

SOUTH AFRICA / JUDGMENT

Maree N.O. and Others v Van Rensburg and Others (1453/2014) [2017] ZAFSHC 78 (18 May 2017)

[2017] ZAFSHC 78**COURT**

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

1453/2014

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**IN THE HIGH COURT OF SOUTH
AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN**
Case
number: 1453/2014
In

the matter between:

NICOLAS
PETRUS MAREE
N.O. 1st
Applicant
(CURRENTLY
NO SECOND
TRUSTEE) 2nd
Applicant
(In
his/their capacity as trustees of the Annette Trust)
SANDRA
STRAUSS 3rd
Applicant
and
ANNETTE
JANSEN VAN
RENSBURG 1st
Respondent
MICHAEL
ANTONIE NICOLAAS JANSEN

VAN
RENSBURG 2nd
Respondent
EDUAN
JANSEN VAN
RENSBURG 3rd
Respondent
HEARD
ON: 23 MARCH 2017

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 18 MAY 2017

- [1] This is an application for leave to appeal against the whole of the judgment by Hancke J which was delivered on 1 December 2016.

The application, brought by the two applicants 14 December 2016, is opposed by the three respondents. The judgment was given in respect of the interlocutory counter application filed by the respondents in the main eviction application.

- [2] The order made by the court a quo on 1 December 2016 reads:

“1. Die aansoek slag en word ‘n bevel verleen ingevolge Bylae “A” aangeheg aan die uitspraak, gelewer op 1 Desember 2016.”

- [3] The applicants were aggrieved by the order and the underlying reasons as set out in the judgment as a whole. On 14 December 2016 the applicants filed a notice whereby they signalled their intention to apply for leave to appeal, against the judgment and the order.
- [4] The grounds of their appeal were encapsulated in the aforesaid notice. There were 12 grounds of appeal. See pages 2-5 of the indexed record. I deem it unnecessary to reproduce them here. I shall deal with them along the way.
- [5] On 25 January 2017 the three respondents filed notice of their intention to oppose the application for leave to appeal.
- [6] On 22 February 2017 I, mero motu, caused the application to be enrolled for hearing on Thursday 23 March 2017.
- [7] On 23 March 2017 the merits and demerits of the application were argued before me. Having heard argument, I reserved judgment in order to digest, analyse and consider the submissions made for and against the application for leave to appeal.

[8] In an application for leave to appeal, the cardinal question is whether the contemplated appeal would have a reasonable prospect of success or whether there is some other compelling reason why the matter should be heard on appeal – See Section 17 Superior

Court Act 10 of 2013. In this particular matter the crucial issue was whether the court a quo committed material and appealable misdirection in taking into account the contemporaneous context and the subsequent conduct of the founder in interpreting the trust instrument.

[9] On the one hand Mr Heymans, counsel for the applicants, submitted that the answer to the issue must be affirmative. The

submission was based on the contention that the trust deed, in this instant, was essentially the will of the founder, the late Frederick Labuschagne Strauss and his wife, the late Maria Magaretha Strauss. That being the case, so went the argument, the court erred in relying on authorities and caselaw applicable to the interpretation of contractual documents instead of the one applicable to testamentary documents. Accordingly, counsel urged me to grant leave to appeal.

[10] On the other hand Mr Van der Merwe, counsel for the respondents, sharply differed. He submitted that the court committed no material and appealable misdirection by interpreting the trust deed as it did. He submitted that the answers to the general

question and the specific issue must both be negative. He argued that the court had correctly taken into account the prevailing

circumstances at the time the trust was created, the structure of the trust and the new global trends concerning interpretation of trust instrument. Accordingly, counsel implored me to refuse leave to appeal.

[11] The relevant statutory provision is section 13 Trust Property Control Act 57/1988. It provides:

“13. Power of court to vary trust provisions.-If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.”

- [12] The basis of the current application for leave to appeal is that the respondents' counter application should have failed. See par 12 applicants' notice dated 13 December 2016 filed on 14 December 2016. On behalf of the respondents it was submitted that the attack on the judgment was so defective at every level of reasoning that it cannot be reasonably expected that another court would follow such an approach to come to a different conclusion on any of the alleged grounds.
- [13] It is necessary to analyse the reasoning of the applicants. The crux of the argument appears to be that the court erred in taking into account the context and the subsequent conduct of the founder in interpreting the trust instrument. This much is apparent upon reading pars 8, 9, 10, 13 and 14 applicants' head of argument.
- [14] In developing their argument, the following motivation was given by the applicants:
- Firstly, that the trust deed was essentially a testamentary will of the founder and his now deceased spouse; secondly, that the court was, therefore, not supposed to have applied authorities dealing with contracts but rather wills in interpreting the trust deed and thirdly, that in interpreting a testamentary clause in a will, a court is precluded from taking the context into account unless the wording of such a clause is so vague and ambiguous that it renders the clause senseless. In this instance the focus under consideration was clause 2.3.1 of the trust deed - vide pars 7, 8, 9 applicants' heads of argument read with par 14 thereof.
- [15] On that basis, it was contended that clause 2.3.1 read with clause 14 of the trust deed was clear. The effect was that the trustees had an unfettered discretion as regards the awarding or allocation of trust assets to the beneficiaries. The critique was that the court put the card before the horses by considering the contextual background and the surrounding circumstances before interpreting the particular clause in the trust deed.
- [16] The apparent implication of the aforesaid argument was that the interpretation of the judge was allegedly in conflict with the trustee's unfettered discretion. In short it was contended that where a clause, at a glance, is clear – it is impermissible to take into account the contextual background of prevailing circumstances as held in a series of caselaw to which the judge referred in par 3 and 4 of his judgment.

It was further submitted that the court was so misled by contextual facts that it allowed considerations of equity to becloud its objective judgment.

- [17] I am not so persuaded. The applicants cited no authority in support of their submission that inter vivos trust deeds such as this one has to be interpreted as a will. Moreover, no authority was cited for the proposition that the new approach of our courts as regards the methods of interpretation does not apply to wills, codicils or testamentary documents. Mr Van der Merwe, submitted that the new approach of interpretation applies to all types of documents whatever their legal nature.

[18] I hasten to add that the new approach has not done away with the old. Consequently, in a case where a document is very clear it may still not be made turbid now by blindly resorting to contextual background or prevailing circumstance. The principle remains as valid here and now under the new approach as it was there and then under the old approach.

[19] The underlying justification or validation for the paradigm shift to interpretation is that words tend to be better understood when they are considered against the complete contextual backdrop in which they were uttered than when they are considered in a vacuum confined to the present but isolated from the past. In *Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111 (3 September 2015) par [28] the court, per Lewis JA, put it in the following brief and robust manner:

“Words without context mean nothing.”

I am in respectful agreement.

[20] If it is true that to attach meaning to words without taking into account the background from which they originated is unscientific in the case of contracts then, so too, it must also surely be unscientific and dangerous to do so in the case of testamentary documents. The law reports are replete with decided caselaw which repeatedly stress that the new approach is applicable to any document whatever its legal character may be. The new approach is not only domestically but also globally embraced and used to interpret documents.

[21] The global trend or the new approach to interpretation was expressly and supremely embraced in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18] where the court, per Wallis JA, said the following:

“Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.” vide 2008 (5) SA 1 (SCA) pars [16-19].

[22] Two years later, the above mentioned decision was reaffirmed in *Bothma-Batho Transport v Bothma & Seun Transport* 2014

(2) SA 494 (SCA) par [10] where Wallis JA:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.”

(the emphasis is mine)

[23] Still in *Bothma-Batho*, supra, at par [12] the court went on to say:

“That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents.”

The summary referred to concerned the “golden rule” of interpretation as discussed and summarised in *Coopers & Lybrand & Others v Bryant*

[1995] ZASCA 64; 1995 (3) SA 761 (A).

It is obvious, therefore, that the submission made by the applicants are at odds with these supreme decisions.

[24] The argument advanced on behalf of the applicant erroneously proceeds from the standpoint that the trust deed, the subject of interpretation in this instance, was not a contract. Such a point of departure was not entirely correct. An inter vivos trust is necessarily in a form of a contract. Some eminent jurists regard an inter vivos trust as a contract for the benefit of a third. See *Crooks N.O. v Watson & Others* 1956 (1) SA 277 (A) at 288A, 296F and 298G-H. I pause here to mention that this is the decision on which the applicants themselves relied. It is not really authority for their proposition. See *Cameron: Honorés South African Law of Trusts*, 5th ed. P216, par 130 (first par). See also *Wills and Trusts*, LexisNexis B5.1 (issue

20) par 5.2 under the heading ‘Stipulatio Ulteri’.

[25] The following passage is opposite:

“Under Roman-Dutch Law influence, the South African trust created by means of an agreement between the founder and the trustees (the inter vivos trust or trust in the narrow sense) has the structure which is akin to a contract for the benefit of a third party (stipulatio ulteri).”

See *Wills and Trusts*, supra. See also *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) par [18]. The trend in all these authorities is against the argument of the applicants.

[26] There were further reasons as to why I am not persuaded by the argument that Hancke J erred by taking into account the contextual

circumstances. There was vigorous dispute on the papers concerning the interpretation of the trust deed. The first

point of dispute was whether Annette and Erna were at all covered by any of the specified classes of beneficiaries.

[27] Their biological mother, Ms Strauss, had contended, in her affidavit, that the founder’s intention was precisely to exclude Annette and Erna since, as she claimed, they had already received more benefits than their little sister, Sandra. The bottom-line of her allegations boiled down to this: The real purpose of the three trusts was that Sandra was not only supposed to enjoy

preference but that her elder sisters, Annette and Erna, were supposed to be completely eliminated from the benefit equation.

Such construction obviously prejudices the interest of potential beneficiaries.

[28] The three trusts were named Annette Trust, Erna Trust and Sandra Trust. Those identificative labels by themselves strongly

militated against Ms Strauss' proposition and related submissions. It was common cause that clause 2.3.1, the clause

at the centre of this dispute, was ambiguous for that very reason alone. It became necessary, therefore, to take the context into account in interpreting the testamentary clause. The so-called "armchair approach" would, according to the approach of more than half a century ago, have been applicable. That in itself would have meant that the context has been taken into account.

[29] Indeed a few days before the hearing of the application, the current applicants formally conceded that the late Ms Strauss'

interpretation that Annette and Erna were excluded from inheriting was wrong and that they were legatees in accordance with clause

2.3.1.2 and clause 2.3.1.3 of the trust deed. Notwithstanding the concession, Hancke J obviously still found it necessary to determine whether such concession was correctly made or not.

[30] During the course of his judgment Hancke J lamented the lack of good draftsmanship in the drafting of the trust deed:

"Dit is duidelik dat hierdie klousule nie 'n toonbeeld van elegansie en duidelikheid is nie. Die vraag ontstaan wat Annette se status ten opsigte van die Annette Trust is. In die hoofaansoek (om uitsetting) het Mev Strauss aangevoer dat Annette glad nie 'n begunstigde van die trust is nie."

Mr Heymans considered the finding to be a misdirection. He argued:

"The court erred in finding that the trust deed is not an example of elegance and clarity ("toonbeeld van elegansie en duidelikheid").

Mr Van der Merwe disagreed. He argued:

"16.5 Verder word aan die hand gedoen dat die submitisie in verband met die beweerde duidelikheid van die sogenaamde "vrye diskresie" foutief is. Indien daar wel uitdruklike riglyne gegee was waarbinne die sogenaamde vrye diskresie uitgeoefen moes word, kon

hierdie submitisie moontlik gewig gedra het. Dit is egter tog duidelik dat die trustees nie reg sou optree indien hulle byvoorbeeld

besluit het om uit die nageslagte na verwys die dogtertjie met die mooiste glimlag uit te soek om al die bates van hierdie trust (en dan ook van die ander twee trusts) te ontvang nie."

I am persuaded by the latter's submission.

[31] If the clause has to be interpreted in the light of the prevailing circumstances, as Ms Strauss herself did, then the applicants in this instance cannot now turn around and allege that the court erred by doing precisely that. In their heads of argument the applicants reverted to their initial stance. They argued that the court erred in finding that the late Ms Strauss wrongly interpreted the trust deed. The submission came as a surprise in view of the previous concession made by the applicants. Mr Van der Merwe pointed out that the latest submission was in sharp conflict with the argument advanced on behalf of the applicants in court on 24 November 2016.

[32] It is useful to highlight the contents of par 2 notice of intention to apply for leave to appeal. It reads:

“Hy het die agtergrond, konteks en omringende omstandighede waaronder die Trustakte tot stand gekom het, oorbeklemtoon teneinde tot ‘n bevinding te kom wat lynreg in stryd is met die ondubbelsinnige bewoording van die Trustakte;”

Here the applicants implicitly conceded that the court was entitled to take the contextual matrix relative to the clause into account.

The only objection, which was narrowly circumscribed, was that the court had “over-emphasized” the context. It will be readily appreciated, therefore, that the applicants were blowing hot and cold.

[33] Mr Heymans also submitted that the court should have interpreted clause 2.3 read with clause 14 of the trust deed in a manner that respected and bolstered the absolute and unfettered discretion of the trustees as to whom they would choose as beneficiaries. To illustrate the point, counsel made the following example: A father promises to bequeath certain farms to his son. On the strength of the promise, the son works very hard, with great expectation, to cultivate and to preserve those farms. However, the father ultimately bequeathes those farms to someone else. The point was the father did so knowing that no court would interfere with his decision on the ground of its apparent unfairness. This sort of thing happens all the time, counsel said.

[34] Once again Mr Van der Merwe disagreed. He articulated his submission as follows:

“Dit word aan die hand gedoen dat die bogenoemde voorbeeld nie alleen onvanpas nie, maar ook ongelukkig en defektief is. Dit word aan die hand gedoen dat terwyl ons reg, ter wille van die beginsel van testeer vryheid, ‘n bedrog soos bovermeld moet toelaat, word ‘n trustees nie toegelaat in ons reg om sodanige bedrog te pleeg nie. En dit nogal in die naam en ter uitvoering van die doeleindes van die oprigter nie. Dit blyk juis dat wyle Mnr Strauss reeds voor die oprigting van die trusts die plaas Beginsel aan Annette toevertrou het met die klaarblyklike bedoeling dat dit permanent sou wees.”

[35] It was undisputed that, long before the trust was created, the late Mr Strauss entrusted the landed property called Beginzel Farm to Annette for her own beneficial occupation, use and enjoyment. He did so with the apparent intention of letting her permanently occupy, exploit, use and enjoy the farm. That finding by the court cannot be faulted. It would, therefore, have been unjust and unfair to dispossess Annette under the guise of a trustee's absolute and unfettered discretion. In our law the principle of freedom of testation is recognised but the scope of that principle is restricted to testators only. It follows, therefore, that a trustee cannot invoke the protection of such testamentary principle.

[36] The principles of trusteeship are clear. A trustee must act objectively, impartially and with bona fide intentions at all times according to our common law. A trustee has to strive to attain the objectives for which the trust was created by the founder. To achieve that goal a trustee has to put her own interest aside.

[37] The legal commentator, WM Van der Westhuizen; Wills and Trusts, Division D LexisNexis at B14 deals with the free discretion of trustees. He comments:

"...does not allow them to do as they please. The trustees' discretion is limited by common law and usually by the trust deed. Their discretion is limited by the trust deed by determining the context in which the trustees exercise their 'unfettered'

discretion, i.e. whether all three levels of discretion regarding the benefit of beneficiaries referred to above are given to the trustees and by other possible contradicting stipulations in the trust deed."

[38] The writer continues further to outline the limitations of a trustee's discretion:

"The common law rules limiting the discretion of trustees stem from the age old principles of Natural Justice. These rules required that whenever any discretion is legally given to anybody, such person, - i.e. a trustee - must apply his/her mind to the actual exercise of any such power or discretion ... the exercising of any discretion therefore calls for a wider, or more comprehensive inquiry into matters by the trustee than he/she might have applied in his/her personal decision making."

[39] The writer referred to Wiid and Others v Wiid & Others

[2006] ZAHSA (1571/2006) (NCK). Commenting on that decision the writer made the following observation:

"Trusteeship requires far more than respecting the sentiments of a deceased founder ..."

[40] In Honore's South African Law of Trusts, 5th ed p 315-6 the authors Cameron De Waal Wunsch deal in detail with the requirement that a trustee must impartially act, avoid conflict of interests and fairly treat beneficiaries.

[41] In her affidavit Ms Strauss stated that the trust deed formed part of the couple's estate planning. Indeed this clearly appears to be the case ex facie the trust deed itself. The trust deed also refers to Erna Trust and Sandra Trust – vide clause 2.3. It was also mentioned that

other trustees would possibly have to be appointed by the founder and his spouse in their lifetime by way of a written document – vide clause 6.1.1; the trustees would be entitled to hand any assets of the trust to any trustee before the termination of the trust – vide clause 16.2 and that such beneficiaries would be at liberty to freely deal with trust assets so allocated to them as their exclusive property – vide clause 16.3. Therefore the submission made on behalf of the applicants was incorrect.

[42] It follows from the integrated reading of the aforesaid clauses that the trust deed itself formed part and parcel of a estate planning which was still work in progress. Should it appear that a trustee, or better still a creator, has made an award in the past as envisaged in clause 1.3 of the trust deed, then the manner in which he dealt with the previous award must surely serve as a guideline to his successors or later trustees in the future.

[43] It is a basic principle of interpretation that a document under consideration must be read as a whole. Where it becomes

apparent upon such complete reading that a document refers to other document, such other documents must also be necessarily read.

They cannot simply be disregarded. In this instance the document, which is central to the interpretation exercise, expressly

refers to two other trust instruments with labels that precisely correspond with the real names of the founder's two other

daughters. Those documents, relative to the two further trusts, must be taken into account in interpreting the first trust.

[44] It must be appreciated that clause 13 does not, in any way prescribe to the court as to how it should go about to ascertain the founder's objectives. The function of the court is not simply restricted to the mere reading of the trust deed. This much is clear from the authorities already referred to earlier.

[45] Now I turn to other miscellaneous grounds of the application. In the first place, it was submitted that Ms MM Strauss was property appointed as the capital beneficiary – vide par 4 notice of application and par 16 applicants' heads of argument.

[46] This point was not at all argued before the court. The trustees, Mr NP Maree N.O. and Ms MM Strauss N.O. decided that the latter was the capital beneficiary. Meanwhile a separate application has been issued to set aside such decision on various

grounds. It would appear that Ms Strauss represented to her co-trustee that it was one of the objectives of the trust that she was earmarked by the founder to become the capital beneficiary. On the strength of such representations the point of departure adopted by the trustees was that Annette and Erna as well as their offsprings, were positively excluded from the benefit stakeholding. The basis of the decision taken by the trustees appears to me to have been questionable. Because it is for another time before another court, I say no more about it.

[47] In the second place, it was submitted that the court erred by considering clause 3.5 of the will – vide par 20 of the heads. I am not persuaded by the submission. The clause is clear. It indicates that the founder of the trust strived to treat his three daughters equally. Such equal adjudication or treatment was the golden thread of the scheme designed by the founder of the trust. I am not persuaded that the court erred.

[48] In the third place, it was submitted that the court erred by interpreting clause 3.3 of the will as it did. – vide par 19 of the heads. I had difficulty with the submission. It is this: It was not at all clarified why the court was wrong in referring to the clause. In my view the clause indicated that there was connective association between the child Annette and the entity affectionately named Annette Trust in the forefront of the trust founder's mind at the time he drew up his will. That point was a compelling consideration. On the contrary, there was no such connective association through which the entity called Annette Trust could be mentally attached or associated with the child named Sandra.

[49] In the fourth place, it was submitted that the court erred in that it attached a wrong meaning to clause 3.6.2 of the will concerning the option relative to the sale of Quaggafontein Farm – vide par 21 of the heads. Let me hasten to say the submission had no substance. The submission was premised on the argument that one would have expected the founder to have bequeathed the farm to Annette straight away instead of giving her the first option to buy it.

[50] It was common cause that the founder had ten farms and three daughters. We know ten is not mathematically divisible by

three. Therefore, the tenth farm did not fit in the founder's scheme of three equal distribution of the farms. Quite obviously bequeathing the one odd farm to Annette would certainly have disturbed the equation. It was precisely the founder's resolute to avoid perceptions of inequality that he testamentary directed that the particular farm be sold and that the proceeds of its sale be equally shared by his three daughters. The one child who had distinguished herself in the farming tradition of the family was Annette which was why the father gave her the optional opportunity of buying the farm in question without giving her any unfair financial advantages.

[51] All those were material consideration. They strongly fortified the submission that the founder was committed to an equality scheme of wealth distribution among his children. He came up with the idea of three possible ways for the sale of the farm. The underlying idea was to ensure that the farm would be entrusted to one and the same person. That, in my view, was of paramount

importance. What emerges from all this is that it was self-evident to the founder that Annette had to inherit the assets of Annette Trust unless, of course, she should fall by the way side before the awarding was done.

[52] In the fifth place, it was submitted that the trust documentation as demanded by the respondents was not really needed. The main application concerns the eviction of Annette and her family from the Beginsel Farm. On behalf of the respondents, it was contended that they required such documentation in order to resist their eviction. Clause 16.3 of the trust deed makes provision for the handing over of trust assets to the appointed beneficiaries even before termination of the trust. It was further contended that the respondent have to ascertain what decision were taken by the trustees prior to the initiation of the eviction proceedings. It is unclear why trustees would withhold such documentation.

[53] In the sixth place, it was alleged that it was unnecessary to have additional trustees appointed. In the meantime, the Master: High Court, has appointed three new trustees, in addition to Nicolas Petrus Maree, namely: Samuel Jakobus Maritz; Abraham Johannes Louw; and Patrick Ellis.

See the letters of authority issued on 17 March 2017.

Therefore, the point requires no further comments.

[54] In the seventh place, it was submitted that the matter be referred to trial for oral evidence – vide par 30 heads.

The court was never asked, prior to the hearing of the application, to refer the matter for oral evidence. That is the one thing. It was not indicated which pertinent points in dispute existed which must be so referred. Indeed all the points that were tabulated as background facts and contextual facts were undisputed. This is another thing.

[55] The rest of the grounds of appeal which I did not specifically deal with in this judgment, were not overlooked or disregarded. I considered them all. I found each of them to be devoid of any substantive merit.

[56] Section 17 Superior Court Act 10 of 2013 provides that leave to appeal shall only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or where there is some other compelling reason why it should be heard. Although the courts are not unanimous in their interpretation of the section, they are nonetheless ad idem that the test is now more stringent than before the section was enacted.

[57] It will be readily appreciated, therefore, that it is no longer business as usual, in considering an application for leave to appeal. The applicant now bears a comparatively more onerous burden than ever before to establish, on a balance of probabilities,

that a reasonable prospect exists that the appeal would succeed. The threshold for granting leave to appeal against a provincial

decision has been purposefully raised. *The Mont Chevaux Trust v Tina Goosen & 18 Others*

[2014] ZALCC (3 November 2014) (LCC14R/2014) (WCT) par 6 per Bertelsmann J. The purpose is to curtail the ever-increasing

influx of appeals to the Supreme Court of Appeals

[58] Given the peculiar circumstances of this particular case and the reasons given by the court for the order – I could find no truly convincing and objective grounds to sustain the submission that a reasonable prospect or possibility exists to persuade another court to come to a different conclusion. Consequently I am inclined to decide the issue in favour of the respondents.

[59] The real driving force behind the current proceedings is Ms Sandra Strauss, the third applicant. She is the only person with real and substantive interest in the pursuit of an appeal now that her mother, and the first applicant in the eviction proceedings is no longer alive. On behalf of her sister Ms Annette Jansen Van Rensburg and her family, the respondents herein, I was urged to direct the third applicant to pay the costs of this application. On the facts, I am persuaded that she has to be held liable for the payment of the costs of this unsuccessful application.

[60] Accordingly I make the following order:

60.1 The application for leave to appeal is dismissed with costs.

60.2 The costs shall be borne and paid by the third applicant.

M.H. RAMPAL, J

On behalf of the applicants: Adv PJ Heymans

Instructed by:

Cooper-Majiedt

Bloemfontein

On behalf of the respondents: Adv JL Van der Merwe

Horn & Van Rensburg

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