IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: 2025-153924

In the matter between:

VIOLET ANN MURPHY MCHARDY	**Applicant**
and	
DANIEL RYAN MARSH NO	**First Respondent**
MASTER OF THE HIGH COURT, PIETERMARITZBURG	**Second Respondent**

ORDER

In the result, I grant the following order:

1. The applicant's application is dismissed with costs.
2. The costs of the application shall be paid from the estate of the late Mr Jan Lucas Bakels and such costs to be taxed on scale B.

JUDGMENT

Chithi J

[1] The crisp issues in this case are:

(a) whether the applicant's right to receive rental income from the property in respect of which she is a usufructuary became enforceable immediately upon the death of the deceased, or whether its enforceability was postponed until the confirmation of the final liquidation and distribution account by the Master of the High Court, Pietermaritzburg (the Master); and

(b) whether there has been a non-joinder of beneficiaries and legatees in terms of the last will and testament (the Will) of the late Mr Jan Lucas Bakels (the deceased).

[2] On 2 September 2025, the applicant instituted an application in which she sought an order to the following effect:

(a) That the applicant, in her capacity as usufructuary in terms of the Will of the deceased, dated 7 October 2018, be declared:

(i) To have the sole and exclusive right to lease the property situated at No. 1[...] L[...] M[...] Avenue, Palm Lakes, Umhlali (*the Property"); and

(ii) To be solely entitled to all benefits of the Property, including all rental income, effective from the date of the death of the deceased.

(b) That the first respondent is interdicted and restrained from collecting, receiving or retaining any rental income derived from the Property for so long as the applicant remains the usufructuary in terms of the Will.

[3] The first respondent is the executor of the deceased estate who was duly appointed in terms of the letters of executorship dated 26 May 2024 and has been cited in these proceedings in her official capacity as such. The second respondent is the Master who is the functionary responsible for the supervision of the administration of the deceased estates in terms of the Administration of Estates Act 66 of 1965. While the first respondent is opposing the application on the grounds which will be dealt with later in this judgment, the Master is not opposing the application.

[4] The facts of this case are briefly that the applicant and the deceased, were permanent life partners who resided at 1[...] L[...] M[...] Avenue, Palm Lakes. Umhlali. The deceased passed away on 18 October 2022. Before he passed away, he executed a Will in which he bequeathed a lifetime usufruct to the applicant.

[5] The relevant provisions of the Will read:

> '2.
> I hereby nominate, constitute and appoint MARINA CHRISTINA WADE lo be my Executrix of my Estate and Administrator of the Trust created in this Will, granting and giving unto her all such powers as are allowed or required by Law and especially the power of assumption and ! direct that the said MARINA CHRISTINA WADE shall not in either capacity be required to furnish security to the Master of the High Court for the due administration of my estate.
> 3.
>
> 3.1 I bequeath to my grandson CHRISTOPHER RICHARD VAN BAGGEM my Rado wristwatch.
>
> 3.2 I bequeath to VIOLET ANN MURPHY McHARDY my Toyota Corolla bearing registration number N[...] and my 2012 Nissan X Trail Extronic bearing registration number N[...] or any other replacement motor vehicles which may be in my possession as at the date of my death.
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> 3.3 I bequeath my immovable properly known as Unit 2[...] S[...] Estates to my daughter AMANDA ELAINE VAN BAGGEM (born BAKELS) in full and final settlement of a loan for R2 000 000:00 (two million rand) made by my daughter to me on the 29th September 2014.
>
> 4.
> The balance of my estate shall devolve upon the beneficiaries of my trust to be established and to be known as the Jan Bakels Family Trust, namely: -
>
> 4.1 my daughter AMANDA ELAINE VAN BAGGEM (born Bakels) born on the 30th July 1966 as a capital beneficiary;

4.2 my granddaughter JADE LIYA BAKELS, a daughter of my deceased daughter NICOLLE DANIELLE BAKELS, as an income beneficiary as well as a capital beneficiary.

5.

'5.1 I direct that my partner, Violet Ann Murphy McHardy, shall have a lifetime usufruct over the property that I am residing in at the date of my death, namely 1[...] L[...] M[...] Ave, Palm Lakes, Umhlali, which usufruct is to be registered against the Title Deeds of the property.

5.2 I further direct that the Trust shall maintain the property and pay all the levies, special levies, rates and taxes and other utility expenses during her lifetime, to ensure that she suffers no financial hardship whilst in residence.

5.3 In the event of Violet Ann Murphy McHardy choosing to vacate the property, the usufruct will continue to fund her needs if she moves to the frail care centre, and the trustees shall allow the property to be rented out to fund this stay in the frail care.

[6] During October 2023, the applicant relocated from the property to a smaller unit in the Palm Lakes Estate. In January 2024, due to her declining health the applicant relocated to The Village Retirement Home's frail care facility, where she currently resides.

[7] In terms of clause 2 of the Will[1], Ms Marina Christina Wade (Ms Wade) was appointed as the executor of the estate. After the applicant relocated to Palm Lakes Estate and later to The Village Retirement Home, Ms Wade leased the property to a third party. The applicant alleges that while she is not entirely sure as to when Ms Wade leased the property, she estimated that this must have been from about 1 November 2023. The property has been under lease since then to date, for a monthly rental of R25 000, which Ms Wade received and retained.

[1] Master Bundle 1: Annexure C: Caselines: page 002-9.

[8] Furthermore, the applicant contends that Ms Wade never had any authority to lease the property, whether in her capacity as the executor or otherwise. Moreover, the applicant contends that the express provisions of the Will accorded her, as the usufructuary, an absolute right which entitled her to lease the property to the exclusion of all other persons and to collect the rent to fund her accommodation and living expenses.

[9] The applicant points out that while initially she was not privy to the details concerning the lease of the property, she was aware that from time-to-time Ms Wade utilised some of the rental to subsidise her accommodation at the Palm Lakes Estate, but not at The Village Retirement Home. The applicant contended that while she indirectly received some benefit of the rentals for the leased property, this was not what was contemplated by the Will.

[10] Following the death of Ms Wade on 28 May 2024, the first respondent was appointed on 28 May 2024, as executor of the estate substituting Ms Wade. The applicant contends that upon the first respondent's appointment as executor, the applicant completely ceased to receive any benefit from the rental derived from the property, whether by way of allowance or otherwise. The applicant points out that all rentals in respect of the property were received and retained by the first respondent and that this remains the position to date. The applicant contends that the cessation of these benefits is contrary to the clear intentions expressed in the Will.

[11] What precipitated this application is a dispute between the applicant and the first respondent on the question of whether the applicant as a usufructuary became entitled to receive any benefits in terms of the Will immediately upon the death of the deceased, or whether those benefits were deferred until the confirmation of the final liquidation and distribution account by the Master.

[12] The upshot of the first respondent's case is that the applicant is not entitled to any rental income until such time as the usufruct has been registered against the title

deed and when the Master approved the final liquidation and distribution account. Additionally, the first respondent contends that as an executor of the estate she was obliged to ensure that the creditors of the deceased estate are paid before taking into account the wishes of the deceased. The first respondent points out that in terms of clauses 3.1 and 3.3 of the Will[2], the deceased's grandson, Christopher Richard van Baggem and the deceased's daughter, Amanda Elaine van Baggem (Mr and Ms van Baggem) are both legatees that stand to be affected by the order which the applicant seeks. Moreover, in terms of clause 4 of the Will[3], both Ms van Baggem and the deceased's granddaughter, Jade Liya Bakels (Ms Bakels) are named as the beneficiaries of the trust intended for establishment.

[13] Consequently, the first respondent contends that if the applicant's interpretation were to be accepted this then means that all rental income from the property would be payable to her while the trust to be formed would still be held liable for the various property expenses without the trust generating any income to meet these expenses. The first respondent therefore contended that, the heirs and legatees in respect of the estate have a direct and substantial interest in the subject matter of these proceedings which may be adversely affected by the order which the applicant seeks, and they accordingly ought to have been joined as parties to these proceedings.

[14] Mr *Campbell*, counsel for the applicant, submitted in the applicant's heads of argument that neither the legatees in terms of the deceased's Will nor the beneficiaries of the trust to be formed have any legal interest which may be prejudicially affected by the order which the applicant seeks.[4] In any event, any potential prejudice which may eventuate in consequence of what the Will itself contemplates is simply an inevitable outcome. Furthermore, Mr *Campbell* submitted that even in the most unfavourable scenario, any potential disadvantage to the legatees and beneficiaries of the estate

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[2] Master Bundle 1: Annexure C: Caselines: page 002-9.
[3] Master Bundle 1: Annexure C: Caselines: page 002-10.
[4] *Henri Viljoen (Ply) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 170H-171B.

would be limited to financial implications, which is insufficient to justify their joinder to these proceedings.[5]

[15] Mr *Campbell* submitted that where a usufruct is created an inference arises that the ultimate beneficiary will have an *immediate* vested right,[6] which in this case so the argument went would be upon the date of death of the deceased, and from which point the applicant was entitled to exercise her rights in respect of the property. It was submitted further on behalf of the applicant that the bequest of a usufruct which is unconditional, and the operation of which is not delayed or suspended in any way, vests in the beneficiary *a more testaloris*.[7]

[16] It was submitted that clause 5.1 of the Will was unequivocal. It did not express or even imply any suspension of the usufructuary's rights, nor did it make them in any way conditional. The fact that the usufruct must be registered is a means of protection and publicity and does not suspend the usufruct, or the rights in terms thereof, until its registration. It was further submitted that similarly, the issues of the establishment of the trust and/or the approval of the final liquidation and distribution account are administrative processes which did not alter the legal position regarding the vesting of rights. Lastly, regarding the nature of a usufructuary's rights in respect of the leased property, the applicant relied on *Willemse v Cronje and Others,*[8] where the court held that:

> 'It is apposite at this juncture to deal with what a usufruct actually entails in this context. A usufruct is a legal right to occupy or use or rent out a property for the usufructuary's benefit. In this instance the testator bequeathed the farm properties to the first respondent subject to the second respondent's usufruct, to make sure she has the means to take care of herself in her life time. In the

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[5] *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK en Andere* 2002 (3) SA 653 (NC) at 663E-H; *Standard Bank of South Africa Ltd v Swartland Municipality and Others* 2010 (5) SA 479 (WCC) at 11-14
[6] *Hilda Holt Will Trust v Commissioner for Inland Revenue* 1992 (4) SA 661 (A) (*Hilda*) at 6671-6688.
[7] *Ex Parte Dickens: In Re Dugmore's Will* 1944 GWLD 55 at 58-59; *Viljoen v Lauw NO and Others* [2023] ZAFSHC 489 (Viljoen) paras 42-43.
[8] *Willemse v Cronje and Others* [2024] ZAWCHC 270 (Willemse) para 43.

circumstances although the testator bequeathed the farm properties to first respondent, he assumed the role of a bare dominium or registered owner of the property without the right to use or benefit from it until waiver thereof the second respondent's death. It follows therefore that the right to lease the properties is at this point in time solely vested in the second respondent as the usufructuary and not on the first respondent.'

[17] Based on *Willemse*, it was submitted on behalf of the applicant that the applicant's rights as a usufructuary vested immediately upon the death of the deceased and became exercisable and enforceable. It was submitted that, as a result, the applicant became entitled to the use and enjoyment of the property, including receiving all rental income derived from the leased property.

[18] Conversely, in the first respondent's heads of argument it was submitted that the applicant conflated two distinct legal concepts namely:

(a) The vesting of a right (ie *dies cedit*); and
(b) The enforceability of that right (ie *dies venit*).

[19] It was submitted that dies cedit referred to the moment a right comes into existence and becomes part of the beneficiary's estate, and that in the context of an unconditional bequest, such as a usufruct, this is presumed to occur upon the death of the testator (*a morte testatoris*). In relation to *dies venit* it was submitted that it by contrast, refers to the moment when the right, which has already vested, becomes enforceable, and enjoyment or possession of the subject matter can be claimed.

[20] Mr *Temlett*, counsel for the respondent argued that while the applicant's right to the usufruct vested upon the death of the deceased, it was not yet enforceable against the executor. It was argued on behalf of the first respondent that the authorities are unequivocal that in the administration of deceased's estates, *dies venit* for an heir or

legatee is postponed until the final liquidation and distribution account is confirmed by the Master.

[21] Mr *Temlett* submitted that in *De Leef Family Trust and Others v Commissioner for Inland Revenue*,[9] the Appellate Division drew a clear distinction between the two concepts. It was held that while a right may vest (*dies cedit*), it only becomes enforceable (*dies venit*) after the confirmation of the relevant account by the Master. He further argued that these principles were expressly applied by the full court in *Govender NO and Others v Gounden and Others*,[10] Koen J held that:

> '[27] "... [T]he heir or legatee of an unconditional bequest obtains a vested right (*dies cedit*) to be entitled to the bequest on the death of the testator (*a morte testatoris*). Such a right is transmissible but his claim is enforceable only at some future time when the executor's liquidation and distribution account has been confirmed (*dies venit*). He then has an enforceable right to claim payment, delivery or transfer of his bequest (*ius in personam ad rem acquirendam*) ..."
> [28] In this case the estate accounts have not been approved by the Master. Accordingly, an incorporeal vested right (*dies cedit*) to the bequest had accrued on the death of the deceased, but that right had not yet been transformed into an enforceable right to claim payment, delivery or transfer of the inheritance.'

[22] Mr *Temlett* went on to distinguish the facts of this case from those of the authorities referred to on behalf of the applicant. He submitted that *Hilda* dealt with the question of when a right vests (*dies cedit*) for purposes of determining tax liability. He pointed out that *Hilda* confirmed that the vesting of an unconditional bequest occurs at death. Mr *Temlett* argued that even if *dies cedit* occurred in this case, this would not assist the applicant in establishing that *dies venit* also occurred. Mr *Temlett* suggested that the applicant's reliance on the authorities cited by Mr *Campbell*, in support of the

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[9] *De Leef Family Trust and Others v Commissioner for Inland Revenue* 1993 (3) SA 345 (A) (*De Leef Family Trust)*.
[10] *Govender NO and Others v Gounden and Others* 2019 (2) SA 262 (KZD) (*Govender*). Also see *De Leef Family Trust* at 358D-F

immediate enforceability of the usufruct, is misplaced and not borne out by those authorities. Mr *Temlett* argued that the applicant's reliance on *Viljoen* was equally misplaced. Mr *Temlett* pointed out that *Viljoen* concerned the interpretation of whether a usufruct was conditional. The court's general statement that an unconditional usufruct vests at the date of death simply affirms the principle of *dies cedit*. It does not support the contention that *dies venit* occurs simultaneously, nor does it override the clear statutory process of estate administration. Mr *Temlett* argued that the applicant when instituting this application, she was litigating against the trust yet to be formed and is asking for the gross rental income before the formation of the trust. This was fundamentally flawed because what it means is that the applicant did not carefully consider what the Will provided for. On this aspect, Mr *Temlett*, concluded by submitting that while the applicant has a vested right, the applicant has no enforceable claim against the first respondent for the fruits of that right (ie the rental income) until the administration process of the estate is completed and the Master has confirmed the liquidation and distribution account.

[23] Regarding the non-joinder of the legatees and the beneficiaries of the estate of the deceased, Mr *Temlett* argued that this was fatal to the applicant's case because they had a direct and substantial interest in the subject matter of these proceedings which may be prejudicially affected by the order which the applicant seeks. Mr *Temlett* suggested that on this ground alone the applicant's application should be dismissed with costs.

[24] Neither issue presents a novel question of law, and both have been dealt with in a substantial body of case law. For the purposes of this judgement, it is convenient to start with the issue of joinder.

[25] The legal test for joinder of a party to any pending proceedings has long been established, in Wassung v Simmons,[11] the court held that:

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[11] *Wassung v Simmons* 1980 (4) SA 753 (N) at 759E - H; Also see *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) para 12.

'... [A] party is to be joined if he has or may have a "direct and substantial interest" in any order
the Court may make... "[D]irect and substantial interest" such as is there mentioned has been held to be
"an interest in the right which is the subject-matter of the litigation and (is) not merely a financial interest which is only an indirect interest in such litigation";
it is
"a legal interest in the subject-matter of the litigation"
excluding
"an indirect, commercial interest only."
It is to be noted that it is a "legal interest" in the proceedings which is relevant.'

[26] It is common cause that Mr and Ms van Baggem are both legatees in terms of the Will, while both Ms van Baggem and Ms Bakels are named as the beneficiaries of the trust to be formed. This in my view constitutes a direct and substantial interest in the subject matter of these proceedings. The order sought by the applicant, that she is immediately entitled to all rental income derived from the property would, if granted, necessarily affect the financial position of the legatees and beneficiaries, who depend on the orderly administration of the estate and the proper distribution of its assets. That potential prejudice is sufficient to require their joinder. Consequently, there has been a non-joinder of Mr and Ms van Baggem, and Ms Bakels from these proceedings.

[27] Regarding the question of when the rights of a usufructuary are enforceable, there are no qualms about the applicant's rights as a usufructuary vesting immediately upon her on the death of the deceased by parity of the reasoning in *De Leef Family Trust* and in *Govender*,[12] it is the exercisability and enforceability thereof which is deferred until the confirmation of the final liquidation and distribution account by the Master. The applicant's reliance on Willemse to contend for any rights in respect of the rental income from the property does not have any foundation, in that, in *Willemse* farm

[12] *Ibid* fn 7 above.

properties were leased without the applicant having been afforded her right of pre-emption, and additionally, the usufruct had already been registered. Furthermore, in considering this question, the express provisions of the Will have to be considered. This is so because a Will, like any other legal document, must be interpreted in accordance with the standard rules of interpretation.

[28] In *King and Others NNO v De Jager and Others*,[13] the Constitutional Court held that:

> '[34] The point of departure when interpreting wills is "to ascertain the wishes of the testator from the language used in the will." Courts are obliged to give effect to the wishes of the testator unless they are prevented by some law from doing so. The 'golden rule' for the interpretation of wills and this inherent limitation is famously described as follows in Robertson:
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> "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." (Footnotes omitted.)

[29] Clause 5.2 of the Will contemplates that it is the trustees who are obligated to ensure that the applicant does not go without during the subsistence of the usufruct. This accords with the position in law what the testator contemplated was that it would be the trustees whose duty it would be to look after the applicant and this would only be possible after the establishment of the trust and, certainly, after the final liquidation and distribution account has had been approved by the Master.

[30] For these reasons, the applicant's application is devoid of any merit and is therefore unwarranted.

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[13] *King and Others NNO v De Jager and Others* [2021] ZACC 4; 2021 (4) SA 1 (CC).

Costs

[31] The general rule is that costs should follow the result. However, the issue of costs is in the discretion of the court which must be exercised judicially. Mr Temlett argued that costs should be paid by the estate. Although Mr Campbell did not make any specific submissions regarding the issue of costs if this court found against the applicant, it did not appear that he was opposed to Mr Temletfs submissions that costs should be paid by the estate. After carefully considering this issue, this court is of the view that it would be fair and just for costs to be paid by the estate. To do so will avoid unnecessarily burdening the applicant with an adverse cost order on the face of financial challenges she may already be confronting.

Order

[32] In the result, I grant the following order:

3. The applicant's application is dismissed with costs.
4. The costs of the application shall be paid from the estate of the late Mr Jan Lucas Bakels and such costs to be taxed on scale B.

Chithi J

Appearances

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Date of hearing:	13 May 2026
Date of judgment:	17 June 2026