

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

Case No: 2033/2011

Heard on: 06/11/2012

Delivered on: 22/02/2013

In the matter between:

CHRISTINE ELAINE TROGER NO

1ST APPLICANT

ALISA KAYE COZZENS NO

2ND APPLICANT

and

SYDNEY REGINALD HUNT

1ST RESPONDENT

MARK HUGH HUNT

2ND RESPONDENT

JEFFREY EDWARD HUNT

3RD RESPONDENT

THE MASTER OF THE NORTHERN CAPE

4TH RESPONDENT

HIGH COURT KIMBERLEY

THE REGISTRAR OF DEEDS, KIMBERLEY

5TH RESPONDENT

THE REGISTRAR OF DEEDS, BLOEMFONTEIN

6TH RESPONDENT

JUDGMENT

MAMOSEBO AJ:

[1] The first applicant, Christine Elaine Troger (Troger), and the second applicant, Alisa Kay Cozzens (Cozzens), seek relief substantially in the following terms:

- 1.1 That a declaratory order be issued declaring that the *fideicommissum* created by the deceased, Reginald Hunt, in favour of the first and second respondents in respect of the immovable property set out in the notice of motion be declared *pro non scripto*.
- 1.2 That the properties set out in prayers 1.1 and 1.11 (specified in paragraph 6 below) be declared to fall within the deceased estate of Kathryn Hunt, the testator's widow;
- 1.3 That the fifth respondent (the Registrar of Deeds, Kimberley) be directed to effect the necessary changes in respect of the immovable properties in the Deeds Registry Office of Kimberley;
- 1.4 That the sixth respondent (the Registrar of Deeds, Bloemfontein) be directed to effect the necessary changes in respect of the properties listed in the Deeds Registry Office in Bloemfontein;
- 1.5 That the costs of the application be costs in the administration of the estate of Kathryn Hunt, unless the application is opposed, in which event the parties opposing the application shall be ordered to pay the costs of this application.

[2] The deceased (the testator) is Reginald Hunt. He passed away on 16 June 1998. He was married Out of Community of Property to Kathryn Hunt,

who is mentioned in para 1.2 (above). Prior to his marriage to Kathryn Hunt, the testator had three sons from a previous marriage. The sons are Sydney Reginald Hunt (the first respondent), Mark Hugh Hunt (the second respondent) and Bruce Hunt, who was disinherited and does not feature in these proceedings.

[3] On the other hand Kathryn Hunt had six children from her previous marriage. The first and second appellants are two of these children; they have also been appointed by the Master of the High Court executrixes of the estate of the late Kathryn Hunt, their mother.

[4] The testator (Reginald Hunt) left a last will and testament dated 17 March 1998, the validity of which is now in dispute for reasons that will follow. I cite only the relevant portions of the will, which read as follows:

“2. I appoint my wife KATHRYN ELAINE HUNT and my son MARK HUNT as Executors and Administrators of my Will and failing any one of them the remainder of them, thereby granting unto them all such power and authority as may be allowed in law especially that of assumption -----.

3.(a) I hereby bequeath my estate, movable and immovable of every description and wherever situate as follows:

(i) The property on which my dwelling house is situate being certain pieces of perpetual quitrent land being Portion 3, a portion of portion “Sydney's Hope” of the farm HV 17, situate in the division of Barkly West; measuring Five(5) morgen. On the death of my wife this property as well as the furniture, paintings and carpets in the house on the property shall go to one of my sons SYDNEY REGINALD HUNT or

MARK HUGH HUNT to be nominated or appointed in the Will of my wife in her absolute discretion. Should my wife make no nomination or appointment this property shall go to my son MARK HUGH HUNT.

- (ii) *All the rest of my immovable property with the exception of the farm RIETPUT.*

On the death of my wife this property shall go to my sons SYDNEY REGINALD HUNT and MARK HUGH HUNT in equal shares. On their respective deaths their shares of the property shall go to GEOFFREY EDWARD HUNT the son of my son SYDNEY REGINALD HUNT.

- (iii) *All my members interest in the Close Corporation REG HUNT STUD CORPORATION CC.*

On the death of my wife the members interest shall go to my sons SYDNEY REGINALD HUNT and MARK HUGH HUNT in equal shares. My wife shall not be entitled to sell the immovable property and water rights registered in the name of the Corporation and the Corporatio[n]'s cattle shall only be sold in the ordinary course of business.

My sons SYDNEY REGINALD HUNT and MARK HUGH HUNT shall have the right of habitation in respect of the houses they occupy on the Corporations immovable property---

- (ix) *All my furniture, curtains, linen, blankets, cutlery, ornaments, crockery, kitchen utensils, stoves, refrigerators*

and other assets contained in my dwelling house which are normally used in the dwelling house.

My wife shall lease the water rights on the immovable properties including the farm registered in the name of REG HUNT STUD CORPORATION CC with the exception of 8(eight) hectares to my sons SYDNEY REGINALD HUNT AND MARK HUGH HUNT, jointly, during her lifetime, for R500,00 (FIVE HUNDRED RAND) per allocated water hectare, per annum. My sons shall also pay for the water rights on the aforementioned 8(Eight) hectares. My sons SYDNEY REGINALD HUNT and MARK HUGH HUNT shall also have the right to the irrigation land in respect of which they pay the water rights.

My wife shall also lease the grazing land, on the immovable properties, to my son SYDNEY REGINALD HUNT and MARK HUGH HUNT, jointly, during her lifetime, for 80% (Eighty per cent) of the ruling price with a minimum of R25,00 (TWENTY FIVE RAND) per hectare. The grazing land on Sydney's Hope and Karee Kloof shall be excluded herefrom if my wife wishes to use it for her own livestock. The Kraals and feeding facilities on the immovable properties will be used jointly, by my wife and sons SYDNEY REGINALD HUNT and MARK HUGH HUNT. All rentals shall be paid quarterly in advance and if the rentals are not paid on due dates my wife shall have the right in her discretion, to cancel the leases. My sons shall also rear my wife's bull calves from the herds referred to in items 3(a)(v) and (vi) free of charge. My sons SYDNEY REGINALD HUNT and MARK HUGH HUNT, jointly, shall also supply

water for my dwelling house and livestock on Sydney's Hope and Karee Kloof free of charge.

My sons SYDNEY REGINALD HUNT and MARK HUGH HUNT shall not have the right to sublet any immovable property during the lifetime of my wife---

- (e) *The rest and residue of my estate movable and immovable wheresoever situate I bequeath to my sons SYDNEY REGINALD HUNT and MARK HUGH HUNT, in equal shares."*

[5] Geoffrey Edward Hunt, who is mentioned in clause (ii) of the quoted Will, is the third respondent in these proceedings whom the testator describes as "*the son of my son Sydney Reginald Hunt.*" The latter is the first respondent. Nothing turns on the alternate spelling of the name "Jeffrey" in the citation in this application.

[6] It is common cause that the eleven immovable properties referred to in para 1.2 and tabulated in this paragraph are held in the name of the testator's widow, Kathryn Hunt, in terms of Deed of Transfer T36/2000. In other words the applicants and their mother did not dispute, through any legal proceedings, that the testator's Will was invalid from the time of his death in June 1998 until the properties were transferred into Kathryn Hunt's name in 2000 (Deed of Transfer T36/2000), and thereafter apparently until 29 September 2005 when its validity was attacked in the manner set out in paras 8 and 9 below. The properties in dispute are the following:

6.1 The remainder of Portion 2 Wonderfontein of the Farm Waterval No. 14 District, Kimberley, Northern Cape Province in

the extent of 771,4570 (Seven Hundred and Seventy-One, Four Five Seven Zero) hectares;

6.2 Portion 5 Annex Wonderfontein of the Farm Waterval No. 14, District Kimberley, Northern Cape Province, in the extent of 128, 4798 (One Hundred and Twenty Eight, Four Seven Nine Eight) hectares;

6.3 Portion 11 (a Portion of Portion 1) of the Farm Witpan No. 13, District Kimberley, Northern Cape Province, in the extent of 1454, 8444 (One Thousand Four Hundred and Fifty –Four, Eight Four Four Four) hectares;

6.4 The remainder of Portion 1 Lynfontein of Farm Witpan No.13, District Kimberley, Northern Cape Province, in the extent of 1514, 7516 (One Thousand Five Hundred and Fourteen, Seven Five One Six) hectares;

6.5 Portion 8 of Rivierzicht of the Farm Doornfontein No.12, District Kimberley, Northern Cape Province, in the extent of 733,4112 (Seven Hundred and Thirty-Three, Four One One Two) hectares;

6.6 Portion 3 (a Portion of Portion 2) of the Farm Karee Kloof No. 312, District Barkley West, Northern Cape Province, in the extent of 4, 2827 (Four, Two Eight Two Seven) hectares;

6.7 The remainder of the Farm Karee Kloof No.312, District Barkly West, Northern Cape Province, in the extent of 789,7249 (Seven Hundred and Eighty – Nine, Seven Two Four Nine) hectares;

6.8 The Farm Headstream No.313, District Barkly West, Northern Cape Province, in the extent of 1437, 4020 (One Thousand Four Hundred and Thirty- Seven, Four Zero Two Zero) hectares;

6.9 The remainder of Portion 2 Sydney's Hope of the Farm KareeKloof No.312, District Barkly West, Northern Cape Province, in the extent of 876, 4578 (Eight Hundred and Seventy Six, Four Five Seven Eight) hectares;

6.10 The remainder of the Farm Rietfontein 1628, District Boshoff, Free State Province, in the extent of 553, 5432 (Five Hundred and Fifty Three, Five Four Three Two) hectares;

6.11 Portion 1 (Erasmusdale) of the Farm Rietfontein 1628, District Boshoff, Free State Province, in the extent of 924, 1111 (Nine Hundred and Twenty-Four, One One One One) hectares.

[7] Shortly after the death of the testator on 16 June 1998 Kathryn Hunt left South Africa to reside with her daughters, the applicants, who are domiciled in the United States of America, where she died on 16 April 2007.

[8] There is a dispute on whether the letter, annexure "PH4" to the applicant's papers, reached the Master of this High Court. The applicants claim that their mother (Kathryn Hunt) wrote the letter and forwarded it to that office. It is unnecessary, in my view, to determine the authenticity and destination of "PH4". What matters is that the applicants rely on its contents as a springboard to launch this

application. It carries the date of 29 September 2005 (seven years after the testator's death and about 18 months before Kathryn Hunt's death on 16 April 2007).

[9] I quote the most relevant part of **"PH4"** :

*"As Reg's health started to wane, his sons frequently pushed for change in his Will to benefit themselves. Many Wills were written during his illness, which varied dramatically depending on the current state of Reg's mind and emotions. The small town attorney who drafted the final Wills was himself extremely ill at the time and shortly after Reg's death he died of cancer. **Because of these aforementioned factors, the last Will that was produced prior to Reg tragically going into a coma, was ambiguous convoluted and difficult for all to interpret. It was also a significant departure from previous Wills he had written, leaving the bulk of the estate free and clear to me.***

Only now, after having several years to grieve, reflect and recuperate from this tragedy and dramatic change in my life do I realize how emotionally and physically exhausted I was when Reg passed away. I was very confused, alone and mentally incapable of making the decisions that were forced upon me. As an older widow left alone on a farm during a time of political turmoil in South Africa I desperately needed the love support and nurturing of my children and siblings in a safe environment. As my family could not afford to travel to, and spend time with me in South Africa I left quickly following Reg's death to join them for a period. I had no one to trust and look to for counselling regarding the settlement of the estate, but my step-sons, who I hoped to be trustworthy. My children and siblings in America encouraged me

to employ an attorney, but in my emotional state, I could not deal with any of the affairs.

*Looking back now I know that I was not myself during this time. I had a temporary breakdown that disabled my usually strong ability to be discerning and businesslike. I just required rest and solace to recuperate and foolishly relinquished the powers and authorities that I had to my step-sons. I was then forced into business decisions regarding issues that I could not perceive the implications of at the time. I am sorely disappointed in my step-sons. I did not anticipate, in my fatigued and clouded state, the deceit that would ensue. They did not look after my best interest, although Reg expected them to care for me as their mother. I feel robbed, abused and treated in a brazenly arrogant manor [sic]. They have twisted a convoluted Will, by their own admonition through advice from many attorneys, without keeping me and my family's best interest in mind. **It is my wish that this will settlement be revisited and interpreted.**"(My emphasis).*

[10] The executrixes, who are the applicants, are in this application merely echoing the sentiments purportedly expressed by their mother in "PH4" in the concluding paragraph that: "It is my wish that this will and settlement be revisited and interpreted". They are entitled to ask the Court to do that even without reference to the letter, "PH4".

[11] The executrixes contend that upon preparing the First and Final Liquidation and Distribution Account pertaining to the estate of the late Kathryn Hunt it became apparent to them that the immovable properties should have been registered and transferred into the name of Kathryn

Hunt “without any encumbrances” as has now happened. In short, no *fideicommissum* was created by the testator.

[12] The argument by AdvPuckrim SC, for the applicants, goes along these lines:

- (a) On an interpretation of clauses (i) and (ii) of the Will, they appear to consist of two separate paragraphs. On a plain interpretation of the two paragraphs it appears that the rest of the testator’s immovable property (but importantly with the exception of the farm Rietput) was bequeathed to “my wife” i.e. Kathryn Hunt. The proviso contained in this clause appears in the second paragraph and is ambiguous. On the one hand, the argument proceeds, it may be interpreted as meaning that on the death of Kathryn Hunt, the farm Rietput should go to the testator’s sons, Sydney Reginald Hunt and Mark Hugh Hunt, in equal shares, subject to the further proviso that on their respective deaths their share of the property should go to Geoffrey Edward Hunt, the son of Sydney Reginald Hunt.
- (b) On the other hand, Mr Puckrin contends, the said clause may also be interpreted to mean that on the death of Kathryn Hunt the immovable property, except the farm Rietput, should go to the testator’s sons, Sydney Reginald Hunt and Mark Hugh Hunt in equal shares.
- (c) In counsel’s view, seen in context and with particular reference to clauses 3(b) and (c) the Will therefore provides that both Sydney Reginald Hunt and Mark Hugh Hunt would inherit one half share of the farm Rietput, which on their respective deaths should go to

the son of Sydney Reginald Hunt being Geoffrey Edward Hunt, the third respondent.

- (d) The provisions of clause 3(a)(ix) seem to suggest that the remaining property was transferred free of any *fideicommissum*, counsel seek to persuade the Court.

[13] The first, second and third respondents (the sons and grandson respectively, of the testator) lodged an objection in terms of s35(1) of The **Administration of Estates Act 65 of 1965** against the L and D Account dated 03 September 2009 relating to the estate of Kathryn Hunt. The essence of their objection was that it was evident from the Will of the testator (Reginald Hunt) that the properties now in dispute were left to his widow, Kathryn Hunt, subject to a *fideicommissum* in favour of his two sons, the first and second respondents. What should be borne in mind, and is of particular relevance is that if the *fideicommissum* stipulation or element is declared *pro non scripto* all the immovable properties in question will devolve upon the estate of Kathryn Hunt free of any encumbrances. Of significance is that under the Will of Kathryn Hunt, executed on 12 October 2004, the only beneficiaries are the two applicants (Ms Troger and Ms Cozzens) and the Kathryn Elaine Hunt Living Trust. Nothing is left to Kathryn Hunt's four other children who were still alive or to the testator's (Reginald Hunt's) two sons and grandson whom he wished to benefit under his Will.

[14] Mr Puckrin has made the following concession, though, in his written Heads of Arguments which was not retracted:

“It is important to bear in mind that it is not disputed that the first and second respondents were to inherit the immovable properties in equal shares.”

[15] The issues which are to be determined are the following:

- (a) What was the intention of Reginald Hunt (the testator) in his Last Will and Testament? Was a *fideicommissum* created?
- (b) As contended for by the applicants, will inheriting the immovable property by the first and second respondents in equal undivided shares contravene the provisions of the Subdivision of Agricultural Land Act, 70 of 1970, resulting in the bequest being null and void?
- (c) Should the Court declare the *fideicommissum* in the Will *pro non scripto*?

[16] The rules applicable to the interpretation of Wills have been the subject of numerous decisions. I refer to only a few of these cases:

16.1 In **Robertson v Robertson’s Executors** 1914 AD 503 at 507 Innes ACJ expressed himself as follows:

“Now 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. In the present instance the testator clearly and plainly directs that his wife shall have no control over his estate during her life; but she comes into a court of law and demands such control. To grant her

request would be to vary the express provisions of the will, and it lies upon her to advance some compelling reason for what, upon the face of it, would be an improper order."

- 16.2 In **Cuming v Cuming and others** 1945 AD 201 at 213 **Davis AJA** cited with approval the following *dictum* by **Blackburn J** in **Allgood v Blake** (1873)LR8 Exh 160, 163 in which the requirements for the interpretation of a will were stated:

"The general rule is that, in construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words."

- 16.3 The following passage appears from RP Pace and WM Van der Westhuizen on Wills and Trusts, Issue 16 at 46(3) para 23.2:
If one is to condense all the salient requirements for the interpretation of a will into one paragraph the summary of Blackburn J in the case of **Allgood v Blake**(1873)LR 8 Exh 160 163 (quoted with approval in **Cuming v Cuming and others**1945 AD 201 could probably not be improved upon:

"But the court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has, by blunder, expressed what he did not mean. And the general rule, we believe, is undisputed, that,

in trying to get at the intention of the testator, we are to take the whole of the will, construe it altogether, and give the words their natural meaning (or, if they have acquired a technical sense, their technical meaning) unless, when applied to the subject matter which the testator presumably had in his mind, they produce an inconsistency with other parts of the will, or an absurdity or inconvenience so great as to convince the court that the words could not have been used in their proper signification, and to justify the court in putting on them some other signification which, though less proper, is one which the court thinks the words will bear.”

[17] On the question of the establishment of a *fideicommissum* the Courts had this to say:

18.1 In **Gordon’s Bay Estates v Smuts and Others** 1923 AD 160 at 165 **Juta JA** states:

“The first question which falls to be determined is whether or not the will created a fideicommissum in respect of the farm Gustrouw; for it is only if that is answered in the affirmative that the further question of accrual (jus accrescendi) need be considered.

The main rule of construction is to ascertain the intention of the testatrix. To this, all other canons of construction must give way, as Voet sums up at the end of his long and elaborate book on fideicommissa: indeed, he says that the general rules are often fallacious. Even where a testator uses the word "fideicommissum," that is not conclusive in the face of other clear expressions, showing a contrary intention

(DE VILLIERS, C.J., in van Breda v The Master, 7 J. 363). So where a usufruct is bequeathed, with the addition of a prohibition on alienation, the general rule, that in such a case the full ownership is deemed to have been bequeathed (Voet, 7.1.10 v. d. Keessell Th. 372, inter alios), must give way to the intention to be gathered from the will as a whole (Samaradiwakara v de Saram, D.C., reported 1911 AD 465). That being so, a decision upon one will is not of much assistance in construing another will, the language in both not being the same.”

At 166 Juta JA continues:

“The effect of a *fideicommissum*, as a general rule, is to vest the ownership of the property in the beneficiary at whose death the property is to devolve on the third person. Do the words in this will show any intention of vesting the ownership in Carl and his wife? The well-established rule in the Roman-Dutch law is that, in case of doubt, the construction should be against a *fideicommissum*. There is no need to invoke that rule here, because there are expressions in the Will which clearly show that there was no intention of vesting the ownership in Carl and his wife, and, therefore, no intention of creating a *fideicommissum*.”

18.2 In **Brits v Hopkinson** 1923 AD 492 at 495 **Wessels JA** decided:

“Before the Court can construe a testamentary disposition to be a fideicommissum it must be satisfied

beyond a reasonable doubt that the testator intended to burden the bequest with a fideicommissum.

To impose a fideicommissum for the benefit of succeeding generations, the words employed must not be vague and indefinite, but must be sufficiently clear to show an intention on the part of the testators that the heirs are not free to deal with the property either during their lifetime or after their death, but that they must allow the property to go to their heirs. (Van Heerden v Van Heerden's Executors, 1909, T.S at p. 291).”

[18] With these principles in mind I deal with the crux of the clauses in the testator’s Will and the submission by Adv De Bruin SC, for the first, second and third respondents (the testator’s sons and grandson, respectively), which I find persuasive.

[19] The testator in a straightforward manner devised by will as follows in the introductory part.

“I hereby bequeath my estate, movable and immovable of every description and wherever situate as follows:

(a) To my wife Kathryn Elaine Hunt:”

What is noteworthy is that there is no interruption or intervention between the testator’s express intention to give or bequeath his estate and to whom he does so.

[20] The bequest in clause 3(a)(i) is to the testator’s wife, Kathryn Hunt. That immovable property is meticulously described, as in a Deeds Register. It is the property on which the dwelling house is situated, a portion of

Sydneys Hope, he states. In the same clause (a)(i) the testator says that: “On the death of my wife this property ---- shall go to one of my sons Sydney Reginald Hunt or Mark Hugh Hunt.” Kathryn Hunt had to stipulate in her Will who of the two must inherit the farm, in default of which Mark Hugh Hunt becomes the beneficiary. I cannot see how “this property” can give rise to any speculation.

[21] In clause 3(a)(ii) the “All the rest of my immovable property with the exception of the farm Rietput” is the title of the subject-matter which the testator dealt with next. “All the rest of my immovable property” means that leave out “a portion of Sydneys Hope” because I have already dealt with it in clause (a)(i) and as far as Rietput is concerned I deal with it later in clause 3(b) and 3(c). Clause 3(a)(ii) therefore deals with nine (9) of the eleven (11) properties which I tabulated in paragraph 6 *supra*.

[22] In summary therefore what the testator devises in clause 3(a)(ii) in respect of the nine immovable properties in his own words:

“On the death of my wife this property as well as the furniture, paintings and carpets in the house on the property shall go to one of my sons SYDNEY REGINALD HUNT or MARK HUGH HUNT to be nominated or appointed in the Will of my wife in her absolute discretion. Should my wife make no nomination or appointment this property shall go to my son MARK HUGH HUNT.

All the rest of my immovable property with the exception of the farm RIETPUT.

On the death of my wife this property shall go to my sons SYDNEY REGINALD HUNT and MARK HUGH HUNT in equal shares. On their respective deaths their shares of the property shall go to

GEOFFRY EDWARD HUNT the son of my son SYDNEY REGINALD HUNT.”

[23] Concerning the farm Rietput the testator states at 3(b) and 3(c):

24.1 “To my son Sydney Reginald Hunt:

(i) One half share of the farm Rietput.

On his death it shall go to his son Geoffrey Edward Hunt.”

24.2 “To my son Mark Hugh Hunt:

(v) One half share of the farm Rietput. On his death it shall go to Geoffrey Edward Hunt, son of my son Sydney Reginald Hunt.”

[24] I therefore find, and must agree with Mr De Bruin, that the rest of the testator’s immovable properties (excluding only the two immovable properties that I have distinguished) are bequeathed to Kathryn Hunt, subject to *afedeicommissum* in favour of Sydney Reginald Hunt and Mark Hugh Hunt and on their respective deaths the properties shall devolve upon Geoffrey Edward Hunt. This is, indeed, a classical *fideicommissum* that was established by virtue of the stipulation in clause 3(a)(ii) of the Will.

[25] The applicants contend that at all material times the immovable properties in question were and still remain agricultural land and that s3 of the **Subdivision of Agricultural Land Act, 70 of 1970** (the SAL Act) provides specifically that there is a prohibition against certain actions relating to the subdivision of agricultural land. I now examine the relevant provisions of the SAL Act – which are sections 2,3,4 and 5.

[26] It makes sense to begin with s3 of the **SAL Act**. It states:

26.1 “**3.Prohibition of certain actions regarding agricultural land.—**

Subject to the provisions of section 2—

- (a) *agricultural land shall not be subdivided;*
- (b) *no undivided share in agricultural land not already held by any person, shall vest in any person;*
- (c) *no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;*
- (e)(i) *no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act No. 27 of 1956); and*
- (g) *no public notice to the effect that a scheme relating to agricultural land or any portion thereof has been prepared or submitted under the ordinance in question, shall be given, unless the Minister has consented in writing.”*

26.2 Section 2 provides that:

“2. *Actions which are excluded from application of Act.—*
The provisions of this Act shall not apply in respect of—

- (a)(i) *any subdivision of land for the purpose of transferring a portion thereof to the State or a statutory body;*
- (ii) *the transfer of an undivided share in land to the State or a statutory body;*
- (iii) *the sale or grant of any right to any portion of agricultural land to the State or a statutory body;*

[Para. (a) substituted by s. 2 (a) of Act No. 55 of 1972 and by s. 2 of Act No. 18 of 1977 and amended by s. 1 of Act No. 49 of 1996.]

Wording of Sections

- (b) *any subdivision of, or the passing of an undivided share in, any land in accordance with a testamentary disposition or intestate succession, if the testator died before the commencement of this Act;*
- (c) *the passing of an undivided share in any land in accordance with a contract entered into prior to the commencement of this Act;”*

26.3 Section 4 reads:

“4. Application for consent of Minister, and imposition, enforcement or withdrawal of conditions by him.—(1)

(a) Any application for the consent of the Minister for the purposes of section 3 shall—

(i) in the case where any act referred to in paragraphs (a) to (e) of that section is contemplated, be made by the owner of the land concerned;

(2) The Minister may in his discretion refuse or—

(a) on such conditions, including conditions as to the purpose for or manner in which the land in question may be used, as he deems fit, grant any such application;”

26.4 Section 5 thereof stipulates:

“5. Succession.—(1) If the Minister does not in terms of section 4 consent to the subdivision of any particular agricultural land in accordance with any testamentary disposition or intestate succession or to the vesting of any undivided share in such land in accordance therewith, and no agreement is reached as to a subdivision or vesting in respect of which the Minister grants his consent in terms of the said section 4, the executor of the estate concerned shall realize the land or undivided share concerned, as the case may be, and dispose of the nett proceeds thereof in accordance with the said testamentary disposition or intestate succession, as the case may be.”

[27] It is helpful as a starting point to revisit the common law on when ownership passes to the acquirer of land. In **Frye’s (Pty) Ltd v Ries** 1957(3) SA 575(A) at 582A-C **Hoexter JA** held:

“As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there

should not be any doubt as to the ownership of the persons in whose names real rights are registered. Theoretically no doubt the act of registration is regarded as notice to all the world of the ownership of the real right which is registered. That merely means that the person in whose name a real right is registered can prove his ownership by producing the registered deed. Generally speaking, no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person he is entitled to do so, not because that person is deemed to know that he is the owner, but because he is in fact the owner by virtue of the registration of his right of ownership.”

[28] In **Eksteen & Another v Pienaar & Another** 1969(1) SA 17(O) at 20A-D the Court stated:

*“Although the dominium is still registered in the name of the deceased fiduciary with the result that it is her executor who has to pass transfer to the fideicommissaries, the ownership in the property is acquired by the latter at the death of the deceased. The general rule is of course that ownership of land passes at the moment that delivery of the immovable is given to the transferee and that occurs at the moment his name is entered in the register as the new dominus of the property (per WESSELS, J.A., in *Breytenbach v van Wijk*, 1923 AD 541 at p. B 547). But this general rule is subject to certain exceptions, one of which relates to succession by a fideicommissary on the death of the fiduciary. (*Anstruther and Others v Chiappini's Trustees*, 3 Searle 91 at p. 98; *Steyn on Wills*, 2nd ed., p. 137, cf. *van der Keessel Theses Selecta* 202; *Voet*, 41.1.41 and 18.1.15 ad fin.). Other exceptions*

are when ownership is acquired by accession, prescription, statute, marriage in community and a sequestration order. In Rosenberg v Dry's Executors and Others, 1911 AD 679 at p. 689, Lord DE VILLIERS said that:

'For the sake of completeness of his records the Registrar of Deeds properly requires that a wife, who after her husband's death wishes to deal with her half-share in any land, shall first receive transfer, but the practice cannot alter the doctrine of our law that, even without registration, the dominium passes by reason of the community.'"

[29] In **Ex Parte Menzies et Uxor** 1993(3) SA 799(C) at 805G-H King J stated:

"It is now accepted that a fideicommissary acquires ownership of immovable property upon the fulfilment of the fideicommissary condition without the need for registration. (Carey Miller (op cit at 170); Eksteen and Another v Pienaar and Another 1969 (1) SA 17 (O) at 19D-20D; Corbett, Hahlo, Hofmeyr and Kahn The Law of Succession in South Africa at 329 especially n 542. As to the registration practice where a fideicommissum is concerned, see Jones Conveyancing in South Africa 4th ed at 161.)"

[30] In **Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another** 2008(1) SA 654(SCA) the Supreme Court of Appeal had to determine the validity of a sale of sub-divided agricultural land where there was no prior Ministerial consent for such subdivision. The SCA held that the land was not agricultural land and that the agreement was valid and binding. This decision caused uncertainty and was taken on appeal.

The Constitutional Court in **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd** 2009 (1) SA 337 (CC) in reversing the SCA decision held:

“[84] ---The questions are rather whether an interpretation which, as indicated in para [81] above, accords a role to national government in the administration of 'agricultural land' through the provisions of the Agricultural Land Act, is one which would promote the spirit, purport and objects of the Bill of Rights or, if necessary, one which would better promote those considerations.

[85] In my judgment both of these questions are to be answered in the affirmative. Whatever powers of administration municipalities may have over land such as that in dispute, according a role to the national government in the administration thereof can only serve to advance the cause of the rights invoked by the amici and the Minister. It cannot be excluded that excessive fragmentation of 'agricultural land', be it arable E land or grazing land, may result in an inadequate availability of food, and the Agricultural Land Act is a valuable tool enabling the State to carry out necessary controls. As the Minister pointed out, international law recognises that the content of the right to food has the twin elements of availability and accessibility. The first element refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally. It also requires the existence of opportunities for individuals to produce food for their own use. The second element requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use. In respect of both elements there is a measure of overlap with the State's obligation under s 25(5) of the Constitution to facilitate equitable access to 'agricultural land', and with the State's

obligation under s 24 of the Constitution to conserve the environment. ”

The Subdivision of the Agricultural land Act further makes provision for an executor to sell the land or the undivided share, should the Ministerial consent not be granted for the subdivision thereof and for the proceeds of such sale to be divided according to the provisions of the Will.

[31] The testator clearly spells out that Kathryn Hunt, Sydney Reginald Hunt and Mark Hugh Hunt must transfer this property to the third Respondent, Geoffrey Hugh Hunt, therefore, all of them are subject to this *fideicommissum*. This case is distinguishable from **Geue and Another v Van Der Lith and Another** 2004 (3) SA 333 (SCA) in that, in Geue, an undivided portion of agricultural land was sold by the owner without prior Ministerial consent as required by section 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970, although the sale was subject to a suspensive condition of the ministerial consent being obtained. There is no question of sale of the agricultural land in this matter. The testator has specifically left this immovable property to his wife, Kathryn Hunt and upon her death, the property is to evolve to his two sons, Sydney Reginald Hunt and Mark Hugh Hunt in equal undivided shares and upon their death, to Geoffrey Edward Hunt.

[32] Applicants argue that the *fideicommissum* in contravention of the **Subdivision of the Agricultural Land Act 70 of 1970** therefore unlawful. They contend that this *fideicommissum* is unenforceable and should fall away. This argument is against the backdrop of a restrictive interpretation. Counsel relies on the prohibition in terms of section 3 of the Act pertaining to the subdivision of agricultural land. It is common

cause that in a *fideicommissum*, as stated by Joubert 1953 THRHR 244, the property vests in the fiduciary subject to a successive right of the *fideicommissary* to the dominion therein. The rights of alienation of the property of the fiduciary are therefore limited, as the object of the *fideicommissary* is to provide for the benefit to be passed on to another beneficiary, in this specific instance, the third respondent, Geoffrey Edward Hunt.

[33] It could never have been the intention of the legislature to deprive beneficiaries of their inheritance purely based on the restrictive interpretation of section 3 of the Subdivision of Agricultural Land Act, 1970. Respondent's counsel has correctly pointed out that the provisions must be read in its entirety and not piecemeal. The Minister can still be approached for his consent and the provisions of section 5 (1) and (2) can be applied. In **Cussons & Andere v Kroon** 2001 (4) SA 833 (SCA) at 838 E-H **Streicher JA** held that section 3(b) of the Act does not prohibit the registration of a partnership asset in the name of a partner and, if that happens, the other partner or partners do not gain a real right in the property but only a personal right against the partner in terms of which she or he is bound to treat the property as a partnership asset.

[34] I have already referred to the Constitutional Court's view in Wary Holdings (supra) that the intention of the legislature with the Subdivision of Agricultural Land Act was to ensure the continued existence of agricultural land and the Minister's control over it irrespective of the establishment of transitional councils. Clearly, first and second respondents are farming on this land and must continue to do so until the property vests in the third respondent according to the

testator's Will. I do not see how their use and enjoyment of such property subject to the *fideicommissum* can in any way contravene the Act or the wishes of the testator.

[35] On the question of costs. Both counsel for the applicants and the respondents have submitted that the costs should include costs of two counsel and be paid from the estate of Kathryn Hunt. I agree.

[36] In the result I make the following order:

- 1. The application is dismissed.**
- 2. The costs of this application, which includes the employment of two counsel, will be costs in the administration of the estate of the late Kathryn Elaine Hunt, failing which, by the applicants jointly and severally, the one paying the other to be absolved.**

M C MAMOSEBO

ACTING JUDGE

NORTHERN CAPE DIVISION

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