

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ADVOCATE S G REIN in his capacity as
Curator-ad-Litem to the minor children
CATHERINE AND ALEXANDRA GIBAUD

Appellant

and

LEONARD FAIRBANK FLEISCHER in his capacity
as Administrator of the Estate of the
late ARTHUR LAWRENCE GIBAUD

1st Respondent

and

ARTHUR CLIFFORD FLETCHER GIBAUD

2nd Respondent

and

ELIZABETH GRAY GIBAUD

3rd Respondent

and

MAUREEN ANNETTE BUTCHER (born Gibaud)

4th Respondent

CORAM: KOTzé, MILLER, JOUBERT,
HOEXTER et HEFER, JJA

HEARD: 21 August 1984

DELIVERED: 18 September 1984

J U D G M E N T

HOEXTER, JA

The

The late Arthur Lawrence Gibaud ("the testator") died at Port Elizabeth in 1962. He was survived by his wife ("the widow"), his daughter, and his two sons Frank (born in 1938) and Arthur (born in 1944). The widow died in 1982 when Frank and Arthur were both more than 35 years old. Meanwhile Arthur had married, and thereafter in 1978, had divorced Elizabeth Gray Gibaud (formerly Turland, born Todd). To Arthur's former wife I shall refer as "Elizabeth". Of the marriage between Arthur and Elizabeth two daughters (Catherine and Alexandra) were born. Both are minors.

By his will dated 25 January 1956 the testator created a trust in respect of the residue of his estate. The will provided that until her death or remarriage the widow should receive annually not less than £2000 while unmarried or £1000 if she remarried; and further directed that provided the annual income from his estate exceeded £2000 (while the widow remained unmarried) or £1000 (in the event of her remarriage)

remarriage) there should be paid from such excess income to each of his two sons, upon such son reaching the age of 21 years, a monthly allowance of £30 until the capital of his inheritance devolved upon him in terms of clause 4 of the will, or until the death or insolvency of such son, whichever should happen first.

Clause 4 of the will contained the following directions -

"4. After the death of my said wife my Executors shall -

(a) DIVIDE my residuary estate in equal shares between my two sons, provided however that the shares of each son shall remain under the administration and control of my Executors IN TRUST and shall not vest in him until he reaches the age of thirty-five years when his inheritance shall be paid out subject to this condition however, that in the event of any son dying or becoming insolvent before that date his share of inheritance shall devolve upon his lawful issue, if any, per stirpes by representation, and if such son leaves no issue then his share devolve upon his brother or the lawful issue of his deceased brother per stirpes by representation.

(b) PAY

(b) PAY the whole of the income accruing on my sons's shares in the interim from the date such son reaches the age of 21 years until he reaches the age of 35 years or until the prior death or insolvency of such son, whichever shall first happen, to him

Clause 6 of the will contained a forfeiture stipulation. Clause 6 read -

"6. I direct that my estate shall remain vested in my said Executors IN TRUST and shall not vest in any beneficiaries under this my Will until the time for distribution of my said estate shall have arrived, and I further direct that no beneficiary under my said Will shall anticipate or encumber his interest or inheritance under my said Will under penalty of forfeiture."

The marriage between Arthur and Elizabeth was dissolved in the Cape Provincial Division on 8 August 1978. Elizabeth was the plaintiff in the action. A written agreement ("the consent paper") was incorporated in the final order of divorce. Paragraph 12 of the consent paper reads -

"The Defendant undertakes to pay to the Plaintiff and the said children (i.e.

Catherine

Catherine and Alexandra) one quarter each of the entire proceeds which the Defendant is due to inherit from his late father's estate in the event of the death of his mother, and for this purpose he agrees that these monies shall be paid directly to the Plaintiff by Fidelity Bank and Trust Company Limited of Port Elizabeth in their capacities as Executors in the said estate. Further, the Defendant undertakes to pay to the Plaintiff and the children one quarter each of any monies he may inherit from his mother and from his cousin, SYBIL GIBAUD. Any monies due to the children in terms hereof shall be dealt with as provided in Clause 11 hereof. The Defendant shall be entitled to retain as his property the remaining quarter of the inheritance referred to in this clause."

The trust company in Port Elizabeth mentioned in paragraph 12 of the consent paper is the administrator in the testator's estate. In February 1983 the secretary of that company ("the applicant") filed an application on notice of motion in the Eastern Cape Division. Annexed to the applicant's founding affidavit were copies of the testator's will and the consent paper in the aforesaid divorce order granted on 8 August 1978. Calling attention to the forfeiture stipulation in

in clause 6 of the will and the undertaking by Arthur set forth in paragraph 12 of the consent paper the applicant submitted that the latter amounted to an anticipation or encumbrance by Arthur of his interest or inheritance under the testator's will which was hit by the provisions of clause 6 of the will; and that in consequence Arthur had incurred the penalty of forfeiture.

On 22 February 1983 the Eastern Cape Division appointed Mr Advocate S G Rein as curator-ad-litem to the minor children Catherine and Alexandra, and at the same time issued a rule nisi calling upon interested parties to show cause why it should not be ordered:

- (a) that Arthur had forfeited his inheritance from the estate of the testator;
- (b) that the administrator in the testator's estate should hold such inheritance in trust for the issue of Arthur until they respectively attain the age of 35 years;
- (c) that the costs of the application be paid by the testator's estate or alternatively by any respondent who might unsuccessfully oppose the application.

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In due course the curator-ad-litem filed with the Court a written report wherein he expressed the view that the undertaking by Arthur in paragraph 12 of the consent paper did constitute an anticipation by Arthur of his inheritance hit by the provisions of the forfeiture clause in the will. Pointing out that the will does not direct on whom, in the event of such forfeiture, the inheritance is to devolve, the curator-ad-litem's report proceeded to consider various possibilities in this connection and then expressed the further view that the relevant share of the residue devolved on Arthur's daughters Catherine and Alexandra, subject to the other terms of the will. Two written reports filed with the Court by the Master of the Eastern Cape Division expressed views coinciding with those of the curator-ad-litem.

Prior to the extended return day of the rule nisi Arthur wrote to the Registrar of the Court declaring his intention to oppose the application in person. In the event Arthur was unable to attend the hearing on the return

day

day. He nevertheless informed the Registrar that he desired no postponement thereof. Elizabeth appeared in person on the return day and resisted confirmation of the rule. Before the Court on the return day there was further a letter addressed to it by Catherine, aged twelve years. She informed the Court that her own researches into the subject impelled her to the conclusion that Arthur had not anticipated his inheritance.

On the return day the matter came before a Full Bench. In a judgment delivered by Mr. Justice KANNEMEYER, MULLINS J. concurring, the Court rejected the contention that Arthur had forfeited his inheritance under the testator's will. Accordingly the rule nisi was discharged. It was further ordered that the costs of the application and also the costs (if any) of Elizabeth and Arthur in opposing confirmation of the rule be paid, as between attorney and client, out of the testator's estate. The curator-ad-litem applied for and

obtained

obtained the leave of the Court below to appeal to this Court, costs of such application to be costs in the appeal. The appeal is by the curator-ad-litem only. The applicant submits to the judgment of this Court.

In everyday speech the word "anticipate" is one of very wide import, variously embracing notions such as forestalling, expecting, foretasting, apprehending, intercepting and forecasting - to mention a few. Some guide to the rather more technical meaning to be assigned to the word "anticipate" in the contextual setting of a forfeiture clause in a will is afforded by the decision of a Full Bench of the Eastern Cape Division in Ex Parte National Board of Executors (EL) Ltd., 1978(3) SA 445(E). That case involved the interpretation of the will of a father who had nominated his two sons, or their lawful descendants by representation, as the sole heirs to the residue of his estate, subject to the condition that such residue be paid to his trustees (one of whom was one of the aforesaid sons) to hold in trust pending the death of his widow

widow (the mother of the aforesaid sons) to whom the testator had bequeathed a fixed income from the interest thereon for the rest of her life. In clause 8(h) of the will it was further provided that -

"No beneficiary shall cede, assign, mortgage or anticipate in any way his or her rights under this will"....

and that upon breach of this condition -

".....the rights of such beneficiary shall immediately cease"

The two sons and their mother survived the father. At the death of the father the two sons therefore acquired a vested right to claim their inheritance upon the trust coming to an end in the future (at the death of their mother), subject to the condition that a breach of the penal clause by either son would result in forfeiture by him. It was common cause that during the subsistence of the trust, and subject to its terms, the full dominium in the assets of the estate vested in the trustees, to whom the will gave wide powers of administration and control. An application by the co-executors in the

estate

estate sought a declaration by the Court that any loans made by the trust to the two sons would not involve a breach of the forfeiture clause. The Court (EKSTEEN, J and HOWIE, AJ) declined to make such an Order. The judgment of the Court was delivered by EKSTEEN, J, who observed -

"It seems to me that the words 'anticipate in any way' in clause 8(h) import a prohibition against the sons of the testator -or any other beneficiaries for that matter - obtaining any part of the benefits due to devolve upon them at a time earlier than that provided for in the will. Insofar as those benefits relate to the capital of the estate the will provides that the heirs will only be entitled to receive it on the death of the testator's widow when the trust comes to an end. They are therefore precluded by the provisions of clause 8(h) from in any way obtaining any benefit pertaining to such capital before the time. Clearly an interest-free, unsecured loan of part of the capital to a heir would constitute such an anticipation and would be tantamount to a part of the capital being given to him before he is entitled to receive it."

The conclusion at which the learned judge arrived (at 452D/E) was -

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"In my view, therefore, any unsecured or inadequately secured loan, or any interest-free loan or loan at a rate of interest lower than the prevailing rate made from the capital of the trust to either of the sons of the testator would amount to an anticipation of part of their rights under the will"

In the instant case the Court a quo in the course of its judgment discussed the line of reasoning adopted in the National Board of Executors case (supra) and thereafter commented thus on the facts of the application before it -

"In my view what the testator intended and wished to ensure was that his sons should receive their inheritances intact when they fell due. He was not interested in what they might do with the money inherited once it became theirs, nor did he wish to control its eventual devolution. Had he wished to do so he could have made appropriate provisions to achieve such an objective. Instead, what he did was to prohibit the encumbrance or anticipation of the inheritances. By prohibiting anticipation he prohibited, to adapt the words of EKSTEEN, J., Arthur from obtaining any part of the benefits due to devolve upon him under his will earlier than at the time stipulated therein. In my view Arthur has not done this."

A little later in his judgment KANNEMEYER, J put the matter

thus -

thus -

"I am satisfied that the word 'anticipate' as here used is not used in the sense of 'look forward to' but rather as meaning 'use in advance' or 'accelerate'. What must not be 'used in advance' or 'accelerated' is the benefit accruing to Arthur under the testator's will. He has not caused this to happen. On his thirty-fifth birthday his inheritance vested in him and he has enjoyed no benefit therefrom before that date."

Having decided that Arthur had not 'anticipated' his inheritance the learned Judge proceeded to consider whether Arthur had breached the forfeiture clause by "encumbering" his inheritance. On the authority of certain dicta by INNES, CJ, in

Hollis v Registrar of Deeds, 1904 TS 603, KANNEMEYER, J

concluded -

"I do not consider that property rights can be 'encumbered' unless another party obtains a real right therein. A contract giving a jus in personam which would entitle the other party to a judgment ad solvendam at some future time if the contract was breached does not, in my view, constitute an 'encumbrance'".

Lastly, the learned Judge expressed the view that the reference

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in the forfeiture clause to the beneficiary's "interest" did not serve to bring Arthur's undertaking in the consent paper within the scope of the prohibition. In this regard KANNEMEYER, J said -

"The 'interest', in my view is not the hope of eventual inheritance but refers rather to (the) intermediate interest the sons have in receiving £30 per month - if available - during their mother's lifetime and the whole income of their share of the inheritance after her death and for the period from their twenty-first to their thirty-fifth birthdays."

In his argument before this Court the curator-ad-litem urged that the particular meaning of "anticipate" selected by the Court in the National Board of Executors case (supra) had reference to the peculiar facts of that case, and was not intended to be an exhaustive definition of the word. This is no doubt so. It would hardly be possible, I think, to hit upon any general formula applicable to all will cases involving forfeiture clauses designed to discourage "anticipation" of an inheritance by a beneficiary.

Nevertheless

Nevertheless the line of reasoning followed by EKSTEEN, J in the National Board of Executors case (supra) seems to me to be helpful to a consideration of the facts and the probable intention of the testator in the present case.

The points which arise in the present case are somewhat narrow and in my judgment they do not admit of much elaboration. Mr Rein has pressed upon us that "anticipate" is wide enough to comprehend the concept of a "dealing with in advance"; and, so the argument proceeds, Arthur's undertaking in the consent paper represented a dealing in advance with his inheritance. I am unable to accept that argument. To my mind it seeks to put upon the words of Arthur's undertaking to Elizabeth an entirely forced construction. In that undertaking, so it seems to me, Arthur did no more than to promise to pay to Elizabeth and their daughters three-quarters of what he hoped he would inherit in terms of the testator's will. The fact that in the

the undertaking Arthur went so far as to bind himself contractually so to deal with his inheritance, after it should become due to him, did not involve any "dealing in advance" with the inheritance before it did in fact become due to him.

The position may be tested from two different angles. One asks, first, whether Arthur's undertaking in paragraph 12 of the consent paper resulted in any benefit to Arthur from his inheritance before it actually fell due to him. Benefit from a patrimony necessarily connotes, I think, the gaining by the beneficiary of some tangible advantage expressible in financial terms. This question must be answered in the negative. Despite his contractual obligation to Elizabeth and his daughters Arthur obtained no financial advantage therefrom before the inheritance fell due; and no benefit flowing to Arthur from the inheritance was in consequence of the undertaking in any way accelerated.

Next,.....

Next, one inquires whether as a result of Arthur's undertaking, and until his inheritance fell due, such inheritance was in any way diminished, prejudiced, or put at risk.

Again the answer is no. I should add that in my opinion no significance attaches to the feature that in paragraph 12 of the consent paper Arthur agreed that Elizabeth and his daughters would be paid directly by the executors in the estate of the testator. If a promise to pay over to another some (or indeed all) of one's future inheritance does not by itself involve "anticipation" of the inheritance, mere administrative arrangements to lend business efficacy to the carrying out of the promise cannot, I consider, alter the juristic quality of the transaction. In this connection it is necessary to refer briefly to the following passage in the judgment of the Court a quo. In dealing with the first limb of the inquiry (whether Arthur had anticipated his inheritance) KANNEMEYER, J said of the applicant:

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"He was not bound by the provision in clause 12 of the consent paper to the effect that the money should be paid directly to Mrs Elizabeth Gibaud as neither he nor the Fidelity Bank were parties to the consent paper. Thus Arthur has not precluded himself from getting his entire inheritance on due date nor has he obtained any part or benefit of it in anticipation of that date."

It seems to me, with respect, that whether or not the applicant was a party to the consent paper is irrelevant to the inquiry. Even if the applicant had so been party to Arthur's undertaking no legal duty would have rested upon the applicant to do anything in connection with Arthur's inheritance unless and until the inheritance fell due in terms of the will.

I turn to consider whether by his undertaking in the consent paper Arthur "encumbered" his inheritance. Reference has already been made to the fact that on this part of the case the Court a quo relied upon the decision in Hollis v Registrar of Deeds (supra). Dealing with the provisions

provisions of sec. 3(i) of Transvaal Proclamation No.10 of 1902, INNES, CJ (in whose judgment in that case WESSELS and MASON, JJ concurred) observed at p 607:

"'Encumbrance' means a real burden on the land, a portion of the dominium parted with by the owner. It does not mean any reference to the land in a contract, giving a mere action in personam to the contracting party."

If in the present case, for example, Arthur had ceded his incorporeal right to his inheritance in security for a debt incurred by him or for advances made to him, then the cessionary would have stood in relation to such incorporeal right in the same position as a pledgee of movables accompanied by delivery (cf. Sandilands v Sandilands' Trustee & Paul, 1913 CPD 632 at 636.) But on the strength of the undertaking in the consent paper Elizabeth obtained no real rights whatever in respect of Arthur's inheritance. I agree with the judgment of the Court below that Elizabeth thereby acquired no more than a personal right against Arthur to

demand

demand performance of his obligation after the date of its performance had fallen due; and that as far as Arthur's inheritance was concerned the acquisition of such a personal right did not represent an "encumbrance."

It is a canon of construction that if in regard to the scope of a forfeiture clause in a will doubt or uncertainty exists as to the intention of the testator, the forfeiture clause should be restrictively interpreted. See: Ex Parte Administrators Estate Sandler, 1976(4) SA 930 (C), where the relevant decisions are collected at 934E/H. In my view it cannot be fairly collected from the testator's will as a whole that an undertaking such as is contained in paragraph 12 of the consent paper is hit by the forfeiture clause in the will.

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The interpretation for which the curator-ad-litem contends seems to me to involve a construction contrary to what the plain words of the forfeiture clause import. The sense of those words, in the context of the will, seem to me to be clear enough to dispel any real doubt or uncertainty as to the intention of the testator. I am accordingly of the opinion that the Court a quo came to the correct conclusion upon the application and that the appeal fails.

There remains the question of costs. At the hearing of the appeal the only respondent represented was the third respondent (Elizabeth). In matters affecting the interpretation of wills costs of suit are generally, but not invariably, ordered to come out of the estate. Mr Dison, who argued the appeal on behalf of the third respondent, submitted that in the event of the appeal being dismissed this Court should order the third respondent's costs of appeal to come out of the estate; but that there was no good reason why the curator-ad-litem's costs of appeal should be

should be borne by the estate. Counsel for Elizabeth urged that when the curator-ad-litem prosecuted the appeal he ought to have appreciated that he was thereby incurring the risk of having to bear the costs of an unsuccessful appeal.

Mr Dison reminded us that whereas courts of first instance in will cases frequently in the exercise of their discretion order the costs of all parties to be borne by the estate, different considerations may apply on appeal. In

Abraham-Kriel Kinderhuis v Adendorff, N O 1957 (3) SA 653(A)

the position was stated thus (at 657 A/B) by SCHREINER, ACJ -

"It may be reasonable to seek the decision of one Court, even if one's view is wrong, but unreasonable to persist in one's wrong view to the extent of appealing. Other parties interested in the estate should not be made to suffer for one's persistence."

Counsel for Elizabeth contended that in the present case the curator-ad-litem should have been content with the judgment of the Full Court, and that the estate should not be made to suffer for his refractoriness. I am unable to accede to

that

that argument. It is true that the problem was not an intricate one; and that it was convincingly resolved by the Full Court. It should not be overlooked, nevertheless, that the curator-ad-litem was not the party who initiated the proceedings in the Court below. The curator-ad-litem was appointed by that Court to protect the interests of two minor children. Though the problem was not one of particular difficulty there was, as the Court a quo pointed out, a dearth of authority on the points raised. Leave to appeal to this Court was granted by a Full Court in a reasoned judgment. In these circumstances it can hardly be said, I think, that in prosecuting the appeal the curator-ad-litem has not fairly used his discretion or that he has in any way acted unreasonably. It is accordingly necessary to protect his position in the matter of his costs on appeal. To leave him to bear his own costs would be not only inequitable but injurious in

tendency

tendency to that vigilant protection of the rights of minors which our system of law seeks to promote by the appointment, in an appropriate case, of a curator-ad-litem.

The appeal is dismissed. The costs of appeal of the third respondent and of the curator-ad-litem are to be paid, as between attorney and client, out of the estate of the late Arthur Lawrence Gibaud.

G G HOEXTER, JA

KOTZÉ, JA)
MILLER, JA) Concur
JOUBERT, JA)
HEFER, JA)