them, to his ascendants and collaterals, but there were several important differences on the way.*

The basic principle of the Aasdoms-recht *was ...the nearest blood relation takes the property. Hence if a person, who would have inherited a portion of the estate had he not predeceased the intestate, left descendants, the latter acquired no share in the estate if there were nearer relatives of the intestate.....*

The Schepensdoms-recht, *on the other hand, recognized representation, i.e. the right of the descendants of a predeceased person to take his share. Further, this law had as its fundamental principle.... the property must go from where it came.... The Political Ordinance of 1580 adopted the principle of representation; in the case of collaterals restricting it to the fourth degree. Finally, the* Placaat *of 1599 effected a compromise between the two systems on the point mentioned and gave one half of the estate to the surviving parent, and the other half to the descendants of the deceased parent.*

The order of succession on intestacy in South Africa is as follows:

1. (a) Where *the deceased leaves descendants, but no surviving spouse: The estate is divided into as many equal portions as there are surviving children and deceased children who leave descendants. Each surviving child takes one share, termed a child's share, and the share of each deceased child is divided equally among his surviving children and each group of descendants of a*

deceased child. This process is known as representation per stirpes, *and it continues* ad infinitum." (My emphases).

[25] Lila E. Isakow [10] agrees with Gibson and accounts as follows:

"Order of Intestate Succession

The law of intestate succession in South Africa is Schepensdoms-recht *as contained in the Political Ordinance of 1st April 1580, and the Interpretation Ordinance of 13 May 1594, modified by the* Octrooi *of 10 January 1661....*

Where there is no surviving spouse

(a) The first parentela *(or order of succession) consists of the descendant's children and their descendants by representation* per stirpes ad infinitum. *Should all the children of the descendant survive him, they will share the inheritance equally. If any child of the descendant predeceases the descendant, such child's share will devolve upon his children and his further descendants by representation* per stirpes." (My underlining).

[26] From the foregoing authorities, it is clear that our Roman-Dutch common law of intestate succession followed the *Schepensdoms-recht* system which allowed descendants of predeceased children to inherit from their grand-parents *ab intestato*. This Court in the **Sikhumbuzo Dlamini** case correctly understood the law. That case did not decide on the issue of the grandchild being born out of wedlock. *In casu* a similar position was taken as an issue held to be unnecessary to decide. In my view, in the eSwatini socio-legal system, it could cause undesirable consequences to insist on formal legitimacy even where the

[10] The Law of Succession through the Cases (1985) p 369

parent has acknowledged paternity of the descendant. Also, illegitimacy has been outlawed in the country and cannot be used as a basis for disentitlement.

[27] *In casu*, it was further argued on behalf of the 1st Appellant along the lines of the **Sikhumbuzo Dlamini** case. Under paragraph 5.2 of their heads of argument, it was contended: *"It is abundantly clear from this exposition of the law under Roman-Dutch Law that grandchildren are entitled to inherit from their grand-parents* ab intestato *where their parents have predeceased the grandparent..... In fact, the learned authors referred to above state at page 582 that: 'The cornerstone of early...Schepensdomsrecht were firstly, the system of* parentalae *or orders of succession governed by the maxim that the estate does not like to climb, ... thirdly, representation* per stirpes ad infinitum *... Clearly therefore a grandchild has a right in Roman-Dutch law to inherit from his grandparents by representation where his parent predeceased the grandparent..."*

Conclusion

[28] In the result, even 1st Appellant potentially had a legal interest in the intestate estate of her grandparent. The delay in raising the application must determine the appeal in favour of the Respondents. In my view, the system of succession which allows for representation is our law of intestacy. Why should a grandchild lose out to his uncles and aunts and cousins just because his / her father or mother predeceased the intestate grandfather or grandmother? After all the grandchild does not take more than the surviving uncles, aunts or cousins.

[29] In this judgment, I have proceeded on the basis that second Appellant was ordinarily a beneficiary in the deceased's estate but for the will which has not been set aside. Second Appellant's case had not been considered by the Court *a quo* and no explanation for it. I have also assumed that the reason for the decision *a quo* was the undue delay in initiating the proceedings. In the result, I do not consider it necessary to tinker with the ultimate result *a quo* except to point out that in paragraph 23 of the judgment, the learned Judge *a*

quo seems to have taken the *Aasdomsrecht* route instead of the *Schepensdomsrecht* highway. In the said paragraph the Judge stated: "*....It is common cause that Patrick predeceased Dick Bennett. It seems proper then that the applicant is not an intestate heir of the late Dick Bennett and does not have a direct interest in the estate.....Even if the will were to be found invalid, a question that does not arise in this matter, it would be of no consequence to the applicant*". That was a misdirection.

[30] In the result, I am of the opinion that whatever damage, real or perceived, may have been caused by the judgment *a quo*, it is better to let it lie where it has fallen. Setting aside the judgment when the assets of the estate in question have long been distributed to the legatees would only generate intractable issues to no one's benefit.

[31] The appeal is accordingly dismissed with no order as to costs.

M J Dlamini JA

I Agree

MM Mamba JA

I Agree

RJ Cloete AJA

For Appellant Mr S. Gumedze
For Respondent Mr S. Nhlengetfwa

quo seems to have taken the *Aasdomsrecht* route instead of the *Schepensdomsrecht* highway. In the said paragraph the Judge stated: *"....It is common cause that Patrick predeceased Dick Bennett. It seems proper then that the applicant is not an intestate heir of the late Dick Bennett and does not have a direct interest in the estate.....Even if the will were to be found invalid, a question that does not arise in this matter, it would be of no consequence to the applicant"*. That was a misdirection.

[30] In the result, I am of the opinion that whatever damage, real or perceived, may have been caused by the judgment *a quo*, it is better to let it lie where it has fallen. Setting aside the judgment when the assets of the estate in question have long been distributed to the legatees would only generate intractable issues to no one's benefit.

[31] The appeal is accordingly dismissed with no order as to costs.

M J Dlamini JA

I Agree

MD Mamba JA

I Agree

RJ Cloete AJA

For Appellant Mr S. Gumedze
For Respondent Mr S. Nhlengetfwa