

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

Provincial Division).  
Provinsiale Afdeling).

Appeal in Civil Case.  
Appèl in Siviele Saak.

Appellant,

Respondent.

Appellant's Attorney  
Prokureur vir Appellant

Respondent's Attorney  
Prokureur vir Respondent

Appellant's Advocate  
Advokaat vir Appellant

Respondent's Advocate  
Advokaat vir Respondent

Set down for hearing on

Op die rol geplaas vir verhoor op

C.A.V.

For Registrar:  
20/8/55.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter <sup>of</sup> ~~between~~ :-

Ex parte JOHANNES FREDERIK LOMBARD. 1st.Appellant

ISABELLA JOHANNA MARE 2nd.Appellant  
(born Lemmer)

and

RICHARD HERMANUS LEMMER 3rd.Appellant

Coram:Schreiner A.C.J., van den Heever, Hoexter, Fagan  
et Steyn, JJ.A.

Heard: 23rd.August, 1955.

Delivered: 6 - 9 - 1955

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J U D G M E N T

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SCHREINER A.C.J.:- On the 20th August 1898 Petrus  
Johannes Lombard and his wife Isabella Johanna Lombard  
(born Botha), whom I shall call "the testators", executed  
a mutual will whereunder they bequeathed the immovable  
property of their estate to their children or their law-  
ful descendants per stirpes, "onder expresse~~x~~ voorwaarden  
"dat het vaste eigendom op de grond onvervreemba<sup>a</sup>ar zal  
"zijn, uitgezonderd tusschen de erfgenamen zelven of  
"hunne wettige afstammelingen tot aan het derde geslacht  
"toe." The first appellant is the son and the second  
and third appellants are grandchildren of the testators;  
they/.....

they are the registered owners of land which formed part of the immovable property of the estate and their title deeds carry, in substance, the above quoted restriction.

The land in question was being used for agricultural purposes when the will was executed and it is still so used, and the likelihood of minerals in payable quantities being discovered thereon only arose recently.

A gold bearing reef series is known to lie beneath the land but this series has been worked for gold in the neighbourhood without much success. Recently, however, there have been reports that reefs of the series carry uranium as well as gold; and there is thus a possibility that gold and uranium in payable quantities may be found to exist under the land of the appellants. In July 1954 they entered into prospecting contracts, which included options to purchase their land, the contracts being conditional upon the grant by the Transvaal Provincial Division of the Supreme Court of an order in terms of section 1(c) of Act 2 of 1916 for the removal of the above quoted restriction.

The relevant portions of sections 1 and 2 of the Act, as amended, read :-

"1. If any beneficiary interested in immovable property which is subject to any restriction imposed by will.....  
desire/.....

desire to have such restriction removed.....on the ground that such removal.....will be to the advantage of the persons, born or unborn, certain or uncertain, who are or will be entitled to such property.....under such will.....such beneficiary may apply to the court for the removal.....of such restriction, and the court if satisfied -

(c)that since the taking effect of the will.....circumstances materially affecting the value of such property have arisen which.....were not contemplated.....may remove.....any such restriction and order such property to be sold...or make such further or other order as to the court shall seem just.

2. In the event of the court ordering any such property .....to be sold, it may further order that the proceeds derived from such sale -

(a)be paid over to some person specifically appointed by the court who shall, for the benefit of the beneficiaries, invest the same in securities or immovable property which shall mutatis mutandis be subject to all the terms conditions and trusts contained in the will.....; or

(b)be distributed among the beneficiaries in being to be enjoyed by them absolutely. "

The appellants set down an application in the Transvaal Provincial Division for an order removing the restriction, authorising the appellants to enter into the contracts and authorising the registration of the contracts against the relevant title deeds. Thereafter they gave notice of an additional prayer, being for

an/.....

an order under section 2 (b) of the Act directing that

"the proceeds derived from the sales of the mineral rights

"and/or the surface of the properties.....be distributed

"to" the appellants "to be enjoyed by them absolutely."

A curator-ad-litem was appointed

to all minor and unborn beneficiaries and notice was served

by registered letter on all major beneficiaries under the

will. At the hearing the appellants, through their

counsel, intimated that they would prefer that no order

removing the restriction should be made if the court was

not prepared to grant the prayer for distribution under

section 2 (b). After hearing counsel for the appellants

the Transvaal Provincial Division made no order on the

application. NESER J., with whom ROPER J. concurred, stated

in his judgment that he would have been prepared, subject

to proof that the prices in the prospecting contracts were

fair, to grant the prayers for an order removing the re-

striction and authorising the execution and registration of

the prospecting contracts. But as the court, holding that

it had a discretion in the matter, was not disposed to order

the distribution of the proceeds among the appellants for

their absolute enjoyment, refusal of the application neces-

sarily followed, in view of the appellants' attitude. That

attitude/.....

attitude was modified before this Court, which was requested, if it should not direct the distribution of the proceeds among the appellants, to make such order as would enable the restriction to be removed and the proceeds to be dealt with for the benefit of such persons as were or might become entitled thereto.

The principal issue before this Court was thus whether an order for distribution under section 2 (b) should have been granted. It was argued for the appellants, and I shall assume rightly, that as <sup>right to</sup> ~~an~~ appeal to this Court is given under section 4 of the Act no question of reluctance to interfere with the exercise of a discretion by the court of first instance arises.

The question whether in particular circumstances an order should be granted under section 2 (a) or under 2 (b) has been discussed in several cases to which we were referred. In Ex parte Dalton (1941 O.P.D. 238) an order for distribution was granted where there was a restriction of unlimited duration against alienation out of the family. In Ex parte Swardt (1942 O.P.D. 253) and also, it seems, upon an unreported application in 1943, similar orders were granted to other applicants who/.....

who were beneficiaries under the same will as that involved in Ex parte Dalton. These cases were followed when yet another application was made in respect of the same will (Ex parte de Swardt, 1953(4)S.A.652), but the court expressed the view that had it not been for the previous decisions in respect of the restriction under the same will it would have been disposed to direct that the proceeds should be dealt with under section 2 (a).

It should be observed that the restriction involved in the above cases was in terms unlimited while in the present case there is the express limitation until the third generation. The restriction under the present will was examined in the case of Ex parte van Eeden and Others (1905 T.S. 151), where an application was made at common law for leave to enter into prospecting contracts in respect of land a small part of which was covered by the same restriction as is in question in the present matter. WESSELS J., at first instance, refused the application. After holding that the restriction was real and not personal, the learned judge said, at page 153, "I cannot see how it can be said that the words 'until the 'third generation' are not to be regarded as creating a fidei-commissum in favour of the third generation." An

appeal/.....

appeal was dismissed and INNES C.J., with whom SOLOMON and CURLEWIS JJ. concurred, pointed out at page 154, that the restriction might have been a nude one but for the words which excepted from the prohibition alienation among the heirs or their descendants down to the third generation. The inference drawn was clearly the same as that so emphatically stated by WESSELS J. in the court below.

The view expressed in van Eeden's case that this will created a fidei-commissum in favour of the third generation might, if accepted as correct, suffice for the dismissal of the present appeal. But I think that it should be pointed out that the Act does not anywhere refer to fideicommissa. It deals generally with the removal of restrictions to which immovable property has been subjected. Whether, therefore, in any particular case the restriction would more appropriately be called by some other name than fideicommissum does not seem to be important. Again it should be noted that, although "beneficiary" is defined in section 7 as "any person entitled to a beneficial interest.....", the context shows that in section 2 (b) the beneficiaries are the same as "the persons, born or unborn, certain or uncertain, who are or will be entitled to such property" who are mentioned in section/.....



section 1 (cf. in re Estate Scholtz, 1937 C.P.D. 146 at page 149). It is true that in the above quoted extract from section 1 the words "are or will" instead of "may be or "become" or the like, suggest certainty, but the preceding words, "born or unborn, certain or uncertain," show that the interests which the court must regard and, if it is thought proper, protect ~~and~~ include those that amount to mere chances or hopes of benefiting from the restriction. The Act does not specify the kind of benefit that is to be regarded or protected, but the language of section 1 indicates that the power given to the court is intended, broadly speaking, to be used for the advantage of all persons who may, according to circumstances, acquire the property by succession or by purchase, where the restriction takes the form of a right of preemption, a limitation to alienations within a particular class or the like. Whatever the form of the restriction the prospects of advantage may range from a slight possibility to a strong probability; the court has to take all the circumstances into account in deciding which course to follow. I agree with what was said by MURRAY J. in Ex parte van Vuuren (1937 T.P.D. 144 at page 147) that where the testator has evinced a clear desire to benefit future generations of his descendants this is a

reason/.....

reason for preferring the use of section 2 (a) rather than section 2 (b). But apart from cases where there is such a clear indication, and assuming that the reason for making a particular restriction may well have been something other than regard for the descendants, it still remains right, I think, that the expectations or hopes of persons who might benefit from the existence of the restriction should not be lightly destroyed by the exercise of the power given under section 2 (b).

Applying the above considerations I am in agreement with the view taken by the Transvaal Provincial Division that this was not a case for the application of section 2 (b). The appeal is dismissed, but the matter is remitted to the Provincial Division for reconsideration and further decision in the light of such evidence as the appellants may put before it in relation to the fairness of the prices. The appellants must pay the costs of the curator-ad-litem.

~~van den Heever, J.A.~~

Hoexter, J.A.

Fagan, J.A.

Steyn, J.A.

} Concur

*D. Schreiner*  
5.9.55