

SOUTH AFRICA / JUDGMENT

Hart v Hart and Others (2453/2024) [2024] ZAWCHC 381; [2025] 1 All SA 373 (WCC); 2025 (3) SA 286 (WCC) (20 November 2024) [2024] ZAWCHC 381

COURT

Western Cape High Court, Cape Town

BEFORE

Mapoma

CASE / FILE NUMBER

2453/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

REPORTABLE

Case No: 2453/2024

In the matter between:

MARGARET
HART
First Applicant
and
WALTER
REGINALD HART
First Respondent
TOBY
EDWARD HART
Second Respondent
ROBERT
GEORGE HART
Third Respondent
BRANDON
JAMES HART

Fourth Respondent

This

judgment was handed down electronically by circulation to the parties' legal representatives by email publication and release

to SAFLII. The date and time for hand-down is deemed to be 14h30 on 20 November 2024.

JUDGMENT

MAPOMA AJ

Introduction

1. This is a family dispute between the stepmother, supported by her son on the one hand, and her three stepsons on the other. The dispute emanates from the special bequest that applicant requires to enforce from her late husband's will. The respective parties are firm in asserting their rights in respect of immovable property, a guesthouse called E[...] in Camps Bay known as Erf 1[...] Camps Bay ("the property") which was owned by the applicant's husband and the respondents' father, the late Peter Dionysius Hart ("the testator") who died testate. The property, which is in full use of the applicant by virtue of the usufructuary rights provided for in the will. The property is now registered in the names of the respondents in accordance with the provisions of the testator's will.
2. The applicant has approached this court to enforce the provisions of the special bequest of the will. In particular, the applicant seeks a number of declaratory orders central of which is an order declaring that, in terms of the special bequest, the applicant

is entitled to insist on the disposal of the property, despite the fact that the first to the fourth respondents are registered owners of the property, and that the respondents, have no right to refuse to honour the applicant's decision to sell the property at market related price.

3. The applicant also seeks an order directing the first to the third respondents to sign the deed of sale and such documents as may be required and take such steps as are necessary to ensure that the sale and transfer of the property is finalised. The first to the third respondents are resisting the application, insisting that the applicant's right to dispose of the property is not unfettered, in that they have a right to refuse the sale if the proceeds thereof are to be invested in the manner proposed by the

applicant. The fourth respondent, who incidentally, is the applicant's only son amongst the respondents, supports the application. For the sake of convenience, I will refer to the first to the third respondents as "the respondents",

4. In short, the determination of the parties' respective rights hinges on the proper interpretation of the will of the testator. The background facts leading up to these proceedings are set out below.

Factual

Background

5. The applicant is the surviving spouse of the testator with whom she was married out of community of property on 8 December 1984. She is the biological mother of the fourth respondent who was born out of the applicant's marital relationship with the testator. The first, second and third respondents are the stepsons of the applicant who were born out of the testator's previous marriages.
6. The testator died testate on 22 September 2013. Since 2004 until his death, the testator lived with the applicant, and they together conducted a guesthouse business from the property. On 8 February 2013, the testator executed his last Will and Testament, which is the subject of these proceedings.
7. In terms of the will the testator nominated the first and the fourth respondents as executors of his estate. The testator bequeathed the entire estate to the four respondents in equal shares subject to the special bequest of usufruct in favour of the applicant as mentioned above. Upon the death of the testator on 22 September 2013, the first and the fourth respondents were duly appointed as executors of his estate.
8. The will contains the following relevant provisions:

"I hereby bequeath my entire estate movable and immovable property, that which I now possess or may possess in the future, whether in expectancy, contingency or otherwise, whether situate and nothing excepted to my four sons; Walter Reginald Hart, Robert George Hart, Toby Edward Hart and Brendon Hart, in equal shares."

9. The will also contains a special bequest which provides as follows:

"SPECIAL BEQUESTS:

1. I wish for my wife, Margaret, to enjoy the full usufruct of all my assets upon my death. She may dispose of any assets and invest the proceeds in any other asset that she wishes with the proviso that the Executor/s of my estate approve of the investment, which approval shall not be unreasonably withheld. The purpose of this proviso is to ensure as best as possible that the capital is preserved. However, the comfort and well-being of my wife, Margaret, is to be the utmost considered criterion by my executor/s.

Upon Margaret's death, the entire proceeds of the remaining assets in my estate shall resolve (sic) on my four sons in equal shares as provided for above."

10. The testator's estate was wound-up. Pursuant to the directions of the will, the liquidation and distribution account was finalized and lodged with the Master of the High Court. The transfer of the property was registered accordingly in the names of the respondents on 31 July 2015. The Notarial Cession of Usufruct recording the rights of the applicant under the special bequest was duly registered on 31 July 2015, and as such, the applicant enjoys full usufructuary rights over the property. Consequently, the four respondents who are the heirs are now the joint owners of the property in equal shares, subject to the provisions of the special bequest in favour of the applicant.

Applicant's

Submissions

11. The applicant avers that she has been running a guesthouse business from the property for the past 20 years and continued doing so for a living after the death of the testator. She is now 78 years of age and contends that due to her age, she is now unable to run the guesthouse business on a 24/7 basis. She further contends that the option of employing a competent manager to run the

guesthouse is not economically viable for the business, as according to her, the average income generated out of the guesthouse was insufficient for that purpose. She further states that at this stage of her life, she needs financial certainty without working in order to continue with her life.

12. During 2023, the applicant decided to sell the property with a view to reinvesting the proceeds of the property in a financial investment wherefrom she would use the interest derived for her living income. According to the applicant, the sale is in exercise of her right in terms of the will and special bequest, and in line with the pursuit of her comfort and well-being as wished for by her late husband, the testator. In pursuit of this idea, the applicant procured the purchaser of the property who is willing to purchase the property at the purchase price of R17 million.
13. Apprehensive that the first to the third respondents might not be disposed to agreeing that the property be sold, the applicant, through her legal representatives, addressed an email correspondence dated 22 May 2023, inviting the respondents to a virtual meeting to resolve the impasse. The email reads as follows:

"Dear Messrs Hart

We act for Margaret Hart.

In light of the impasse which has arisen in respect of Margaret's entitlement under the will of your late father, Peter Hart, and the notarial Cession of the usufruct bequeathed to her in terms of such will, our advice has been sought in regard to Margaret's legal position under the said instruments. I would like to invite you to a Teams meeting for the purposes of resolving the deadlock which has been reached.

It is Margaret's wish not to commence with any litigious process, which is inherently acrimonious, and is likely to negatively impact family relations, without a final attempt at resolving this matter amicably.

In the circumstances, kindly let the writer know by no later than Wednesday 31 May 2023, per return of email, if you are amenable to resolving this matter without the need for litigation. Should we not receive a response from you by such date, Margaret shall accept that you do not wish to resolve this matter without the intervention of a court of law.

Yours faithfully

...”

14. The first to third respondents responded to the above correspondence through their attorneys by a letter dated 8 June 2023, where they indicated their amenability to the proposed meeting. The respondents noted however, that they did not agree with the issues raised for discussions. Notably the respondents' letter reads as follows:

“1. Thank you for your e-mail of 7 June 2023.

2. Our clients are amenable to a Microsoft Teams meeting. We will revert to you with the date, and time on which our clients will be available.
3. We note the issues we should wish to raise for discussion. Would you not agree with all of the issues-- although this is perhaps a matter of semantics.
4. Our clients regard the most important question which needs to be decided as being the correct interpretation of the Will, and in so doing the identification of the dominant clause. The question then would be how the dominant clause is modified by the usufruct which was conferred upon your client, and her rights thereunder.
5. Our clients do not accept that your client, as the usufructuary, has a warrant to sell the property unless this is necessary for the purposes of providing her with funds which she absolutely requires for the purposes set out in the Will.
6. Our clients have been advised that they are required to exercise a discretion in this regard. This discretion must be exercised in light of the prevailing facts, which will include your client's reasonable financial requirements.
7. We therefore respectfully request to provide us with a complete statement of your client's monthly expenses, and of her assets and income. Our clients are obviously prepared to sign a nondisclosure agreement which will prevent them from disseminating this information to any other person. We invite you to draft a suitable NDA. If you prefer for us to draft such a document, we will be happy to oblige.
8. We do not agree that the Will permits her to do so using the usufruct for this purpose.

9. In fact, we have taken counsel's opinion which is to the effect which is to the effect (sic) that your client cannot simply sell the property and invest the money and then live off the interest and/or capital. The Will expressly prohibits that, stipulating that the proceeds of the sale must be invested in an alternative asset---which our clients, as the remaindermen, must approve. Provided that the agenda is expanded to include these issues our clients have no objection to meeting either in person or by teams or in front of the mediator.
15. The above correspondence exchanged between the parties was the beginning of the many correspondence exchanges that followed. Upon receipt of the letter dated 17 January 2024, from the respondents' attorneys, the applicant realised that the respondents were opposed not only to the proposed investment of the proceeds of the sale of the property but the sale itself. She then approached this court for appropriate relief.

Respondents'

Submissions

16. The respondents dispute the applicant's right to sell the property without their consent as they contend that her right to sell the property is not unfettered. They contend that the applicant's interpretation of the will is flawed, in that it fails to give proper effect to what they consider to be the testator's true intention, which according to the respondents, is evidenced by the dominant clause which vests the estate in the four sons. According to the respondents, the dominant clause sought to strike a balanced and equitable equilibrium that would ensure that the rights and interests of the heirs are not subordinated to the unilateral desires of the applicant through the special bequeath.
17. The respondents aver that in interpreting the will, the court should consider the context, more particularly the factors that were known by the testator when he made the will. According to the respondents, the testator was a seasoned businessman in property and as a property valuer and estate agent, the testator knew that the owners of the property had to consent to its sale. According to the respondents, the intention of the testator was to enable them to veto any proposed sale and investment of the proceeds, because the testator knew that any sale of the property and investment of the proceeds would affect their rights. They argued that the testator wanted to ensure that the capital would be preserved and protected against the risk of erosion by ensuring that the applicant's entitlement to usufruct is balanced with the need to safeguard the interests of the heirs.
18. The respondents went at length to seek to illustrate by extrinsic evidence that when making the will the testator harboured concerns regarding the applicants' brother's influence over her, and that the applicant had propensity to be influenced by her brother to use his estate to financially support him with various 'dubious' financial endeavours at their expense as heirs. According to the respondents, these considerations weighed heavily in their father's mind when he executed the will, as his intention was not to provide the applicant with any money but merely with usufruct over their property.

Issues

19. The central issue is whether on proper construction of the will, the applicant has an unfettered right to insist on the disposal of the property despite the fact that the first to the fourth respondents are registered owners of the property; whether the special bequest as contained in the will endows the respondents with a right to consent to the sale of the asset and the re-investment of the proceeds; whether the respondents have no right to refuse to honour the applicant's decision to sell the property at a market related price; and whether the approval of the applicant's decision to invest the proceeds of the proposed sale of the property is unreasonably withheld by the respondents.

The applicable legal principles in the interpretation of the Will

20. The cardinal principle in construing a testamentary document is to ascertain from the consideration of it in its entirety, the true

intention of the testator.[1] Reference to the will as a whole may result in the court departing from the literal meaning of the particular word or phrase in the will or in some or other manner modifying the meaning of the language. However, in the interpretation of a will the object is not to ascertain what the testator meant to do, but his intentions as expressed in the will.[2]

21. The dominant clause must be given the overriding effect throughout the will and its effect must not be modified nor its meaning strained because there are other clauses in the will which apparently require this to be done, unless it is quite clear from the other clauses that the testator so intended.[3]

22. In terms of the ancient armchair evidence rule of the interpretation of the will, the court is entitled to put itself in the testator's

armchair and have regards to the material facts and circumstances known to the testator when he or she made the will.[4] However, in *Lello & Others v Dales* NO 1971 (2) SA 330 (A) at 335D-E, the Appellate Court warned that the admission of the armchair evidence does not mean that the intention of the testator

may be sought by reasoning or conjecture not founded upon the scheme in terms of the will.

23. Where the terms of the will are clear and unambiguous the court is not entitled to look at the surrounding circumstances for external

facts

to show that the testator must have had some different intention.[5]

24. In the process of interpreting a will the general rule is that no evidence outside the will is normally admissible to explain the meaning or intention of the testator, unless in exceptional circumstances. In this regard, in *Allen v Estate Bloch* [1970] 2 SA 376 (C), Corbett J stated the legal position as follows:

“Briefly the position is as follows: Basically, the duty of the court is to ascertain not what the testator meant to do when he made his will but what his intention is, as expressed in the will. 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 intentions. At the same time no will can be analysed in vacuo. In interpreting a will the Court is entitled to have regards to the material facts and circumstances known to the testator when he made it: it puts itself in the testator's armchair. Moreover, the process of interpretation invariably involves the ascertainment of the association between the words and external objects and evidence is admissible in order to identify these objects. The process of applying the words of the will to external objects through the medium of extrinsic evidence may reveal what is termed a latent ambiguity in that the words, though intended to apply to one object, are in fact equally capable of applying to two or more objects (known technically as an ‘equivocation’) or in that words do not apply clearly to any specific object, as where they do not describe the object or do not describe it accurately. In both these instances additional extrinsic evidence is admissible in order to determine, if possible, the true object of the bequest, but except in the case of equivocation, such evidence may not include extrinsic declarations of the testator’s intention.”

25. This brings me to the issue of whether on the words expressed in the will, the applicant enjoys an unfettered right to sell the property. The respondents themselves argued that the testator made a calculated move when he made the will. According to them, the testator did not want to leave the applicant with any disposable cash because of his fear that she would be easily influenced by her brother. That was denied by the applicant to be the case. If indeed that is so, surely in such circumstances she enjoys an unencumbered or unrestricted right to sell the property. In fact, that is sanctioned by the

special bequest as the testator did not want the applicant to fall into hardship, but to enjoy the comfort she was accustomed to when the testator was alive. When the will, including the special bequest, is interpreted purposefully, the property was meant to cushion the applicant in times of need.

Whether the applicant’s right to dispose of the property is subject to the consent of the respondents

26. The applicant contends that in terms of the will, she is entitled to sell the property at a market related price and invest the proceeds on another asset of her choice. This, according to the applicant, is the benefit of the “full usufruct” of all the testator’s assets as envisaged by the testator in his will. The applicant further contends that the respondents’ right is only in relation to the approval of the investment of the proceeds of sale, not the sale itself. According to the applicant, the right to insist on the sale of the property is buttressed by the provision of her husband’s desire as expressed in the will to the effect that her comfort and well-being is to be the “utmost considered criterion” by the executors.

As stated above, the respondents contend that the applicant's right to dispose of the property is not unfettered. They argue that the dominant clause in the will should be accorded its weight as the most direct and unequivocal expression of the intention of the testator, and as such, its effect should not be whittled down by the special bequest. This principle was well pronounced in *Ex Parte Melle and Others* 1954

- (2) SA 329 (A) at 334, and cited with approval at *Schaumberg v Stark* 1956 (4) SA 462 (A) at 468 as follows:

"full effect should be given to the dominant clause which bequeaths the legacy or institutes the heir and that its effect should not be modified nor its meaning strained because there are other clauses in the will which, apparently, require this to be done, unless it is quite clear from those other clauses that the testator so intended."

27. I take the view that the clause which bequeaths the entire estate to the four respondents in equal shares is the dominant clause in the will. Full effect should be given to the dominant clause which bequeaths the legacy or institutes the heir and its effect should not be modified nor its meaning strained because there are other clauses in the will which apparently require this to be done, unless it is quite clear from these other clauses that the testator so intended.[6]
28. The pertinent question, therefore, is whether the effect of the dominant clause is whittled down by the special bequest, and if so, whether the testator's intention to limit the effect of the dominant clause as expressed in the special bequest are unclear and ambiguous.
29. In terms of the special bequest, the applicant is given the full usufruct in the assets of the testator's estate during her lifetime. The will directs that upon the applicant's death the entire proceeds of the remaining assets in the estate shall devolve on all the four respondents in equal shares. It is clear from the words used in this clause that the effect of the dominant clause is limited, in that a special bequest makes the full ownership rights of the respondents to the remainder of the testator's estate to take effect only upon the death of the applicant.
30. In my view the intention of the testator as expressed in the will is clear and unambiguous. It was to bequeath the entire estate to the four respondents in equal shares, but to limit the effect of the bequest to be subject to the full usufruct as expressed in the special bequest. This in my view shows that the intention of the testator was to restrain the full effect of the dominant clause by what is referred to by the testator as 'full usufruct'. My view is fortified by the testator's express

words that upon the applicant's death, the entire proceeds of the remaining assets in his estate shall devolve on the four

respondents in equal shares as provided for in both the dominant clause and the special bequest. I note that in the will the testator

used the words “...my estate shall ‘resolve’ on my four sons...”. I take it that the testator meant “devolve” instead of “resolve”, for no sense can be made out of the use of the word ‘resolve’ in that sentence.

31. In terms of common law, the usufruct entitles the usufructuary to have the use and enjoyment of another person's property (usus) and to take its fruits (fructus).[7] In other words, the usufructuary rights go beyond the right to use of the property but extends to the right to enjoyment of its fruits. In casu, it seems to me that the applicant, now that she is unable to enjoy the fructus by operating a guest house business on the property due to her old age, she seeks to enjoy the fructus by disposing of the property and re-invest the proceeds thereof in another asset and enjoy interest as fructus.
32. I am mindful of the fact that in law, when the usufruct is terminated, the usufructuary property has to be restored *salva rei substantia* to its owner. Thus, ordinarily the usufructuary is not allowed to consume or destroy the property, adversely affect its value, or alter its character. However, in casu the situation is unprecedented or out of the ordinary, in that in his will, the testator went beyond bequeathing just the usufruct. He awarded the applicant an extraordinary right to dispose of the asset by directing that the applicant may dispose of any asset and invest its proceeds in any other asset she wishes, as long as the capital is preserved.
33. Essentially, the testator gave the usufructuary a right to alter the character of the property by disposing of the property and invest the proceeds in any other asset. This is of course with the proviso that the investment of the proceeds of the disposed of asset has to be approved by the executors of the estate in order to ensure that as best as possible the capital is preserved.
34. The provisions of the will do not present any conflict with the provisions of the dominant clause, in that the respondents are the heirs of the entire estate, and their ownership of the estate is intact. The applicant's case does not in any event contest the provisions of the dominant clause, and the right of ownership of the respondents to the estate. The applicant merely wants to exercise the usufructuary rights as contained in the notarial bond.
35. Thus, in a case like the present, where the special bequest of usufruct is clear, and is not in conflict with the dominant clause, the intention of the testator was to have the co-existence of the dominant clause and the special bequest in the will.
36. In resisting the sale of the property, the respondents also contend that, based on extrinsic evidence, the testator was a businessman trading in property. According to the respondents, as a businessman in property, the testator must have known that as owners of the property, the respondents would have to consent to the sale of the property. As such, so argue the respondents, the applicant may only dispose of the property with the consent of all four respondents who are the registered owners.

37. The respondents further argued that for them to decide on the approval of the investment, they have to exercise a discretion to consent to the sale itself. This, according to the respondents, is so because as the owners of the property, and thus parties who have an interest in the property, they have a duty to ensure that the preservation of the capital is not compromised. It seems to me that the respondents' argument is premised on the conjunctive interpretation of the right to sell and right to approve the investment of the proceeds as expressed in the will.
38. Indeed, in the normal course of events, consent of the owner has to be given for the sale of the owner's property. A third party would not dispose of the property without the consent of the registered owner. However, in this instance, the right to dispose of the property was given by the testator even before the bequeathed property was registered in the names of the four respondents. It then follows that no consent is required from the registered owners of the property as they became conditional owners after all had been said and done by the testator. Evidently, even though they are the registered owners of the property, the respondents do not have possession and use of the property. The executor envisaged the full taking over and control of the property after the death of the applicant.
39. The legal position is that in the interpretation of a will the object is not to ascertain what the testator meant to do, but his intentions as expressed in the will. Where the intention of the testator appears clearly from the words of the will, as is the case in casu, it is not permissible of the court to use evidence of surrounding circumstances or other external facts to show that the testator must have had some different intentions. I repeat, nowhere in the will is an expression that the disposal of the asset is subject to the consent of the heirs. The respondents' contention that the applicant's right to dispose of the asset is subject to their consent is without merit.
40. In the circumstances, I do not find the applicant's proposed insistence of the disposal of the property as inconsistent with the intention of the testator as expressed in the will. In my view, the words expressed in the will are clear and unambiguous. In terms of the will, the applicant may dispose of any asset. The right to dispose of any asset is a separate issue and an absolute discretion of the applicant. It further states that the applicant may then invest the proceeds of such disposal in any other asset that she wishes, provided that the executors of the estate approve of the investment. The intention of the testator, as gleaned from the words expressed in the will, is to give the applicant a right to dispose of any asset including the property in question. Thus, the respondents have no right in terms of the will to frustrate the sale of the property.
41. I am not persuaded that the extrinsic evidence postulated by the respondents, which is largely speculative and deviates from the words as expressed in the will, is permissible in ascertaining the intention of the testator. On the words as expressed in the will, it cannot be concluded that the testator intended that the decision of the applicant to sell the property would be subject to the consent of the respondents. I am satisfied that based on the clear words expressed in the will, the testator intended to give his wife, the applicant, an absolute

right to dispose of the property.

Duty to invest the proceeds and the preservation of capital

42. The special bequest enjoins the applicant to, upon disposal of any asset, invest the proceeds thereof in any other asset she wishes, with the proviso that the executors of the estate approve of the investment. According to the will, the purpose of the proviso is to ensure as best as possible that the capital is preserved. On the proper interpretation of the special bequest clause, the duty to preserve the capital of the estate lies on both the applicant and the respondents, inter se. On the one hand, the applicant has to invest the proceeds of the sold asset on any other asset. On the other, the respondents must approve of the investment, which approval should not be unreasonably withheld. The expressed rationale in the will is that the comfort and well-being of the applicant in this regard is of the utmost considered criterion.
43. The respondents are opposed to the proposed investment model. Their contention is that as a businessman in property, the testator must have meant that the investment “on any other asset” to mean on any other immovable property, because, so goes the argument, by asset the testator meant the alternative immovable property and not financial investment. The extrinsic evidence approach proposed by the respondents is not convincing on two grounds. Firstly, the testator’s words are clear, namely that the applicant may invest on any other asset she wishes. This does not require application of extrinsic evidence. Secondly, the proposed interpretation is inviting the court to impermissibly invoke a meaning outside the expressed words in the will. Given that the applicant has a right to full usufruct on the asset, the respondent’s proposed interpretation does not conceive how the applicant would enjoy the fructus and make a living in re-investment on the alternative property.
44. On proper construction of the words as expressed in the will, the intention of the testator is clearly that the applicant should invest the proceeds of the disposed of asset on any other asset. The contention that by “any other asset” the testator meant “any other property” is in my view an overstretch of interpretation. This overstretched interpretation deviates from the clear and ordinary language used in the will and is not justified. This is more so that in the ordinary business language, assuming that the testator was a seasoned businessman as contended, the word ‘asset’ has wider meaning than just immovable property.
45. The further argument of the respondents in resisting the investment proposed by the applicant is that the investment in financial securities will erode the value of the capital due to inflation and compromise the testator’s ideal of reservation of capital. The applicant averred that she enlisted the services of investment consultants and tax practitioners to develop an investment structure

that would ensure that the capital is preserved, and interest is derived for her benefit. Whilst the respondents dispute the applicant's averments, there is no dispute that the investment structure that addresses applicant's and the respondents' interests is possible. The real issue taken by the respondents is that they had not been involved in the process of identification and/or development of the investment structure.

46. It is not for this court to determine which investment should be approved by the respondent. What the court is required to do is to provide proper interpretation of the will, and in so doing to determine whether, on proper interpretation of the will, the approval is unreasonably withheld. In approaching this issue, the court has to bear in mind, inter alia, the testator's expressly desired comfort and well-being of the applicant as the usufructuary on the one hand and the preservation of capital for the benefit of the respondents as the bare dominium holders on the other.
47. It is not in dispute that the applicant makes a living out of the guesthouse business on the property. She is now 78 years of age and is now unable to run the guest house at that age. She seeks to invoke her usufructuary rights provided for in the special bequest so as to derive different means of financial benefits out of the usus of the capital of the asset and receive fructus in the form of interest. The applicant has proposed to invest the proceeds through a financial investment structure where, as an usufructuary, she would preserve the capital and use the interest as fruits of the investment.
48. In her submission the applicant has provided evidence that she took reasonable steps to secure an investment model that seeks to ensure that the capital is preserved. The respondents did not provide any evidence that the investment in financial securities by its very nature erodes capital. Given that the proposed investment model is intended to preserve the capital and utilise the interests, and that reasonable safeguards had been put in place to preserve the capital, the argument that the proposed investment was not intended by the testator is not sustainable.
49. In the circumstances, to the extent that the respondents insist that the proceeds of the sold property be invested only on immovable property, such approval is unreasonably withheld. The investment in any other asset means in any asset that would enable the applicant to enjoy the fruits as usufructuary rights on the capital asset, provided that the capital is preserved.

Costs

50. The principle is that costs follow the result. There is no reason why this principle should not apply in this matter. The applicant has succeeded in this application. Despite many reasonable attempts by the applicant to present possible solutions to the dispute, the respondents have displayed a steadfast opposition towards the resolution thereof. Instead, the respondents adopted a nonchalant attitude and invited the applicant to approach the court for the relief the applicant sought. There is no reason therefore why the first, second and third respondents should not pay costs of this litigation.

51. I am also satisfied that the complexity of this matter and the magnitude of issues that had to be dealt with warrant that costs be awarded in favour of the applicant as between party and party at the High Court Scale B.

52. In the result, I make the following order:

1. It is declared that:

1.1 the first to the fourth respondent's ownership rights in Erf 1[...] Camps Bay, also known as "E[...]", commonly known as F[...] Close, Camps Bay is limited by and subject to the applicant's rights arising from the special bequest recorded in the will of the Late Peter Dionysuis Hart and reflected in the title deed to the property and Notarial Deed 685/2015;

1.2 in terms of the special bequest the applicant is, despite the fact that the first to the fourth respondents are the registered owners of the property, entitled to insist on the disposal of the property;

1.3 despite the fact that the first to the fourth respondents are the registered owners of the property, the first to the fourth respondents have no right to refuse to honour the applicant's decision to sell the property at a market related price, and must take all steps necessary to give effect to the sale and transfer of the property (including the signature of any deed of sale, transfer documents and making payment of any costs, fees and taxes from the proceeds of the sale) should the applicant decide to sell the property and upon her request;

1.4 despite the fact that the first to the fourth respondents are the registered owners of the property, they are not entitled to use the proceeds of any sale of the property (capital) as contemplated above until the applicant's death and that the applicant is entitled to use the full fruits (interest) arising from the re-investment of the capital as contemplated in the special bequest.

1.5 the investment of the proceeds of the property as contemplated in the special bequest must be approved by the first and the fourth respondents as the "executors" contemplated in the special bequest;

1.6 the first and the fourth respondents must not unreasonably withhold the above consent, provided that the executors have taken reasonable steps to ensure that the capital is preserved as best as possible for the benefit of the first to the fourth respondents, but that the applicant's comfort and well-being should be the "utmost considered criterion" for such approval;

1.7 the first and the third respondent's refusal/failure to sign the Deed of Sale dated 5 December 2023 is in breach of/or contrary to the provisions of the special bequest;

1.8 the first to the third respondent's refusal/or failure to approve the proposed re-investment of the capital/or proceeds of the sale as specifically advised, is unreasonable and in breach of/contrary to the provisions of the special bequest; and,

1.9 after the re-investment of the capital realised from the sale of the property the applicant has a right to deal with the interest of the capital so invested subject to the provisions of the will until her death, including the right to insist that any investment be disposed of subject to the provisions of the special bequest.

2. It is ordered that:

2.1 the first to the third respondent must sign the Deed of Sale presented by the applicant within 10 days of granting of this order and thereafter sign such documents and take all such steps as are necessary to ensure the sale and transfer of the property in terms of the sale, failing which the Sheriff of this Court is authorised to sign any such document and take any such step on their behalf; and,

2.2 the first respondent and the fourth respondent, and in the absence of any of them, alternatively the first, the second and the third respondents shall approve the re-investment of the capital as realised, and shall sign such documents and/or take all such necessary steps to give effect to such investment, failing which the Sheriff of the Court is authorised to sign any such document and take any such step on their behalf.

3. The first to the third respondents are ordered to pay the applicants costs as between party and party at the High Court Scale B.

MAPOMA AJ

Acting Judge of the High Court

Appearance

For the Applicant : LN Wessels

Instructed by

: Mathews Enslin Inc

For the 1st – 3rd Respondents: P Tredoux

Instructed by

: Ebersons Attorneys

[1] Corbett et al- The Law of Succession in South Africa, 3ed, 704

[2] Corbett et al- The Law of Succession in South Africa, 3ed, 703

[3] In re Estate van Aardt 1925 CPD 250; Ex parte Melle 1954 (2) SA 329 (A); Staden NO and Othara 1984(4) SA 507 (T) 511. Corbett et al- The Law of Succession in South Africa, 3ed, 703 (where these authorities are cited)

[4] Allgood v Blake (1873) LR 8 Exch 160 at 163 (referred to with approval in 1945 AD 201)

[5] LAWSA, 2nd ed 31 p287 at para 408; Allen v Estate Bloch [1970] 2 SA 376 (C)

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- [6] De Waal et al: LAWSA (Vol 31: Wills and Succession) (First re-issue) at paragraph 376, Corbett et al: The Law of Succession in South Africa (2nd Edition) at p447.
- [7] Vairetti v Zardo NO and Others (12423/2007) [2010] ZAWCHC 146 (12 April 2010) at para 27
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