240/54

G.P.-S.918—1950-1—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
(Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

E. G. GREENBERG, V. HARRIS, R. NATHAN, M. GREENBERG & V. GREENBERG & S.M. HACK, Appellant,

versus

L. J. [illegible], K. J. KARK & ORS (CEXORS. EST. LATE P. GREENBERG) Respondent.

Appellant's Attorney / Prokureur vir Appellant: K. W. Abrahams
Respondent's Attorney / Prokureur vir Respondent: C. Rand

Appellant's Advocate / Advokaat vir Appellant: J. M. Nathan
Respondent's Advocate / Advokaat vir Respondent: H. Coleman – 2nd, 3rd & 4th; I. P. Maisels & D. M. Williamson – 1st

Set down for hearing on / Op die rol geplaas vir verhoor op: Monday 9th May 1955.

1.2.4.5.6 — Before: Centlivres, C.J. Schreiner, Hoexter, Fagan, & Steyn, JJ.A.

10.30 – 12.50
2.15 – 3.30 – CAV.

Judgment:

Appeal dismissed, with costs – No order made as to the costs of 2nd, 3rd & 4th Respondents.

Centlivres, C.J., Schreiner, Hoexter, Fagan, & Steyn, JJ.A.

Registrar,
30/5/55.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter netween :

GREENBERG & OTHERS Appellants

&

ESTATE GREENBERG & OTHERS Respondents.

CORAM :- Centlivres C.J., Schreiner, Hoexter, Fagan et Steyn JJ.A.

Heard :- 9th May 1955. Delivered :- 30: V: 55

J U D G M E N T

CENTLIVRES C.J. :- Abraham Greenberg, to whom I shall refer as the testator, and his wife, who is still living, made a joint will on April 8th, 1918. He died on September 6th, 1918, leaving this will of full force and effect. Three sons, Bernhard, Max and Harry Greenberg were living at his death. All three sons are now dead, two of them having left issue.

The preamble to the will recited that the testator and his wife had been "married to each other in Russia, out of community."

The relevant provisions of the will are as follows :-

" 2. In case the said Testator shall be the first

" dying of them the Appearers declare their will and desire to be as follows :-

(a) The Executors hereinafter named shall hold in trust (1) certain immovable property "(which was specified)" and (2) a certain Mortgage Bond "(which was specified)". The said Executors shall allow the Survivor during her lifetime or until she remarries to control and administer the said immovable property and to let and hire the same, to collect the rents accruing in respect thereof and the interest accruing in respect of the said Bond, to pay out of the amounts so collected the cost of maintaining the said properties and all rates taxes quitrent and premiums of insurance payable in respect thereof and to retain the balance of such rents and interest as her sole free and absolute property. The said Executors may with the consent of the Survivor and at their discretion sell and dispose of the abovementioned property at public auction or otherwise, and invest the proceeds in good sound security for the benefit of the Survivor. Furthermore in the event of the Mortgage Bond having been paid off at the date of the death of the Testator the said Executors shall invest on good sound security a sum equal to the present value thereof for the benefit of the Survivor and in case the capital amount of the said Bond shall be reduced, a sum equal to the reduction shall be invested as aforesaid by the Executors for the benefit of the Survivor.

The said Executors may recover payment of the said Bond at such time as they think fit but any portion of the capital sum paid to or recovered by them shall be invested as aforesaid for the benefit of the Survivor.

" Upon the death or re-marriage of the said Survivor the said properties and the said Bond or the proceeds thereof and any sums invested in terms of this clause shall be divided equally between the three sons of the Appearers, the shares of each heir being subject to the conditions applying to the other portions of their respective inheritances as hereinafter set forth.

(b) The Balance of the Estate of the Testator shall be realised by the said Executors and the proceeds thereof shall be divided as follows :-

(1) One-third thereof shall devolve upon GEARS GREENBERG more generally known as HARRY GREENBERG, a son of the Testators as his sole free and absolute property.

(2) One-third thereof shall devolve upon MARCUS GREENBERG more generally known as MAX GREENBERG, a son of the Testators as his sole free and absolute property.

(3) Out of the remaining third a sum of £500. 0. 0. or a proportionate share thereof, shall devolve upon each of the three children of BEAR GREENBERG more generally known as BERNHARD GREENBERG, a son of the Testators, as their respective sole and absolute property. The said sums of £500. 0. 0. shall be invested by the Executors in such manner and on such security as they may think fit and each of the said children shall be entitled to receive the capital sum due to him with accumulated interest on attaining majority.

If any of the children die before attaining majority the amount of his legacy shall be added to the balance accruing to his father as hereinafter provided.

" (4) The balance (if any) of the estate of the Testator after providing for the above inheritances and subject to the terms of the next succeeding clause, shall devolve upon and be the property of the said son, BERNHARD GREENBERG, provided always however that the amount of such balance and any other inheritance accruing to him in terms of this the Will of the Testators shall be invested by the Executors in good sound security and shall be paid to the said BERNHARD GREENBERG in instalments not exceeding £300. 0. 0. in any one year, until such time as the whole amount so invested and the interest thereon shall have been received by him. In the event of a balance still remaining on the death of the said BERNHARD GREENBERG such balance shall devolve upon his children in equal shares.

" (d) The Executors and administrators may alter vary or transpose any investments or securities for others as often as it shall seem expedient to them to do so.

(e) In the event of any of the sons of the Testators dying before becoming legally entitled to any inheritance then the child or children if any, being the lawful issue of any such deceased son shall be entitled to and shall receive the inheritance to which such deceased parent would have been entitled had he lived.

(f) The two sons of the testators namely HARRY GREENBERG and MAX GREENBERG shall be the executors of this the Will of the Testator and administrators of his estate and affairs, with all such power and authority as are required or allowed in law especially that of assumption. "

The executors dative petitioned the Griqualand West Local Division for an order declaring the respective rights of the heirs of the testator. The interested parties raised various contentions. The Local Division upheld a contention that upon the death of the testator, in addition to the rights referred to in Clause 2(b) of the testator's will, the testator's children acquired a vested right to the asset referred to in Clause 2(a) of the testator's will, subject to a usufructuary interest in favour of the testator's widow. The matter now comes before this Court on appeal.

The appellants contended that the children of the testator did not acquire any vested rights to the assets referred to in Clause 2(a) of the will. This contention was supported by the second, third and fourth respondents whose interests were similar to those of the appellants.

I do not propose to discuss the various canons of construction which are often used in ascertaining whether a legatee obtained a vested right a morte testatoris, as those canons are adequately discussed in Smith and Another v Estate Smith (1949(1) S.A. 534 at pp. 544 - 545). There is, however, one passage in that judgment which was relied on by the appellants' counsel and which I think I ought to consider. It reads as follows :-

" The inference" (of a vesting a morte testatoris) " is also not so strong when the testator bequeaths the whole of his estate to trustees, as he has done in this case, for the following reasons. In the interpretation of wills it has always been regarded as necessary that the dominium in the testator's property must reside in someone. A usufructuary has no dominium in the fiduciary property. It follows naturally, when property is bequeathed subject to an intervening interest which is usufructuary in character, that the dominium should be regarded as residing in the ultimate beneficiary, because if it does not it would have to reside temporarily in the executor (see Black vBlack's Estate (21 S.C. 555)) or in the heirs ab intestato and such a position was regarded as anomalous and not favoured (see Estate Cato v Estate Cato and Others (1915 A.D. 290 at pp.

" 300 - 301). No such difficulty exists if the intermediate interest is fiduciary in character. But the difficulty as to the dominium disappears where a testator bequeaths his estate to trustees, because the trustees are fiduciaries in whom the dominium can reside and so the question as to the time of vesting of the rights of the ultimate beneficiaries can be considered free from any difficulties as to residence of the dominium. "

The position under our modern system of administering deceased estates is that when a testator bequeaths property to a legatee, the latter does not acquire the dominium in the property immediately on the death of the testator but what he does acquire is a vested right to claim from the testator's executors at some future date delivery of the legacy i.e. after confirmation of the liquidation and distribution account in the estate of the testator. If, for instance, immovable property is bequeathed to a legatee, he acquires a vested right as at the death of the testator but he does not acquire the dominium in that property until it is transferred to him by the executor. If that property has to be sold in order to pay the debts of the estate, the legatee may never acquire the dominium in that property. See Estate Smith v Estate Follett (1947 (2) A.D. 364 at p. 383) and Commissioner for Inland Revenue v Estate Crewe (1943 A.D. 656 at pp. 669 and 692). It seems

to me to be inaccurate to suggest (as was suggested on behalf of the appellants) that in ascertaining whether a legatee has acquired a vested right to his legacy as at the death of the testator one must enquire where the dominium in the property resides immediately after the testator's death. The futility of such an enquiry can, perhaps, best be illustrated by taking as an example a bequest of a sum of money. When a testator bequeaths, say, £1,000 to "A" the dominium in that sum of money does not vest in "A" as at the death of the testator but "A" acquires a vested right to claim that sum from the executor at the future date I have indicated, provided that the estate is solvent. The test seems to me to be whether, on a true interpretation of a will, the testator intended that a legatee should acquire as at his death a vested right to his legacy. It may be said that the legatee, if such was the testator's intention, then acquires the dominium of that right but it cannot be said that he then acquires the dominium in the subject matter of the legacy. The case of Gordon's Bay Estate v Smuts (1923 A.D. 160) affords a good illustration of what I mean. In that case a testatrix bequeathed a ~~farm~~ farm to ~~his~~ her son and his wife or the survivor of them for life and free of all rent and then directed that at the death of ~~his~~ her son and ~~wife~~ his wife the farm should be sold

and the proceeds divided between two of her children and a grandson. This Court held that the two children and grandson acquired a vested right as at the death of the testatrix. They obviously did not acquire a dominium either in the farm or the proceeds as at the death of the testatrix, because the farm was not bequeathed to them and the proceeds were not in existence at that date.

The interpretation sought to be placed by Appellants' counsel on the passage I have quoted from Smith and Another v Smith (supra) cannot be accepted as it cannot be assumed that this Court intended in that case to depart from what it had previously said in Smith v Estate Follet (supra) and Commissioner for Inland Revenue v Estate Crewe (supra).

The principle laid down by the cases of Estate Follet and Estate Crewe in essence amounts to this : in ascertaining whether a legatee has obtained a vested right to his legacy as at the death of the testator or whether an heir, who under the law as it now exists, is merely a residuary legatee, has at that time acquired a vested right to his inheritance, it is irrelevant to enquire where the dominium in the legacy or inheritance (as the case may be) resides immediately after the death of the testator. The fact, therefore, that a testator bequeaths the whole or part of his estate to trustees does not show that he did not intend a legatee or an

heir to acquire a vested right to his legacy or inheritance as at his death. In every case the intention of the testator must be gathered from the terms of his will.

Earlier cases, such as Estate Cato v Estate Cato (supra at p. 300/1) and Estate Kemp & Others v McDonald's Trustee (1915 A.D. 490) seem to me to have erroneously laid stress on the residence of the dominium immediately after the death of the testator. So too did the case of Ex parte Isham (1954(2) S.A. 511) quoted by counsel for the appellants. The reason why such stress was laid was because it was not appreciated that under our modern system a legatee or an heir never acquires the dominium in the legacy or inheritance immediately on the death of the testator : all that he acquires is a right to claim the legacy or inheritance.

Coming now to the interpretation to be placed on the will of the testator it will be observed that the testator's widow was given, under Clause 2(a), the right to retain, during her life-time, the balance of the rents accruing on the immovable properties and the interest on the bond after paying the cost of maintaining the properties and all rates, taxes, quitrent and premiums of insurance payable in respect of the properties. The fact that the testator considered it necessary to provide specifically that the widow had to pay the rates and taxes on the immovable property shows that he could not have had

in mind any intention of treating her as an owner of the immovable property : in other words she was not a fiduciary. See the Gordon's Bay Estate case (supra) at p. 166. The widow therefore could not become the owner of the assets in respect of which she had a life interest if (as actually happened) all her sons prececeased her. She had nothing more than an interest of a usufructuary character.

I shall now deal with the concluding words of Clause 2(a) whereunder it is provided that "upon the death or re-marriage "of the said Survivor the said properties and the said Bond "or the proceeds thereof and any sums invested in terms of this "clause shall be divided equally between the three sons of the "Appearers." If the words which I have quoted had stood by themselves without the addition of the words "the shares of "each heir being subject to the conditions applying to the "other portions of their respective inheritances as hereinafter "set forth" I am of opinion that the three sons would have obtained a vested right to the corpus or the proceeds of the assets referred to in Clause 2(a). See the Gordon's Bay Estate case (supra.)

The effect of the added words must now be considered. Those words bring into operation paragraph (e) of Clause 2.

That paragraph clearly applies also to paragraph (b). Under paragraph (b) "the balance of the estate" is bequeathed as follows :-

1. One third fo Harry Greenberg

2. One third to Max Greenberg

3. Portion of the remaining third goes to the children of Bernhard Greenberg and if anything is left after payment of that portion it is to go to Bernhard Greenberg subject to certain conditions.

There can be no doubt that, in respect of the balance of the estate, i.e. the estate less the assets specified in Clause 2(a), paragraph (e) is a direct substitution. It is clear that the sons of the testator became legally entitled to their inheritances immediately on the death of the testator. If any son had predeceased the testator leaving children his children would have stepped into their father's shoes. I have already stated my view that the sons obtained a vested right to the assets (or the proceeds thereof) specified in Clause 2(a). The object of making the concluding portion

of Clause 2(a) subject to paragraph (e) was to ensure that the children of a son who predeceased the testator should inherit what his father would have inherited had he lived.

For all these reasons I am of opinion that the appeal must fail.

There remains the question of costs. Counsel for the appellants contended that in the event of the appeal being unsuccessful the costs of appeal should be paid by the testator's estate. The appellants were the widow and the children of the late Harry Greenberg. They sought an order reversing the order made by the Local Division and the effect of such a reversal would have been to render of no value cessions made by Harry Greenberg to Max Greenberg of whatever rights he had under Clause 2(a) of the will. The appeal was prosecuted in the interests of Harry Greenberg's children, for if their contention had been upheld, they would have become

entitled to the assets specified in Clause 2(a) if they survived the testator's widow. The appeal was, therefore, not prosecuted in the interests of the testator's estate and it seems to me that the appellants having failed in their appeal should be ordered to pay the costs on appeal incurred by the eleventh and twelth respondents who were the executors in the estate of the late Max Greenberg. Where the proper interpretation to be placed on a will is in dispute and difficulties arise as to the intention of the testator owing to the language used by him courts of first instance frequently in the exercise of their discretion order the costs incurred by all parties to be paid out of the testator's estate. But I can see no reason why, when an appeal fails, the appellant should not pay the costs of appeal. When he prosecutes an appeal he knows or ought to know that he runs the risk of having to pay the costs of appeal and, unless the circumstances are very special, he should not be allowed to prosecute his appeal at the expense of others.

The second, third and fourth respondents are the children of the late Bernhard Greenberg. They supported the contentions advanced by the appellants and their counsel stated that they availed themselves of the opportunity, as interested parties, to place their submissions before the Court and were prepared

to do so at their own expense irrespective of the result of the appeal. Counsel, however, submitted that all the costs should be paid out of the testator's estate. For the reasons given above I do not think that this submission should be acceded to. Counsel for those respondents did not ask that the appellants should be ordered to pay their costs : indeed such an order could not properly be made as those respondents supported the contentions of the appellants.

The result is that the appeal is dismissed with costs and no order is made as to the costs of the second, third and fourth respondents.

A.W.Centlivres.

Hoexter JA.
Fagan JA.
Steyn JA } Concur.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

GREENBERG & OTHERS Appellants

&

ESTATE GREENBERG & OTHERS Respondents

CORAM :- Centlivres C.J., Schreiner, Hoexter, Fagan et Steyn JJ.A.

Heard :- 9th May 1955. Delivered :- 30.5.55

J U D G M E N T

SCHREINER J.A. :- I agree with the judgment of the Chief Justice but wish to add a few remarks relative to a portion of the summary of canons of construction set out in Smith and Another v Estate Smith (1949 (1) S.A. 534). Watermeyer C.J. in giving the judgment of the Court says at p. 543, "If property is "bequeathed to a beneficiary at some future date subject to an "intermediate interest given to another beneficiary then if the "intermediate interest is of a usufructuary character the natural "inference is that the testator intended the right of ownership "to vest immediately on his death in the ultimate beneficiary. "If on the other hand the intermediate interest is of a fiduciary "character the natural inference is that the testator intended

"the right of pwnership of the property not to vest on his "death in the ultimate beneficiary. But these inferences "must necessarily give way to any contrary intention of the "testator which is disclosed by the provisions of the will. "

The language of these propositions comes from Strydom v Strydom's Trustee (11 S.C. 425 at pp. 429/430), and has been used a number of times in this Court. Nevertheless I venture the comment that this language is not beyond the need of clarification. If all that was intended was that the fact that a disposition uses the words "usufruct" or "fideicommissum" or expressions that ordinarily connote a usufruct or fideicommissum, while it raises an inference that the disposition creates a usufruct or fideicommissum, as the case may be, yet allows to but that the inference may be met by counter inferences raised by other considerations arising from the language of the will, there could, I think, be no criticism of the propositions. But from what followed the propositions in the judgment in Strydom's case (supra) one may be forced to the view that something more was intended. Illustrating the unexceptionable statement that presumptions must yield to other indications of the testator's intention, de Villiers C.J. proceeded, "There have been cases in which the right of a legatee to a

"legacy payable after the death of a usufructuary has further been
"made conditional as a contingency personal to the legatee,
"such as marriage or majority, events or dates uncertain,
"which may never take place or arrive, and in such cases the
"presumption in favour of immediate vesting has been held to
"be rebutted. On the other hand, the fact that the prior
"interest is in the nature of a fideicommissum is not con-
"clusive proof that the testator intended to postpone the
"vesting until the termination of such prior interest. A
"fideicommissum may be so purely in the nature of what the
"English law terms a trust as not to interfere with the vest-
"ing of the fidei-commissary legatees' interest, even before
"the arrival of the time for the payment of the legact. "

In regard to the first illustration, there could, of course, be no doubt that the interest which succeeds an admittedly usufructuary interest may be prevented from being a vested interest by other factors importing a condition. But that would hardly justify the use of language which seems to leave open the possibility that even when there are simply two successive interests the first of which is found to be of a usufructuary character the second is not necessarily a vested interest. So far as the existence of the two interests alone is under consideration it seems to me that the vesting of the second interest at the

death of the testator is simply another aspect of the statement that the first interest is of a usufructuary character.

In regard to the second illustration it can be supported only by calling a trust a fideicommissum. It is, of course, perfectly clear that our law has not absorbed the English law of trusts, but there seems to be no advantage in continuing to call a trust a fideicommissum and a trustee "a fiduciary in "the nature of an administrative peg" or "a fiduciary under a "fideicommissum purum" or the like. If that usage were abandoned "the fact that the prior interest is in the nature of "a fideicommissum" would not only be material for inference or even conclusive proof that there was an intention to postpone the vesting : it would amount to saying the same thing in a different way.

This line of approach ~~it~~ seems to me to assist in removing the difficulty referred to in the judgment of the Chief Justice in regard to the importance which has sometimes been attached to the factor of placing the bare dominium when deciding questions of vesting.

C.W. Schreiner

28. 5. 55