

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No.: 4906/2009

In the *ex parte* application between:

<u>ANSO RABIE</u>	1 st Applicant
<u>CHARL PARKIN</u>	2 nd Applicant
<u>LIESL PARKING</u>	3 rd Applicant
<u>CARIN JANSEN</u>	4 th Applicant
<u>CORNÉ VISAGIE</u>	5 th Applicant
<u>PIETER ADRIAAN WESSELS</u>	6 th Applicant

(The first, third, fourth and fifth applicants in their personal capacity and all the six applicants in their capacity as trustees in the SEP HUMAN TESTAMENATRY TRUST, NR MT8038/2009)

JUDGEMENT: RAMPAL J

HEARD ON: 22 OCTOBER 2009

DELIVERED ON: 12 NOVEMBER 2009

[1] These were motion proceedings. The matter came before me by way of an ordinary application. The *ex parte* application served before me in the unopposed motion court. The relief sought is twofold. The first dimension of the relief sought is the grant of certain powers to the trustees to deal

with the trust property. The second dimension thereof is declaring the condition of the last will unenforceable.

[2] Jurgens Johannes Septimus Human was born on the 11th April 1940. He lived at Marine Parage in Durban in Kwazulu Natal. He was at Senekal in the Free State Province on 16 November 2006 where he executed a will – annexure j.

[3] He stated in his will that upon his death all his immovable properties must be devolve upon the trust called Sep Human Testamentary Trust. He als determined that his four children would be equal capital beneficiaries of the trust. He further determined that his children together with their children would become income beneficiaries of the trust. Besides the fixed properties, he also bequeathed all his livestock, tractors and implements to the same Sep Human Testamentary Trust.

- [4] He appointed his four children, his attorney together with the executor of his estate as the six trustees of the aforesaid trust.
- [5] The deponent to the founding affidavit is Mnr Charl Parkin, the second applicant. He is an accountant by profession, the testamentary executor and co-trustee. He is the testator's son-in-law. He is married to the third applicant. He avers that his father-in-law died on 6 July 2009 and that the Master of the High Court appointed him as the executor and authorised him as such to liquidate and distribute the estate of J J S Human. The letters of executorship were issued in Bloemfontein on 13 July 2009 under estate number 8038/2009, annexure "A".
- [6] The first, third, fourth and fifth applicants are the surviving daughters of the late J J S Human. The sixth applicant is his attorney. The daughters, the attorney and the executor were authorised were authorised by the Master of the High Court in terms of section 6(1), Trust Property Act, 57 of 1988 to act

as the trustee(s) of the aforesaid trust. The authority was given in Bloemfontein on 26 August 2009 – Annexure “B”. The four ladies involved in these proceedings support the application each in her dual capacities – first, each acts in her personal capacity as a child of the testator, secondly, as a trustee of the aforesaid testamentary trust.

- [7] This application was precipitated by a testamentary restriction contained in clause 2.6 of the testator’s will. The clause reads as follows:

“Die restant van my boedel, niks uitgesonder nie, bemaak ek in gelyke dele aan my 4 kinders. **Ek bepaal dat die netto kontant wat op my kinders vererf, nie deur hulle gebruik mag word om die boerdery trust te bedryf of te finansier nie. Ek bepaal dat die kontant wat op elkeen van my kinders vererf, deur hulle belê moet word en dat die rente inkomste, en indien nodig ook van die kapitaal, aangewend moet word vir die Graad en Nagraadse studies van elkeen van my kleinkinders totdat hulle afgestudeer het. Nadat my kleinkinders afgestudeer het kan elkeen van my kinders die oorblywende kapitaal wat**

dan beskikbaar mag wees, vir hulle eie doeleindes na goeddunke aanwend.”

- [8] It is the highlighted portion of the clause which the appellants consider unnecessarily burdensome to the enjoyment of the inheritance by the testator’s daughters. They therefore want to have it scrapped and the will executed as if such restrictive condition was *pro non scripto*.
- [9] Perhaps it is as well to take stock of the testator’s current grandchildren. The first applicant, Ms Anso Rabie, is his first daughter. She is a 42 year old widow and a credit controller of Alberton. She has one minor child, Casper, a boy 17 years of age – Annexure “D”. The third applicant is Ms Liesl Parkin, his second daughter. She is a 40 year old optometrist of Port Elizabeth, she is a married woman. The deponent is her husband. The couple is childless – Annexure “E”. The fourth applicant, Ms Carin Janse, is his third daughter. She is a 36 year old surgeon of Tshwane. She is a married woman and a mother of three minor children, a girl 8 years of age, another girl 5 years of age and

a boy 19 months of age – Annexure “F”. The fifth applicant, Ms Corne Visagie, is his fourth daughter. She is a 31 year old beautician and health-therapist of Tshwane. She is apparently single at present and has no dependent minor child – Annexure “G”.

[10] Therefore the testator was survived by four grandchildren. Biologically there are still realistic prospects of further posthumous grandchildren. The interests of such potential heirs and heiresses cannot simply be ignored. After all, these are precisely the interests which the testator sought to protect. Besides Ms Parkin, the testator’s other three daughters have not expressly ruled out the possibility of new additions to the current sizes of their families through birth or adoption.

[11] Ms Parkin’s husband apparently suffers from a certain medical condition. Since she and her husband have been advised that such medical condition was hereditary, the couple has resolved to have no babies. The second

applicant avers as follows in paragraph 3.2 of the founding affidavit:

“Ek en derde applikante het nie enige kinders nie en het ons ook geen bedoeling om enige kinders te verwek nie vanweë mediese probleme waaraan ek ly en die daadwerklike moontlikheid dat my mediese toestand oorerflik is. Ek heg derde applikante se ondersteunende beëdigde verklaring hiertoe aan as bylaag “E”.”

- [12] The Master of the High Court was somewhat concerned about the couple’s failure to beef up their claim with any written medical proof – see paragraaf 2 of the Master’s Report. Indeed the averment is not satisfactorily verified by any medical practitioner. It is also not adequately particularised. The alleged medical condition is not specified. It may well be that the coupled reckoned it to be a sensitive and confidential matter, the disclosure of which would have an adverse impact on their privacy rights. In *ex parte* applications sufficiently full measure of disclosure is generally required. The applicants have to take the court

into their confidence by adequately disclosing all the relevant facts so that the court can make an informed decision. Unless this is done the court may grant an order with serious adverse impact on the rights of the absent but interested parties – such as the unborn children in the instant case.

[13] The restrictive condition complained of is fraught with impracticalities. It is clear and obvious that the testator placed a very high premium on education. Of course education must be respected. Two of his daughters are well educated. They are professionals in intricate fields of human endeavour. This clause indicates just how much the testator cherished the ideal of having his grandchildren well educated.

[14] His testamentary direction that the cash component of each of his daughters inheritance must be invested and first utilized for the purpose of educating each of his grandchildren until each of them graduates and obtains a further post-graduate qualification is extremely restrictive

and burdensome to his immediate heiresses and their children as well.

[15] This is particularly so since there is no time frame linked to the study programme. There is no numerical deadline for a child-bearing or child adoption by any of the daughters. There is no provision made for a variety of scenarios that may arise in the future. For instance, one, two, more, or all the grandchildren may not want to pursue education to such great heights. What then? There may be a grandchild or two who genuinely want to attain such high academic goals but find it very difficult, if not impossible to attain on account of learning disabilities or intellectual limitations. What then? The will is silent. I get the impression that it probably never crossed his mind that one or two of his daughters may in theory never have children or wish to adopt children .

[16] Apart from possible further births and adoptions, the current situation of only four grandchildren already poses enormous problems to the four sisters. There are no separate and

distinct avenues of inheritance created in respect of each daughter. Consider this scenario. The first applicant has one child. Suppose she keeps it that way forever. Suppose further that her son studies and obtains B.Com and later M.Com at the age of 25 years, in other words six years from now. By then the first applicant will be 48 year of age. Will she be able to claim her share of the inheritance in 2015 on the basis that her one and only child, the testator's first grandchild, has completed his post-graduate studies?

- [17] It appears to me that she will not succeed with her claim. Before the last of the current crop of the grandchildren qualifies in accordance with the testator's directive, there is only one indivisible inheritance. Her share thereof, according to the clause, is an undivided quarter, inextricably linked to those of her younger sisters and their children. Therefore she will have to wait until the fourth applicant's son, now less than 2 years, also completes his post-graduate studies, wishfully also at the age of 25 years in 2032. By then the first applicant will be 65 years of age.

This is absurd in my view. The testator could not have anticipated such a scenario of prolonged and uncertain delays.

[18] The hardship of the condition is most severe in the case of the third applicant than any of her siblings. She and her husband have no children and do not intend having any. Although the couple's vague declaration of intent is open to critique, I am inclined to view that such vagueness cannot validate the outright rejection of their sworn statements. In reaching this conclusion I am fortified by the master's lame comment. I can see no good reason why the third applicant must wait until about 2032, at the earliest, for her younger sister's youngest son to complete his post-graduate studies.

[19] To a lesser extent, the same may be said about the fifth applicant who is currently single and childless. The delay in the distribution of the inheritances of the daughters may be infinitely prolonged by every birth of a further grandchild in the future. If one of the sisters, say for the sake of

argument, the youngest of the sisters, who is the fifth applicant, wants to spite her elder sisters she can easily frustrate them by adopting child after child until all her sisters have died.

- [20] Burdensome and restrictive conditions of this type often arise out of good intentions but may give rise to circumstances which were unforeseen by the testator. Sometimes such unforeseen circumstances may create impracticalities which seriously interfere with the enjoyment of the legacies which the testator had intended to leave behind for his beloved immediate beneficiaries. In dealing with testamentary conditions designed to preserve fideicommissary property in which minors and unborn children are interested, it should be constantly kept in mind that the fiduciary also has rights in such property which rights the testator by his will conferred on him or her and intended him or her to enjoy without undue delay. **Ex parte Visagie** 1940 CPD 42 on 44.

[21] At paragraph 8 of the founding affidavit the executors states:

“8.1 Die oorledene, wat ongetroud was tydens sy lewe, was ‘n vermoënde man wat volgens die voorlopige inventaris wat deur my voorberei en by die Meester ingedien is, bates van ongeveer **R10 641 297.00** nagelaat het.

8.2 Hierdie bates bestaan uit verskeie onroerende eiendomme, synde ‘n plaas in die Lindley-distrik, plase in die Senekal-distrik, ‘n woonhuis op die dorp Senekal en ‘n deeltitel-eenheid te Durban. Daarbenewens is voertuie, meublement en vee agtergelaat en beloop die kontant in die boedel bykans **R3 miljoen.**”

[22] In his report dated 22 October 2009 the registrar of deeds in Bloemfontein specified the testator’s fixed properties, excluding the property in Durban. The registrar described the landed properties in the Free State Province only as follows:

“2. Volgens die oorkondes van hierdie kantoor is die volgende eiendomme geregistreer op die naam van die oorledene;

2.1 Die plaas Concordia no. 39 distrik Senekal. Die plaas is verbind met verband no. B3030/2002 ten gunste van Nedcor Bank in die bedrag van R55 000,00. Die eiendom word gehou kragtens transportakte no. T8107/1972.

2.2 Die Restant van gedeelte 1 en gedeelte 2 van die plaas Mostertfontein no. 136, distrik Senekal. Ook verbind en gehou soos in paragraaf 2.1 hierbo beskryf.

2.3 Die plaas Weimar no. 1214, distrik Senekal. Ook verbind en gehou soos in paragraaf 2.1 hierbo beskryf.

2.4 Die plaas Aboukir no. 300, distrik Lindley. Groot 738,7303 hektaar en gehou kragtens Transportakte no. T33948/2001.

2.5 Erf 368 Senekal gehou kragtens Transportakte no. T33948/2001.”

[23] It will be readily appreciated therefore, that the late J J S Human was a man of great substance. He had accumulated enormous wealth in his lifetime. It is estimated that he has left behind a deceased estate worth approximately R14

million. The cash component thereof alone is R3 million.

He, remarkably, has no debts whatsoever.

[24] In view of the serious impracticalities of the restrictive testamentary conditions as well as the enormous wealth of the testator, as well as the natural bonds between the second and the third generations of the beneficiaries, I am of the firm view that the clause complained of should not be allowed to stand. I am persuaded that there will probably be sufficient funds in the testamentary trust for the education of the testator's grandchildren – both the living and the unborn. In the circumstances, it does not appear that, on behalf of the minor grandchildren, the court has to exact anything more from the testator's four daughters as fiduciaries of such children – alive or unborn – than that, as mothers, they should responsibly and genuinely safeguard their children's rights and interests in the *fideicommissary* property. With the aid of their co-trustees, they should faithfully work out a distribution plan, reserve fund or an investment portfolio in terms of which the interests of the *fideicommissary* children

are adequately provided for and safeguarded. Such a plan must, of course, be approved by the master. Provided this is done there will be no danger, real or potential, to the interests of such children to justify a need for the appointment of a curator *ad litem* for them. I would therefore expunge the restraint.

[25] In now turn to consider the powers and functions which the applicants seek to be granted to them in order to run the affairs of Sep Human Testamentary Trust. This is the prayer 1 of the notice of motion. The proposed powers are embodied in annexure “X” to the founding affidavit. The Registrar of Deeds correctly pointed out that three of the provisions of annexure “X” were in conflict with annexure “J” – the testator’s will.

[26] The relevant portion of annexure “J” is clause 2.3 which reads:

“Ek benoem en stel hiermee aan as Trustees van voormelde Trust my 4 (vier) kinders tesame met my Eksekuteur.

Ek bepaal dat my Trustees gedurende hulle leeftyd, of vir so lank as wat hulle bevoeg is om as Trustees op te tree, die onroerende bates wat aan bogemelde trust bemaak is, nie mag verkoop of met 'n verband mag beswaar nie. Voormelde Trust sal dus ontbind sodra die laaste van my vier kinders tot sterwe sou kom. Ek bepaal dat by die ontbinding van die Trust, die trustbates in gelyke dele sal vererf op my kleinkinders wat dan in lewe mag wees.

Ek bepaal verder dat my Trustees in eie diskresie mag besluit oor die verdeling van die trust se inkomste.”

[27] The offending provisions of the powers sought as per annexure “X” read as follows:

“2.2 onroerende en roerende eiendom aan te koop, te verkoop, verruil, oor te dra en te transporteer, onderhewig aan die verkryging van die toestemming van die Hooggeregshof ten opsigte van die vervreemding van onroerende eiendom;

...

2.5 trustgoed onder verband te beswaar vir lenings wat hierkragtens gemagtig is onderhewig aan die verkryging

van die toestemming van die Hooggeregshof ten opsigte
van onroerene eiendom;

...

3.

Dit word uitdruklik bepaal dat alle handelinge met betrekking tot die vervreemding of beswaring op welke wyse ookal van die trust se onroerende eiendom slegs mag geskied met die eenparige vooraf toestemming van al die trustees en voorts onderhewig aan die verkryging van die toestemming van die Hooggeregshof. In alle ander gevalle sal die magte en bevoegdhede uitgeoefen mag word by wyse van gewone meerderheidstem.”

[28] Mr Cillié, counsel for the applicant, conceded during the course of the motion that the foregoing three provisions of annexure “X” were not in harmony with the aforesaid clause 2.3 of the will which was unchallenged by the applicants. Accordingly I find the powers sought indeed to be incompatible with the testator’s will. Therefore they cannot be authorised as currently formulated.

[29] Mr Cillié correctly anticipated my attitude. Therefore he handed in a draft document whereby the original annexure “X” was amended. To remove the cause of the complaint by the registrar of deeds. The document was marked annexure “X”. Since this document did not form part of the original set of annexures to the founding affidavit – and since it was not filed under cover of any supplementary affidavit to the founding affidavit – it is inappropriate to describe it as an annexure. Although it was intended to replace annexure “X”, annexure “X” was not formally withdrawn. For the sake of experience, I took it upon myself to label it, exhibit “X”.

[30] The purpose of exhibit “X” was to address the concerns raised by the registrar of deeds.

Paragraph 2.2., exhibit “X” amends paragraph 2.2, annexure “X”. It reads:

“2.2 onroerende en roerende eiendom aan te koop, te verkoop, verruil, oor te dra en te transporteer, **onderhewig aan die verkryging van die toestemming**

**van die Hooggeregshof ten opsigte van die
vervreemding van onroerende eiendom”**

Paragraph 2.5., exhibit “X” amends paragraph 2.5, annexure
“X”. It reads:

“2.5 trustgoed onder verband te beswaar vir lenings wat
hierkragtens gemagtig is **onderhewig aan die
verkryging van die toestemming van die
Hooggeregshof ten opsigte van onroerende
eiendom;**”

Paragraph 3, exhibit “X” amends paragraph 3, annexure “X”.
It reads:

“3. Dit word uitdruklik bepaal dat alle handeling met
betrekking tot die vervreemding of beswaring op welke
wyse ookal van die trust se onroerende eiendom slegs
mag geskied met die eenparige vooraf toestemming van
al die trustees, **onderhewig aan die verkryging van die
toestemming van die Hooggeregshof ten opsigte van
onroerende eiendom.**”

[31] I am satisfied that so amended such powers may be duly exercised without doing real harm to the essence of what the testator wished to achieve by inserting the prohibition. Accordingly I would authorised the trustee to exercise the powers as more fully set out in exhibit "X" provided that the specified powers in terms of paragraph 2.2, 2.5 and 3 are exercised subject to the written approval of the Master of the High Court in respect of any immovable property wherever situated, nothing exempted. Obviously, the court as the upper guardian of all children retains its inherent powers to interpose its final authority on any such alienation transaction as the master may approve in the future.

[32] Accordingly I make the following order:

32.1 The powers and functions as encapsulated in exhibit "X" are hereby granted to the applicants as trustees of Sep Human Testamentary Trust, No 8038/2009.

32.2 The portion of clause 2.6 of the will of Jurgens Johannes Septimus Human signed at Senekal on 16 November 2006 which reads as stated below is declared unenforceable:

“2.6 ... Ek bepaal dat die kontant wat op elkeen van my kinders vererf, deur hulle belê moet word en dat die rente inkomste, en indien nodig ook van die kapitaal, aangewend moet word vir die Graad en Nagraadse studies van elkeen van my kleinkinders totdat hulle afgestudeer het. Nadat my kleinkinders afgestudeer het kan elkeen van my kinders die oorblywende kapitaal wat dan beskikbaar mag wees, vir hulle eie doeleindes na goeddunke aanwend.”

32.3 The first, third, fourth and fifth applicants are hereby declared to be unconditional legatees of the testator and as such entitled to their separate bequests free from any restrictive provision or condition as set out in

clause 2.6 of the testator's will as more fully set out in paragraaf 28.2 of this order.

32.4 The consent of the master for the alienation of the testator's immovable property shall be subject to the approval of this court.

32.5 The costs of this application shall be borne and paid by the deceased estate of the late Jurgens Johannes Septimus Human, estate number 8038/2009 on the scale as between attorney and client.

M. H. RAMPAL, J

On behalf of applicants:

Adv. H. J. Cillie
Instructed by:
Naudes
BLOEMFONTEIN

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