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EX PARTE WALLACE.

(NORTHERN CAPE DIVISION.)

1969. *October* 16, 30. DE VOS HUGO, J.P.

Land.—Removal of restriction.—"Public interest".—What amounts to. —Act 94 *of* 1965, *sec.* 3 (1) (d).

It is in the "public interest" under section 3 (1) (*d*) of Act 94 of 1965 that persons should not be compelled to carry on an activity which they have no wish to carry on or for which they have no desire and so be prevented from doing those things which they consider they would rather do.

Application in terms of sec. 2 of Act 94 of 1965. The facts appear from the judgment.

N. W. Zietsman, for the applicant.

[The application was granted and the reasons were handed down on the 30th of October.]

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DE VOS HUGO, J.P.: This is an application in terms of sec. 2 of Act 94 of 1965 by way of a petition by Magdalena Hugo Wallace (born Olivier) for leave to sell a farm and for the removal of a conditional *fideicommissum* appearing in the deed of transfer of the farm. The following order was made and the Court indicated that the reasons would be handed down later. The reasons now follow.

The order is as follows: " ..... "

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The petitioner and her husband were resident in Cape Town, but at the instance of her father, she bought, against her actual wishes, the farm Rooisandheuwel in the Richmond district, from her father. The farm was transferred to her on the 23rd of February, 1954, and the transfer was made subject to the following conditions:

"Subject further to the following newly imposed conditions—

(*a*) to the usufruct in favour of the transferor Johannes Paulus Olivier (born on 2nd July, 1892) European Group, and after his death in favour of his wife Elizabeth Johanna Olivier (born Hugo on 7th December, 1894) European Group, to whom he is married in community of property, which usufruct is registered in the register of servitudes this day 9.7.1954.

(*b*) During the period in which the above-mentioned usufruct is in force, the said transferee Magdalena Hugo Wallace (born Olivier on 23rd August, 1927) married out of community of property to Gilbert Edward Wallace, shall not have the right to sell, mortgage or exchange the above-mentioned property without the written consent of the transferor and after his death without the written consent of his wife, the said Elizabeth Johanna Olivier (born Hugo on 7th December 1894) to whom he is married in community of property.

(*c*) If the above-mentioned Magdalena Hugo Wallace (born Olivier) dies without leaving lawful descendants, an undivided half share in the above-men-

tioned property shall accrue to her brother and sister in equal shares. If her brother or sister were then to be deceased, such a brother or sister's share shall accrue to their lawful descendants respectively."

The brother and sister referred to in the conditions are Andries Phillipus Olivier, who farms on the farm Rheboksfontein in the Victoria West district, and Maria Magdalena Orr, married to Desmond Reith Orr. They are resident in Johannesburg. The petitioner has three children of her own, Robyn Elizabeth Wallace, born on 16th August, 1954; Norman Edward Wallace, born on 28th November, 1956, and John Hilton Wallace, born on 9th December, 1959. The petitioner's brother has two children, born in 1957 and 1961, and her sister has also two children, born in 1949 and 1952.

It appears from the petition that the petitioner's father was afraid that she would die childless and that he did not want the farm then to fall into the hands of her husband. She says that her father informed her that the restriction on this property would be removed as soon as

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a child is born out of her marriage. She assumed that her father, after the birth of her first child, in fact removed the restriction, but in 1967 she discovered that the restriction still exists. Her father died in 1962 and her mother in 1965, with the result that the usufruct over the farm has already expired. Consequently only para. (*c*) of the restriction is still of importance to-day. The petitioner and her husband have farmed on the farm since 1953 but they do not want to farm and now the opportunity has presented itself to sell the farm to someone who wants to farm there. She consequently requests leave to sell the farm for the amount of R145,000 and that this amount be free of the *fideicommissum*.

The brother of the petitioner says that he knows the farm very well and that he assisted his father in farming on the farm. He is familiar with the farming conditions there. It is an oblong farm, stretching over a distance of 14 miles. It has a difficult shape and according to him the farm cannot be divided in a profitable way. According to the *fideicommissum* he and his other sister are merely entitled to a half share of the farm if the condition were to be fulfilled, and the division of the property which will then have to be made, is totally impractical.

The petitioner and her husband have introduced a considerable number of permanent improvements during the years in which they farmed on the property. A sworn appraiser, Mr. F. A. Paul, made a careful survey of the improvements, and he is of the opinion that the value of the farm has thereby improved by at least R2 per morgen and that the total value of the improvements amounts to slightly more than R19,000. These are improvements which form part of the *corpus* of the *fideicommissum* but are improvements in respect of which the petitioner, as *fiduciaria*, is entitled to be compensated. *Vide* Steyn, *Law of Wills in South Africa*, 2nd edition, p. 376. The petitioner's brother also says that it will be highly undesirable to lease the farm and that the petitioner will get less advantage from the farm if it is leased instead of sold.

The brother adds that he is quite well-to-do, and that he has no interest in any benefit which may accrue to him in terms of the *fideicommissum* and he also supports his sister's application that the farm be sold free from the *fideicommissum*. Petitioner's sister and her husband are resident in Johannesburg and both she and her husband say that they also support the petitioner's prayers and that they have no interest whatsoever in any benefit which might accrue to her in terms of the *fideicommissum*. They are also very well-to-do.

The *fideicommissum* is subject to the condition that the petitioner must die without lawful descendants. She now has three children and the possibility that she will die without lawful descendants is very remote. Admittedly, there is the possibility that the children may predecease her or may die in an accident, but this is, in the normal run of events, an extremely remote possibility. If one reads the *fideicommissum* in the context in which it appears then it is obvious that the petitioner's father merely wanted to ensure that the petitioner, if she were to die without leaving lawful descendants, would not leave the property to someone who is not a blood relation, e.g. her husband. The father apparently intended the children of his daughter to enjoy the benefit of the farm. She admittedly purchased the farm from her father, but it is obvious that she must have bought the farm at a price which takes her

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inheritance into account because, according to the joint will of the father and mother, the remainder of the estate, and this is practically the whole estate, apart from trifles divided amongst the children, is bequeathed to Maria Magdalena Orr. The son has his own farm which he also apparently purchased from his father under the same circumstances as those under which the petitioner purchased hers. The question is now whether the petitioner must be granted leave to sell the farm free from the *fideicommissum*.

The question is now whether the petitioner is entitled to the order requested. In terms of sec. 2 (1) of Act 94 of 1965 a beneficiary, like the petitioner, may request a restriction on immovable property to be removed, on the grounds that the removal will be to the advantage of those persons, born or unborn, certain or uncertain, who, under the document which imposes the restriction, are or will become entitled to the property. The basis of such an application is therefore the advantage of the said persons. In terms of sec. 3 (1) the Court, to whom such an application is made, may remove the restriction if the Court is convinced that it will be in the public interest or in the interest of the persons mentioned in sec. 2 (1), to do so. Here the public interest is introduced as an alternative ground for the removal of the restriction. The question is therefore whether the restriction can be removed because it is in the public interest or in the interest of the beneficiaries to do so. Concerning the public interest it can be said in the present case that it is indeed in the public interest that someone who does not want

to farm, be allowed to make room for someone who wants to farm and who is able to use the farm productively. It is, in my view, also in the public interest that persons should not be compelled to carry on an activity which they have no wish to carry on or for which they have no desire and so be prevented from doing those things which they consider they would rather do. Their lives must not be forced by the "hand of the dead" in a direction in which they are unwilling to go.

As far as the interest of the beneficiaries is concerned, it can be said that it is in fact in the interest of the petitioner and her children that the farm be liquidated and that the money be applied to provide them with an income in the way they desire.

At the moment the petitioner's capital is invested in the farm and she cannot reach it in order to create a better future for her children if the restriction is not removed. The only two other interested parties, viz. the brother and the sister of the petitioner, have no interest in the share which might accrue to them and they support their sister's application. Their support must be seen in the light of the family circumstances with which they are well acquainted and in the light of which they are convinced that their sister must enjoy the full benefit of the farm sold to her. There is no reason whatsoever to assume that the parents of the petitioner wanted to discriminate between the children and nothing more appears from the restriction on the petitioner's property than the father's concern that the property should be owned for the benefit of the petitioner's children. If there had been no children, half of the

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property would have accrued to the brother and sister, but now that there are children and the brother and sister renounce their contingent benefits, and it is highly improbable that their benefits will materialize, it can, in my view, be rightly maintained that removal of the restriction will be to the benefit of the petitioner and her children. If she does not gain control over her capital now, in order to ensure a good future for the children, it can be most prejudicial to her and to them. Because of these considerations the above order was made.

Applicant's Attorneys: *Kempen & Kempen.*
