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IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **432/2020**

In the matter between:

FRANKEL ENGELBRECHT N.O.

Applicant

(in his capacity as executor in the estate of
The late Hendrik Hermias Spangenberg, Master's
Reference 453/2010)

and

THE MASTER OF THE HIGH COURT, KIMBERLEY

1st Respondent

CHRISTINA GERTRUIDA SPANGENBERG

2nd Respondent

ID: [...]

IZAK FREDERICK SPANGENBERG

3rd Respondent

ID: [...]

MARIA CORNELIA VAN DER WESTHUIZEN

4th Respondent

ID: [...]

CHRISTINA ALETTA W. LA COCK

5th Respondent

ID: [...]

Coram: LEVER AJ

JUDGMENT

LEVER AJ:

1. The applicant is the executor in the estate of the late Hendrick Hermias Spangenberg (the deceased or the testator) who died on the 15 January 2010. The applicant's letters of executorship were issued on the 29 November 2018. The applicant was not the first executor appointed by the Master. For present purposes it is not necessary to go into the history of the delays in the finalisation of the relevant estate, suffice it to say that there had been ongoing disputes around the interpretation of essentially one provision in the will of the deceased. It is, in short, as a result of the ongoing disputes regarding such interpretation that the applicant approaches this court for a declaratory order to establish the proper interpretation of the relevant provision of such will and the consequences that flow therefrom.
2. The relevant will, which has been accepted by the Master appears to have been executed on the 2 July 1991. Such document is annexed to the founding affidavit as annexure

“FE2”. The relevant provision of the said will reads as follows:

“B. Aan my dogters, MARIA CORNELIA VAN DERWESTHUIZEN en CHRISTINA ALETTA SPANGENBERG, of by gebreke aan hulle, aan hulleafstammeling per stirpes, die volgende:-

(i) My persele 243 en 741, Olyvenhoutsdrift, distrik Keimoes, onderhewig aan die reg van Habitatio (woonreg) ten gunste van my eggenote, GERTRUIDE SPANGENBERG tot by haar dood of hertroue, watter geval ookal eerste mag plaasvind. Dit sal nie vir haar nodig wees om sekuriteit aan die Meester of enige ander instansiete verskaf nie. ...”

3. The relief that the applicant seeks is set out in prayers 1 to 4 of the Notice of Motion dated the 19 February 2020. The relevant prayers read as follows:

“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, Olyvenhouttsdrift, 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 right 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;*

4. *That the costs of this application be paid from the estate of the late Hendrick Hermias Spangenberg, save in the event of opposition, in which case the costs shall be paid by such opposing respondent."*

4. The relief sought in prayer 1, quoted above, depends upon the interpretation of the provision under clause B(i) of the will, also quoted above. The relief sought in prayers 2 and 3 quoted above will flow from the interpretation of the provisions of B(i) of the relevant will as well as the rights that normally form part of the right of *habitatio*. The relief sought in prayer 4 quoted above is essentially within the discretion of this court.

5. The applicant contends that the provisions of clause B(i) of the said will mean that the second respondent has the right of *habitatio* over both Plot 243 and Plot 741. On applicant's behalf it is argued that this represents the ordinary and natural meaning of clause B(i) of the said will. It was further contended on behalf of applicant that there is no and there can be no ambiguity in the provisions of clause B(i) of such will. Further, that in such circumstances, it was not permissible to refer to extrinsic evidence to determine the intention of the deceased as set out in the relevant will.

6. The third, fourth and fifth respondents (the opposing respondents) faintly raise the issue that the applicant has not established a basis for this court having jurisdiction to consider the declaratory relief he seeks. This issue was raised in the Heads of Argument filed on behalf of the opposing respondents but was not pursued in oral argument.
7. Then the opposing respondents make a number of contentions in interpreting clause B(i) of the will. Firstly, they contended that the right of *habitatio* has been defined in an *ante-nuptial* contract which was executed in 1985 and it was therefore not necessary for the testator to repeat such definition. Secondly, they contend that the surrounding circumstances explain what clause B(i) means. Finally, they contend that there is a 'latent ambiguity' in the provisions of clause B(i) of the relevant will. That such latent ambiguity emerges when one considers certain evidence external to the relevant will.
8. In support of their arguments the opposing respondents annex to their answering affidavit an opinion of a Senior Counsel which appears to have been dated at Bloemfontein on the 23 June 2011. The said opinion deals with the very questions that are before me for decision. This is the first time that I have ever come across such practice and it is certainly not a practice that should be encouraged.
9. Certainly, the opposing respondents would have been free to argue the views espoused in the relevant opinion when they argued the matter before this court, and I

would then have considered such views on their merits. However, to insert such opinion into the record and by implication intimate that its source must somehow sway my views is at least inappropriate.

10. To make matters worse, there are certain passages that are clearly missing from the said opinion. Further, the opinion is based on the instructions given to such Senior Counsel in a letter to him from the then instructing attorney. This letter does not form part of the record. In such circumstances the factual basis upon which the opinion was given is not fully disclosed. The applicant has indicated that he has the same complaints. Accordingly, I shall simply ignore the said opinion.
11. In the circumstances of this matter, it will be convenient to deal with the contentions of the opposing respondents first.
12. Dealing with the jurisdiction of this court to make declaratory orders in this matter, this situation is governed by the provisions of s21(1)(c) of the Superior Courts Act¹.
13. The then Appellate Division dealing with an earlier and similarly worded statutory provision in the case of *Ex Parte Nell* held that the court has jurisdiction to entertain a declaratory order if there are interested parties that will be bound by such order.² In view of the

similarly worded statutory provisions I take the view that

¹ Act 10 of 2013

². **Ex parte Nell**, 1963 (1) SA 754 (A) at p 760C.

Ex Parte Nell is still binding authority on this court.

14. Having regard to the history of the dispute as emerged with the correspondence of the first executor appointed in the relevant estate. I am satisfied that the declaratory orders sought by the applicant will resolve such dispute. It is also clear from the facts disclosed in the record that any declaratory order this court might issue will be binding on the applicant, the opposing respondents and second respondent.
15. As set out above I have already found that a number of parties will be bound by any order this court makes. Accordingly, it follows that the applicant has established that this court has jurisdiction to entertain the declaratory relief he seeks. Insofar as I may need to exercise a discretion in the matter, for the aforesaid reasons, I exercise such discretion in favour of the applicant.
16. The first argument dealing with the interpretation of the relevant clause B(i) of the said will submitted on behalf of the opposing respondents was that the right of *habitatio* was defined in the *ante-nuptial* contract executed in 1985. The said *ante-nuptial* contract was annexed to the respondents' answering affidavit. The relevant clause in the said contract reads as follows :

"4. Dat voormelde HENDRICK HERMIAS SPANGENBERG aan voormelde CHRISTINA GERTRUIDA IMMELMAN n bewoningsreg oor perseel 243, gedeelte van perseel 452, Olyvenhoutsdrifi nedersetting Afdeling Kenhardt verleen vanaf datum van die afsterwe van gesegde HENDRICK HERMIAS SPANGENBERG tot die sterftedatum van gesegde CHRISTINA GERTRUIDA

IMMELMAN, mits dat die huwelik tussen die partye nog van krag was onmiddellikvoor die afeterwe van gesegde HENDRICK HERMIAS SPANGENBERG. ”

17. It seems to me that the argument of the right of *habitation* being defined in the *ante-nuptial* contract can be dealt with quite simply. For this argument to hold sway the *ante-nuptial* contract, or at least the definition of the right of *habitation* therein, would have to be incorporated into the will by reference. This is not the case in the present circumstances. It then follows that this argument cannot stand.

18. The right of *habitation* as set out in the ante-nuptial contract also forms part of the next argument raised by the opposing respondents, being that the surrounding circumstances will explain clause B(i) of the said will. The opposing respondents adopt two approaches in referring to this extrinsic evidence. First, they refer to the case of NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY ³ in what appears to be another context. Then by sleight of hand the opposing respondents simply proceed as if the unitary approach to interpretation, where one starts with the language of the provision read in the context of the document itself and having regard to the purpose of the provision and the background to the preparation and production of the document, applies to a testamentary instrument. Second, the opposing respondents then seek to argue that the said *ante-nuptial* contract together with certain other allegations creates or is evidence of a latent ambiguity in the will. Both of these contentions will be dealt

³ 2012 (4) SA 593 (SCA).

with in turn hereunder.

19. The opposing respondents did not refer me to any authority where the 'unitary' approach to interpretation has been applied to the interpretation of a testamentary instrument. Nor could I find any such authority.
20. However, once one gets over the initial shock of seeing this leap from one context to another with no attempt to motivate it, it might not be such an unreasonable position to adopt. On a conceptual level the well-established 'armchair' approach to interpreting a will appears to largely overlap the 'unitary' approach to interpretation.
21. The 'armchair' approach has been described by Corbett J (as he then was) in the following terms:

*“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 the 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.”*⁴

(references omitted)

22. When one considers the purpose of the relevant provision in a will and the background to the preparation

⁴ **Aubrey Smith v Hofmeyer N.O.** 1973 (1) SA 655 (CPD) at 657H.

and production of a will, it would be necessary to bear the following considerations in mind: A valid will is executed in a formal legislated process⁵; The underlying rationale for this formal legislated process is to eliminate or minimise the opportunity for fraud and misrepresentation; and To allow a formal document such as a will to be interpreted with reference to extrinsic evidence which may not have been produced in a formal or controlled manner, needs to be approached with caution.

23. The starting point remains the language of the provision, which is now read within the context of the relevant document itself. If the relevant provision is clear and unambiguous and is not at odds with the relevant document itself, there is no room for interpretation. The relevant provision of the will then has its ordinary and natural meaning that can be ascribed to it in the context of the will itself. The underlying rationale for this approach is that the court must refrain from writing a will for the testator. The court must give effect to the will the testator actually wrote and executed. Again, this has been succinctly set out by Corbett J in the Aubrey Smith case, the relevant passage reads as follows:

“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 the process of application, evidence of an extrinsic nature is admissible to identify the subject or object of a

⁵ **Wills Act**, No: 7 of 1953.

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.”⁶

(references omitted)

24. It is only where there is an ambiguity in relation to the subject or object of the relevant provision in the will or if the relevant provision is at odds with the rest of the document, read in its context, that there would be a justification in referring to extrinsic evidence when considering the purpose of the relevant provision in the will and the background to the preparation and production of the will concerned.
25. The relevant question to be determined then is whether the opposing respondents have established an ambiguity in clause B(i) of the relevant will or that the relevant clause is at odds with the rest of the will. In my view the opposing respondents have failed to do so. Clause B(i) of the said will is not ambiguous in any way. It naturally and properly confers a right of *habitatio* over both plot 243 and plot 741 Olyvenhoutsdrift, district Keimoes on the second respondent.
26. The extrinsic evidence and arguments based thereon raised by the opposing respondents contravene the approach of Corbett J as quoted in the passages above. The object of such evidence, in the present case, was to contradict what is the clearly expressed intention of the testator in the relevant will. Accordingly, such extrinsic evidence is not admissible in the circumstances of this

⁶ **Aubrey Smith** case, above at p 657E to G.

case.

27. This then leaves the issue of whether on the extrinsic evidence referred to by the opposing respondents they have established a latent ambiguity in the will.
28. Again, the requirements of a latent ambiguity have been succinctly set out by Corbett J in the Aubrey Smith case. The relevant passage reads as follows:

“If the application of the words of the will to the external facts reveals what is termed a 'latent ambiguity' then additional evidence may be admitted to remove it. There are two types of latent ambiguity: the first is where the words of the will are equally applicable to two objects and there arises what is known as 'an equivocation'; and the second is where the words of the will are not clearly or definitely applicable to any known subject-matter. In both these cases further extrinsic evidence may be admitted but it would seem that only in the case of an equivocation (if at all) may direct declarations of intention by the testator before, at the time of or after the execution of the will be admitted, and only then when all other aids and evidence have failed to provide a solution to the problem.”⁷

(references omitted)

29. The opposing respondents have failed to establish that on the facts of the case they presented in this matter that an equivocation exists. They have also failed to establish that the words of the will are not clearly or definitely

⁷ **Aubrey Simth** case, above at pp 657H to 658C.

applicable to any known subject matter.

30. In the circumstances, the opposing respondents have failed to establish a 'latent ambiguity' on the facts of this case. Accordingly, they have failed to establish a basis for admitting the extrinsic evidence that they seek to rely on.
31. In the circumstances, for the reasons set out above, the applicant has established that he is entitled to the declaratory order set out in prayer 1 of the relevant Notice of Motion.
32. Whether applicant is entitled to the relief sought in prayers 2 and 3 of the said Notice of Motion will require a brief consideration of the right of *habitatio* itself. The question is, does it include the right to let or sub-let.
33. The right of *habitatio* has been classified as a personal servitude⁸, a limited real right.⁹ It allows the holder of such right to live in the house of another without detriment to the substance of the relevant property.¹⁰ The holder of such right may sublet.¹¹ The holder of such right may also let the right of *habitatio*.¹²
34. The opposing respondent have complained *inter alia* that the applicant's interpretation of clause B(i) of the will means that they will be evicted from their homes. Not at all, it simply means that they will have to come to an agreement with either the applicant or the second

⁸ **Kidson v Jimspeed Enterprises CC** 2009 (5) SA 246 (GNP) at 250C-E.

⁹ Above.

¹⁰ **Hendricks v Hendricks** 2016 (1) SA 511 (SCA) at 514F.

¹¹ **LAWSA**, 2nd Edition., Vol 24 para 605.

respondent on a reasonable market related rental for their homes. On the opposing respondents' own version, the houses built by the deceased for the fourth and fifth respondents were built essentially at the cost of the deceased.

35. In such circumstances it is not unreasonable to conclude that the deceased saw this as a mechanism to maintain his erstwhile spouse. As the applicant has pointed out, if his application for declaratory relief fails, the second respondent will have a claim against the estate for maintenance in any event.
36. In the circumstances, I conclude that the applicant is entitled to the declaratory relief sought in prayers 2 and 3 of the relevant Notice of Motion.
37. That leaves the issue of costs to be determined. The applicant only sought a costs order against those who opposed the relief he sought, otherwise he sought an order that the costs be borne by the estate. The third, fourth and fifth respondents have actively opposed this application. They have for the reasons set out herein not been successful in their opposition. In these circumstances, costs should follow the result.
38. Further, in circumstances where there are mainly fixed assets in the estate and no or insignificant cash assets, as appears to be the case in the present matter, to order that the costs be paid out of the estate will simply mean that the applicant will have to find the wherewithal to pay the said costs. This will create a cash flow problem for the

¹² **Arend v Estate Nakiba** 1927 CPD 8 at p10.

estate. This will not be equitable in the circumstances of this case. Having regard to the history involved and the nature of the opposition raised by the opposing respondent I find that the third, fourth and fifth respondents should pay the costs of this application, the one paying the others to be absolved.

In the circumstances, the following Order is made:

- 1) **DECLARATORY RELIEF AS SET OUT IN PRAYERS 1, 2 AND 3 OF THE NOTICE OF MOTION DATED 19 FEBRUARY 2020 IS AWARDED IN FAVOUR OF THE APPLICANT.**
- 2) **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.**

L LEVER

ACTING JUDGE

HIGH COURT, KIMBERLEY

NORTHERN CAPE DIVISION

Date of hearing: **6 NOVEMBER 2020**

Date of Judgment: **8 JANUARY 2021**

APPEARANCES:

For the applicant:

ADV S L ERASMUS

(oio Engelsman Magabane Inc.)

For the 3rd, 4th and 5th

Respondents:

ADV DC HATTINGH

(oio **Van De Wall Inc.**)