

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

Case No: 1257/2019

Date heard: **28 November 2019**

Date delivered: **28 January 2020**

In the matter between:

GRAY ERNEST EDWARDS

Applicant

and

ROBERT MARK DOBROWSKY N.O.

First Respondent

**THE MASTER OF THE EASTERN CAPE
HIGH COURT, GRAHAMSTOWN**

Second Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

[1] Applicant seeks an order setting aside Second Respondent's decision to overrule Applicant's objection to the Liquidation and Distribution Account in the Estate Late Annie Dobrowsky (*the Estate*), upholding the objection lodged

in the Estate and including Applicant's claim therein in the sum of R550,000.00, alternatively R360,000.00. (In argument it became clear that the relevant sum is limited in fact to R360,000.00.)

- [2] In essence the real issue is whether Applicant has a claim properly to be included in the Estate.

BACKGROUND

- [3] Briefly put Applicant, a farmer, resides on the farm Redlands (*Redlands*). In 1992 Applicant bought the remainder of the farm Redlands No. 594 (*Redlands 594*). A second property Redlands Annexe (*Redlands Annexe*) 71,9487 Hectares in extent was bought by Mr C.D. Dobrowsky (*Mr Dobrowsky*) (the husband of Annie Dobrowsky) for R46,800.00. It is Redlands Annexe that forms the subject matter of the dispute herein.

- [4] It is not seriously disputed that the late Mr Dobrowsky farmed in close vicinity to Redlands Annexe and Redlands 594 and treating Applicant as a son, advised him to farm a "*portion*" of the disputed property (Redlands Annexe) as if it were his own. This occurred in 1992 since which date Applicant utilized the property, as a farm, improving same by the construction of an irrigation scheme a portion thereof. In fact Applicant's access to Redlands is by road over Redlands Annexe.

[5] Respondents contend that the above is misleading as it is alleged that Applicant's use of a portion of Redlands Annexe is on a "*quid pro quo*" basis as the boundary fence between Redlands 594 and Redlands Annexe is incorrectly placed, or so it is contended.

[6] However this is clarified in the answering affidavit as follows:

"12.2. This results in the applicant using a portion of the property that he does not own (the second property) whilst certain farming operations are conducted on the applicant's property in exchange therefor."

This is a concession that the entire farm Redlands Annexe is "*used*" by Applicant.

[7]

[7.1] Against this background Mrs Dobrowsky died on 28 July 2015.

[7.2] Mr Dobrowsky had already died on 9 March 2005, he and Mrs Dobrowsky having signed a joint Will on 31 March 2004, the main subject matter of this dispute (*the Will*).

[7.3] The relevant clauses thereof are:

"1. DEATH OF THE FIRST-DYING

Provided the survivor of us outlives the other for a period of ten days we direct that our community estate shall be massed and be regarded as one whole and we bequeath our massed estate to the survivor of us in a fiduciary capacity, free from the obligation to furnish security, and subject to the following provisions:-

- 1.1** The survivor of us shall, during the subsistence of his or her fiduciary interest, have the right to sell any asset which he or she may receive in terms of this clause whenever he or she might wish to do so and to purchase out of the proceeds of such sale any other asset of his or her choice subject to the condition that any such asset which he or she may purchase shall be subject to the same conditions attaching to the original bequest to him or her. Any moneys derived from the sale of a fiduciary asset which are not utilised by the survivor of us for the purpose of purchasing another asset as provided for herein shall also be subject to the same conditions attaching to the original bequest to him or her.
- 1.2** The survivor of us shall be entitled to continue any bond liabilities which may be in existence at the date of death of the first-dying of us. The survivor of us is hereby authorised to pass any bond in replacement of an existing bond, but shall not be entitled to bond any property for an amount exceeding the sum outstanding at the date of death of the first-dying of us and we direct that any bond debt outstanding at the termination of the fiduciary interest shall be assumed by the ultimate heirs.
- 1.3** Upon the death of the survivor of us the fiduciary assets shall devolve in terms of clause 2 below.

2. DEATH OF THE SURVIVOR

Should neither us survive the other for a period of ten days or should the survivor of us having so survived thereafter come to die without leaving a further valid Will, we direct as follows:-

2.1 Cash Legacies

We bequeath an amount of R25,000 (Twenty-Five Thousand Rand) to those of the undermentioned persons who are alive at the death of the last-dying of us:-

GILLIAM FROST

JANET MARY TERBLANCHE

GEOFFREY DOUGLAS HAWKER

DAVID HAWKER

Our son-in-law JEFF BARRETT, irrespective of his marital status at the death of the survivor of us.

2.2 Specific Bequests

- 2.2.1** We bequeath our farming property known as Redlands Extension to GRAY EDWARDS, provided he is still farming the

remainder of his farming property known as Redlands at the death of the last-dying of us.

Should this bequest for any reason fail, then it shall follow the same destination as the bequest at sub-clause 2.2.4 below.

2.2.2 We bequeath our fixed property known as “Bawnmore Flats,” all our furniture, and household effects, our vacant erf situate at Forestview, all our farming properties (excluding farming properties specially bequeathed elsewhere in this Will or any Codicil thereto), all our livestock, farm implements, farm vehicles, tractors, farm machinery, and other movables pertaining to the farm operations and forming part of our estates, to our son ROBERT MARK DOBROWSKY in a fiduciary capacity, free from the obligation to furnish security, and subject to the following conditions:-

2.2.2.1 Our said son shall be entitled to continue any bond liabilities which may be in existence at the date of death of the last-dying of us. Our said son is hereby authorised to pass any bond in replacement of an existing bond, and shall further be entitled to bond any property for an amount exceeding the sum outstanding at the date of death of the last-dying of us. Any bond debt outstanding at the termination of the fiduciary interest shall be assumed by the ultimate heirs.

2.2.2.2 The fiduciary interest shall terminate upon our said son attaining the age of 50 years or upon his death, whichever event may first occur, whereupon the fiduciary assets shall devolve upon our said son, or should the fiduciary interest terminate as a result of his death then upon his descendants by representation, with the provision that should any beneficiary not have attained the age of 25 years then that beneficiary’s inheritance shall be held in trust by the Trustees subject to the trust provisions of clause 3 below.

2.2.3 We bequeath all our jewellery to our daughter JUDITH BARRETT, or should she predecease the last-dying of us then to her descendants by representation.

2.2.4 We bequeath our fixed property situate at Schoenmakerskop, Port Elizabeth, Eastern Cape, in equal shares to our granddaughters JADE-ANNE DOBROWSKY and PHILLIPA DOBROWSKY, but should either predecease the last-dying of us then the share of such beneficiary shall devolve upon that beneficiary’s descendants by representation and failing such descendents upon the remaining beneficiary or such beneficiary’s descendents per stirpes, subject to the usufruct of

our son ROBERT MARK DOBROWSKY free from the obligation to furnish security, until the youngest of our said granddaughters who is alive attains the age of 25 years, or until the death of the last-dying of them, whichever event may first occur.”

[8] Effectively there is no dispute that Applicant still farms Redlands and Redlands Annexe.

[9] It is common cause that Mrs Dobrowsky in fact sold Redlands Annexe, in circumstances and for reasons essentially undisclosed, for the sum of R360,000.00, this then being registered to the Bawnmore Family Trust (seemingly a Dobrowsky Family Trust). This sale however at no time interfered with Applicant’s use of Redlands Annexe.

[10] It is clear that Mrs Dobrowsky was disenchanted with Applicant, she expressing this in a letter dated 21 February 2015.

[11] In due course after Mrs Dobrowsky’s death Applicant called for implementation of Clause 2.2.1 of the Will.

[12] The executor declined to accept Applicant’s claim in the Estate and the objection lodged with the Master was disallowed with reference to Sections 35(10) and 95 of the Administration of Estates Act 66 of 1965.

INTERPRETATION OF WILLS

[13] The interpretation of the Will is fundamental to the outcome of the dispute.

[14] The proper approach is well set out in ***Harvey NO and Others v Crawford NO and Others*** 2019 (2) SA 153 (SCA) as follows (per Molemela JA dissenting):

“[24] As stated before, this matter turns on the interpretation to be given to the relevant phrases used by the donor to describe the capital beneficiaries of his Trust. In interpreting such phrases, a court must be careful not to follow an approach in terms of which it offers nothing more than the dictionary definition of the words used in order to support the result. It is a trite principle of our law that in order to determine what the author of a document intended, courts must examine the language used in the document, as well as all the facts which give it context. As correctly pointed out in *Novartis v Maphil* in relation to the interpretation of contracts, courts must consider all the facts and context in order to determine what the parties intended. It is expected to do so whether or not the words of the contract are ambiguous or lack clarity.

[25] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* this Court stated as follows:-

‘The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.’

[26] The following remarks made by this Court in *Bothma-Botho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* are apposite:

‘While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise. . . . ’

...

[30] In interpreting the donor's Trust Deed, it must be borne in mind that although other courts' decisions on the interpretation of words and phrases can be of assistance in the interpretation of another will, ultimately every will has to be interpreted according to its own language and context. In this regard, Innes CJ aptly remarked as follows: 'The truth is that a decision upon the meaning of one will is often of no assistance in ascertaining the meaning of another, in spite of surface similarities between the two. Each document must be read as a whole and must stand upon its own language'. Another important consideration is that although indications and pointers must be sought in the instrument itself, it is permissible to interpret it in the light of the relevant circumstances existing at the time of its making. The circumstances and other external facts which may be taken into consideration include the degree of the skill of the draftsman and other circumstances of which the donor or testator was aware of and which were uppermost in his or her mind at the time of the making of the will."

[15] In the minority judgment the following is said:

"[45] It is a principle of trust law that 'the trustee must give effect to the trust instrument, properly interpreted, as far as it is lawful and effective. A trust deed must be construed in accordance with the well-known and time honoured rules regarding the interpretation of written contracts. In *Sea Plant Products Limited and others v Watt* 2000 (4) SA 711 (C) at 720D-G, Van Heerden J (Hlophe JP and Motlala J concurring) stated:

'As with the interpretation of a written contract, the point of departure in interpreting a trust deed is therefore the grammatical or ordinary meaning of the words used, read within the context of the trust deed as a whole.'

[46] Some sixty years ago, Caney J observed in *Moosa v Jhavery* 1958 (4) SA 165 (N) at 169D-F:

'In my opinion the trust speaks from the time of its execution and must be interpreted as at that time. It is the settlor's intention at that time that must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot, I consider, be used to alter that intention.'

Likewise, a will falls to be interpreted by giving words and phrases used by the testator the meaning which they bore at the time of execution."

[16] Apart from the emphasis upon the interpretation being made as at the time of execution, the words being given their meaning at the time of execution, there is no difference in the above approach which I adopt accordingly.

THE INTERPRETATION AGAINST THE CONTEXT AT THE TIME OF EXECUTION

- [17] At the time of execution of the Will it cannot be gainsaid that the Dobrowskys regarded Applicant as a son and had allowed him to occupy and farm Redlands Annexe for some time and which he had continued to do. They created a massed estate bequeathing¹ the massed estate to the survivor as a fiduciary thereof. This incorporated the right to sell any assets, for whatever reason, envisaging both a purchase of a new asset with the proceeds, alternatively the said proceeds not being so used, as being subject to the same condition attached to the original bequest (the fideicommissum)².
- [18] On the death of the survivor the fiduciary assets (clearly incorporating the proceeds of any sale) were to further devolve on the final heirs as per Clause 2 of the Will.
- [19] In this there is little contentious and the intention is perfectly clear, against the context relevant.
- [20] Clause 2.2.1, in context, makes the testator's intention clear that Redlands Annexe was to devolve upon Applicant providing he was at that time still farming the remainder of Redlands (that is Redlands and Redlands 594 not Redlands Annexe) as at the date of death of the survivor. This makes perfect sense as it was Applicant's use of Redlands and Redlands 594 that made the

¹ In Clause 1 of the Will.

² It is beyond doubt that the Will established a fideicommissum in favour of the last dying of the Dobrowsky parents with Applicant in part as a fideicommissary.

use of Redlands Annexe valuable and useful to Applicant and this was appreciated by the Dobrowskys, they treating Applicant at that time as a son.

[21] The reference to the failure of the bequest in Clause 2.2.1 refers clearly to Applicant in the event of his not farming Redlands and Redlands 594 at the time of death and nothing else.

[22] As Applicant was so farming Redlands and Redlands 594 at the relevant time the fiduciary bequest operates in his favour and Clause 2.2.4 of the Will is not implicated. This is more than clear, on the proper interpretation approach, as a fideicommissum is clearly established in Clause 1 of the Will subject to Clause 1.3 and 2 thereof, the specific bequest to Applicant as fideicommissary being in Clause 2.2.1 thereof for the reasons already set out above.

[23] The so-called revocation and ademption argument advanced for Respondents is, in my view, unsupported by the facts and proper interpretation and I do not agree therewith. The money realized upon the sale of Redlands Annexe fell into Mrs Dobrowsky's estate at the time and there is nothing suggesting that the said R360,000.00 was not in her estate at the time of her death. The bequest most certainly did not fail upon the sale of Redlands Annexe, on a proper interpretation of the Will as set out above, ademption being thus irrelevant hereto.

[24] The remaining submissions for First Respondent are similarly without merit based upon my interpretation of the Will (in context) which is fundamental to the outcome of the dispute and dispositive of the remaining arguments.

[25] The matter is properly before us for adjudication, the claim is not premature as it is clear on what was before the Master that the real issue was the interpretation of the fideicommissum, nor is it of significance that this relied on the original claim of R550,000.00, not R360,000.00.

[26] Upon the death of Mrs Dobrowsky Applicant as fideicommissary was accorded a *rei vindicatio* for the recovery of the property from third parties and in this matter was afforded a claim in the estate for the sum of R360,000.00 ³.

[27] In the result the Application succeeds and the following order issues:

1. The decision of the Master of the Eastern Cape High Court, Grahamstown (Second Respondent), dated 29 March 2019 (attached to the founding affidavit as “GEE18”), which overruled Applicant’s objection to the Liquidation and Distribution account in the estate of the Late Annie Dobrowsky, is reviewed and set aside.

2. The decision of Second Respondent is substituted with the following:

³ ***Douglasdale Dairy (Pty) Ltd and Others v Bragge and Another*** 2018 (4) SA 425 (SCA); ***Ex Parte Matthews and Others In re Bragge v Douglasdale Dairy (Pty) Ltd*** 2018 (4) SA 409 (GJ)

2.1 The objection lodged against the Liquidation and Distribution account in the estate of the Late Annie Dobrowsky by Applicant is upheld;

2.2 The executor of the estate of the Late Annie Dobrowsky is directed to amend the Liquidation and Distribution account to include the claim of the Applicant in such amended Liquidation and Distribution account, in the sum of R360,000.00.

3. First Respondent is to pay the costs of this application.

M.J. LOWE
JUDGE OF THE HIGH COURT

ROBERSON, J:

I agree.

J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant: Adv W Olivier
Instructed by: Dold & Stone Inc., Grahamstown

Obo Respondents: Adv S. Stretch
Instructed by: Netteltons Attorneys, Grahamstown