

SOUTH AFRICA / JUDGMENT

Noome and Others v Botha N.O. and Others (4405/2021) [2022] ZAFSHC 108 (23 May 2022)

[2022] ZAFSHC 108

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

4405/2021

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In the HIGH COURT

OF South Africa

FREE STATE

PROVINCIAL DIVISION

Reportable: YES/NO

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Judges: YES/NO

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to Magistrates: YES/NO

Case

No.: 4405/2021

In

the matter between:

CATHARINA
ANDRISINA
NOOME
First Applicant
CHRISTINE
DE
VILLIERS
Second Applicant
CHRISTINE
DE
VILLIERS
Third Applicant
(In
her capacity as the guardian of her minor children
Petrus
Jacobus de Villiers, Stefanus Johannes de Villiers
and
Luné de Villiers)
and
LUCIA
JACOBA BOTHA N.O.
First Respondent
FREDERICK
JOHANNES JACOBUS PRETORIUS N.O. Second
Respondent
(The
first and second respondents in their capacities as
duly
authorised trustees of the Petrus Jacobus Botha
Testamentary
Trust, MT no.:9575/07)
LUCIA
JACOBA BOTHA
Third Respondent
DANIËL
JACOBUS BOTHA
Fourth Respondent
THOMAS
DANNHAUSER BOTHA
Fifth Respondent
THOMAS
DANNHAUSER BOTHA
Sixth Respondent
(In
his capacity as the guardian of his minor children
Petrus
Jacobus Botha, Ilze Botha and Lucia Botha)
THE
MASTER OF THE HIGH COURT, FREE STATE
Seventh Respondent
THE

	REGISTRAR OF DEEDS, FREE STATE PROVINCE Eighth Respondent
Coram:	Opperman, J Date
of hearing:	24 March 2022 Judgment
Delivered:	23 May 2022 Reasons for Judgment: The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 23 May 2022. The date and time for hand-down is deemed to be 23 May 2022 at 15h00.
Summary:	Interpretation of will - sale of immovable property specifically allocated to beneficiary of testamentary trust and descendants - duty of trustees

JUDGMENT

INTRODUCTION

- [1] It has been lamented as far back as 400 years ago that the interpretation of wills fell into a despair of jurisprudence (excedit juris prudentum artem). The explanation therefor may be that “no will has a twin”.^[1]
- [2] The above nonetheless; the most valuable compass in the interpretation of wills is: “... if a will be plain, then to collect the meaning of the testator out of the words of the will...”.^[2]
- [3] The construction of wills is often a process without plan or rule.^[3] The tragedy is the bedlam and hatred caused in cases as in this application, and between a mother and her children, when a will was drafted in a manner that might cause confusion.
- [4] The confusion often lies in the eye of the beholder as in this case. The will in issue might not have been unclear if the correct rules of law were applied.
- [5] The golden rule of the interpretation of a will is to ascertain the wishes of the testator from the language of the will as a whole. The will of the testator may not always amount to a sense of fairness for all. This fact does not allow for the provisions of a will to be unlawfully distorted.^[4] In *Ex parte Jewish Colonial Trust Ltd*; *In re Estate Nathan* 1967

- (4) SA 397 (N) at 408E it was correctly ruled that beneficiaries of a will must be content to take what they were given:

The Court cannot make, or re-make a testator's will for him; it cannot vary the will he has made. It cannot change the devolution of his estate as he has directed it, nor add to or subtract from the benefit he has conferred upon each of the beneficiaries. They must be content to take what they are given, when and on the terms on which it is given. The Court will interpret the will in order to ascertain who are the beneficiaries and the extent to which each benefit and in interpreting it will give consideration to what may properly be implied into the will. The rights of the beneficiaries are determined by the will properly interpreted.

- [6] The totality of the instructions in the will as is stated in the words is vital for effective interpretation and clarification. Again, *King v De Jager*:

- [34] The point of departure when interpreting wills is 'to ascertain the wishes of the testator from the language used in the will'. Courts are obliged to give effect to the wishes of the testator unless they

are prevented by some law from doing so. The 'golden rule' for the interpretation of wills and this inherent limitation is famously

described as follows in Robertson:

'The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the Court is bound to give effect to them, unless we are prevented by some rule or law from doing so.'[5]

- [7] The application turns on the provisions of a joint will ("the will"), executed on 25 July 2007 by one P.J. Botha and his wife, L.J. Botha ("First and third respondent" or "the mother"). P.J. Botha ("the deceased") passed away on 16 August 2007. The will commanded a trust mortis causa.

- [8] A trust is not a legal persona and is a legal institution sui generis. Trustees must conduct themselves with the utmost integrity. The trustees do not become the owners of any assets or property in trust to deal with on a whim.[6]

- [9] They are mere caretakers in service of, and subservient to the trust instrument; the will. Section 9 of the Trust Property Control Act No. 57 of 1988 is the law:

9. Care, diligence and skill required of trustee. —

- (1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

- (2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).
- [10] Irregularities in connection to the administration of a trust must be reported to the Master of the High Court.
- [11] Trustees must be removed from office if they fail to perform any duty imposed upon them satisfactorily:
20. Removal of trustee. —
- (1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.
- (2) A trustee may at any time be removed from his office by the Master—
- (e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master.
- [12] Their duty is due to all the beneficiaries and equally so. In *Griessel NO and others v De Kock and another* 2019 (5) SA 396 (SCA) the Supreme Court of Appeals stated that:
- [19] The role of a trustee in administering a trust calls for the exercise of a fiduciary duty owed to all the beneficiaries of a trust, irrespective of whether they have vested rights or are contingent beneficiaries whose rights to the trust income or capital will only vest on the happening of some uncertain future event. While discrimination on the basis of need may, under certain circumstances, be justified by the needs of a particular beneficiary, the trustees did not advance 'need' as the reason for treating the first respondent less favourably. It is clear from the averments made in the affidavits and the tenor of the attorneys' correspondence that he was regarded as obstructive and contrarian. That may be so, but that does not suffice as justification for treating him less favourably. This therefore means that the trustees unfairly discriminated against him. It follows that the court a quo was correct in reinstating his right to visit the farm on a rotational basis.

THE RELIEF

- [13] Succinctly the applicants seek, inter alia, the following relief against the conduct of the first, second, third and fourth respondents:[7]

8.1 That the first and second respondents, in their capacities as duly authorised trustees of the trust, be interdicted from transferring the farm Vijfhoek, the property of the trust, to the fourth respondent;

8.2 That the agreement of sale concluded between the first and second respondents, as sellers, and fourth respondent, as purchaser, in respect of the farm Vijfhoek be set aside and/or declared invalid;

8.3 That it be declared that the first and second respondents are, in their capacities as trustees of the trust, not entitled to dispose of or sell or alienate or transfer the farm Vijfhoek as well as the other farms of the trust, during the life of the third respondent and before the termination of the trust in accordance with the provisions of the will;

8.4 That the first and second respondents be interdicted from disposing of or selling or alienating or transferring the farm Vijfhoek and the other farms of the trust, during the life of the third respondent and before the termination of the trust in accordance with the provisions of the will; and

8.5 That the first and second respondent be ordered to pay the costs in respect of the main application in terms of Part B of the notice of motion de bonis propriis together with the third and fourth respondent, jointly and severally, the one to pay the other to be absolved.

THE PARTIES

- [14] The deceased was an affluent farmer who conducted a mixed farming operation consisting of crop farming, stock farming and game farming shortly before his death. The deceased had immovable property in the form of farm implements, vehicles, stock and game at the time of his passing.
- [15] He resided with the third respondent on the farm Vijfhoek. Shortly before his death the deceased and the third respondent moved to a R[....]2 village where the third respondent still resides.
- [16] The first applicant is a major female housewife residing at the farm Aurora, district Warden, Free State Province. She and her descendants are capital and income beneficiaries after the death of the third respondent. She will become a trustee of the trust after the death of the third respondent.
- [17] The second applicant is a major female housewife residing at 2 General de la Rey Street, Elandia, Kroonstad, Free State Province. She and her descendants are capital and income beneficiaries after the death of the third respondent. She was also named executrix in the absence of the testators. She will become a trustee of the trust after the death of the third respondent.
- [18] The third applicant is the second respondent in her representative capacity as the guardian of her minor children Petrus Jacobus de Villiers, Stefanus Johannes de Villiers and Luné de Villiers.

- [19] The first respondent is Lucia Jacoba Botha N.O., a major female residing at Unit [...], R[....]1 R[....]2 Village, P[....] v[....] G[....]Street, Bethlehem, Free State, in her capacity as duly authorised trustee of the trust since its creation. In terms of the trust instrument the first respondent was to be the only trustee of the trust. The Master of the High Court deemed it appropriate to appoint a second trustee.
- [20] The second respondent is Frederick Johannes Jacobus Pretorius N.O. with his business address in Bethlehem. He litigates in his capacity as trustee of the trust. He was only appointed as trustee on 14 September 2021 by the Master of the High Court. One Mr. Morrison ("Morrison"), that was appointed on 8 September 2008 resigned amid the conflict within the family over the farm Vijfhoek around 6 August 2021.[8] He was subsequently replaced by Frederick Johannes Jacobus Pretorius; the second respondent.
- [21] The fourth respondent is Daniël Jacobus Botha, a major farmer residing at the farm Vijfhoek in the district of Lindley, Free State Province. The fourth respondent did not inherit equally to his three other siblings. The only right he acquired from the will is that the farm Nil Desperandum shall go to his descendants (with exclusion of adopted children) already born and alive at the time of the fourth respondent's death and in the absence of such descendants to the descendants of the fifth respondent, subject to the use and enjoyment of the farm by the fourth respondent for the duration of his lifetime.
- [22] The fifth respondent is Thomas Dannhauser Botha, a major male farmer residing at the farm Nova Scotia, Lindley. He and his descendants are capital and income beneficiaries after the death of the third respondent. He will become a trustee of the trust after the death of the third respondent.
- [23] The sixth respondent is the fifth respondent in his capacity as guardian of his minor children Petrus Jacobus Botha, Ilze Botha and Lucia Jacoba Botha.
- [24] Notwithstanding what seemed to be a vehemently opposed motion with three applicants and eight respondents, very few of the parties declared themselves to be part of the dispute. Only the two trustees, in the end, opposed the application and their legal representatives have now withdrawn.
- [25] The third and fourth respondents that caused the litigation opposed the costs orders applied for against them and abide by the court's decision regarding the remainder of the relief the applicants seek.[9]
- [26] The fifth and sixth respondents do not oppose the application.
- [27] The sixth respondent is the Master of the High Court. In a recent report dated 28 January 2022, it was noted that they will abide by the ruling of the court but opined that the trustees have been given the powers to sell the property in issue. BUT, in the same breath the Master states unequivocally in contradiction to their earlier submission that:

4.

Notwithstanding the above I also wish to refer the Court to clause 3.2.9 of the will in contrast to clause 3.2.2. above. This brings a matter of interpretation between these clauses and the Court is in a better position to give direction in this regard.[10]

[28] The eighth respondent, the Registrar of Deeds, Free State Province, does not oppose the application and filed a notice to abide.

[29] On the 14th of October 2021 this court appointed Advocate C.D. Pienaar as curator ad litem on behalf of the minor contingent beneficiaries and the unborn contingent beneficiaries nominated in the will.

[30] Various of the minor contingent beneficiaries were represented in the proceedings by their guardians; the third applicant, in her capacity as guardian, represented her minor children. The sixth respondent represented his minor children in the same manner. One of the children of the third applicant, HB De Villiers, has reach majority in age and it was noted that he will abide by the ruling of the court.

THE WILL

[31] The judgment will have to depict the will in its entirety.[11] As indicated; the significance and gist of the will lie in the document as a whole.

[32] The trust was created in terms of clause 3.2 of the will. The will provides as follows:

1. The third respondent is until her death the only income beneficiary of the trust and is entitled to the nett income of the trust.
2. At the death of the third respondent, the first applicant, second applicant and the fifth respondent become the income beneficiaries of the trust for a period of 1 year, which income is to be appropriated for the maintenance and education of the first applicant, the second applicant and the fifth respondent and their descendants. It is imperative to note that the fourth respondent was expressly excluded from this benefit.
3. After the lapse of a period of 1 year from the death of the third respondent, the trustees are authorised to appropriate the income and to extent, if necessary, any capital of the trust for the maintenance and education of the first applicant, the second applicant and the fifth respondent and their descendants should the trustees in their discretion decide to continue with the trust.
4. After expiry of a period of 1 year after the death of the third respondent, the trustees of the trust may terminate the trust and transfer the trust assets to the beneficiaries, including any unappropriated income and as follows:

4.1 The farm Rooikraal, Lindley to the second applicant;

4.2 The farm Vijfhoek, Lindley to the first applicant;

4.3 The farms Nova Scotia and Beginsel, Lindley to the fifth respondent;

4.4 The farm Nil Desperandum to the descendants of the fourth respondent already born and alive at the time of the fourth respondent's death, in the absence of such descendants to the descendants of the

fifth respondent subject to the use and enjoyment thereof by the fourth respondent for the duration of his life;

4.5 The farm Olivia to the deceased's grandchildren namely, Nardus de Villiers, Pieter de Villiers and Jaco Botha in equal shares; and

4.6 The remainder of the trust assets to go to the first applicant, the second applicant and the fifth respondent.

5. In terms of clause 5 of the will it is further specifically provided that in the event that a child who is a beneficiary in terms of the will dies before the deceased or the third respondent and/or before the termination of the trust, then the interest of such child vests in the descendants of the other children of the deceased and the third respondent.

6. In terms of the will the descendants of the first applicant, the second applicant and the fifth respondent are contingent income and capital beneficiaries of the trust. In addition, the descendants of the fourth respondent are also contingent capital beneficiaries.

[33] The ruckus in the case erupted with the sale of the farm Vijfhoek by the trust that was specifically and unequivocally bequeathed to the first applicant and her descendants.

[34] The trustees elected to sell her farm out of six farms and other movable assets available and bequeathed to other beneficiaries; to the fourth respondent. The fourth respondent is also a beneficiary in the trust.

[35] The sale occurred without any notice to the sole and specific heir and beneficiary of the proprietorship of the immovable property. Neither the third or fourth respondent, nor the trustees had any claim to this property in terms of the trust instrument.

[36] They effectively disinherited the first applicant and the contingent beneficiaries of the farm in stark contrast to the explicit terms and intent of the will.

[37] The farm was sold to the fourth respondent and for the solitary benefit of the third and fourth respondents. The unequal treatment of the one beneficiary in itself is so glaringly illegal that it, on this basis alone, justifies the granting of the application.

[38] The will specifically excluded the fourth respondent from ever possessing a farm or receiving any other tangible benefit. The only right he acquired from the will is that the farm Nil Desperandum shall go to his descendants (with exclusion of adopted children) already born and alive at the time of the fourth respondent's death and in the absence of such descendants the farm will go to the descendants of the fifth respondent, subject to the use and enjoyment of the farm by the fourth respondent for the duration of his lifetime.

[39] The testator clearly had his reasons for treating his children differently. The facts show that he and his wife disinherited one of their other children completely. [12] These were the circumstances and the wishes of the testator and the third respondent at the time of the drafting of the will.

[40] The will of the testator was plainly for the farms not to fall into the hands of third parties outside of the Botha family and the

only entities that had the authority to sell the farms were the heirs of the specific farms; not the trustees. The beneficiaries may also not claim what is not theirs to claim.

1. NOTE: If the afore mentioned heirs[13] decided to sell their farms, they are not permitted to so sell the farms to a third person before they had offered the farms for sale to their brothers THOMAS DANNHAUSER BOTHA and DANIËL JACOBUS BOTHA and after they had been informed in writing that the brothers are not interested in acquiring the farms at market related prices or as valuated by the Land Bank of South Africa. (Clause 3.2.9.2)

The above is evidence of the fact that clause 3.2.2 was never intended for the farms specifically bequeathed to be sold and authority was not granted in this clause to nolens volens: "...rent, sell or liquidate the assets."

2. All the property kept in trust to be inherited was ruled by the trust instrument to be out of the realm and excluded from the legal consequences of marriages in community of property, marriages entered into with the accrual system applicable and the marital control of husbands of the female heirs. (Clause 6.3)
3. If the immediate successors are not available to inherit the farms, the beneficiaries in succession will. (Clause 5.)
4. By implication, any beneficiaries that lay claim to benefits not stated in the will, shall be disinherited forthwith. (Clause 3.2.9.7)

I declare herewith specifically that should any of the beneficiaries claim against the estate for monies owed by myself to him/her, will said beneficiary summarily be disinherited and have no right to claim any benefits in terms of this will.

(Ek bepaal hiermee uitdruklik dat sou enige begunstigdes 'n eis teen my boedel indien vir geld deur my aan hom/haar geskuld, word sodanige begunstigde summier onterf en sal hy/sy nie geregtig wees op enige voordele kragtens hierdie testament nie.)

[41] The deceased and the third respondent were married out of community of property.[14] The farm Vijfhoek was the exclusive property of the testator. The will did not permit the third respondent from any benefit except for the following:

1. Residency for life at " R[...]1 Stigting", Bethlehem;
2. all game on the farm Nova Scotia;

3. all household appliances and furniture;
4. a cash inheritance of one million rands; and
5. the net income from the trust for life. (Clauses 3, 3.1, 3.1.1, 3.1.2, 3.1.3, 3.1.4 and 3.2.5) The evidence is that the farms at the time of the execution of the will in 2007 had a potential yearly income of about R275 060.00. The deceased and the third respondent realised this at the time of the drafting of the will and both was undoubtedly in agreement that the income would be enough to cover the financial needs of the third respondent. The fact that her economic circumstances changed does not allow for the terms of the will to be changed.

- [42] The rest of the property in trust is bequeathed as to become the property of the other beneficiaries. The third respondent has no right or claim to it; specifically, not to alienate it to boost her income and disinherit the rightful heirs to the benefit of herself and one other heir. It can never be inferred from the will that the testator intended for the third respondent to have absolute power over all the assets in the trust. The absurd impact would be that she, in her lifetime, may commandeer, usurp and hijack all the assets and in effect disinherit the heirs in toto. This brings me to the impugned clause that caused the litigation.
- [43] In stark contrast with the Law of Succession the first and second respondents are stuck on one clause of many to promote their view. This is clause 3.2.2.
- [44] The core of the application involves the interpretation of the provisions of the will created in terms of clauses 3.2 to 3.2.9.7. The opposition of the merits of the application is founded upon the contention that clause 3.2.2 of the will empowers the trustees to sell and alienate the farm Vijfhoek as well as the other farms of the trust.

3.2.2 To, in the interest of the trust, in his discretion, rent, sell or liquidate the assets, or to rent or buy any moveable or immovable assets.

(Om in belang van die trust, in sy diskressie, die bates te verhuur, te verkoop of tegelde te maak, of om enige roerende en onroerende eiendom te huur of aan te koop.)

- [45] It is imperative to note that the will in paragraph 3.2.2 draws a clear distinction in its wording between “the assets” that are being permitted to be rented out, sold or liquidated and “immovable property”. It does not refer to immovable property that are allowed to be alienated. The only mention to immovable property is when the trust is permitted to rent or buy such. There is never any mention that immovable property may be disposed of, sold, alienated or transferred. Specifically, not the farm Vijfhoek and the other farms in the trust, and specifically bequeathed.
- [46] Clearly, according to the wording of the clause, the trust instrument only permits that immovable property be acquired or rented. If the word “assets” were meant to include immovable property or immovable property specifically bequeathed, the: “or to rent or buy any moveable or immovable assets (“of om enige roerende en onroerende eiendom te huur of aan te koop”) would not have been added in the sentence of the clause.

THE FACTUAL HISTORY THAT CAUSED THE LITIGATION

- [47] The solution in law is not as complicated as are the emotions in the family feud. As was shown, the will is clear. The factual background of the case confirms that the first, second, third and fourth respondents had, in the least, a suspicion that they may not sell the farm and specifically in the manner they went about it.
- [48] The case is one of emotional and unrelenting family feuds. As indicated; the first applicant and fourth respondent are siblings; the third respondent, their mother and also a trustee of the trust. The family seems to be divided in two feuding factions: the mother and the fourth respondent on the one hand; and the two applicants and the fifth respondent on the other.
- [49] The feuding and the specious conduct of the fourth respondent during the litigation caused the attorneys of the first and second respondents to withdraw from record after the matter was heard, but before judgement and on 21 April 2022.
- [50] He, without the knowledge of his legal representatives and the other parties, caused a letter to be send to my office wherein he divulged facts that did not form part of the court papers. On 12 April 2022 all counsel were invited to my chambers and copies of the document were made available to them. It was decided that the matter will be adjudicated as per the arguments and papers that were placed before me on the date of the hearing; 24 March 2022. The information, underhandedly so, placed before the presiding officer will be ignored as null and void.
- [51] On 18 May 2022 it came to the notice of this court that the first and second respondents are in contempt of the court order dated 11 November 2022 to pay the costs of the curator ad litem and that a Warrant of Execution against some movable property of the trust was issued by the Registrar of this court. The papers were served and filled on record.
- [52] To reiterate; disconcertingly, the very two people that caused the litigation, that claim that the farm may be sold, that claim that the farm bequeathed to one specific beneficiary of the trust may be sold to another and thereby effectively disinherits her; now only oppose the costs order sought against them and abide by the decision of the court regarding the remainder of the relief which the applicants seek. They want for the trust to bear the costs.
- [53] The events that caused the litigation also give perspective to the final finding of this court.
- [54] Vital is the fact that this is a repeat of a previous identical situation whereby the second, third and fourth respondents were forewarned that their actions might not be in accordance with the law.
- [55] The conflict consisted, inter alia, as result of neglect of the farms that were to be managed by the trust and substantial interest free loans granted to the one brother, the fourth respondent (outstanding amount R660 905.00: 28 February 2018), and the mother (outstanding amount R875 077.00: 28 February 2018).

- [56] A major event occurred in April 2013 when the ownership of one of the farms, Vijfhoek was transferred to the fourth respondent without the knowledge of the other siblings and beneficiaries of the trust. By the time the information came to the knowledge of the applicants, the farm was already transferred and registered on Title Deed T [...]
- [57] The first applicant obtained legal aid and Mr. Strating, her present attorney, raised the issue with the trustees on the basis that the trustees were not, in terms of the provisions of the trust instrument, entitled to sell Vijfhoek and to transfer the ownership of said farm to the fourth respondent. As a result, the farm was swiftly re-transferred by the fourth respondent to the trust on 13 January 2014. Title Deed T [...] is prove thereof.
- [58] To add fuel to the fire a mortgage bond was registered for the full amount of the purchase price for which the trust sold the farm to the fourth respondent and it appears from the records of the eighth respondent that the mortgage bond (B5303/2012) was registered in favour of the trust as represented by the mother and Morrison. It seems that the fourth respondent effectively obtained ownership of the farm without making any payment and the trust had to pay the mortgage.[15]
- [59] On 16 August 2019 a letter was addressed to the trust recording the concerns of the applicants regarding the maintenance of the trust's assets and also the fact that the trustees failed to ensure that rental income is generated from the trust's farms. Communication between the parties ensued but the Covid pandemic delayed the matter.
- [60] In August 2021 one Mr. van Aardt, attorney for Morrison and the mother, informed the applicants that an Advocate van Vuuren, whose instructing attorneys are not known, acted on behalf of the mother. Morrison was requested by the mother to sign sale agreements regarding the property, Vijfhoek, but he had refused to do so because he wanted to consider the proposed sale, the contract and the legal position of the trust. Morrison resigned immediately hereafter. Mr. van Aardt followed on his heels and resigned as attorney of record on behalf of the mother and Morrison. This was announced in a letter dated 20 August 2021.[16]
- [61] The applicants again took immediate action and addressed a letter to the mother in regard to the alleged sale. She, the mother, refused to acknowledge receipt. Advocate van Vuuren accused the applicants and their legal representative of harassment of the mother and confirmed that she intent to dispose of the property. Advocate van Vuuren was requested to suspend the sale of the property until the dispute was resolved. His reply was that the mother needed the income from the sale to provide for her needs and that she had a claim against the trust for maintenance in terms of the provisions of the Maintenance for Surviving Spouses Act, 27 of 1990. They refused any undertaking to put the disposal of the property in abeyance.
- [62] The transfer started and Phatshoane Henney Incorporated was instructed to conclude the process. On 14 September 2021 the attorney of the applicant's initial correspondent in Bloemfontein, Mr. Volschenk, liaised with the Master of the High Court to ascertain whether

the second respondent was now appointed as trustee in the place of Morrison. The appointment was confirmed and Mr. Volschenk had to withdraw due to a conflict of interest in that he was the correspondent of the applicants in Bloemfontein and was now instructed to do the transfer of the farm Vijfhoek by the trust to the fourth respondent.

- [63] Phatshoane Henney represented by one Ms. Van Zyl was informed by Mr. Strating (Symington & de Kok Attorneys) that the trust already sold the farm to the fourth respondent and that in terms of the provisions of the joint will the trust is not allowed to sell the farm. They insisted on an undertaking that they will not proceed with the transfer of the property pending the finalisation of the application awaiting in the High Court. It was recorded that if the undertaking is not provided an urgent interdict is unavoidable and costs de bonis propriis will be requested. Symington & De Kok provided the background and the fact that a previous controversial transfer occurred to said attorneys.
- [64] On 20 September 2021 Advocate van Vuuren contacted Mr. Strating telephonically and again stated in no uncertain terms that the transfer will not be suspended. Advocate van Vuuren is a friend of the third respondent and parent of the fiancée of the fourth respondent and seems to have a serious conflict of interests. Litigation erupted and the applicants came to this court on an urgent basis to interdict the sale. As indicated; the sale was, lo and behold, again to the fourth respondent.

THE INTERIM LITIGATION

[65] On 14 October 2021 Daffue, J issued the following order:

1. The Uniform Rules relating to service and process are dispensed with and it is directed that Part A of this notice of motion be heard on an urgent basis in terms of the provisions of Uniform Rule 6(12).
2. Advocate Christiaan Diedericks Pienaar is appointed as curator-ad-litem on behalf of the minor contingent beneficiaries and the unborn contingent beneficiaries in terms of the will ("the will")

of the late Petrus Jacobus Botha, a copy of which is annexed as annexure "FA2".

3. A rule nisi is issued in terms whereof the respondents are called upon to show cause, at 9h30 on 11 November 2021, why:

3.1 The first and second respondents should not be interdicted from transferring the ownership of the farm Vijfhoek no. 164, measuring 384.8512 ha, situated in the district Lindley and held by the Testamentary Trust, MT no: 9575/07 ("the trust") in terms of the Title Deed no. T [...], to the fourth respondent pending the final adjudication of the rule nisi as well as the final adjudication of the main application in terms of Part B of this notice of motion;

3.2 The first and second respondent should not be ordered to pay the costs of the application for the issuing of the rule nisi and the granting of the interim relief pending the final adjudication of the application for the issuing of the rule nisi, de bonis propriis together with the third and fourth respondents, jointly and severally, the one to pay the other to be absolved;

3.3 Any of the fifth to eight respondents who oppose this application for the issuing of the rule nisi and consequent interim relief, should not be ordered to pay costs of the application for the issuing of the rule nisi and consequent interim relief, jointly and severally, with the first, second, third and fourth respondents; the one to pay the other to be absolved; and

3.4 The costs occasioned as result of the appointment of the curator-ad-litem should not be paid out of the trust fund.

4. The relief in paragraph 3.1 supra shall serve as interim interdict with immediate effect pending the final adjudication of the rule nisi as well as the final adjudication of the main application in terms of Part B of this notice of motion;
5. This order shall immediately be served upon the attorneys of the 1st to 6th respondents as well as the 7th and 8th respondents.

[66] The relief claimed in Part B is the following:

1. That the first and second respondents be interdicted from transferring the farm Vijfhoek no. 164, measuring 384.8512 ha, situated in the district Lindley and held by the Testamentary Trust, MT no: 9575/07 ("the trust") in terms of the Title Deed no. T [...], to the fourth respondent.
2. That the agreement of sale in respect of the Vijfhoek no. 164, measuring 384.8512 ha, situated in the district Lindley and held by the Testamentary Trust, MT no: 9575/07 ("the trust") in terms of the Title Deed no. T [...], concluded between the first and second respondents, as sellers, and the fourth respondent, as purchaser, be set aside and/or declared invalid.
3. That it be declared that the first and second respondents are, in their capacities as trustees of the Trust, not entitled to dispose of or sell or alienate or transfer the immovable properties of the trust, recorded below, during the life of the third respondent and before the termination of the Trust in accordance with the provisions of the will:

Portion 1 of the farm Olivia no. 385, measuring 214.333 ha, situated in the district of Lindley, held in terms of Title Deed no. T [...];

The farm Rooikraal no. 689, measuring 506.3589 ha, situated in the district of Lindley, held in terms of Title Deed no. T [...];

The farm Nil Desperandum no. 239, measuring 328.1449 ha, situated in the district of Lindley, held in terms of Title Deed no. T [...];

The farm Nova Scotia no. 605, measuring 625.2684 ha, situated in the district of Lindley, held in terms of Title Deed no. T [...];

Portion 1 of the farm Beira no. 607, measuring 312.6342 ha, situated in the district of Lindley, held in terms of Title Deed no. T [...];

The farm Vijfhoek no. 164, measuring 348.8512 ha, situated in the district of Lindley, held in terms of Title Deed no. T [...].

4. That the first and second respondents, in their capacities as trustees of the Trust, are interdicted from disposing of or selling or alienating or transferring the immovable properties of the Trust, recorded below, during the life of the third respondent and before the termination of the Trust in accordance with the provisions of the will of the late Petrus Jacobus Botha:
5. That the first and second respondents be ordered to pay the applicants' costs, as between party and party, in respect of the main application in terms of Part B of the notice of motion *de bonis propriis* together with the third and fourth respondents, jointly and severally, the one to pay the other to be absolved.
6. That any of the fifth to eight respondents who oppose the main application in terms of part B of the notice of motion be ordered to pay the costs of the main application, jointly and severally, with the first, second, third, and fourth respondents, the one to pay the other to be absolved.
7. That the eighth respondent be directed to record the interdicts granted in terms of paragraphs 1 and 4 of Part B of the notice of motion against the title deeds of the relevant immovable properties of the Trust.

[67] On 11 November 2021 Mathebula, J ordered that:

1. The first and second respondents are interdicted from transferring the ownership of the farm Vijfhoek no. 164, measuring 348,8512 ha, situated in the district Lindley and held by the Petrus Jacobus Botha Trust, MT no: 9575/07 in terms of Title Deed no. T [...], to the fourth respondent pending the final adjudication of the main application in terms of Part B of the notice of motion;
2. The issue regarding the joint and severally liability of the first to fourth respondents for the costs relating to the issuing of the rule nisi and the granting of the interim relief pending the final adjudication of the application for the issuing of the rule nisi, including the costs occasioned by the appearance in court on 14 October 2021 and on 11 November 2021 and the issue whether a *de bonis propriis* costs order should be granted against the first and second respondents, stand over for determination during the adjudication of

the main application in terms of Part B of the notice of motion; and

3. The costs occasioned as a result of the appointment of the curator ad litem shall be paid out of the trust fund.

CONCLUSION

- [68] The first, second, third and fourth respondents and advocate Van Vuuren acted ultra vires. They did not comply with the prevailing law and the trust instrument. One may be able to argue, in light of the history of the case, that the conduct of the trustees, Advocate van Vuuren and the fourth respondent was an endeavour to circumvent the fact that the fourth respondent, in effect, did not gain equally; or gained next to nothing from the will. The testator clearly did not want for him to gain ownership of a farm without the co-operation of the other heirs. It may also be inferred that the only manner in which he was to acquire ownership of any farm was to buy it lawfully. The testator also clearly did not want for the third respondent to gain ownership of the farms or to use the farms to bolster her income.
- [69] The alleged underhandedness is neutralised by the fact that several legal representatives and the Master of the High Court advised that the sale of the farm may be legal. The court is thus prevented from making an order de bonis propriis against the first, second, third and fourth respondents.
- [70] The conduct of the fourth respondent and the withdrawal of the attorneys for the first and second respondents after the conclusion of the hearing do speak volumes. The conduct of the trustees in collusion with the fourth respondent must be reported to the Master of the High Court and the suitability of the trustees to remain as such must be investigated. The conflict of interest of the second respondent is glaringly inappropriate and not in the interest of the administration of justice. A costs order on an attorney and client scale will be proper in the circumstances of the case.

[71] ORDER

Having considered the notice of motion and the documents before the court and having heard the legal practitioners on behalf of the applicants and the first to fourth respondents as well as the curator ad litem: It is ordered that:

1. The first and second respondents, in their capacities as trustees of the Petrus Jacobus Botha Testamentary Trust ("the Trust"), are interdicted from transferring the farm Vijfhoek no. 164, measuring 348.8512 ha, situated in the district of Lindley and held by the Trust in terms of Title Deed no. T [...], to the fourth respondent.
2. The agreement of sale in respect of the farm Vijfhoek no. 164, measuring 348.8512 ha, situated in the district of Lindley and held by the Trust in terms of Title Deed no. T [...], concluded between the first and second respondents, as the sellers, and the fourth respondent, as the purchaser, is declared invalid and set aside.

3. It is declared that the first and second respondents, in their capacities as trustees of the Trust, are not entitled to dispose of or sell or alienate or transfer the immovable properties of the Trust, recorded below, during the life of the third respondent and before the termination of the Trust in accordance with the provisions of the will:

Portion 1 of the farm Olivia no. 385, measuring 214.333 ha, situated in the district of Lindley, held in terms of Title Deed no. T [....] ; The farm Rooikraal no. 689, measuring 506.3589 ha, situated in the district of Lindley, held in terms of Title Deed no. T [....] ;

The farm Nil Desperandum no. 239, measuring 328.1449 ha, situated in the district of Lindley, held in terms of Title Deed no. T [....] ; The farm Nova Scotia no. 605, measuring 625.2684 ha, situated in the district of Lindley, held in terms of Title Deed no. T [....] ; Portion 1 of the farm Beira no. 607, measuring 312.6342 ha, situated in the district of Lindley, held in terms of Title Deed no. T [....] ; The farm Vijfhoek no. 164, measuring 348.8512 ha, situated in the district of Lindley, held in terms of Title Deed no. T [....] .

4. The first and second respondents, in their capacities as trustees of the trust, are interdicted from disposing of or selling or alienating or transferring the immovable properties of the trust, recorded below, during the life of the third respondent and before the termination of the trust in accordance with the provisions of the will of the late Petrus Jacobus Botha:
5. The first, second, third and fourth respondents are ordered to pay the applicants' costs, on the scale as between attorney and client, in respect of the main application in terms of Part B of the notice of motion.
6. The first, second, third and fourth respondents are ordered to pay the applicants' costs, on the scale as between attorney and client, in respect of the application for the interim relief granted in terms of the orders issued by the court on 14 October 2021 and 11 November 2021, including the costs occasioned by the appearance in court on 14 October 2021 and 11 November 2021.
7. The eighth respondent is directed to record the orders granted in terms of paragraphs 1 and 4 above against the title deeds of the relevant immovable properties of the trust.
8. The Master of the High Court: Free State is ordered to investigate the conduct of the trustees; the first and second respondents, and to ensure the legal and proper administration of the trust.

M OPPERMAN, J

APPEARANCES

FOR THE APPLICANTS ADVOCATE D.J. VAN DER WALT SC

FREE STATE SOCIETY OF ADVOCATES

082 883 2889

MR. L STRATING

SYMINGTON DE KOK ATTORNEYS

1698 Nelson Mandela Drive

Westdene

BLOEMFONTEIN

051 430147711

E-mail: mnel@symok.co.za

FKB0095/mm

CURATOR AD LITEM ADVOCATE C.D. PIENAAR

082 378 1381

E-mail: tpienaar@law.co.za

FOR THE FIRST &

SECOND RESPONDENTS

ADVOCATE J.M.C JOHNSON

051 430 3567

MR. OJ VAN SCHALKWYK

LOVIUS BLOCK ATTORNEYS

31 First Avenue

051 430 3874

Ref: E09955*OVS/lv/S350/21

FOR THE THIRD &

FOURTH RESPONDENTS

ADVOCATE A SANDER

[1] Edmond Cahn, an American lawyer writing in the Georgetown Law Journal in 1937, E N Cahn, Testamentary Construction: The Psychological Approach

(1937) 26 Geo L J 17 as quoted in Williams, R, Construction of Wills: “Tips, Traps and the Latest Cases, 2017, <https://brisbanechambers.com/wp-content/uploads/2018/09/Construction-of-wills-May-2017-R-Williams.pdf> on 7 May 2022.

[2] Coke CJ in Roberts v Roberts

[1613] 2 Bulster 124 at 130, 80 ER 1002 at 1008 as quoted in Corbet et al, The Law of Succession in South Africa, 2nd edition (2001) at Chapter XX1, page 447.

[3] Williams, R, Construction of Wills: “Tips, Traps and the Latest Cases, 2017, <https://brisbanechambers.com/wp-content/uploads/2018/09/Construction-of-wills-May-2017-R-Williams.pdf> on 7 May 2022.

[4] King v De Jager 2021 (4) SA 1 (CC).

[5] The above was confirmed in Goosen v Wiehahn 2020 (2) SA 341 SCA at paragraph [9], Wilkinson v Crawford N.O. 2021

(4) SA 323 (CC) at paragraph [35], Van Deventer v Van Deventer

[2007] 3 ALL SA 236 (SCA) at paragraph [6] and Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk 2014 (2) SA 494 SCA at paragraph [12].

[6] The Trust Property Control Act No. 57 of 1988: “Section 12. Separate position of trust property. - Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property.”

[7] Pages 3 to 4 of the Applicant’s Heads of Argument at paragraphs 8.1 to 8.5.

[8] “FA30” at page 253. The mother and Morrison were the authorized trustees of the Trust during the transfer of a farm to the fourth respondent in 2012/2013 (see “FA11” the letters of authority issued by the Master of the High Court; Free State; the seventh respondent.)

[9] Third & fourth respondents’ Answering Affidavits at paragraph 14 on pages 465 and Paragraphs 51.1 to 51.3 on page 476.

[10] The Master referred the court to page 307 at paragraph 180 and page 314 at paragraph 190 of Honoré’s South African Law of Trusts, 5th edition; page 78, paragraph B16 of Trusts by WM van der Westhuizen; Chapter 23, paragraph 23.33 of Meyerowitz on The Administration of Estates and their Taxation, 2010 edition and Chapter XXI of The Law of Succession in South Africa, second edition by Corbett, Hofmeyer and Kahn.

[11] “FA2” at pages 70 to 75:

GESAMENTLIKE TESTAMENT Ons die ondergetekendes, PETRUS JACOBUS BOTHA (IDENTITEITSNOMMER [...]) en LUCIA JACOBA BOTHA (IDENTITEITSNOMMER [...]) getroud buite gemeenskap van goedere tans woonagtig te die plaas Vyfhoek, Arlington, distrik Lindley, maak hiermee ons testament soos volg: 1. HERROEPINGSKLOUSULE Ons herroep hiermee alle vorige testamente, kodusille en/of ander testamentêre aktes deur ons voor die datum hiervan maak,

hetsy gesamentlik en/of afsonderlik. 2. AFSTERWE TESTATRISE Ingeval ek, die testatrise, die eerstesterwende van ons, die testateure, mag wees, bemaak ek my gehele boedel en nalatenskap aan my eggenoot PETRUS JACOBUS BOTHA. 3. AFSTERWE TESTATEUR Ingeval ek, die testateur,

die eerssterwende van ons, die testateure, mag wees, bemaak ek my gehele boedel en nalatenskap soos volg: 3.1 Ek bemaak spesiaal aan my eggenote LUCIA JACOBABOTHA die volgende: 3.1.1 My woonreg in Residentia Stigting te Bethlehem. 3.1.2 Al die wild op die plaas NOVA SCOTIA. 3.1.3 Alle huishoudelike toebehore en meublement. 3.1.4 'n Kontantlegaat van R1.000,000-00 (EEN MILJOEN RAND) 3.2 Die restant van my boedel aan die trustee in trust van die PIET BOTHA FAMILIE TRUST welke hierkragtens geskep word. My trustee sal beklee wees met die volgende magte pligte en trustopdragte, naamlik: 3.2.1 Om enige bates te aanvaar, te beheer en te administreer. 3.2.2 Om in belang van die trust, in sy diskresie, die bates te verhuur, te verkoop of tegelde te maak, of om enige roerende en onroerende eiendom te huur of aan te koop. 3.2.3 Om in die belang van die trust enige kontant op sodanige wyse te belê as wat hy mag goeddink, sonder om tot erkende trustee-sekuriteite beperk te word. Die trustee word hiermee ook gemagtig om enige belegging op die roep en die opbrengs ooreenkomstig die voorafgaande bepalings te belê. 3.2.4 Om ter uitvoering van enige bepaling van hierdie trust enige som geld te leen en om enige vorm van sekuriteit te verskaf vir die behoorlike terugbetaling daarvan, insluitende die mag om enige bates van die trust te verpand, te belas of met 'n verband te beswaar. 3.2.5 Om die netto inkomste aan die testatrise oor te dra en uit te betaal tot by haar afsterwe. 3.2.6 Om na die afsterwe van die testatrise die netto inkomste oor te dra en uit te betaal aan ons kinders THOMAS DANNHAUSER BOTHA, CHRISTINE DE VILLIERS en CATHARINA ANDRISINA NOOME vir 'n periode van een (1) jaar en indien nodig soveel van die kapitaal as wat hy na sy goeddunke nodig mag ag, aan te wend vir die onderhoud, opvoeding en geleerdheid van ons kinders voormeld en die afstammeling van ons kinders of vir enige ander doel in hulle belang. 3.2.7 Om, nadat 'n periode van een (1) jaar sedert die afsterwe van die testatrise verstryk het en indien die trust sou voortgaan in die diskresie van die trustee, soveel van die inkomste en indien nodig van die kapitaal as wat hy na sy goeddunke nodig mag ag, aan te wend vir die onderhoud, opvoeding en geleerdheid van ons kinders voormeld en die afstammeling van ons kinders of vir enige ander doel in hulle belang. Enige inkomste, wat nie vir die bogemelde doeleindes aangewend word nie, mag gekapitaliseer word. 3.2.8 Om, nadat die periode van een (1) jaar sedert die afsterwe van die testatrise verstryk het, op enige stadium wat die trustee in sy uitsluitlike oordeel mag vasstel, 'n trustbates in 'n begunstigde te laat vestig. 3.2.9 Om die trust te beëindig na die afsterwe van die testatrise in die uitsluitlike oordeel van die trustee, maar nie voordat 'n periode van minstens een (1) jaar na die afsterwe van die langselewende van ons verloop het nie en die kapitaal en enige opgelope inkomste oor te dra en uit te betaal soos volg: 3.2.9.1 Aan ons dogter CHRISTINE DE VILLIERS die plaas bekend as ROOIKRAAL, LINDLEY. 3.2.9.2 Aan ons dogter CATHARINA ANDRISINA NOOME die plaas bekend as VYFHOEK, LINDLEY. NOTA: Indien voormelde erfgename egter sou besluit om die plase te verkoop sal hulle nie geregtig wees om die plase te verkoop aan 'n derde persoon nie alvorens hulle die plase te koop aangebied het aan hul broers THOMAS DANNHAUSER BOTHA en DANIËL JACOBUS BOTHA en hul skriftelik in kennis gestel is dat hul broers nie belangstel om die eiendom aan te koop teen 'n markverwante koopprys of Landbank waardasie nie. 3.2.9.3 Aan ons seun THOMAS DANNHAUSER BOTHA die plase bekende as NOVA SCOTIA en BEGINSEL, LINDLEY. 3.2.9.4 Aan die wettige afstammeling, nié aangenome kinders nie, van my seun DANIËL JACOBUS BOTHA wat reeds gebore en in lewe is ten tye van sy dood, die plaas bekend as NILL DESPERANDUM,

LINDLEY. Indien DANIËL JACOBUS BOTHA geen wettige afstammeling nalaat soos hiervoor omskryf nie, bemaak ek die plaas NILL DESPERANDUM, LINDLEY aan die wettige afstammeling van my seun THOMAS DANNHAUSER BOTHA wat dan in lewe is. Hierdie bemaking sal onderhewig wees aan die lewenslange gebruiksreg ten gunste van my seun DANIËL JACOBUS BOTHA, met vrystelling van sekerheidstelling. 3.2.9.5 My kleinseuns, NARDUS DE VILLIERS, PIETER DE VILLIERS en JACO BOTHA, in gelyke dele, die plaas OLIVIA distrik LINDLEY. 3.2.9.6 Die restant in gelyke dele ten gunste van ons kinders THOMAS DANNHAUSER BOTHA, CHRISTINE DE VILLIERS en CATHARINA ANDRISINA NOOME. 3.2.9.7 Ek bepaal hiermee uitdruklik dat sou enige begunstigdes 'n eis teen my boedel indien vir geld deur my aan hom/haar geskuld, word sodanige begunstigde summier onterf en sal hy/sy nie geregtig wees op enige voordele kragtens hierdie testament nie. 4. GELYKTYDIGE AFSTERWE Indien ons gelyk of binne dertig (30) dae na mekaar te sterwe kom, dan en in daardie geval bemaak ons ons onderskeie boedels en bates aan die trustees in trust soos vermeld onder klousule 3.2 met onderafdelings hierbo, behalwe dat enige verwysing na die eggenote asook die een (1) jaar periode sal verval. 5. SUBSTITUSIE Indien 'n kind wat kragtens hierdie testament sou erf, ons vooroorly of sou sterf voor die beëindiging van 'n trust, dan gaan so 'n kind se belange, aan die vooroorledene se wettige afstammeling staaksgewys, of by gebreke aan afstammeling dan aan die oorblywende aangewese kinders. 6. ALGEMEEN 6.1 Indien 'n erfgenaam nie by afsterwe of by beëindiging van enige trust geskep na vore kom of opgespoor kan word nie, of deur 'n geneesheer as geestelik ongesteld gesertifiseer is, word bepaal dat sodanige begunstigde se erflating nie aan die voogdyfonds oorbetal moet word nie, maar deur ons eksekuteur of trustee volgens goëddunke

in trust geadministreer word op enige toepaslike wyse in ooreenstemming met die magte, pligte en bevoegdhede soos vervat in die trust voormeld. 6.2 Ons bepaal dat enige roerende bate(s) wat 'n minderjarige erfgenaam kragtens hierdie testament of 'n trust in hierdie testament geskep ontvang, aan die erfgenaam se voog, in die diskresie van die trustee oorhandig mag word vir veilige bewaring totdat meerderjarigheid bereik word. Ons stel sodanige voog vry van die verpligting om sekuriteit te verskaf vir bate(s) aan hom/haar oorhandig en sal 'n kwitansie deur die voog as voldoende ontheffing aan ons eksekuteur(s) en/of trustee(s) dien. 6.3 Dit is 'n uitdruklike voorwaarde van hierdie testament dat enige erfenis wat aan enige erfgenaam hierkragtens mag toeval, sowel as enige inkomste wat daaruit verdien mag word asook enige inkomste wat uit 'n trust hierin geskep, verdien mag word, uitgesluit sal wees van die regsgevolge van 'n bestaande of toekomstige huwelik binne gemeenskap van goedere of wat onderhewig is aan die aanwasbedeling. Ingeval van 'n vroulike erfgenaam sal so

'n erfenis nie onderhewig wees aan die kontrole, beskikkingsreg en maritale mag van haar eggenoot nie. Verder sal 'n ontvangserkenning van enige vroulike erfgenaam, sonder die bystand van haar eggenoot, voldoende ontheffing aan ons eksekuteur wees. 7. BENOEMING VAN AMPTE 7.1 As eksekuteur benoem ons die langsliewende van ons en ingeval klousule 4 van toepassing mag wees benoem ons ons dogter CHRISTINE DE VILLIERS as eksekuteur. 7.2 As trustee van die trust voormeld benoem ek die TESTATEUR, my EGGNOTE voormeld en by haar afsterwe dan my kinders CHRISTINE DE VILLIERS, THOMAS DANNHAUSER BOTHA en CATHARINA

ANDRISINA NOOME. 7.3 Alle ampsdraers hierbo word hiermee uitdruklik vrygestel van die verskaffing van sekuriteit aan die Meester van die Hooggeregshof. 8. FOOIESTRUKTUUR Ons eksekuteur sal geregtig wees op vergoeding vir sy dienste en wel op die voorgeskrewe wettige tarief min 'n korting van vyftig present (50%). 9. ONDERNEMING EN MAGTIGING Enslins onderneem om hierdie testament na ondertekening in veilige bewaring te hou en magtig ons Enslins om direk of deur bemiddeling met my te kommunikeer en die testament of enige ander dokument per geregistreerde pos na my laaste bekende adres te stuur. ALDUS GEDOEN en GETEKEN te Bethlehem op die 25ste dag van Julie 2007 in die teenwoordigheid van ondergetekende getuies, wat in ons teenwoordigheid en in die teenwoordigheid van mekaar hierdie testament as getuies onderteken het.

[11] "FA2" at pages 70 to 75:

GESAMENTLIKE TESTAMENT

Ons die ondergetekendes,

PETRUS JACOBUS BOTHA

(IDENTITEITSNOMMER [...])

en

LUCIA JACOBA BOTHA

getroud buite gemeenskap van goedere tans woonagtig te die plaas Vyfhoek, Arlington, distrik Lindley, maak hiermee ons testament soos volg:

1. HERROEPINGSKLOUSULE

Ons herroep hiermee alle vorige testamente, kodusille en/of ander testamentêre aktes deur ons voor die datum hiervan gemaak,

hetsy gesamentlik en/of afsonderlik.

2. AFSTERWE TESTATRISE

Ingeval ek, die testatrise, die eerstesterwende van ons, die testateure, mag wees, bemaak ek my gehele boedel

en nalatenskap aan my eggenoot PETRUS JACOBUS BOTHA.

3. AFSTERWE TESTATEUR

Ingeval ek, die testateur, die eerssterwende van ons, die testateure, mag wees, bemaak ek my gehele boedel en nalatenskap soos volg:

3.1 Ek bemaak spesiaal aan my eggenote LUCIA JACOBA BOTHA die volgende:

3.1.1 My woonreg in Residentia Stigting te Bethlehem.

3.1.2 Al die wild op die plaas NOVA SCOTIA.

3.1.3 Alle huishoudelike toebehore en meublement.

3.1.4 'n Kontantlegaat van R1.000,000-00 (EEN MILJOEN RAND)

3.2 Die restant van my boedel aan die trustee in trust van die PIET BOTHA FAMILIE TRUST welke hierkragtens geskep word. My trustee sal bekleë wees met die volgende magte pligte en trustopdragte, naamlik:

3.2.1 Om enige bates te aanvaar, te beheer en te administreer.

3.2.2 Om in belang van die trust, in sy diskresie, die bates te verhuur, te verkoop of tegelde te maak, of om enige roerende en onroerende eiendom te huur of aan te koop.

3.2.3 Om in die belang van die trust enige kontant op sodanige wyse te belê as wat hy mag goeddink, sonder om tot erkende trustee-sekuriteite beperk te word. Die trustee word hiermee ook gemagtig om enige belegging op die roep en die opbrengs ooreenkomstig die voorafgaande bepalings te belê.

3.2.4 Om ter uitvoering van enige bepaling van hierdie trust enige som geld te leen en om enige vorm van sekuriteit te verskaf vir die behoorlike terugbetaling daarvan, insluitende die mag om enige bates van die trust te verpand, te belas of met 'n verband te beswaar.

3.2.5 Om die netto inkomste aan die testatrise oor te dra en uit te betaal tot by haar afsterwe.

3.2.6 Om na die afsterwe van die testatrise die netto inkomste oor te dra en uit te betaal aan ons kinders THOMAS DANNHAUSER BOTHA, CHRISTINE DE VILLIERS en CATHARINA ANDRISINA NOOME vir 'n periode van een (1) jaar en indien nodig soveel van die kapitaal as wat hy na sy goeddunke nodig mag ag, aan te wend vir die onderhoud, opvoeding en geleerdheid van ons kinders voormeld en die afstammeling van ons kinders of vir enige ander doel in hulle belang.

3.2.7 Om, nadat 'n periode van een (1) jaar sedert die afsterwe van die testatrise verstryk het en indien die trust sou voortgaan in die diskresie van die trustee, soveel van die inkomste en indien nodig van die kapitaal as wat hy na sy goeddunke nodig mag ag, aan te wend vir die onderhoud, opvoeding en geleerdheid van ons kinders voormeld en die afstammeling van ons kinders of vir enige ander doel in hulle belang. Enige inkomste, wat nie vir die bogemelde doeleindes aangewend word nie, mag gekapitaliseer word.

3.2.8 Om, nadat die periode van een (1) jaar sedert die afsterwe van die testatrise verstryk het, op enige stadium wat die trustee in sy uitsluitlike oordeel mag vasstel, 'n trustbater(s) in 'n begunstigde te laat vestig.

3.2.9 Om die trust te beëindig na die afsterwe van die testatrise in die uitsluitlike oordeel van die trustee, maar nie

voordat 'n periode van minstens een (1) jaar na die afsterwe van die langselewende van ons verloop het nie en die kapitaal en enige opgelope inkomste oor te dra en uit te betaal soos volg:

3.2.9.1 Aan ons dogter CHRISTINE DE VILLIERS die plaas bekend as ROOIKRAAL, LINDLEY.

3.2.9.2 Aan ons dogter CATHARINA ANDRISINA NOOME die plaas bekend as VYFHOEK, LINDLEY.

NOTA: Indien voormelde erfgename egter sou besluit om die plase te verkoop sal hulle nie geregtig wees om die plase te verkoop aan 'n derde persoon nie alvorens hulle die plase te koop aangebied het aan hul broers THOMAS DANNHAUSER BOTHA en DANIËL JACOBUS BOTHA en hul skriftelik in kennis gestel is dat hul broers nie belangstel om die eiendom aan te koop teen 'n markverwante koopprys of Landbank waardasie nie.

3.2.9.3 Aan ons seun THOMAS DANNHAUSER BOTHA die plase bekende as NOVA SCOTIA en BEGINSEL, LINDLEY.

3.2.9.4 Aan die wettige afstammelinge, nié aangenome kinders nie, van my seun DANIËL JACOBUS BOTHA wat reeds gebore en in lewe is ten tye van sy dood, die plaas bekend as NILL DESPERANDUM, LINDLEY. Indien DANIËL JACOBUS BOTHA geen wettige afstammelinge nalaat soos hiervoor omskryf nie, bemaak ek die plaas NILL DESPERANDUM, LINDLEY aan die wettige afstammelinge van my seun THOMAS DANNHAUSER BOTHA wat dan in lewe is. Hierdie bemaking sal onderhewig wees aan die lewenslange gebruiksreg ten gunste van my seun DANIËL JACOBUS BOTHA, met vrystelling van sekerheidstelling.

3.2.9.5 My kleinseuns, NARDUS DE VILLIERS, PIETER DE VILLIERS en JACO BOTHA, in gelyke dele, die plaas OLIVIA distrik LINDLEY.

3.2.9.6 Die restant in gelyke dele ten gunste van ons kinders THOMAS DANNHAUSER BOTHA, CHRISTINE DE VILLIERS en CATHARINA ANDRISINA NOOME.

3.2.9.7 Ek bepaal hiermee uitdruklik dat sou enige begunstigdes 'n eis teen my boedel indien vir geld deur my aan hom/haar geskuld, word sodanige begunstigde summier onterf en sal hy/sy nie geregtig wees op enige voordele kragtens hierdie testament nie.

4. GELYKTYDIGE AFSTERWE

Indien ons gelyk of binne dertig (30) dae na mekaar te sterwe kom, dan en in daardie geval bemaak ons ons onderskeie boedels en bates aan die trustees in trust soos vermeld onder klousule 3.2 met onderafdelings hierbo, behalwe dat enige verwysing na die eggenote asook die een (1) jaar periode sal verval.

5. SUBSTITUSIE

Indien 'n kind wat kragtens hierdie testament sou erf, ons vooroorly of sou sterf voor die beëindiging van 'n trust, dan gaan so 'n kind se belange, aan die vooroorledene se wettige afstammelinge staaksgewys, of by gebreke aan afstammelinge dan aan die oorblywende aangewese kinders.

6. ALGEMEEN

6.1 Indien 'n erfgenaam nie by afsterwe of by beëindiging van enige trust geskep na vore kom of opgespoor kan word nie, of deur 'n geneesheer as geestelik ongesteld gesertifiseer is, word bepaal dat sodanige begunstigde se erflating nie aan die voogdyfonds oorbetaal moet word nie, maar deur ons eksekuteur of trustee volgens goeddunke

in trust geadministreer word op enige toepaslike wyse in ooreenstemming met die magte, pligte en bevoegdhede soos vervat in die trust voormeld.

6.2 Ons bepaal dat enige roerende bate(s) wat 'n minderjarige erfgenaam kragtens hierdie testament of 'n trust in hierdie testament geskep ontvang, aan die erfgenaam se voog, in die diskresie van die trustee oorhandig mag word vir veilige bewaring totdat meerderjarigheid bereik word. Ons stel sodanige voog vry van die verpligting om sekuriteit te verskaf vir bate(s) aan hom/haar oorhandig en sal 'n kwitansie deur die voog as voldoende ontheffing aan ons eksekuteur(s) en/of trustee(s) dien.

6.3 Dit is 'n uitdruklike voorwaarde van hierdie testament dat enige erfenis wat aan enige erfgenaam hierkragtens mag toeval, sowel as enige inkomste wat daaruit verdien mag word asook enige inkomste wat uit 'n trust hierin geskep, verdien mag word, uitgesluit sal wees van die regsgevolge van 'n bestaande of toekomstige huwelik binne gemeenskap van goedere of wat onderhewig is aan die aanwasbedeling. Ingeval van 'n vroulike erfgenaam sal so

'n erfenis nie onderhewig wees aan die kontrole, beskikkingsreg en maritale mag van haar eggenoot nie. Verder sal 'n ontvangserkenning van enige vroulike erfgenaam, sonder die bystand van haar eggenoot, voldoende ontheffing aan ons eksekuteur wees.

7. BENOEMING VAN AMPTE

7.1 As eksekuteur benoem ons die langselewende van ons en ingeval klousule 4 van toepassing mag wees benoem ons ons dogter CHRISTINE DE VILLIERS as eksekuteur.

7.2 As trustee van die trust voormeld benoem ek die TESTATEUR, my EGGNOTE voormeld en by haar afsterwe dan my kinders CHRISTINE DE VILLIERS, THOMAS DANNHAUSER BOTHA en CATHARINA ANDRISINA NOOME.

7.3 Alle ampsdraers hierbo word hiermee uitdruklik vrygestel van die verskaffing van sekuriteit aan die Meester van die Hooggeregshof.

8. FOOIESTRUKTUUR

Ons eksekuteur sal geregtig wees op vergoeding vir sy dienste en wel op die voorgeskrewe wettige tarief min 'n korting van vyftig persent (50%).

9. ONDERNEMING EN MAGTIGING

Enslins onderneem om hierdie testament na ondertekening in veilige bewaring te hou en magtig ons Enslins om direk of deur bemiddeling met my te kommunikeer en die testament of enige ander dokument per geregistreerde pos na my laaste bekende adres te stuur.

ALDUS GEDOEN en GETEKEN te Bethlehem op die 25ste dag van Julie 2007 in die teenwoordigheid van ondergetekende getuies, wat in ons teenwoordigheid en in die teenwoordigheid van mekaar hierdie testament as getuies onderteken het.

[12] Page 25 at paragraph 33.

[13] The applicants.

[14] Page 25 at paragraph 34.

[15] Page 35 at paragraph 61.

[16] “FA34”.

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