

**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE PROVINCIAL DIVISION**

**Case No.: 2842/2022**

**Reportable: YES/NO**

**Of interest to other Judges: YES/NO**

**Circulate to Magistrates: YES/NO**

In the matter between:

**TESSA CAMERON**

First Applicant

**MARLÉ KRUGER**

Second Applicant

and

**WYNAND GABRIËL WESSELS**

First Respondent

**ANDRIES JACOBUS MARIUS WESSELS (JNR) N.O.**

Second

Respondent

**(In his capacity as Trustee of the Waganella Trust: TMP 4287)**

**HENDRIK STEPHANUS LUDEWICKUS DU PLESSIS N.O.**

Third Respondent

**(In his capacity as Trustee of the Waganella Trust: TMP 4287)**

**WYNAND JOSEPH BOTHA N.O.**

Fourth Respondent

**(In his capacity as Trustee of the Waganella Trust: TMP 4287)**

**Coram:** Opperman, J

**Date of hearing:** 3 November 2022

**Judgment Delivered:** 7 November 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 7 November 2022. The date and time for hand-down is deemed to be 7 November 2022 at 15h00.

**Summary:** Habitatio in terms of will – registration of the servitude – right to occupation

## JUDGMENT

[1] Little more than what was enunciated in *Hendricks v Hendricks and Others* (20519/14) [2015] ZASCA 165; 2016 (1) SA 511 (SCA) (25 November 2015) by the Supreme Court of Appeal can be said to describe the atmosphere of this case:

[14] It is necessary to add one last observation. This unseemly family feud is highly regrettable. It is plain on the papers that hard, inflexible positions have been adopted on both sides. Ultimately, no one wins in a matter such as this. The more desirable outcome, beneficial to all concerned, is to bury the hatchet

and to co-exist in harmony on the property. One can only hope that good common sense will prevail. (Accentuation added)

[2] To be added is that cases of this nature contaminate the administration of justice. The true and real facts of this case is that one of the feuding parties, the first respondent, very well realises that his conduct is morally disgraceful and that he fuelled the litigation with his unbecoming conduct. Unfortunately, the *de facto* cause of action does not suit the legal remedies sought. Any court order that will be granted on the prayers in the Notice of Motion will be, *ex lege* so, premature and illegal.

[3] This is the relief sought by the applicants:

1. That the right of *Habitatio*, registered under number K194/2015 S with protocol number 489/2015 at the office of the Fifth Respondent, for the First Applicant, Second Applicant and First Respondent be confirmed.
2. That the right of *Habitatio*, registered under number K194/2015 S with protocol number 489/2015 at the office of the Fifth Respondent, be shared equally between the First Applicant, Second Applicant and First Respondent- each having a one-third share in the *Habitatio*.
3. That the right to occupy the dwelling, as per the shared *Habitatio* (number K194/2015 S with protocol number 189/2015), to rotate between the First Applicant, Second Applicant and First Respondent for a four (4) month periods- being: 15 January to 14 May, 15 May to 14 September, 15 September to 14 January.
4. That neither the First Applicant, Second Applicant nor the First Respondent will have the right to permanently occupy the dwelling- outside their rotational term, under their shared right of *Habitatio*.

5. That all expenses, inclusive of maintenance, renovations, insurance, administrative costs, cleaning services regarding the dwelling- subject to the right of *Habitatio*- to be share equally between the First Applicant, Second Applicant and First Respondent.

6. That leave be granted to the Applicants to approach his Court, on the same papers duly supplemented, for an order to cancel the *Habitatio* (K194/2015 S protocol number 489/2015) of the First Respondent, in the event that the First Respondent does not honour the terms of this Order.

7. Cost of the application to be paid by the First Respondent, if this application is opposed.

8. Further and/or alternative relief.

[4] Paragraph 3.7.1.7 of the Last Will and Testament of AJM Wessels that bequeathed the habitation to the three siblings clearly has to be interpreted and declared upon by a court in light of the dispute that reigns. This to give clarity and before the application in the instance may be granted. To grant the application *in casu* will be to change the words of the will that reads as follows:

3.7.1.7 That all my children, but for Andries Jacobus Marius Wessels (Jnr) and Jacob Johannes Wessels, after the passing of myself and my wife Sonja Hesteria Wessels, shall have the right to full and unlimited tenure (*Habitatio*) off the property referred to in clause 3.1.4 as well as a full right to disposal over the house content, which rights will prevail until the passing of each of these children.<sup>1</sup>

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“3.7.1.7 Dat al my kinders anders as ANDRIES JACOBUS MARIUS WESSELS (Junior) en JACOB JOHANNES WESSELS na die afsterwe van my eggenote SONJA HESTERIA WESSELS volle en onbeperkte verblyfsreg sal geniet oor die eiendom na verwys in klousule 3.1.4 asook volle beskikkingsreg sal geniet oor die huisinhoud daarvan welke regte sal voortduur tot en met die afsterwe van elk sodanige kind.”

[5] 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”.<sup>2 3</sup>

[6] 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...”.<sup>4</sup>

[7] The construction of wills is often a process without plan or rule.<sup>5</sup> The tragedy is the bedlam and hatred caused in cases as in this application, and between a brother and two sisters, when a will was drafted in a manner that might cause confusion.

[8] 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.

[9] 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.

[10] *But this case is not about the interpretation of the provisions of a will.* This court may not change the words of the will and declare on the meaning of the will by ordering occupation on a rotational basis at this stage. It seems as if the Judgement of Solomon is the solution. In the story from the Hebrew Bible Solomon ruled between two women both claiming to be the mother of a child and suggested the baby be cut in two, each woman to receive half. Might the dwelling *in casu* be “cut” in three portions?

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<sup>2</sup> 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.

<sup>3</sup> 4405 2021, CA NOOME AO v LJ BOTHA NO AO on 23 May 2022.

<sup>4</sup> 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*, 2<sup>nd</sup> edition (2001) at Chapter XX1, page 447.

<sup>5</sup> 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.

[11] As said; the cause of the litigation is the morally disgraceful conduct of the first respondent. He is abusing the words of the will to sabotage his siblings in the *de facto* use of their right of habitation of property bequeathed to them by their father. The first respondent has nothing but invaded the property. He, in a crafty manner prevents the applicants from realizing their right to habitation given to them. This is how he does it:

1. The dwelling, that is at the center of the application, consists of one bedroom, a lounge area, a kitchen and a bathroom.
2. The first respondent has taken permanent primary residency of the property without contributing to the maintenance and basic upkeep of the property. The allegations are that he resides here free of charge.
3. He moved into the property with his girlfriend and a minor child.
4. He claims that he has a right, in terms of the will, to unlimited tenure of the property in accordance to the wording of the will.
5. He maintains that he does not obstruct the applicants' rights and have invited them to stay with him. The real truth is that there is not enough space for the two applicants, their husbands and their children to be occupied at the same time with the first respondent, his girlfriend and the minor child. There is much animosity between them and there has also been attempts to obtain interdicts against each other in terms of the Domestic Violence Act 116 of 1998. They will all have to share one bedroom for instance. The suggestion of the first respondent is not tenable and executable on the circumstances and the facts of the case; it is farfetched and underhanded sabotage.

[12] The case turns on the servitude of *Habitatio* that was bequeathed to the applicants and the first respondent in terms of the will of their father.

[13] The application is supported by all the respondents but for the first respondent that opposes the case.

[14] In *Hendricks v Hendricks and Others supra Habitatio* is described and delineated in law to be:

1. When the holder, together with his or her family, has the right to dwell in the house of another without detriment to the constituent and fundamental structure.
2. A lifelong right to live in a house owned by another defines the right to habitation.
3. This right is registered in the Deeds Office and once that has been done it is enforceable against everyone, including the owner of the immovable property.
4. It trumps ownership. The owner's rights in regard to a house must yield to the inhabitant's right of habitation.
5. The Supreme Court of Appeal held that the right of habitation was recognized as a limited real right.
6. The court also held that the holder of the right of *Habitatio* could apply for the eviction of the registered owner.

[15] The unfortunate reality of the case is that the prayers in the Notice of Motion is not appropriate at this stage of the state of affairs. It is a common cause that:

1. The habitation is not yet registered in favor of the applicants and the first respondent. When Mr. AJM Wessels passed away, a Deed of Session of *Habitatio* was registered in favor of his wife and the mother of the two applicants and the first respondent and on 21 April 2015. Since the mother passed away on 9 February 2019 the Notarial Session of *Habitatio* will have to be cancelled. In addition, as the concerned property is a farm; section 6 of the Subdivision of Agriculture Land Act 70 of 1970 is applicable and consent from the Minister must be obtained for the registration of the rights of the applicants and the first respondent: This according to the third and fifth respondents. Then and then

only can the Servitude of habitation be registered in the name of the two applicants and the first respondent.

2. All three litigants lack *locus standi* for the remedy claimed *in casu*. Counsel for the first respondent was correct to point out that *Habitatio* is a form of personal servitude recognized as such in our law. It creates a real right in favor of a person over a; in this instance, residence or dwelling. The holder of the personal servitude acquires a personal claim to registration of the servitude.

3. *The argument and contention by counsel for the first respondent referred to above confirms that the first respondent has taken illegal occupancy of the residence. He only has a right to registration of the right and only thereafter can he enforce the right over the other title holders and third parties to habitation.*

4. All three litigants lack *locus standi* to organize the maintenance of the property since the Waganella Trust, apparently the bare dominium owner, bears the responsibility as for now.

[16] The first respondent is the cause of the litigation. That said; the erroneous litigation was brought by the applicants. They will each have to carry their own costs. The rest of the respondents did not join and/or oppose the motion.

## **[17] ORDER**

1. The prayers as per the Notice of Motion are dismissed.
2. Each of the two applicants and the first respondent to carry their own costs.

**M OPPERMAN, J**

## **APPEARANCES**

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