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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: **56/2020**

In the application between:

ADRI VILJOEN

Applicant

and

FRANCOIS CARL LOUW N.O.

First Respondent

LILLY RAUTENBACH N.O.

Second Respondent

DIETER VILJOEN

Third Respondent

DANIEL VILJOEN

Fourth Respondent

DEWALD VILJOEN

Fifth Respondent

**THE MASTER OF THE FREE STATE
HIGH COURT**

Sixth Respondent

CORAM: **P R CRONJÉ, AJ**

HEARD ON: **7 SEPTEMBER 2023**

DELIVERED ON: **4 DECEMBER 2023**

JUDGMENT BY: P R CRONJÉ, AJ

- [1] The Applicant was the second wife of the deceased testator, the Third to Fourth Respondents are his sons (“the sons”) from a previous marriage.
- [2] She seeks an order declaring that clause 2.1 of the last Will of the testator, dated 18 June 2020, affords her the right of *usufruct* over an immovable property and all movables therein. On her version, the clause limits the right to dispose of movable property, unless she obtains the prior approval and consent of the sons and this condition does not apply to the *usufruct* over the immovable property.
- [3] During the testator’s lifetime he executed various Wills in Afrikaans, some handwritten and others typed. I freely translate the provisions of all to English. On 27 February 2013, the relevant part of the Will read:
- “I am presently married to Adri Viljoen, she shall have right of use of all my houses, and she may also generate an income from the houses, it can only happen if she does not marry again. If she remarries with whomsoever, she has 3 months to find another place to stay.”¹*
- [4] It is clear that this is an unconditional *usufruct*. The Applicant states that the testator handed that Will to one Ms Torr, employed by his attorneys, during or about February 2013 and requested that it be kept safe.
- [5] During 2016, the testator informed Ms Torr that he was desirous to amend that Will. Ms Torr subsequently prepared a new Will. On 1 April 2016, the deceased executed the Will. Whilst the 2013 Will was handwritten, the Will of 2016 was typed. That Will did not create a *usufruct* in favour of the Applicant.

¹ The original text in Afrikaans reads:
“Tans is ek getroud met Adri Viljoen, sy sal ook vruggebruik hê van al my huise, en ook kan sy vir haar ‘n inkomste vanuit die huise genereer, dit kan net gebeur as sy nie weer trou nie. As sy trou met wie ookal, het sy 3 maande kans om vir haar ‘n ander heenkome en blyplek te kry.”

[6] On 5 November 2019, the testator executed a new Will, revoking the 2016 Will. Freely translated the relevant parts read as follows:

- “1. The properties Fontein Street [...], Ficksburg and Imperani Street [...], is bequeathed to my three sons, jointly.
2. If it carries the approval of the sons, I propose that Adri Viljoen enjoys right of use of the family house, Fontein Street [...]. The sale of any assets excluded. It will last as long as she remains unmarried. If she should marry or reside with another person, the usufruct will terminate. There would also not be for any of the family of the applicant, e.g. her children or her family a profit or residence from the usufruct. It shall be controlled by the sons.
3. In the event that the house is not cared for, the sons may cancel the usufruct.”²

[7] That Will clearly provide for the approval of a *usufruct* by the sons. During or about June 2020, the testator consulted with Ms Torr and informed her that he was desirous to revoke the previous Will. The testator was adamant that the immovable property and its contents must be bequeathed to his three (3) sons, subject to the Applicant’s usufruct and on condition that she does not cohabit with another man and/or does not get married. On 18 June 2020, the testator perused the draft and executed it. This is the contentious Will. The relevant clauses read as follows:

“I bequeath my estate as follows:

- 2.1 My property at Fontein Street, Ficksburg and all movable assets in the house, I bequeath in equal parts to my sons DIETER, DANIEL and DEWALD, subject to a usufruct in favour of my spouse, ADRI VILJOEN, until her death.

²

Afrikaans text:

- “1. Die eiendomme Fonteinstr[...], Ficksburg en Imperanistr [...], bemaak ek aan my drie seuns, gesamentlik.
2. Indien dit die seuns se goedkeuring wegdra stel ek voor dat Adri Viljoen die vruggebruik van die familiehuis, Fonteinstr[...], mag hê, die verkoop van enige bates uitgesluit. Dit sal geskied solank sy ongetroud is. Indien sy sou trou of saambly verval die vruggebruik. Ook sal daar nie vir enige van die aangetroude familie, byv my vrou se kinders of haar familie ‘n wins of blyplek wees uit die vruggebruik daarvan nie. Dit moet streng deur die erfgename beheer word.
- 3.. Indien die huis verwaarloos word of agteruit gaan staan dit die seuns vry om die vruggebruik te stop.”

The usufruct does not include the sale of assets or goods and is subject to the approval of my sons.

2.2 *The balance of my estate, movable or immovable, I bequeath in equal parts to my sons DIETER, DANIël and DEWALD.*³ [my emphasis]

- [8] The meaning of the underlined portion has to be determined.
- [9] The Applicant states that the testator informed her during their marriage that she does not have to be concerned as he would ensure that she has control over the property, that she may reside in the property, and enjoy the benefits thereof as well as the movable property for the rest of her life.
- [10] It is an expansive property with twelve (12) rooms, which could be used as a guesthouse or overnight facilities, generating a substantial annual income. She accuses the sons of selfish greed. She was informed that the Fifth Respondent will occupy one of the rooms as from 25 August 2021, and this would constitute nothing less than an abusive strong-arm tactic.
- [11] On 28 August 2021 a meeting was held and the sons made it clear that they would not grant a *usufruct*. The possibility of a rental agreement would not be considered, and she has to vacate the property not later than thirty (30) days after notification.
- [12] The sons' position was reaffirmed in a later letter. Thereafter a host of correspondence was exchanged until or about 3 October 2022.

³ Afrikaans text:

“2.1 My woning Fonteinstraat[...], Ficksburg en alle roerende goedere in die huis bemaak ek in gelyke dele aan my seuns, DIETER, DANIël en DEWALD, onderworpe aan die vruggebruik van my eggenote, ADRI VILJOEN, tot haar afsterwe. Die vruggebruik sluit nie die verkoop van bates of goedere in nie en is onderworpe aan die goedkeuring van my seuns. Haar vruggebruik sal verval indien sy weer sou trou of saambly.

2.2 *Die restant van my boedel, roerend of onroerend bemaak ek in gelyke dele aan my seuns, DIETER, DANIël en DEWALD.*”

- [13] The Master's report, dated 25 November 2022, states that he/she does not oppose the application and that the Will of 18 June 2020 was accepted.
- [14] The Third Respondent was the main deponent to the answering affidavit and the founding affidavit for a conditional counter-application. As first point *in limine* it is stated that the founding affidavit purports to have been signed and sworn to at Bloemfontein whereas the police officer commissioned it on the same date at Bethlehem. The same argument is raised in respect of the affidavit of Mr Louw.
- [15] The second point *in limine* is that there was no compliance with the provisions of Rule 41A for referral to mediation.
- [16] The Fifth Respondent stayed with the testator and the Applicant in their house, which relationship was initially amicable. The Applicant would later force the Fifth Respondent to do homework up to 2 or 3 o'clock in the morning. He was merely 9 years old. The Applicant allegedly became very aggressive and the testator would not tolerate the Applicant's conduct.
- [17] The Applicant never needed a residence as she stayed in a flat in Bethlehem. She also earned more than the testator. Notwithstanding stating that it should not be seen that he badmouth the Applicant, an incident happened which caused the Applicant being disinherited. That was the cause for the removal of the *usufruct* in the 2016 Will.
- [18] The acrimonious relationship between the testator and Applicant is alleged to have commenced during 2013, which continued in 2015 when the testator allegedly told the sons to switch off the lights, to lock the door and to keep quiet as the Applicant was outside the house armed with a Brownie pistol. The testator allegedly described the Applicant as a woman of unsound mind. The sons appended a transcript of a recording that the testator made whilst he was driving with the Applicant. It can be seen from the transcript that the Applicant was confrontational. The sons state that the testator attached great value to his belongings.

- [19] In March 2015, the testator convened a meeting with the sons and produced the 2013 Will. He asked his sons how they would feel if he provided a *usufruct* in favour of the Applicant. They told him that, as a result of the poor relationship between them and the Applicant, it would not work. The relationship further deteriorated at the end of 2016 when the Applicant would break things and throw it at the testator.
- [20] During March 2017, the Fifth Respondent left the house after he allegedly found the Applicant strangling the testator. In 2017, the testator read the 2016 Will to them. There was no *usufruct* in it. This was apparently in line with the discussions in 2015. The sons told the testator that it would be sensible to sell the house and open a guesthouse at another address. The testator agreed that they could do as they deem fit. On 5 November 2019, the testator signed his 2019 Will. He requested them to peruse the Will and asked them whether they agreed. They would inherit the house but if they agree, the Applicant could have a *usufruct*. During that time, the testator told the Third Respondent that he would not divorce the Applicant since she was not a bad person when she took her medication. The 2019 Will was sent to them via WhatsApp.
- [21] In 2020 the testator sent his last Will via WhatsApp and they had no doubt that the Applicant will enjoy a *usufruct* only if they approve of it. The sons state that the Will should simply be read that the *usufruct* does not include the sale of assets or goods, and the usufruct is subject to their approval.
- [22] In September 2020 the testator contemplated selling the property and according to the sons did not envisage that the house should serve as a residence for the Applicant until her death. When Ms Torr read the Will after the deceased's death, she apparently was unaware of the 2020 Will.
- [23] They state that the holder of a *usufruct* cannot sell immovable property and that the interpretation of the Applicant does not indicate the contrary. The

sons make much of the fact that the Applicant received a good income and benefits. She does not need income from the property.

- [24] In reply the Applicant states that the reference to Bloemfontein in the commissioning of the respective affidavits is incorrect as the papers were prepared in Bloemfontein and erroneously did not state Bethlehem.
- [25] Rule 41A only compels the filing of a notice whether the parties agree to referral for mediation and both parties did not comply. In my view, the parties were so far apart, that mediation would on probabilities have not succeeded. It is nonetheless important that parties consider same seriously as a Court may, in appropriate circumstances, disallow costs.
- [26] The sons filed a notice of application to strike out certain averments in the Applicant's affidavit as being vexatious, scandalous and irrelevant. They furthermore complain that one of the confirmatory affidavits amounts to hearsay. The Applicant readily concedes the point in respect of hearsay.
- [27] Mr Coetzer who appeared for the Applicant argues that Rule 6(15) of the Uniform Rules of Court provides that a Court shall not grant an application to strike out unless it is satisfied that prejudice will occur.⁴ The Rule is not absolute and a measure of common sense should be applied.⁵
- [28] It is trite that relief sought by an applicant can only be granted in the event of conflict between the versions, unless the respondent's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable, in which case the Court is justified in rejecting them merely on the papers.⁶

⁴ Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368 G

⁵ Smith v Kwanonqubela Town Council 1999 (4) SA 947 (SCA) at para [15]

⁶ Wrightman t/a JW Construction v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA)

[29] It is argued that the Court should follow a robust and common sense approach.

[30] A person enjoying a *usufruct* has in any event no right to alienate the *corpus* unless expressly authorized by the Will. A Will stands to be interpreted as any other legal document and the standard rules of interpretation is therefore applicable. The Courts, however, tend to adopt a more liberal approach in construing a Will as the testator already passed away and the Court will be more benevolent than it would have been in the interpretation of a contract.⁷

[31] In Robertson v Robertson's Executors⁸ the Court held:

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

[32] In Aubrey Smith v Hofmeyer N.O.⁹ it was stated that a Court is not confined to the written record and the words of the Will must be applied to the external facts, resulting in extrinsic evidence becoming admissible to identify the subject or object of a disposition.

[33] It is argued that the first sentence of Clause 2.1 is clear, unambiguous and a *usufruct* was created. Clause 2.1 constitutes a limitation of ownership by the sons. Ms Torr was not informed that the testator intended to leave the ultimate decision regarding the right to *usufruct* in the hands of the sons. If the sons' version is accepted, the conclusion would be that the testator could have disinherited the Applicant as he has done previously. The testator disinherited his own daughter in the 2019 Will. He did not do so in respect of the Applicant. The sons have a vested interest in the outcome of the relief, whereas Ms Torr does not and she has no reason to be dishonest. Attributing friendship between the Applicant and Ms Torr is based on mere say-so.

⁷ Wills & Trusts, Wills, Chapter 3, A22 – Introduction, page 86 (29)

⁸ 1914 AD 503 at 507

⁹ 1973 (1) SA 655 (C) at 657 E - H

- [34] Mr Cilliers, on behalf of the sons concedes that the Court has a discretion to accept the affidavits, notwithstanding defects in commissioning.
- [35] In respect of the application to strike out, it is argued that each case must be decided on its own particular merits and in the light of its particular circumstances. The general rule is that new matter may not be introduced in a replying affidavit but this is not absolute.¹⁰ It is argued that prejudice is not a requirement when the application to strike out hearsay is made. Allegations which are immaterial and irrelevant should be struck out, especially when they advance damaging, vague and unsubstantiated allegations regarding a party's conduct. The prejudice to the latter party arising from such allegations was found to be "*evident*".¹¹
- [36] New matter which is impermissibly raised in a replying affidavit falls under the rubric of irrelevant matter and is susceptible to being struck out.¹² A decision to strike out or not, is discretionary.¹³
- [37] Bearing in mind the acrimonious relationship between the Applicant, the testator and the sons, interpreting clause 2.1 of the 2020 Will as to require approval from the sons in respect of the sale of movables only, is untenable and opportunistic.
- [38] Ms Torr, an administrative clerk, is criticized for not particularizing the instructions that she received from the testator in respect of the 2020 Will, which was not read to the testator.
- [39] Reference is made to King and others N.N.O. v De Jager and others¹⁴ where it was held:

¹⁰ Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC)
¹¹ University of the Free State v Afriforum and another 2017 (4) SA 283 (SCA)
¹² Van Zyl and others v Government of the RSA and others [2005] 4 All SA 96 (T)
¹³ Titty's Spar and Bottle Store *supra*
¹⁴ 2021 (4) SA 1 (CC) at para [34]

[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.”

[40] It is argued that the second sentence in Clause 2.1 is clearly aimed at qualifying the *usufruct*. There is no ambiguity in paragraph 2.1 and the *usufruct* was simply subject to the approval of the sons. The sons contend that the various Wills, as discussed with them by testator, and the poor relationship that existed between them and the Applicant, meant that the usufruct would be subject to their approval. The application stands to be adjudicated on the sons’ version.

[41] In Natal Joint Municipal Pension Fund v Endumeni Municipality (*Endumeni*):¹⁵

“[18] ...The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to

¹⁵ (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. 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.

[19] *All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:*

'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'

More recently Lord Clarke SCJ said 'the exercise of construction is essentially one unitary exercise'." (footnotes omitted) [my emphasis]

[42] My views of the above factual and legal matrix are as follows. Clause 2.1 clearly creates a *usufruct*. Unless it is made conditional, it vests in the person at date of death. There is no dispute about this principle. The testator bequeathed all his property to his sons. No limitation is placed on their title and no condition/s are set for acquiring full title over all the property.

[43] The *usufruct* states that it is granted to the Applicant until her death. No condition is set. Read up to here, the right to exercise a *usufruct* over the property vested in the Applicant on date of death of the testator.

- [44] It provides that the assets or goods may not be sold by her. Up to this point there is still no restriction on the right to use or title.
- [45] It is from this point onwards that the dispute exists. The testator anticipated that there may be a need to dispose of movables. As the Applicant has a right of use and may not need some or all of the movables, she may deem it opportune to dispose of it. This may be done at any time by the sons, subject to the Applicant's consent. As user, one may not dispose of another's property unless there is consent. Read with this in mind the testator restricted all the parties from dealing with the movable property as they wish. He effectively imprisoned the Applicant and the sons in, what both parties agree, a hostile relationship. The clause therefor makes sense in restraining the Applicant from disposing movables without consent, automatically restraining the sons from disposing of it too.
- [46] What does the words "*subject to the approval of my sons*" then mean?
- [47] As a suspensive condition, she needs the consent of the sons for right of use.
- [48] Stripped of the words "*subject to the approval of my sons*", the intentions of the testator is clear – he bestowed an unconditional usufruct. The testator did not bestow on the sons the power to set their own terms for the *usufruct*.
- [49] The sentence can be dissected to be read in two ways. It can be read as that the *usufruct* is subject to the approval of the sons. It can also be read that only the sale of the assets or goods are subject to the approval of the sons.
- [50] The reading of the words in itself does not fully answer the question. In line with the approach in *Endumeni*, one also has to consider the context in which the provision appears and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective.

- [51] The 2013 Will gave the sons no say as to the right of use. It gave recognition to the Applicant for maintaining him. The unconditional right would in that context be understandable. The 2016 Will makes no reference to the Applicant. The 2019 Will places the Applicant back on the scene. If the testator was resolved on cutting ties with the Applicant in the event of his death, one would not have expected it. The relationship was clearly not as acrimonious as the sons wish to portray.
- [52] Clause 2 of the 2019 Will starts off by qualifying the usufruct in making it subject to the sons' approval. It then states that the movables may not be sold, not even with consent. Remarriage also serves as a disqualifying factor for the right of use.
- [53] Seen against this backdrop, one may conclude that the testator merely reworded the sentences in the 2020 Will, but that the right of use was in fact subject to the same conditions found in the 2019 Will.
- [54] Is there any other material that may serve as context for interpreting the Will and determine the intentions of the testator? Mrs Badenhurst is the daughter of the Applicant. She paints a picture of true love that existed between the testator and the deceased in December 2020, six months after making of the 2020 Will. Ms Torr's affidavit does not take it much further as she merely drafted it, which she says was not a monumental task as there was an existing Will from which she presumably worked. The deceased gave very limited input.
- [55] I find that the testator was acutely aware of the strained relationship between the sons and the Applicant. He did not want to disappoint the sons by granting the Applicant a right of use, but also did not want to disappoint the Applicant in closing the door of the house on her.
- [56] He decided to formulate the right of use as best as he could to satisfy both parties. On the one hand the sons retained a say in the *usufruct*. On the other

hand the Applicant still had the prospect that the sons will allow her use. The door was not closed on her.

- [57] The 2020 Will is but a shadow of the 2019 Will. The right of use, however, remained the central piece in both wills. The 2019 text was handwritten and edited in a typed document constituting the 2020 Will.
- [58] The sons seek a declaratory order that the *usufruct* is conditional on their approval. It is not necessary to make such an order as a dismissal of the main application has the same effect.
- [59] In respect of the first point in *limine*, I exercise my discretion in favour of the Applicant as the issue needed to be determined and there was not prejudice. In respect of the second point in *limine*, it is clear that mediation would have been futile.
- [60] In respect of the application to strike out, I conclude that the sons opened the door for a push-back from the Applicant. They went much further than what was placed on the table in the founding affidavit. They could not suffer prejudice as a result of the averments made, which to a large extent was invited.
- [61] This application was voluminous and contained a host of accusations and counter-accusations, which were not all helpful. What is clear is that the testator loved all the parties. Both sets of parties harboured aspirations and the Wills expressed the testator's attempt to satisfy the persons close to him. Whether the testator have or could have foreseen the result of the wording of his Will is speculative. In retrospect he may have done it differently.
- [62] I conclude that a plain reading of the provisions in the 2019 and 2020 Wills, contextually, leaves no doubt that the usufruct was subject to the sons' approval.

[63] I carefully considered what cost order should be made. I cannot find that either of the parties foresaw the finer nuances that the other party may raise. Both parties' arguments were extremely helpful and thorough. There was little to prefer the arguments above the other. In fairness to all the parties, the interest of justice, and promoting the right to have disputes of familial nature properly ventilated before a Court, each party should pay its own costs. This would be fair and reasonable.

[64] I make the following order.

ORDER:

1. The Application is dismissed.
2. Each party pays its own costs.

P R CRONJÉ, AJ

On behalf of the Applicant:

Adv J C Coetzer
Stander and Associates
Bloemfontein

On behalf of the Third to Fifth Respondents:

Adv H J Cilliers
Pieter Skein Attorneys
Bloemfontein