38/1955.

G.P.-S.12136—1952-3—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.

COMMISSIONER for INLAND REVENUE Appellant,

versus

EXORS EST. LATE ANNIE M. LUKIN Respondent.

Appellant's Attorney
Prokureur vir Appellant ~~State Attorney~~

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

— Appeal dismissed, with costs.

Centlivres CJ.
Schreiner, v.d. Heever,
de Beer, & Reynolds, JJ.A.

Registrar
Regr. 1/12/55

Record.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

COMMISSIONER FOR INLAND REVENUE Appellant

&

ESTATE LUKIN Respondent

CORAM :- Centlivres C.J., Schreiner, van den Heever, de Beer et Reynolds JJ.A.

Heard :- 24th November 1955. Delivered :- 1.12.55

JUDGMENT

CENTLIVRES C.J. :- Sir Henry Timson Lukin, to whom I shall refer as the testator, died in 1925 leaving a will which, after setting forth a bequest to Lady Lukin, his wife, of his residence and his personal effects, proceeded as follows :-

" I bequeath the usufruct or income of the rest, residue and remainder of my Estate, nothing whatever excepted to my said wife, Annie Maria Lukin (born Quinn) for the term of her natural life, giving her the right of disposition of the said residue and remainder by Will.

It is my will and desire that in the event of my said Wife, me surviving, dying without having made a Will, the following dispositions of such residue shall be made by my Executors hereinafter named. "

The "following dispositions" consisted of :

(1) the bequest to certain nieces and nephews of "the income derived from the amounts set opposite their respective names." There followed a provision as to the devolution of the "capital amount mentioned in respect of each" nephew and niece ;

(2) the bequest of £300 to a godson "as his sole and absolute property" ;

(3) a direction to his executors to apply a sufficient sum of money, not exceeding £1,000, for the endowment of a bed in two named hospitals ;

(4) a direction to his executors to provide a sufficient sum of money for establishing a bursary of £50 per annum for any student studying at a named institute;

(5) a direction that "the capital amount" of "any residue over and above the bequests aforementioned shall be equally divided between all my aforementioned nieces and nephews or the survivors of them..... "

The will then proceeded as follows :-

" I nominate and appoint, as Executors and Trustees under this Will, and Administrators of my Estate, the STANDARD BANK OF SOUTH AFRICA, LIMITED (hereinafter called 'The Bank')

.....

and I desire that the Bank may..... transact any Banking Business on behalf of my Estate or the Trusts under this Will, and may retain on current or deposit or may advance any moneys it may be necessary or convenient to

" retain or advance on the same terms as would be made with a Customer in the ordinary course of business. "

Lady Lukin died in 1952, leaving a will in which she exercised the right conferred on her by the testator to dispose of the residue of the testator's estate.

The executors of the estate of the late Lady Lukin applied to the Cape Provincial Division for an order declaring that the interest held by her immediately prior to her death in the residuary estate of the testator was a "usufructuary or other like interest" within the meaning of Sec. 3(4)(c) of Act 29 of 1922 as amended.

The Provincial Division granted the application and the Commissioner now appeals.

The contention of the Commissioner is that Lady Lukin acquired, within the meaning of Sec. 3(4)(b) of the Act, a fiduciary interest in the residue of her husband's estate. If that contention is correct then the estate of Lady Lukin is liable to pay estate duty on the value of such fiduciary interest, calculated in terms of Sec. 5(b)(iii). (See/ Sec. 24 but under Sec. 25 the duty would be recoverable, in terms of Sec. 23, from the persons to whom any advantage accrued as a result of Lady Lukin's death.) If the contention of the executors of Lady Lukin's estate is correct, no estate duty will, in view of Sec. 4(a)(vii), be payable in respect

of the interest which she acquired under her husband's will.

Mr. de Villiers, who appeared on behalf of the Commissioner, contended that, as the testator did not bequeath the residue of the estate to his executors, trustees and administrators, to whom I shall refer as the Bank, it must be taken that he did not intend that the dominium in the residue should vest in the Bank and that he intended that the dominium should vest in Lady Lukin. Counsel went so far as to contend that it was the intention of the testator that Lady Lukin should have the custody and control of the residue of the testator's estate and that the final liquidation and distribution account in the estate of the testator should not have awarded the residue of the estate to the Bank as trustees and administrators. No good purpose can be served by setting out the elaboration of counsel's argument on this point. It is sufficient to say that if one peruses the testator's will carefully it will at once become apparent that he was fully aware of the difference between bequeathing capital and bequeathing the income of capital. In the bequest to Lady Lukin the testator used the words "usufruct or income". He obviously regarded those two words as being synonymous. Strictly speaking it may be said that when a person has the usufruct of a thing he is entitled to have the control and custody of that thing but in ordinary everyday

language it is often said that a person has the usufruct of the residue of an estate when all that is meant is that he is entitled to receive the income produced by that residue.

Although there is no express bequest of the residue of the testator's estate to the Bank, it is clear, in my opinion, that the testator intended the Bank to have the custody and the control of the residue during Lady Lukin's lifetime and also after her death in the event of her not exercising the right of disposition conferred on her by the will. The Bank was appointed not only as executors but also as trustees and administrators and it seems to me that the words "the trusts "under this Will" (occurring in the clause appointing the Bank) refer not only to the duties cast on the Bank after Lady Lukin's death, should she fail to exercise her power of disposition, but also to the implicit duty cast on the Bank to pay her the income derived from the residue of the estate during her lifetime. In my opinion, therefore, the residue of the estate was correctly awarded to the Bank in the final liquidation and distribution account in the testator's estate.

Mr. de Villiers also contended that the fact that Lady Lukin was given the right to dispose by will of the residue of the testator's estate was an indication that the testator

intended her to get a fiduciary interest. Mr. de Villiers correctly, I think, conceded that what is commonly known as a power of appointment can be conferred by will on a beneficiary who is a usufructuary. That this is so in the case of a power of appointment conferred by a deed containing a donatio inter vivos is clear from the case of Commissioner for Inland Revenue v Smollan's Estate (1955 (3) S.A. 266).

Considerable misconception has been caused by the statement made by Juta A.J.A. in Union Government v Olivier (1916 A.D. 74 at pp. 89/90). He said that a power of appointment granted by will to an heir to bequeath his portion to one or more of his children as he should think fit "can only be "exercised in our law by way of a fideicommissum, see Voet "36,1,29 and in re Myburgh (13 S.C. 218) and Stanley v Botha's "Executors (17 S.C. 48) which followed Voet - so that the heir "or legatee to whom the power of appointment is given is the "fiduciary, and the persons selected from those named by the "testator are the fideicommissaries under the will of the test-"ator." This statement was referred to with apparent approval by Curlewis C.J. in Westminster Bank Limited N.O. v Tinn N.O. (1938 A.D. 57 at p. 66). None of the authorities referred to by Juta A.J.A. support his statement that a power of appointment

can only
~~exercised~~ be exercised by way of a fideicommissum. Both in Oliver's case and the Westminster Bank case more than one judgment was delivered and there is nothing to show that the majority of the Court in either case approved of the statement made by Juta A.J.A. In both cases property was bequeathed to the person who was given the power of appointment : in Olivier's case „onder servituut" i.e. subject to a fideicommissum which was specified, and in the Westminster Bank case it was provided that the children's shares "shall be burthened "with 'Fidei Commissum' ". Consequently in each case the person holding the power of appointment was a fiduciary and all that the statement made by Juta A.J.A. probably means is that where that is the case the ordinary rule in regard to fideicommissa applies viz: that the persons appointed by the will of the person to whom the power was given were fideicommissaries and as such succeeded to their inheritance not under the will of the person who exercised the power but under the will of the person who granted the power. In view of the fact that in each of the above cases there was a bequest to a beneficiary who was given a power of appointment and that beneficiary was burdened with a fideicommissum I do not think that either Juta A.J.A. or Curlewis C.J. can be held to have intended to lay down that a power of appointment can be granted by will

only by way of a fideicommissum - a doctrine which it was not necessary to lay down in either case. In so far as the cases of de Villiers v Estate de Villiers (1929 C.P.D. 106) and Lindsay's Estate v McBride's Curator (1939 C.P.D. 426) are inconsistent with what I have said they must be taken to be overruled. For these reasons I agree with the concession made by Mr. de Villiers.

But Mr. de Villiers relied on the cases of Oliver and the Westminster Bank for the following proposition : where, as in this case, the nature of an intervening beneficiary's interest is in issue, the conferring upon her of the right of disposition of the corpus of the estate in which she holds that interest, affords a strong indication that the testator intended dominium to vest in her, subject to the limitations indicated in the will. It is, perhaps, sufficient to say that I can find nothing in either of the above cases which supports the proposition put forward by counsel. As I have already pointed out in both those cases there was a bequest to the holder of the power of appointment and that bequest was expressly burdened with a fideicommissum and that being the case there was no occasion to lay down any such proposition. I may add that such a proposition seems to be inconsistent with the ratio decidendi in Smollan's case (supra).

I now return to the testator's will. The bequest to Lady Lukin is confined to "the usufruct or income of the rest, "residue and remainder of my Estate" and is followed by conferring on her "the right of disposition of the said residue "and remainder by Will." All that the bequest to Lady Lukin amounts to is that she is entitled to the income derived from the residue - income which it is implicit from the will read as a whole must be paid to her by the Bank on which is imposed the duty of administering the residue. There is no reason to suppose that the testator intended that Lady Lukin should be vested with the dominium in the corpus of the residue. For the purpose of this case it is not necessary to decide whether the dominium in that corpus vested in the Bank as executors in the first instance and afterwards in the Bank as administrators and trustees when it was awarded the residue on the confirmation of the final liquidation and distribution account in the testator's estate. If, as I think is the case, Lady Lukin had no dominium in the residue, it follows that she did not hold a "fiduciary interest" within the meaning of Sec. 3(4)(b) of the Act but a "usufructuary or other like interest" within the meaning of Sec. 3(4)(c).

For these reasons I am of opinion that the conclusion reached by the Provincial Division is correct and that the appeal should be dismissed with costs.

Schreiner JA
de Beer JA
Reynolds JA
concur.