

SOUTH AFRICA / JUDGMENT

Spangenberg and Others v Engelbrecht NO and Another (717/21) [2023] ZASCA 100 (14 June 2023)

[2023] ZASCA 100

COURT

Supreme Court of Appeal

BEFORE

Petse, Mbatha, Matojane, Weiner, Mali

CASE / FILE NUMBER

717/21

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 717/2021

In the matter between:

IZAK FREDERICK SPANGENBERG First Appellant

MARIA CORNELIA

VAN DER WESTHUIZEN Second

Appellant

CHRISTINA ALETTA W LA COCK Third Appellant

and

FRANKEL ENGELBRECHT NO First

Respondent

GERTRUIDA SPANGENBERG Second

Respondent

Neutral citation: Spangenberg and Others v Engelbrecht NO and Another (Case no 717/21) [2023]
ZASCA 100 (14 June 2023)

Coram: PETSE AP, MBATHA, MATOJANE and WEINER JJA and MALI AJA

Heard: 22 March 2023

Delivered: 14 June 2023

Summary: Will – interpretation – context – terms clear and unambiguous – appeal dismissed.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley

(Lever J sitting as a court of first instance):

1 The appeal is dismissed with costs.

2 The costs are to be paid jointly and severally by the appellants, the one paying the others to be absolved.

Weiner JA (Petse AP, Mbatha and Matojane JJA and Mali AJA concurring):

‘Death is not the end. There remains the litigation over the estate.’[1]

Introduction

[1] This appeal emanates from a dispute between the appellants, Izak Frederick Spangenberg (Mr Spangenberg), Maria Cornelia Van Der Westhuizen (Ms van der Westhuizen) and Christina Aletta W La Cock (Ms La Cock), and the respondents. The appellants are the children of Hendrik Hermias Spangenberg (the deceased). The first respondent, Mr Engelbrecht NO, is cited in his capacity as executor of the estate of the deceased (the executor). The second respondent, Gertruida Spangenberg (Mrs Spangenberg) is the widow of the deceased, and the step-mother of the appellants. The dispute concerns the interpretation of the deceased’s last will and testament (the Will).

[2] The deceased executed his Will in July

1992. He died on 15 January 2010. The Master of the High Court accepted it as his last will and testament. In the Will, the clause which is relevant to the litigation reads as follows:

‘1.

‘I give and bequeath my entire estate as follows: -

A...

B. To my daughters Maria Cornelia Van der Westhuizen and Christina Aletta Spangenberg[2]...the following:

(i) My plots 243 and 741 subject to the right of habitatio in favour of my spouse[3] until her death or remarriage whichever may occur first.’[4]

- [3] Several court applications followed the death of the deceased, including one reviewing the decision of the Master to appoint Mr Engelbrecht as executor. As matters presently stand, although some legal proceedings are still pending, the executor's power to bring the application for the declaratory order was not challenged.

The dispute

- [4] The dispute between the appellants and respondents centred around the interpretation of clause B(i) of the Will. The executor held the view that, in granting the right of habitatio over both plot 243 and 741 (the two plots) to Mrs Spangenberg, she was entitled to all the benefits concomitant therewith, including the right to receive all rentals for properties situated on the two plots.

- [5] The appellants, on the other hand, contended that it could not have been the deceased's intention to grant Mrs Spangenberg a habitatio over plot 741, as he and the appellants had informally agreed to divide plot 741 into three portions with each sibling being allocated

a specific portion. The deceased paid for the construction of the homes on plot 741 for Ms van der Westhuizen and Ms La Cock. Mr Spangenberg developed some flatlets on his portion of plot 741, from which he collected rentals. Accordingly, the appellants asserted that a habitatio would be inconsistent with this agreement.

- [6] The appellants sought to rely upon extrinsic evidence for the interpretation of the clause. They submitted that the right of habitatio was defined in clause 4 of the ante-nuptial contract (ANC) concluded between the deceased and Mrs Spangenberg in 1985. It provided that Mrs Spangenberg would have the right of habitatio over plot 243, until her death.[5] Therefore, the argument went, it was not necessary for the deceased to repeat such definition and intention in the Will. Initially the appellants argued that clause 4 of the ANC should be incorporated into the Will by reference. This argument was abandoned by the appellants in this Court.

- [7] After failing to obtain a satisfactory response from the appellants, regarding the payments of rentals from the properties on plot 741, to the executor on behalf of Mrs Spangenberg, and having obtained an interdict in this regard for the retention of such funds, the executor launched the application for declaratory relief. Lever J, in the Northern Cape Division of the High Court, Kimberley (the high court) granted the following order, in favour of the executor against the appellants:

'1. It is declared that the right of habitatio granted to the Second Respondent in terms of clause B(i) of the last will and testament of the late Hendrick Hermias Spangenberg extend over the immovable properties described as Plot 243 and 741, Olyvenhoutsdrift, district Keimoes, until her death or re-marriage,

whichever may occur first.

2. It is declared that the right of habitatio, referred to in paragraph 1 above, includes the rights and entitlement of the Second Respondent to lease and sub-lease the said properties and the rental proceeds generated from the lease of all buildings situated on the properties referred to in paragraph 1 above, for the duration of the right of habitatio.
3. It is declared that, for the duration of the right of habitatio, no other person can occupy the properties referred to in paragraph 1 above, without the consent of the First Respondent.
2. [sic] The costs of this application are to be borne by the Third, Fourth and Fifth Respondents jointly and severally on the ordinary party and party scale, the one paying the others to be absolved.'
- [8] This appeal is with the leave of the high court. The respondents contended that clause B(i) of the Will is clear – Mrs Spangenberg has the right of habitatio over both plots. This is the ordinary and natural meaning of the clause. There was no ambiguity in the provisions of the clause and, in such circumstances, it was not permissible to incorporate the extrinsic evidence referred to by the appellants, to determine the meaning of clause 4 of the deceased's Will.

Freedom of testation

- [9] Generally, it is accepted that testators have the freedom to dispose of their assets in a manner they deem fit, except insofar as the law places restrictions on this freedom. The Constitutional Court has accepted that freedom of testation 'is fundamental to testate succession'[6] and that it forms part of s 25(1) of the Constitution,[7] in that it protects a person's right to dispose of his or her assets, upon death, as he or she wishes.
- [10] This Court, in *Harvey NO and Others v Crawford NO and Others*[8] referred to this principle as follows:

'The right of ownership permits an owner to do with her thing as she pleases, provided that it is permitted by the law. The right to dispose of the thing is central to the concept of ownership and is a deeply entrenched principle of our common law.

Disposing of one's property by means of executing a will or trust deed are manifestations of the right of ownership. The same holds true under the Constitution.'
- [11] The principle of freedom of testation has been held to warrant constitutional refuge through the right to privacy, coupled with the right to dignity, in terms of ss 14 and 10 of the Constitution, respectively.[10] As stated by Jafta J in *King N O and Others v De Jager and Others*:[11]

'It cannot be gainsaid that private testamentary bequests (when juxtaposed to public trusts) relate to our most intimate personal

relationships and can very well be based on irrational and erratic decisions which are located in the domain of the “most intimate core of privacy”. It is, therefore, apposite for the right to privacy to play an active role in determining whether judicial interference can enter the perimeter of private testamentary bequests. This, in turn, buttresses the point that when courts intervene in private testamentary bequests of this nature there ought to be a lower level of judicial scrutiny.’[12]

Principles of Interpretation

[12] The ‘golden rule’ for the interpretation of Wills and the inherent limitation (that it should not contravene the law), was, as far back as 1914, described in *Robertson v Robertson* thus: [13]

‘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.’[14] [Emphasis added.]

[13] Corbett J, in *Aubrey Smith v Hofmeyer NO*,[15] referred to ‘the armchair approach’ in dealing with the interpretation of a will. He stated that:

‘Generally speaking, in applying and construing a will, the Court's function is to seek, and to give effect to, the wishes of the testator as expressed in the will. This does not mean that the Court is wholly confined to the written record. The words of the will must be applied to the external facts and, in this process of application, evidence of an extrinsic nature is admissible to identify the subject or object of a disposition. Evidence is not admissible, however, where its object is to contradict, add to or alter the clearly expressed intention of the testator as reflected in the words of the will. ... in construing a will the object is not to ascertain what the testator meant to do but his intention as expressed in the will.

On the other hand, in addition to receiving evidence applying the words of the will to the external facts, the Court is also entitled to be informed of, and to have regard to, all material facts and circumstances known to the testator when he made it. As it has been put, the Court places itself in the testator's armchair. Nevertheless, the primary enquiry still is to ascertain, against the background of these material facts and circumstances, the intention of the testator from the language used by him in his will’[16] [Emphasis added.]

[14] In *Aubrey Smith*,[17] Corbett J presciently, espoused the interpretative principles referred to in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[18] the seminal case, on interpretation of documents, where Wallis JA stated that: ‘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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision

appears; the apparent purpose to which it is directed and the material known to those responsible for its production. ... The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’[Emphasis added.]

[15] Although Endumeni did not deal with the interpretation of a will, the ‘golden rule’ and the ‘armchair approach’ can now be seen in the light of the principles enunciated in Endumeni. In his article published in the Potchefstroom Electronic Law Journal (PELJ),[19] Justice Wallis opined that:

‘There are areas of interpretation that are untouched by the contents of this paper, which has concentrated on contracts and statutes, rather than other areas of law. Perhaps the most obvious omission is the fertile field of the construction of wills and the extent to which the Endumeni approach to interpretation can be adapted to that situation. That is a particular omission, given that in articulating his golden rule Lord Wensleydale specifically said that it applied to “wills and, indeed statutes and all written instruments”. Wills are of course unilateral documents, but so are statutes, patent specifications and judgments, yet they all demand a broadly similar approach.’

[16] Justice Wallis, in the PELJ article, referred to *Raubenheimer v Raubenheimer*,[20] which dealt with whether an implied term could be incorporated into a will. Surprisingly, there was no specific reference to Endumeni in *Raubenheimer*. Leach JA,[21] however, held that a court is ‘guided by the same principles as those applied when implying tacit terms into a contract – it applies the well – known ‘bystander test’ in the light of the express terms of the will and the relevant surrounding

circumstances and considers whether it is a term ‘so self-evident as to go without saying.’[22] Leach JA went on to adopt the ‘golden rule’ in his interpretation of the will. He held that:

‘In interpreting a will, a court must if at all possible give effect to the wishes of the testator. The cardinal rule is that “no

matter how clumsily worded a will might be, a will should be so construed as to ascertain from the language used therein the true

intention of the testator in order that his wishes can be carried out.”[23]

[17] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*,[24] the Constitutional Court held that ‘the emerging trend’ in interpretation of documents is ‘to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.’[25] The appellants latched onto this principle, in contending that, in interpreting the clause in the Will, even if there is no ambiguity,

the surrounding circumstances and background facts will establish that the intention of the testator was not as it appears in clause

B(i). They referred to the following chronology of events, in this regard:

- a. The ANC was concluded on the 29th March 1985;
- b. In 1991 the deceased and his son, Mr Spangenberg, entered into an agreement in respect of erf 741. The deceased and the appellants informally agreed to divide erf 741 into three portions with each sibling being allocated a specific portion;
- c. The deceased executed his Will in 1992;
- d. Plot 741 was at that stage undeveloped. In 1996 the deceased paid for and erected a house for Ms van der Westhuizen on her portion of erf 741. She has lived on that property from 1996 to date;
- e. In 1996 Mr Spangenberg began to reside on his portion of erf 741 and developed a number of flats thereon. From 1996 to date, he has seen to the upkeep of the units that he caused to be erected and has collected the income generated by those units;
- f. In 1998 the deceased erected and paid for the house for Ms La Cock on her portion of erf 741. She has lived in that house from that date until the date of the application;
- g. In 2009 the deceased requested Mr Spangenberg to erect a storage facility for himself on erf 741 in order to enable him to remove his plant and equipment from erf 243 which he did; and
- h. The deceased passed away on the 15 January 2010.

[18] In *KPMG Chartered Accountants (SA) v Securefin Ltd*, [26] this Court held that ‘...to the extent that evidence may be admissible to contextualise the document (since “context is everything”) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’

...The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’

and ‘surrounding circumstances’. The distinction is artificial and, in addition, both terms are vague and confusing.

Consequently, everything tends to be admitted. The terms ‘context’ or ‘factual matrix’ ought to suffice.’ [27]

[19] The appellants contended that, having regard to the chronology of events, outlined in para 17 above, the language of the clause and the use of the term *habitatio* did not demonstrate an intention to bequeath the undeveloped property (as erf 741 was at the time of the execution of the Will) to Mrs Spangenberg. If the deceased had intended to afford Mrs Spangenberg any right in respect of erf 741, he would have used the word *usufruct* as opposed to *habitatio* in order to provide for her maintenance.

[20] The distinction sought to be drawn by the appellants is not understood. A person who has a usufruct has the right to occupy a property which belongs to someone else. It grants the right to a person to make use of another person's property, enjoying the fruits (profits and other advantages of ownership) for a limited period of time whilst ensuring that the property itself is preserved. The holder of a habitatio has the lifelong right to live on the property or to let the property out, but without the right to enjoy the fruits (profits or other advantages of ownership). It allows the holder of such right to live in the house of another without detriment to the substance of the relevant property.[28] The holder of such right may sublet.[29] She may also let the right of habitatio.[30]

[21] There is no reason why a usufruct would have been a more appropriate right to bequeath as the appellants would have it. Mrs Spangenberg in exercising her rights of habitatio is entitled to all the benefits that right bestows upon her. Her maintenance was to be catered for from the rentals of the properties

on the two plots, as a right of habitatio grants her.

[22] The appellants also argued that as the residences were situated on two different pieces of land, a right of habitatio can only be applicable to one piece of land, that is the one on which the matrimonial residence was situated. They relied on *Endumeni*[31] in submitting that having regard to the context surrounding the execution of the Will, the habitatio could only apply to plot 243, as set out in the ANC. They contended that the Will was indeed ambiguous and 'uncertain in

application from collateral circumstances'. They relied further on the 'bystander test' and submitted that the court should take into cognisance the relevant surrounding circumstances in determining that the term of the will 'is so self-evident as to go without saying'. [32]

[23] This, however, is not the position in the present case. There is no ambiguity. The appellants claim that, if this Court took cognisance of the surrounding circumstances or factual matrix referred to in the chronology of events, it would find that it 'goes without saying', that the deceased did not intend to grant a right of habitatio over plot 741 to Mrs Spangenberg. This argument would require this Court to ignore the clear wording of the Will, seen in the light of the circumstances prevailing at the time of its execution.

[24] It is trite that when a patent or latent ambiguity appears from a written document, including a will, a court would be entitled to consider extrinsic evidence in order to evaluate, interpret and make a finding on a clause in a document. This Court in *Engelbrecht v Senwes Ltd*[33] held:

'The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s)' of

the document. Evidence of ‘surrounding circumstances’ is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide ‘sufficient certainty’.[34][Emphasis added.]

[25] Mrs Spangenberg did not oppose the appeal, not by choice but due to a lack of funds. This Court required assistance and Mr H van Zyl of the local Society of Advocates, to whom we owe a great debt of gratitude, was appointed as the *amicus curiae* for the hearing. He contended that if the intent of the testator can be ascertained from the language used, there is no reason to further consider the further requisites as set out in *Endumeni*,[35] because the interpretation of the will is based only on the subjective intention of the testator as can be ascertained from the

words used by the testator. It is only, so the argument went, in cases of ambiguity that the principles in *Endumeni* would become applicable.

[26] *Endumeni* is a general exposition on the interpretation of documents. It does not exclude a will. Whether one adopts the ‘golden rule’, the ‘armchair approach’ or the unitary approach, in the interpretation of a will, a court must ascertain the wishes of the testator from the language used. In endeavouring to ascertain

these wishes, the will must be read in the light of the circumstances prevailing at the time of its execution.[36]

[27] There is no ambiguity in the words used in the Will. Thus, relying on the contextual interpretation of the words in the Will, there is no place for the introduction of the ‘surrounding circumstances’ relied upon by the appellants. What the appellants seek to do is use the wording of the clause in the ANC to create an ambiguity in the Will and thus introduce extrinsic evidence of surrounding circumstances. The ambiguity does not emanate from the Will itself. It has been contrived through the reference to external documentation.

[28] What is evident from the chronology of events referred to by the appellants is that the deceased was at all times fully aware of the activity surrounding the development of plot

741. He executed his Will after the agreement between him and the appellants that each would be allocated a portion of plot 741. He paid for the construction of his daughters’ residences and was aware of all the developments on the plot. But, he still saw fit not to change his Will, which provides for the habitatio to apply to both plots. Mrs Spangenberg is and will probably be in need of maintenance for a number of years. This averment was not denied by the appellants in the application. It is therefore probable that the inclusion of plot 741 by the deceased, was in order to see to the financial well-being and maintenance of Mrs Spangenberg, as found by the high court.

[29] The contention of the appellants was that the interpretation relied upon by the respondents, means that they will be evicted from their homes. But this is not necessarily so. They will have to come to an agreement with the respondents in regard to the rentals payable. On their own version, the houses were, in the main, built by the deceased and essentially at the cost of the deceased.

[30] Accordingly, the appeal must fail. The issue that remains is that of costs. The appellants submitted that the costs should be borne by the estate but there seems to be no rationale for this. Mrs Spangenberg also has an interest in the estate and there is no reason why she should be prejudiced by the appellants' ill-fated application and appeal.

[31] Accordingly, the following order is made:

2 The costs are to be paid jointly and severally by the appellants, the one paying the others to be absolved.

S E WEINER

JUDGE OF APPEAL

Appearances

For appellants: B Knoetze SC (with Boonzaier) Instructed by: Honey Attorneys, Bloemfontein
For respondents: H van Zyl (heads of argument prepared by H E De La Rey) Instructed by: Kramer Weihmann Attorneys, Bloemfontein

[1] Ambrose Pierce.

[2] The third appellant is now Christina Aletta W La Cock.

[3] The second respondent herein, Gertruida Spangenberg.

[4] English translation of the clause which in Afrikaans reads – 'B(i) my persele 243 en 741 Olyvenhoutsdrift, distrik Keimoes, onderheweg aan die reg van habitatio (woonreg) ten gunste van my eggenote, GETRUIDA SPANGENBERG tot by haar dood of hertroue, watter geval ookal eerste mag plaasvind.'

[5] Clause 4 of the ante-nuptial contract reads as follows: 'Dat voormelde HENDRICK HERMIAS SPANGENBERG aan voormelde CHRISTINA GETRUIDA IMMELMAN 'n bewoningsreg oor perseel 243, gedeelte

van perseel 452, Olyvenhoutsdrift nedersetting Afdeling Kenhardt verleen vanaf datum van die afsterwe van gesegde HENDRICK HERMIAS

SPANGENBERG tot die sterftedatum van gesegde CHRISTINA GETRUIDA IMMELMAN, mits dat die huwelik tussen die partye nog van krag was onmiddellik voor die afsterwe van gesegde HENDRICK HERMIAS SPANGENBERG.’ The English translation is: That the aforementioned HENDRICK HERMIAS SPANGENBERG grants to the aforementioned CHRISTINA GETRUIDA IMMELMAN a right of occupancy over lot 243, part of lot 452, Olyvenhoutsdrift settlement [township] Division Kenhardt from the date of the death of said HENDRICK

HERMIAS SPANGENBERG until the date of death of said CHRISTINA GETRUIDA IMMELMAN, provided that the marriage between the parties

was still in force immediately before the death of said HENDRICK HERMIAS SPANGENBERG (own translation)... .

[5] Clause 4 of the ante-nuptial contract reads as follows:

‘Dat voormelde HENDRICK HERMIAS SPANGENBERG aan voormelde CHRISTINA GETRUIDA IMMELMAN ‘n bewoningsreg oor perseel 243, gedeelte

van perseel 452, Olyvenhoutsdrift nedersetting Afdeling Kenhardt verleen vanaf datum van die afsterwe van gesegde HENDRICK HERMIAS

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was still in force immediately before the death of said HENDRICK HERMIAS SPANGENBERG (own translation)... .

[6] Moosa N.O. v Minister of Justice

[2018] ZACC 19; 2018 (5) SA 13 (CC) para 18.

[7] Section 25(1) provides ‘no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’

[8] Harvey NO and Others v Crawford NO and Others

[2019] ZASCA 147; 2019 (2) SA 153 (SCA) (overruled by the Constitutional Court in King N.O. and Others v De Jager and Others but not in relation to these general principles).

[9] Ibid para 56.

[10] Section 14 provides that: ‘Everyone has the right to privacy, which includes the right not to have...(c) their possessions

seized;’ Section 10 provides that: ‘everyone has inherent dignity and the right to have their dignity respected and protected’. BOE Trust Ltd N.O. (in their capacities as co-trustees of the Jean Pierre De Villiers Trust 5208/2006)

[2012] ZASCA 147; 2013 (3) SA 236 (SCA) para 27.

[10] Section 14 provides that: ‘Everyone has the right to privacy, which includes the right not to have...(c) their possessions

seized;’

Section 10 provides that: ‘everyone has inherent dignity and the right to have their dignity respected and protected’. BOE Trust Ltd N.O. (in their capacities as co-trustees of the Jean Pierre De Villiers Trust 5208/2006)

[2012] ZASCA 147; 2013 (3) SA 236 (SCA) para 27.

[11] King N.O. and Others v De Jager and Others [2021] ZACC 4; 2021 (4) SA 1 (CC).

[12] King supra at para 144; Minister of Education v Syfrets Trust Ltd 2006

(4) SA 205 (C); Curators, Emma Smith Educational Fund v University of KwaZulu Natal 2010

(6) SA 518 (SCA) para 46.

[13] Robertson v Robertson 1914 AD 503.

[14] Ibid at 507.

[15] Aubrey Smith v Hofmeyer NO 1973

(1) SA 655 (C) (Aubrey Smith).

[16] Aubrey Smith supra at 657 E-658C.

[17] Aubrey Smith supra footnote 16.

[18] Natal Joint Municipal Pension Fund v Endumeni Municipality

[2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[19] Wallis ‘Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality’ 2012 4 SA 593 (SCA) 2019 PER / PELJ 22.

[20] Raubenheimer v Raubenheimer [2012] ZASCA 97; 2012 (5) SA 290 (SCA).

[21] With Mpati P, Nugent, Cachalia and Wallis JJA concurring.

[22] Raubenheimer para 21.

[23] Raubenheimer supra para 23.

[24] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others [2004] ZACC 15; 2004 (4) SA 490 (CC) para 89.

[25] Ibid para 90.

[26] KPMG Chartered Accountants (SA) v Securefin Ltd 2009

(4) SA 399 (SCA).

[27] KPMG para 39.

[28] Hendricks v Hendricks

[2015] ZASCA 165; 2016 (1) SA 511 (SCA) at 514F.

[29] LAWSA, 2nd Edition, vol 24 para 605.

[30] Arend v Estate Nakiba 1927 CPD 8 at 10.

[31] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 para 18.

[32] Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited

[2017] ZASCA 88; 2017 (6) SA 90 (SCA) para 26.

[33] Engelbrecht v Senwes Ltd 2007

(3) SA 29 (SCA).

[34] Ibid paras 6-7 (footnotes omitted), referred to with approval by the Constitutional Court in Eke v Parsons 2016

(3) SA 37 (CC) para 30.

[35] Endumeni para 18.

[36] Aubrey Smith supra; Strauss v Strauss and Others [2023] ZAGPJHC 377 paras 30-31.

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