

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No. 12423/2007

In the matter between:

MARIA VAIRETTI

Applicant

and

FRANCESCA ZARDO N.O.

First Respondent

CAROLA ZARDO N.O.

Second Respondent

GLYN ERIC WILLIAMS N.O.

Third Respondent

JUDGMENT DELIVERED THIS 12th DAY OF APRIL 2010

NC ERASMUS J,

INTRODUCTION

[1] This matter concerns the interpretation of a provision in the trust deed of the Gennari Trust ('the trust'). The relevant provision provides as follows:

"Notwithstanding the foregoing, the Donor specifically requires and directs that FRANCESCA ZARDO (born Gennari), the daughter of EMILIO GENNARI, shall during her lifetime have the full use of the property described as Erf 1650 (a portion of Erf 159) Bakkershoogte and that MARIA VAIRETTI [the applicant], the companion of EMILIO GENNARI, shall during her lifetime have the full use of the property described as the remainder of Erf 159 Bakkershoogte as indicated on the diagram SG No 3965/1997 approved by the Surveyor General on 3 July 1997."
(Emphasis supplied)

[2] The dispute relates to the ambit of the rights and concomitant obligations conferred on the applicant in respect of "the remainder of Erf 159 Bakkershoogte" situate in Somerset West ('the property'), and, in particular whether such rights and obligations are the fuller ones of usufruct (as the respondents contend) or the more limited ones of usus (as the applicant contends).

[3] The donor of the trust is, at least nominally on the face of the trust deed, one Mr Johannes Du Plessis ('Du Plessis'). Du Plessis was at the relevant time the attorney of the (now) late Mr Emilio Gennari ('Gennari'). It is common cause on the papers (or at least not in dispute) that the trust was established at the instance of Gennari, for estate planning purposes. In any event, both parties have in their papers correctly adopted the position that the founder of the trust was in reality Gennari (not Du Plessis).

[4] Gennari was an Italian national who died on 16 November 1999. The first respondent is his daughter. The second respondent is the daughter of the first respondent, i.e. Gennari's granddaughter. The first and second respondents are two of the three trustees of the trust, and are cited in that capacity. The third respondent, an attorney, is the other trustee. The trust is the registered owner of the property.

[5] The first and second respondents are South African citizens. The first respondent has, for the reasons stated in the answering papers, and summarised below, occupied the property since June 2006.

[6] The applicant is described in the trust deed (which was executed on 1 September 1997) as Gennari's "companion". Their relationship commenced in about 1982. The applicant was once a trustee of the trust. Gennari, however, terminated her trusteeship on 14 September 1999.

[7] The applicant is an Italian national. She resides in Italy. She does not have South African residency.

[8] In 1999, before his death, Gennari advanced money to the Trust to buy another property in the same town, which property is situated at 3 Paul Kruger Street. During the period 1999-2000, the rent received from this property covered the maintenance, rates and taxes and the water and electricity bill of the entire property situated at 17 Leccino Terrace. By June 2006, the Kruger

Street Property was sold and the proceeds distributed to the capital beneficiaries (the applicant did not receive any of the proceeds.)

[9] Between 2002 and 2006 attempts were made by Du Plessis to persuade the applicant to waive her right for R100 000, 00.

[10] The applicant has only been able to actually use the property once after Gennari's death, which was for a few weeks during February 2000.

[11] Since (at least) June 2006, the first and second respondents, from time to time, have been occupying the property. The applicant has been in South Africa a few times since, and she has had to stay in rental accommodation for the duration of her visit.

[12] The applicant's case is that the respondents have frustrated the exercise of her right to "*full use*" of the property. She seeks an order directing the first respondent and also, (incorrectly) the second respondent who does not reside at the property to vacate the property, together with an order declaring that:

"12.2 Liability for past and present maintenance costs and property rates in connection with the property falls on the trustees, not the applicant."

[13] The applicant contends that despite the broad sweep of the right of use which she seeks to exercise, the right conferred on her by the trust deed is the more limited right of *usus*, which carries with it limited obligations. It does not extend to paying maintenance costs and property rates in respect of the property (as would be the case if the right conferred was the more encompassing one of usufruct).

[14] In particular the applicant argues that:-

14.1 The Trustees maintained the right of the applicant amounted to the common law right of "usus", which basically allows the applicant to utilise the property herself but not to rent it to others. The right to lease was a right, according to the Trustees, which is not part of the right of usus, but accrues to the holder of the more extensive right of "usufructus". It was contended that the applicant, being the holder of the usus right, has maintenance obligations and is responsible for the payment of rates and taxes.

14.2 The Trustees made the applicant's right to access to the property dependent on the applicant paying all the past expenses (by February 2000 set at approximately R300 000.00) and acceptable proof that sufficient funds are available in South Africa to meet her future obligations.

14.3 They argue further that the applicant was effectively precluded from exercising her right to use the property. For all practical purposes, the Trustees have achieved a transfer of the applicant's right of usus to the first and second respondent. They contend that first and second respondents are now using the property while insisting that the applicant is responsible for maintaining it and paying the rates and taxes.

[15] In the alternative to the relief summarised above, the applicant seeks an order terminating the trust. I shall not be dealing with the alternative relief for reasons that will be advanced later in this decision.

[16] As regards the primary relief, the respondents' stance is as follows:

16.1 Upon a proper interpretation of the trust deed, the right conferred on the applicant is that of usufruct, not the limited right of usus.

16.2 The respondents recognise that right and do not seek to frustrate the applicant's exercise thereof. The respondents have tendered to place the property at the applicant's disposal precisely for that purpose. The tender was subject to the applicant's willingness to assume the obligations that are the corollary of her right of full use.

16.3 They further argue that the ambit of the applicant's obligations in respect of the property are commensurate with the "full" right conferred on her, which in short is the obligations of a usufructuary, which include

paying maintenance costs and property rates in respect of the property¹, which are the subject of the usufruct and furnishing security to the trust for the proper use and enjoyment of the property and for its restoration in a proper condition or when the usufruct expires.²

16.4 *Even if the applicant's right of use is, on a proper interpretation thereof, that of usus, the manner in which the applicant proposes to exercise it – to wit, to the complete exclusion of the trust as owner – exceeds the ordinary bounds of usus and, if exercised in that manner, the expanded right carries expanded obligations, which are commensurate with those attaching to a usufruct.*

16.5 *The applicant has repudiated her obligations (this very application evidences her repudiation of her obligation to pay maintenance costs and property rates in respect of the property. Because the property was falling into a dilapidated condition, the first respondent took occupation of it in 2006 and has carried all expenses in regard to the general upkeep of the property. (The repudiation that characterizes this application is, moreover, entirely at odds with an earlier undertaking made on behalf of the applicant, expressly and in writing, to pay the property rates in respect of the property. She has not honoured that undertaking, and the declaratory relief sought in paragraphs 3 and 4 of the notice of motion is inconsistent with it.) In*

¹ *Ex Parte Estate Borland* 1961 (1) SA 6 (SR); *Ex Parte Standard Bank Limited: In re Estate Rodger* 1963 (3) SA 683 (SR); Joubert et al (Eds) *LAWSA First Reissue* Vol 24 at 436 and *Van der Merwe Sakareg Tweede Uitgawe* at 518

² *Joubert op cit* at 436; *Van der Merwe op cit* 516-517

addition, the applicant has refused to provide security (for the purpose set out in paragraph 16.3 above). The consequence is that the applicant's rights of use are "held in abeyance until the security is given".³

SERVITUDES: USUFRUCT AND USUS

Ownership and servitudes

[17] Ownership comprises of an 'elastic' bundle of rights.⁴ It is elastic in the sense that the full exercise of ownership rights by the owner of the thing concerned (be it movable or immovable) may be suspended by granting a third party the power to exercise certain of the rights flowing from that ownership.⁵

[18] The incidents of ownership that are relevant for present purposes are:

- 18.1 bare legal ownership; and
- 18.2 the right of use and enjoyment.⁶

[19] Servitudes, such as usufructus and usus, are limited real rights which restrict "the rights, powers or liberties of [the] owner to a greater or lesser extent in favour of either another person or the owner of another tenement".⁷ Servitudes are in short a subtraction from the owner's dominium.⁸ While dominium remains with the owner, certain of the rights of use and enjoyment

³ Joubert *op cit* at 435

⁴ Van der Merwe "The Law of Things and Servitudes" at 105

⁵ *Ibid*

⁶ See the analysis along these lines in *Barnett and Others v Rudman and Another* 1934 (AD) at 203-206

⁷ See above note 4 at 215

⁸ Above note 1

are placed at the disposal of a third party to the exclusion of the owner.⁹ Servitudes are either personal or praedial in nature (usus and usufruct being personal) and are generally classified according to the nature and extent of the rights conferred on the third party (and taken away from the owner).

Usufruct

[20] A usufruct "is defined to be the right to use the thing of another in such a way as to preserve its substantial character".¹⁰ The right encompasses enjoyment of fruits.¹¹ A usufruct confers the full right of use and enjoyment on the usufructuary, leaving "*slegs naakte eiendom* [only nude ownership]" in the hands of the owner.¹²

[21] The obligations of the usufructuary that are relevant for present purposes are set out in paragraph 16.3 above.¹³

Usus

[22] A servitude of usus "resembles a usufruct, but the holder's rights are far more restricted".¹⁴ It is "a lesser right than usufruct"¹⁵ (*'n minder omvangryke persoonlike servituut as usufructus*).¹⁶

⁹ *Ibid*

¹⁰ *Brunsdon's Estate v Brunsdon's Estate and Others*.

¹¹ Joubert *op cit* at 422; See also above note 2 at 508.

¹² Above note 2 at 515.

¹³ For a fuller exposition, see Van der Merwe "*Sakereg*" Tweede Uitgawe at 516-520.

¹⁴ Kleyn and Borraine Silberberg & Schoemans "*The Law of Property*" 3ed at 397.

¹⁵ Joubert *op cit* at 441.

¹⁶ Above note 12 at 521.

[23] The right of usus is generally intended to provide for the subsistence needs (die "lebensbehoeftes"¹⁷) of the rightholder. The rightholder's entitlement to use and enjoy the property and the fruits is thus limited to his/her own needs (including that of his/her family).¹⁸

[24] The use rights which are not incidental to the usuary's needs remain at the owner's disposal. For example, the owner may attend on a farm subject to a right of usus to gather the fruits which remain after the usuary's subsistence needs have been met.¹⁹

[25] The limited nature of the right carries, as a corollary, a commensurately limited set of obligations, in particular as regards the upkeep of the property.²⁰ The obligation to provide security for the return of the property *salva rei substantia* is, however, the same as that in the case of a usufruct.²¹

[26] The right of usus, and the obligations it entails, are flexible in the following sense. As the needs of the usuary increase, so he/she becomes entitled to use the property to a greater extent (and, conversely, the residual rights vesting in the owner diminish).²²

[27] Logically, such an extension of the usuary's right of use (i.e. to cater for increased needs) extends the usuary's obligations. If the usuary makes full

¹⁷ Above note 16 at 522

¹⁸ *Setlogelo v Setlogelo* 1921 CPD 161 at 168-169

¹⁹ Above note 17

²⁰ Above note 19 at 523

²¹ *Ibid*

²² See above note 15

use of the property to the complete exclusion of the owner, then the usuary's obligations expand to become commensurate with the obligations of a usufructuary. See, for example,

27.1 Voet *Commentarius ad Pandectus* (I *Usufrucht*, Book VII) translation by Searle and Joubert at page 85:

"But as there is less of advantage in 'usus' than in usufrucht, so also there is less in respect of burdens to be borne; for as a usufructuary is bound to bear moderate expenses inasmuch as he appropriates all the fructus, ...the usuary on the other hand bears no expense unless he takes all the advantage, so that the proprietor can take no 'fructus'. For which reason he who has the 'usus' of a house is compelled to repair it as often as he does not allow the proprietor to use any part of it..." (emphasis supplied)²³

[28] In the case of both usufructus and usus:

28.1 The owner retains (at least) bare dominium of the property.²⁴

28.2 A right of use is conferred on a party other than the owner.

²³ See also Hall & Kellaway *Servitudes* (1973) at 177, where it stated that:

"Just as the advantage derived from usus may be less than that derived from a usufruct, so the liability for the expenses of upkeep is likewise less, for the rule is that the usuary need bear no part of the expense unless he takes all the fruits or has the sole use of the corpus (Voet 7.8.5)."

²⁴ See for example *Cowley and Another v Hahn* 1987 SA 446 (ECD) 448 F.

[29] The difference between the two is one of degree. It depends on the extent to which the 'bundle' of use rights (which exists over and above nude dominium) is conferred on the right holder, i.e. the extent of the subtraction from the owner's dominium. Viewed from the right holder's perspective, usufruct confers fuller rights than usus. Viewed from the owner's perspective, usus subtracts to a lesser extent from the rights of ownership.

[30] A full conferral of use rights is known as a usufruct. A more limited conferral, which confines the right to use to the rightholder's own needs, is known as usus. *"As one moves along the continuum from a full subtraction of use rights from dominium to a lesser subtraction, so one is moving out of the realm of usufruct and into that of usus"*²⁵

INTERPRETING THE TRUST DEED

[31] The respondent argues that the only interpretation to be had for the words in the Trust Deed are that the right conferred is one of *usufruct*.

[32] In my view the words "full use" in the context of the Trust Deed, having regard to the provisions of maintenance and rates and taxes to be paid from an external source other than the applicant, the court must have regard to "full use" in the context of the Trust Deed. The Court must also have regard to all relevant facts in determining the actual intention of the Trust Deed

²⁵ See *Barrie N.O. v Ferris* 1987 (2) SA 709 (C) at 714 E.)

[33] I am of the view that the doner and the drafter of the deed, which at that stage was the attorney, as well as the actions of Gennari must be taken into account; inter alia:

33.1 *The letter dated 10 February 2000 where, the right conferred is clearly, identified by the attorneys acting for the trustees as the common law right of "usus".*

33.2 *In November 2000, permission was requested by the applicant to lease a part of the property, but this was refused. It was stated that the applicant, who only has a usus right in terms of the trust deed, will not be allowed to let it out.*

33.3 *In June 2006, Du Plessis wrote as follows to the applicant's daughter:*

"The right which your mother has obtained in terms of the Trust Deed (which I have prepared and of which I am the Donor), is not a usufruct, but only a personal right to occupy the property ("usus"). This means that the right is available to her and not to members of her family or friends and also that she is not entitled to let the property to others."

[34] The intention of Gennari was clearly to confer the right of "free occupation" or usus to the applicant and not the right or usufructus. This is quite apparent from the following:

34.1 The drafter of the Trust Deed was an attorney (Du Plessis) and he was clearly aware of the distinction between the right of *usus* and *usufructus*. The words "full use" was accordingly one deliberately used to describe the right. It is frankly unthinkable in these circumstances, so Mr De Waal argued that the intention was to confer the *usufructus* right.

34.2 Gennari took steps to ensure that it would be possible for the applicant to exercise her *usus* right. As stated above, the rent received from the property at 3 Paul Kruger Street, which was purchased in 1999, easily covered the maintenance, rates and taxes and the water and electricity of the property in 1999-2001. There was indeed money left to distribute to the Trust's income beneficiaries. It was accordingly safe for Gennari to assume that the Trust would have the income to pay the maintenance, rates and taxes of the property. This became impossible when the Kruger Street property was sold and the money distributed to the Trust beneficiaries.

[35] I accordingly find that the applicant is the holder of a *usus* in respect of the property.

[36] In order for the applicant, having to exercise her rights and to obtain the relief sought she must accept and assume her obligations in respect of the property as it relates to the exercise of her rights of *usus*.

[37] The applicant, in law does not have the duty to pay rates and taxes.²⁶

[38] Consequently, I make the following order:

- a) Having declared that the Applicant has the right of *usus* in respect of the property, the First Respondent is directed to vacate the property, situate at 17 Leccino Terrace, Somerset West, described in the attached plan as the remainder of Erf 159 Bakkershoorgte ("the property") within 2 weeks of the date of the order.
- b) The Applicant shall have all the rights and obligations of the holder of the right of *usus*.
- c) The Applicant shall not be able to exercise any rights declared to hers in paragraph b above until such time as she provides the Trustees with security to restore the property in the condition that she received it which security shall consist of her maintaining insurance for the property of no less than 75% of its market value for the duration of her rights set out in paragraph 2 above. May I just add, if she should use it only for a limited period that will not be for a limited period.

²⁶ See Van der Merwe *Sakereg* (2nd ed) at 532, Hall & Kellaway *Servitudes* (1973) at 177; para 38; Corbett et al, *The Law of Servitudes in South Africa* (2nd ed), 2001 at 386 and *Crosbie v Crosbie Executor* (1904) 21 SC 597.

- d) The Applicant is not responsible for the payment of any past expenses, including maintenance costs and property rates, in connection with the property.
- e) The Trustees of the Trust, in other words the trust itself, at the time when the order is made, shall pay the costs of this application.

A handwritten signature in dark ink, appearing to read 'Nathan Erasmus', is written over a horizontal line.

Judge Nathan Erasmus

Western Cape High Court