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N v H

E R HOROWITZ / R BROCK AND OTHERS

SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

ELIZABETH RACHEL HOROWITZ	Appellant
and	
RICHARD BROCK	First Respondent
JULIAN BROCK	Third Respondent
HENRY GLUCKMAN, IVOR GLUCKMAN, ROBERT MACFARLANE AND PETER SIMKINS, NNO	Fourth Respondent
ALEXANDER BROCK	Fifth Respondent

CORAM: JOUBERT, GROSSKOPF, SMALBERGER, JJA, et NICHOLAS, STEYN, AJJA

HEARD: 17 AUGUST 1987

DELIVERED: 5 NOVEMBER 1987

J U D G M E N T

SMALBERGER, JA :-

Introduction

The appeal and the two petitions before this Court involve issues inextricably linked to the proper

interpretation / .....

interpretation of the joint will of the late Selig Hillel Hillman and Chane Rochel Hillman. For convenience I shall refer to them jointly as "the testators", and individually as "the testator" and "the testatrix" respectively.

The proper interpretation of certain relevant provisions of the testators' will, to which I shall advert in more detail later, was the subject of a declaratory order sought by the trustees of the testamentary trust established in terms of the will in the Witwatersrand Local Division.

The judgment on the application by McEWAN, J, is reported sub nom Ex parte Gluckman and Others NNO 1980 (3) SA 1127 (W). McEWAN, J's judgment was taken on appeal to the Full Bench of the Transvaal Provincial Division and its

judgment (delivered by I W B DE VILLIERS, AJ, DE VILLIERS and MOLL, JJ, concurring) is reported sub nom Ex parte Gluckman and Others NNO : In re Hillman's Estate 1982 (2) SA 628 (T). I shall refer to these judgments as the "WLD" and "TPD" judgments respectively.

Much of the relevant factual background necessary for a proper appreciation of the issues before us appears from the two judgments referred to. In order to facilitate the reading of this judgment it is necessary to recount certain of those facts. In doing so I shall borrow freely from the WLD judgment.

The joint will of the testators was executed on 13 May 1925. The testator died on 9 November 1928, and the

testatrix / .....

testatrix on 8 March 1955. In terms of the will the estates of the testator and the testatrix were massed and were to be held in trust subject to the conditions of the will. The testatrix, as survivor of the spouses, became entitled to a life usufruct in respect of the income from the trust subject to a certain maximum amount. On her death certain legacies were to be paid whereafter the balance of the trust was to be divided between the testators' four children, namely, Maurice Hillman, Wolf Hillman, Fay Gluck= man and Annie Brock in the proportions and subject to the limitations stated in the will. For the sake of convenience and brevity I shall refer to the children by their first names. The bequests to Maurice and Wolf fell away because

they predeceased the testatrix without leaving lawful issue. As a result their shares devolved upon their sisters subject to the same conditions as were imposed in relation to the sisters' own shares of the inheritance. Those conditions are set out in clause 7 of the will, to which I shall advert in greater detail later. Suffice it for the present to state that Fay and Annie were income beneficia= ries only in respect of their shares, and in terms of the will the trustees were enjoined "on their respective deaths to hold their shares as aforesaid for the benefit of and to pay over the same to their lawful children in equal shares who shall attain the age of 25 years".

Fay had two sons. She died on 26 November 1976. By that time both her sons had attained the age of 25 years. One-quarter of the trust estate was accordingly distributed to each of them. Fay's descendants do not claim to have any interest in the present proceedings, which revolve around the rights of Annie's children and grandchildren.

Annie had two children, Richard and Theda. Richard has two sons, Julian and Alexander, both of whom are majors. Theda died in 1966. At the time of her death she was married to Ruben Horowitz, and was survived by a daughter, Elizabeth (also spelt Elisabeth). The latter attained majority prior to the hearing of the present appeal.

At a / .....

At a certain stage Annie expressed the wish to renounce all her rights of whatsoever nature in and to the trust in favour of Richard. This led to the trustees of the trust seeking the declaratory order which gave rise to the WLD judgment. The declarations sought in the notice of motion appear at 1130 H to 1131 E of the WLD judgment. In view of subsequent developments and their effect on the issues arising in the present appeal it is necessary, for the sake of clarity, to repeat these herein. They are as follows:-

> "2.1 Upon renunciation by Annie Brock in favour of Richard Brock of all her interests in and to the trust estate ('the trust') created in terms of the last will and tes= tament ('the will') of the late Selig Hillel Hillman and his subsequently deceased spouse Chane Rochel Hillman, the

corpus in the trust will pass to Richard Brock to the exclusion of any living or unborn person, and the trust will terminate;

2.2 the estate of the late Theda Rhona Horowitz (born Brock) has no claim to the corpus of the trust whether on a renunciation by Annie Brock to Richard Brock of all her interests in and to the trust, or failing such renunciation, on the death of Annie Brock and whether or not she is then survived by her son Richard Brock, other than in terms of the arrangement referred to in these papers between Richard Brock and the said estate;

2.3 Elizabeth Horowitz has no claim to the corpus of the trust whether on a renunciation by Annie Brock to Richard Brock of all her interests in and to the trust or, failing such renunciation, on the death of Annie Brock and whether or not she is survived by her son Richard Brock;

2.4 on the death of Annie Brock (failing any renunciation during her lifetime of her interests in the trust) her son Richard Brock will become exclusively entitled to the corpus of the trust as then existing;

2.5 on the death of Richard Brock during the lifetime of Annie Brock (failing any renun= ciation during her lifetime of her interests in the trust) Annie Brock will acquire full dominium in the assets comprising the trust to the exclusion of any other person whether alive or unborn."

In interpreting the will McEWAN, J, concluded that the word "children" in the phrase "pay over the same to their lawful children in equal shares" had to be given an extended meaning to include the children of predeceased children of Annie (in casu, Elizabeth). He expressed the view (obiter) that on Annie's death Richard and Elizabeth would be beneficiaries in equal shares of the corpus of the trust (at 1135 F). In the result he refused prayers 2.1, 2.3, 2.4 and 2.5 of the notice of motion, but granted

prayer / .....

prayer 2.2 (in regard to which there was no real dispute). As at the time of the hearing Elizabeth, Julian and Alexander were all minors they were represented by curators-ad-litem, in the case of Elizabeth, by Mr Bashall, and in the case of Julian and Alexander, by Mr Cloete.

The trustees duly appealed, which appeal even= tually gave rise to the TPD judgment. The appeal was partly heard on 27 May 1981. Prior to the hearing heads of argument were filed by the appellants (the trustees) as well as by Messrs Bashall and Cloete as curators-ad-litem (in the case of the latter in the form of a report). On 21 May 1981 the attorney acting for Richard filed an affidavit intimating that Richard (who had not previously been repre=

sented) /.....

sented) would be present at the hearing of the appeal and would seek leave to be heard through counsel. Richard was duly represented by counsel at the hearing on 27 May 1981 (counsel having previously filed heads of argument). For reasons which are not germane to the present matter the appeal was postponed until 5 November 1981. On 29 October 1981 Annie died without ever having renounced her rights in and to the trust in favour of Richard. Consequent upon Annie's death the appellants (the trustees) filed a notice of amendment on 2 November 1981 intimating that at the resumed hearing of the appeal they would seek leave to amend the original notice of motion in the following respects:-

"(a) By / .....

"(a) By the deletion of prayer 2.1.

(b) By the deletion of the contents of prayer 2.3 with the exception of the following phrase:

'2.3 ELIZABETH HOROWITZ has no claim to the corpus of the Trust'.

(c) By the deletion in prayer 2.4 of the words in brackets and the substitution of the words 'will become' with the word 'became'.

(d) By the deletion of prayer 2.5."

At the same time they filed an affidavit in support of their application in which, inter alia, the following was said:-

"3. We respectfully submit that the death of Annie Brock has rendered academic all but one of the issues in this case. The issue which remains is the meaning of the phrase 'their lawful children' in the context of the bequest of the corpus of Annie Brock's share on her death. The Applicants wish

to / .....

to effect a distribution of the corpus of the trust to the beneficiary or beneficia= ries entitled thereto as soon as possible, and we submit that as all the interested parties are before the above Honourable Court, a decision on the meaning of this phrase on a proper interpretation of the will should be given at this stage.

4. In consequence of the death of Annie Brock it has become necessary to amend the Notice of Motion in order to relate the relief sought to the remaining relevant issue, and application will accordingly be made at the resumed hearing of this matter for an amend= ment to the Notice of Motion in the terms set out in the notice of application to which this affidavit is annexed.

5. The Applicants contend that the only lawful child of Annie Brock who survived her death is her son Richard and that he is consequently exclusively entitled to the corpus of the trust. However, should the appeal not be upheld against the ruling of the learned Judge a quo that the word 'children' must be given an extended meaning to include grand=

children, the Applicants respectfully ask that the above Honourable Court give a ruling on the question whether the two sons of Richard Brock are to be included in the concept of 'children' for the purposes of the distribution, and on the shares to which the respective 'children' are entitled."

I shall in due course revert to these events.

Suffice it for the nonce to say that the appeal was duly heard and eventually dismissed. At the end of its judgment the TPD said (at 636 G - 637 B):-

"The final question is whether the testators intended Annie's share of the corpus to devolve per stirpes or per capita. Words indicating that the beneficiaries are to inherit in equal shares point towards a division per capita. Corbett et al (op cit at 533). The testators in my view intended that Annie's issue who were alive at the moment of her death would be entitled to partake in equal shares of her share of the corpus. In other words, devolution would take place per capita. Where such an heir had not yet attained the age of

25 years, his or her share would be retained and held by the trustees in terms of the trust to be paid over when the heir in question attained that age. In such a case the provisions of the sixth proviso would in the meantime be applicable.

It follows that at Annie's death her share of the corpus devolved upon Richard Brock, Julian Brock, Alexander Brock and Elizabeth Horowitz, in equal shares. Richard Brock is approximately 48 years old and the trustees are accordingly entitled to pay over his quarter share immediately. Julian, Alexander and Elizabeth will be entitled to be paid over their respective shares when they become 25 years of age. In the meantime their shares

will / .....

will be retained and administered by the trustees in terms of the trust.

The appellants have requested that, if the appeal should not be upheld, this Court should give a ruling on the question whether the two sons of Richard Brock are to be included in the concept of 'children' for the purposes of dis= tribution, and on the shares to which the respective 'children' are entitled. The nature of this ruling appears from the previous para= graph."

Apart from dismissing the appeal and making appropriate orders as to costs the TPD substituted for the order of the WLD the following:-

"(a) A declaratory order is granted in terms of prayer 2.2 of the notice of motion as amended.

(b) Declaratory orders in terms of prayers 2.3 and 2.4 are refused."

The / .....

The order made was, in substance, identical with that made by the WLD. The "ruling" made by the TPD was never incorporated within its order. The significance of this, insofar as the later events are concerned, will be dealt with in due course.

Richard applied for, but was refused, leave by the TPD to appeal to this Court. His application was opposed, inter alios, by Elizabeth's curator-ad-litem. For reasons which will become apparent later, no leave to appeal was sought on behalf of Elizabeth, nor were any further steps taken on her account until the proceedings which are the subject of the present appeal were launched. They took the form of an application made by Elizabeth's father on her behalf for:-

"An order declaring that the share of the late ANN BROCK in the corpus of the trust created under the will of the late SELIG HILLEL HILLMAN and CHANE ROCHEL HILLMAN, will devolve as to one-half upon RICHARD BROCK and as to one-half upon ELIZABETH RACHEL HOROWITZ, provided the latter survives to the age of twenty-five."

The respondents were Richard in his personal and representative capacities, the curator-ad-litem to Julian and Alexander and the administrators of the testators' massed estate (who are also the trustees of the trust and to whom I shall henceforth refer as "the administrators"). As is apparent, the relief sought was contrary to the "ruling" given by the TPD in the course of its judgment.

The matter came before SPOELSTRA, J, who held that he was precluded from granting the relief sought on

the grounds of res judicata, concluding that the TPD's ruling constituted "an integral part of the judgment as effectively as if it had been part of the Court's order." He accordingly dismissed the application, but granted leave to appeal to this Court.

Subsequently, more than 3½ years after the TPD judgment had been delivered, Elizabeth's father approached the TPD for leave to appeal on her behalf to this Court, together with condonation for the late application for leave to appeal. The object was presumably to have two strings to Elizabeth's bow so that, if SPOELSTRA, J, was correct in holding that the ruling was res judicata, it would be open to Elizabeth to argue the correctness of the ruling on appeal. Condonation and leave to appeal were refused, whereupon

Elizabeth's/ .....

Elizabeth's father petitioned this court for the necessary relief. Thereafter Richard likewise petitioned this Court for condonation and for leave to appeal

against / .....

against the judgment of the TPD. Both petitions were referred for decision to the Court hearing the appeal against SPOELSTRA, J's, judgment.

In view of the attainment of majority by various of the interested parties and resultant orders of substi= tution the parties to the present appeal are as follows:-

Appellant:	ELIZABETH RACHEL HOROWITZ
First Respondent:	RICHARD BROCK
Third Respondent:	JULIAN BROCK
Fourth Respondent:	THE ADMINISTRATORS
Fifth Respondent:	ALEXANDER BROCK

The second respondent (Richard Brock in his representative capacity) has fallen away. The fourth respondent abides the decision of the Court and was not represented at the hearing of the appeal. For the sake

of convenience and continuity I shall continue to refer to the appellant and the first, third and fifth respondents as Elizabeth, Richard, Julian and Alexander respectively. Elizabeth has also been substituted as petitioner for her father in the petition presented by him.

The issues

The issues which arise on appeal are the follow=ing:-

(a) Was SPOELSTRA, J, precluded from granting the relief sought either on the basis that the TPD's "ruling" rendered the matter res judicata in our law, or

(b) because of the applicability of the so-called doctrine of issue estoppel (assuming it to be part of our law) and

(c) if he was not so precluded, is Elizabeth entitled to the relief sought on a proper interpretation of the testators' will?

It is / .....

It is common cause that if SPOELSTRA, J, was not precluded from entertaining the application, and Elizabeth is entitled to the relief sought, the appeal must succeed. At the same time, because such success would inevitably follow upon a definitive and binding interpretation of the will the two petitions, which are both principally aimed at securing from this Court a proper interpretation of the will, will fall away. It is only if the appeal fails on the basis of res judicata (or issue estoppel), thereby precluding further inter= pretation of the will, that the petitions, and the relief sought thereunder, will have to be considered.

Res judicata and issue estoppel

The requisites of a valid defence of res judicata in Roman-Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties and the same thing must have been demanded. (Voet: Commentarius ad Pandectas 44.2.3; Bertram v Wood (1893) 10 SC 177 at 180; Mitford's Executor v Ebden's Executors and Others 1917 AD 682 at 686). The rule that the same thing must have been demanded in both actions has been held to mean "that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a causa petendi of the same thing between the same parties, cannot be resuscitated in subse=

quent proceedings" (per STEYN, CJ, in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562 D).

The doctrine of issue estoppel does not require for its application that the same thing must have been demanded, and it is the lack of this element which disting= uishes it from res judicata. The doctrine, although not specifically referred to by the name by which it is currently known, appears to have first found acceptance in our law in Boshoff v Union Government 1932 T P D 345 where GREENBERG, J, (at 350/1) accepted as correct the principle stated in Spencer-Bower: Res Judicata : sec 162 that "(w)here the decision set up as a res judicata necessarily involves a

judicial / .....

judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms." Boshoff's case has been followed in a number of decisions of our courts (e g Turk v Turk 1954 (3) SA 971 (W); Durban City Council v Standard-Vacuum Refining Co (Pty) Ltd 1961 (2) SA 682 (N); Liley and Another v Johannesburg Turf Club and Another 1983 (4) SA

548 (W) /.....

548 (W)), and while it has been referred to in judgments of this Court (e g Minister of Justice v Nationwide Truck Hire (Pty) Ltd 1981 (4) SA 826 (A) at 835 D - H) the principle expressed therein, to which reference has been made, has not yet been pronounced upon by this Court. It remains a vexed question whether issue estoppel is part of our law. There is a strong body of academic opinion which proclaims that it is not, or at least that it should not be (LAWSA : Vol 9, 188, Hoffman and Zeffertt : South African Law of Evidence : 3rd Ed, 265/7; Schmidt : Bewysreg : 2nd Ed, 582/3; Zeffertt : Issue Estoppel in South Africa (1971) 88 SALJ 312). However, it is not necessary to decide the matter in the present

appeal, for both res judicata and issue estoppel require for their operation that the same issue should have been adjudicated upon, and the fundamental question which arises in the present matter is whether the ruling given by the TPD related to an issue properly before it. If it did not, the declaratory order sought before SPOELSTRA, J, cannot be said to have related to an issue previously adjudicated upon, resulting in the absence of an essential requirement for a valid defence of either res judicata or issue estoppel.

An issue, broadly speaking, is a matter of fact or question of law in dispute between two or more parties which a Court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant

to the relief sought. As pointed out by INNES, CJ, in the oft-quoted passage from Robinson v Randfontein Estates G M Co Ltd 1925 A D 173 at 198, "(t)he object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or prevent full enquiry. But within these limits the Court has a wide discretion". According to Beck's Theory and Principles of Pleading in Civil Actions : 5th Ed, 32 one of the functions of pleadings "is to place the issues raised in the action on record so that when a judgment is given such judgment may be a bar to parties litigating again on the same issues". In motion proceedings the issues appear from the affidavits filed by

the parties and are crystallised in the relief sought, such relief being definitive of the essential issue(s) between the parties.

The relief sought by the administrators in the WLD related solely to the question whether it would be competent for Annie to renounce her interest in the corpus of the trust and, if so, whether upon such renunciation the corpus of the trust would vest solely in Richard to the exclusion of all others, particularly to the exclusion of Elizabeth and her late mother's estate. Throughout the piece the administrators adopted the attitude that Elizabeth was not entitled to share in the corpus of the trust. When McEWAN, J, came to a contrary conclusion in the WLD

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his decision was taken on appeal to the TPD. The administrators maintained their previous attitude on appeal, at least until the time of Annie's death. As appears from the record, in the heads of argument filed by counsel for the respective parties prior to the initial hearing of the appeal in May 1981, no more than passing reference, unsuppor= ted by argument, is made to the proportion of the trust corpus which would accrue to Elizabeth in the event of her being entitled to share therein. Pursuant to Annie's death the notice of motion was amended prior to the resumed hearing of the appeal. The purpose of the amendment was to eliminate issues which had became academic by virtue of Annie's death. The administrators apparently persisted

in their attitude that Elizabeth had no claim to any share in the corpus of the trust. No attempt was made to broaden the issues by introducing an alternative prayer relating to any share to which Elizabeth might be entitled in the trust corpus. Furthermore, no relief was sought in relation to any rights which either Julian or Alexander might have. All that the administrators sought, as appears from their affidavit accompanying their applica= tion to amend the prayers to the notice of motion, was "a ruling on the question whether the two sons of Richard Brock are to be included in the concept of 'children' for the purposes of distribution, and in the shares to which the respective 'children' are entitled". The administrators'

studied refusal or failure to amend the notice of motion to claim any form of relief consequent upon the ruling sought raises, in the circumstances, a strong probability that they merely sought the ruling for their own guidance without intending it to become an issue in the appeal, or any pronouncement thereon by the TPD binding on the parties. Confirmation for this is to be found in the affidavit which they filed in the present matter to which I shall advert later. In my view the request for a ruling divorced from its legal consequences because no relief was sought consequent thereon did not introduce a new issue into the proceedings, and was not "plainly a broadening of the original issues raised by the prayers" as held by the Judge a quo. Nor

was / .....

was mere acquiescence in the ruling being sought (by Elizabeth's curator-ad-litem in particular) sufficient to elevate what was required to be dealt with in the ruling to an issue in the absence of a clear intention by all the parties to broaden the existing issues. The fact that submissions were advanced by all interested parties in regard to the ruling can equally not avail the respondents. While a court in motion proceedings may decide a dispute on an issue which has not been raised on the affidavits or in the relief sought provided it has been fully canvassed "it must be fully canvassed by both sides in the sense that the Court is expected to pronounce upon it as an issue" (Director of Hospital Services v Mistry 1979 (1) SA 626 (A)

at 636 C; South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA 708 (A) at 714.)

I am not satisfied that the ruling sought was canvassed in that sense. As was pointed out in Middleton v Carr 1949 (2) SA 374 (A) at 386, one must guard against the danger of an injustice being done if unpleaded issues are readily treated as having been fully canvassed. There are insufficient indications that all the parties expected the TPD to pronounce upon the ruling sought as an issue. If anything, the indications are to the contrary. As previously mentioned, no relief was sought consequent upon the ruling. Nor was the ruling made part of the TPD's order. An order is a decision

of a court of law upon relief claimed, inter alia, by way of motion proceedings. For a ruling to amount to an order "the Court must be duly asked to grant some definite and distinct relief" (Dickinson and Another v Fisher's Executors 1914 AD 424 and 427; see too Constantia Insurance Co Ltd v Nohamba 1986 (3) SA 27 (A) at 43, and authorities there cited). The TPD presumably did not make the ruling part of its order because it was not asked, nor did it consider that it was being asked, "to grant some definite and distinct relief" in respect of the ruling. This in turn indicates that the ruling sought was not intended to resolve an issue between the parties and to be binding upon them. That was the attitude of Mr Bashall and the

administrators. The former, in writing to Elizabeth's father shortly after judgment was delivered by the TPD stated:

> "I think on the last occasion that I reported to you the position was that the judgment had just been delivered. As I recall, I stated that I had given very serious consideration to the implications of the judgment. On considering it carefully it appeared to me that there was no ground under which we would be entitled to appeal against the orders. The orders, you will appreciate, relate specifically to the prayers sought originally by the applicant and which were subsequently supported by Richard Brock. In so far as the Judges adverted to the specific proportions to the award to each of the potential beneficiaries, this was not made part of the order and is therefore not appealable."

and further

"Insofar / .....

"Insofar as the body of the judgment is concerned, to which I referred above, the Judges made certain observations as to which persons, including, of course, Elizabeth, would be entitled to what proportions of the corpus. This is, of course, only obiter i.e. it is not part of the judgment."

The administrators in their answering affidavit said, inter alia, the following:

"As the judgment gave no guidance to the Fourth Respondent on this aspect, which was crucial to the distribution of the estate, the Fourth Respondent gave instructions that at the hearing of the appeal a directive should be sought from the Honourable Court as to the proportions of (to?) which the aforesaid persons were to succeed. This was duly done by Counsel for the Fourth Respondent in the course of argument."

Later in the affidavit they went on to add:

"The / .....

"The Fourth Respondent accepts that the ruling to which reference is made in paragraph 23 of the Founding Affidavit herein is not binding upon it for the reason that it was not part of the order of the Court. However, the Fourth Respondent was advised by Senior Counsel that the directive should be followed unless and until a contrary judgment is given: in Counsel's view the ruling, emanating as it did from the full Bench of the Transvaal Provincial Division at the request of the Fourth Respondent, was of considerable persuasive force. On the basis of this advice, the Fourth Respondent took the view that it should distribute the estate in accordance with the ruling unless and until a contrary ruling was obtained by any of the inte= rested parties."

The / .....

The respondents accepted that the onus rested upon them in order to succeed in their plea of res judicata to establish that the subject of the ruling in the TPD had been an issue in the appeal. In my view they have failed to do so. In this respect the present matter is distinguishable from that of Mitford's Executor v Ebden's Executors and Others (supra) where the point in dispute had clearly been raised as an issue in previous proceedings between the same parties or their privies. It follows that the Court a quo should not have upheld a plea of either res judicata or issue estoppel.

The proper interpretation of the will

Having determined that the Court a quo was not pre= cluded from adjudicating upon the relief claimed in the application, I must now consider the proper interpretation

of the testators' will, the relief sought being dependent thereon. In this regard I am mindful of the fact that the TPD judgment is not the subject of the present appeal, and so long as it stands its findings are res judicata. The correctness, however, of the TPD judgment is one of the matters which arise for consideration in connection with Richard's petition for leave to appeal against that judgment. It is therefore convenient to deal with the proper interpre= tation of the will in respects relevant to both the present appeal and Richard's petition.

The relevant provision of the will is clause 7 which, after providing for the payment of certain legacies, continues:

"and after / .....

"and after payment of the aforegoing legacies ..... upon trust to divide between Maurice Hillman, Wolf Hillman, Fay Gluckman (born Hillman) and Annie Block (born Hillman), the four children of the testators, the whole of the balance of the trust estate in the following shares and proportions, namely:

To the said Maurice Hillman and the said Wolf Hillman each a three-tenths share of such

balance / .....

balance; and to the said Fay Gluckman and the said Annie Block each a one fifth share of such balance."

Thereafter follow six provisos which are quoted in full in the TPD judgment at 631 C - 632 C, and which for ease of reference have been numbered. To avoid unneces= sary duplication I shall confine myself to repeating provisos 3 and 6:

"(3) provided further that the shares of the balance of the trust estate so accruing to the said Fay Gluckman and the said Annie Block shall be retained and held by the trustees in trust to invest and administer the capital funds and moneys representing such shares with the like powers as are given them hereunder in respect to the trust estate and to pay the annual income from the said shares to the said Fay Gluckman and the said Annie Block respectively during their lifetime and on their respective deaths to hold their shares

as aforesaid for the benefit of and to pay over the same to their lawful children in equal shares who shall attain the age of 25 years and in the event of either of them the said Fay Gluckman and the said Annie Block dying without leaving lawful issue her surviving then to divide the share of the one so dying between her brothers and sister in equal shares subject to the share of the sister being held by the trustees in like manner and on the like trusts as are above set out relative to the share accruing to her, and in the event of both the said Fay Gluckman and the said Annie Block dying without leaving lawful issue them surviving then to divide their shares between their two brothers in equal shares;"

(My underlining. The references in the will to "Annie Block" should be to "Annie Brock".)

"(6) and / .....

"(6) and provided further that whilst any child or children or remoter descendants entitled to benefits hereunder on attaining the age of 21 years or 25 years as the case may be shall not have attained such age the trustees shall subject to the rights of beneficiaries hereinbefore mentioned have power to apply such part as the trustees shall think fit of the income from the expectant or presumptive share of each such child or remoter descendant if such income is available for or towards his or her maintenance and education or otherwise for his or her benefit and the trustees may either themselves so apply the same or may pay the same to the guardian or guardians of such child or remoter descendant for the purpose aforesaid without seeing to the application thereof."

The dispute concerning the proper interpretation of the will centres on the words I have underlined in the third proviso, and in particular the meaning to be ascribed

to the words "lawful children". Their meaning will determine who the heirs are to the corpus of the trust. Various contentions were advanced in this regard. On behalf of Richard it was claimed that they only refer to children of the first degree alive at the date of Annie's death, and as he alone fell into that category he was entitled to the whole of the corpus of the trust. On Julian and Alexander's behalf it was contended that the words were to be given an extended meaning to include children and remoter descendants of Annie alive at her death, and that consequently Richard, Elizabeth, Julian and Alexander were joint heirs, and as such entitled to the corpus of the trust in equal shares (this view being

consistent with the ruling given by the TPD). On behalf of Elizabeth it was argued that on a proper interpretation of the will she succeeded by representation to her prede= ceased mother's share of the corpus; accordingly the corpus was to be divided equally between herself and Richard. In determining which of these contentions is correct one must in the first instance have regard to the words of the will for, as stated by INNES, ACJ, in Robertson v Robertson's Executors 1914 AD 503 at 507: "the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used". (See too Cuming v Cuming and Others 1945 AD 201 at 206.) Presumptive aids to interpretation are subject to the

proper application of this principle.

Having regard to the clear wording of the third proviso the testators intended Annie's children (their grandchildren) to succeed equally to her share of the trust corpus on her death (provided they had attained the age of 25 years, failing which the individual share of each would be held in trust until such time as he or she reached such age). This is the primary meaning of the language used by the testators. If therefore Theda had survived Annie, she and Richard (being Annie's only children) would each have inherited a half share of the corpus of the trust. In that event there could be no question of remoter descendants having any claim simultaneously with

Richard / .....

Richard and Theda to the trust corpus. Julian, Alexander and Elizabeth would accordingly not have shared therein. This is in keeping with the principle referred to in CORBETT et al: The Law of Succession in South Africa at 210, that when a beneficiary is appointed together with his descendants, whether they be his children or remoter descendants (assuming for the present that this is the position which pertains in the present matter) then, in the absence of a contrary intention appearing in the will, the provision is regarded not as an appointment of joint beneficiaries but as a bequest containing a direct substitution. Its effect is that the descendants succeed to the bequest only if the appointed beneficiary predeceases

the testator or for some other reason fails to take.

(Human v Human's Executors (1893) 10 SC 172 at 175 - 6;

Ex parte Rossouw NO 1951 (3) SA 681 (A)). Theda having

predeceased Annie, the question that falls to be determined

is whether the testators intended to institute as heirs

to the trust corpus only those of Annie's children who

survived her, or whether they intended that descendants

of a predeceased child would acquire such child's share by

representation, in other words, would step into the shoes

of such child. It is only in this context

that one poses the question whether "lawful children"

should be given an extended meaning to include grandchildren.

The issue is therefore narrowed down to the question whether

Richard, as Annie's only surviving child, inherits the whole of the trust corpus, or whether he must share it with Elizabeth who takes her mother's share by represen= tation. In answering this question possible indicia in the will that the testators did not intend the phrase "lawful children" to be limited to children of the first degree only assume importance. There can be no question of Annie's grandchildren inheriting in the same line with her children - if the former qualify to inherit at all it would only be by representation in the place of a prede= ceased parent who was a child of Annie. Accordingly Julian and Alexander would only have come into consideration as heirs to the trust corpus if Richard had predeceased

Annie. Because he survived her they are excluded from inheriting. As pointed out previously, if Theda had survived Annie, she and Richard would each have inherited one half of the trust corpus to the exclusion of their children. This being so, there can be no logical or legal basis why Julian and Alexander, simply because Theda predeceased Annie, should now rank equally with their father Richard in relation to the inheritance of the trust corpus, nor are there any indications in the will that the testators intended this. In expressing the view that Julian and Alexander were entitled to share in the trust corpus the TPD clearly erred. It did so because it wrongly regarded the essential issue as being "whether

the testators intended Annie's share of the corpus to devolve per stirpes or per capita". Having determined that the phrase "lawful children" should be given an extended meaning to include grandchildren the TPD failed to consider, as it should have done, whether Annie's grand= children were appointed joint heirs together with her children, or whether they were appointed only in substitu= tion for those of her children who predeceased her. In the latter event it matters not whether the distribution is per stirpes or per capita, because on either basis only Richard and Elizabeth would share equally in the trust corpus.

It follows that at best for Julian and Alexander they could have claimed a share of the trust corpus by

representation if Richard had predeceased Annie. Richard having survived Annie they have no claim to the trust corpus. This disposes of the matter as far as they are concerned. The essential issue, however, remains whether Richard alone is entitled to the trust corpus, or whether he must share it with Elizabeth.

Mr Mostert for Richard contended that if one had proper regard to the language of the will it was clear that throughout the will the testators used the words "child" or "children" in the sense of children of the first degree only, whereas the phrases "lawful issue" and "remoter descendants" were intended to refer to descendants more remote than children of the first degree. In

developing this contention he referred to various passages in clause 7 of the will where the words and phrases in question are used. In the result he submitted that it was apparent from the provisions of the will that when the testators referred to children in the phrase "lawful children" they had in mind children of the first degree only, and not more remote descendants. Richard, being the only "lawful child" in that sense to survive Annie, was therefore entitled to inherit the whole of the corpus of the trust. I shall in due course deal with the interpretation to be placed on the relevant provisions of clause 7 of the will.

In / .....

In support of his argument Mr Mostert invoked the rule laid down in the Privy Council decision in Galliers and Others v Rycroft (1900) 17 SC 569 (the correctness of which was challenged by Mr Zulman on behalf of Elizabeth) The will that fell to be interpreted in Galliers v Rycroft read as follows:

> "I give and bequeath all and singular my real and personal estate .... unto my dear wife Matilda Galliers (born Sabin) for the use and benefit of herself and my children during her lifetime, and after her decease I direct that same may be equally divided among my children or such of them as may be then alive."

In delivering the opinion of the Judical Committee Sir Henry De Villiers, relying on Voet 36.1.22, held (and this constitutes the rule referred to) that the term "children"

used in a will must be taken to refer to descendants of the first degree only unless it can be gathered from the context of the will that the testator had regard to descendants of a remoter degree as well. Voet, in the passage referred to, was dealing with fideicommissary substitution, and it permits of no doubt that the Roman-Dutch law recognized a presumption of the kind mentioned by him in the case of a fideicommissary bequest. (See e.g. Sande: Decisiones Frisicae: 4.5.10 and 11; Groenewegen: De Legibus Abrogatis: D50.16.220; Van Leeuwen: Het Rooms-Hollands Recht: 3.8.11). In the result it was held that only the children of Galliers alive at the death of his wife were entitled to inherit his estate to the

exclusion / .....

exclusion of a grandson who was not substituted for his predeceased father.

Apart from the fact that the words in the Gallier's will "or such of them as may be then alive" pointed strongly to an intention on the part of Galliers to benefit only children of the first degree, the Court may well have been dealing with a conditional fideicommissum (cf Estate Welford v Estate Wright 1930 OPD 162 at 166; (1954) 17 THRHR at 38), in which case the presumption referred to would have been correctly applied. The correctness of the conclusion reached in Galliers v Ry= croft is therefore not seriously in doubt. Where Sir Henry de Villiers appears to have gone wrong was to apply

the presumption referred to in Voet to what he construed to be a case of direct substitution - having concluded that the effect of the direction contained in Galliers' will "was virtually to institute the children as heirs on the death of their mother and to substitute the survivors for such of the children as might die before their mother. It is a case, therefore, of direct and not of fideicommissary substitution". In doing so he apparently overlooked the converse presumption applicable in Roman-Dutch law in the case of direct substitution, namely, that the term "children" must be taken to include grandchildren and further descendants through a predeceased child in the absence of a contrary intention in the will (see e g

Kersteman: Hollandsch Rechtsgeleert Woordeboek s.v. Kindskinderen (p 229); De Groot: Inleidinge tot de Hollandsche Rechtsgeleerdheid : 2.18.6; Van der Keesel: Theses Selectae: 2.18.6).

Despite doubts as to its correctness, and even trenchant criticism thereof (cf Estate Welsford v Estate Wright (supra); Ex parte Wessels 1949 (2) SA 99 (0) at 103; O'Dwyer v Estate Marks and Others 1957 (1) SA 287 (A) at 291; (1954) 17 THRHR at 38 - 40), the rule in Galliers v Rycroft has been consistently applied in our courts and has been interpreted as a binding decision on the meaning of a bequest to children irrespective of whether the sub= stitution in question is direct or fideicommissary. In

Cannon / .....

Cannon and Others v Norris 1947 (4) SA 811 (A) at 816 it was specifically stated that the decision is binding on this Court. However, since the passing of the Privy Council Appeals Act 16 of 1950 abolishing appeals to the Privy Council the decision in Galliers v Rycroft cannot be considered as absolutely binding on this Court, and may be departed from if clearly considered to be erroneous. (John Bell and Co Ltd v Esselen 1954 (1) SA 147 (A)).

Although the rule in Galliers v Rycroft has been modified by section 24 of Act 32 of 1952, the con= trary rule enacted by that section (apart from having a limited application) applies only to the will of a testator who dies after 14 June 1952. The provisions of that section are accordingly not applicable to the will under

consideration.

One cannot distinguish the rule in Galliers v Rycroft on the basis that it was an obiter dictum and therefore not binding. A contention to this effect failed in Estate Welsford v Estate Wright (supra). In my view it is clear that the court in Galliers v Rycroft, rightly or wrongly, considered that it was dealing with a case of direct substitution, and by applying the presumption in Voet 36.1.22 to that situation it accepted that the pre= sumption was equally applicable to instances of both direct and fideicommissary substitution. That is the true ratio decidendi of the decision. While the application of the rule may have been incorrect, it was not obiter.

Consequently the binding nature of the decision, unless held to be erroneous, cannot be called into question. This raises the question, should the rule in Galliers v Rycroft be followed, or should this Court now decline to do so if it can be said to be clearly incorrect insofar as it relates to cases of direct substitution? The rule has been consistently followed since 1900 (except, of course, in cases now covered by the provisions of section 24 of Act 32 of 1952). It is not inconceivable that over the years its growing acceptance led to a number of wills being drafted on the strength of it correctly stating the law. A departure from the rule now could conceivably frustrate the intentions of testators in such cases.

Furthermore / .....

Furthermore, the rule today can only have limited appli=cation, having been modified in 1952. In the circum=stances the correct approach would seem to be to decline to reconsider the correctness of the rule despite the temptation to correct a possibly false perception of the Roman-Dutch law. (Cf Tuckers Land and Development Corpora=tion (Pty) Ltd v Strydom 1984 (1) SA 1 (A) at 16 G - 18 H; Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk en Andere 1985(2) SA 769 (A) at 780 G).

It follows that, applying the rule in Galliers v Rycroft, one has to interpret the will on the basis that, unless there are indicia to the contrary, the term

"children" / .....

"children" must be taken to refer to descendants of the first degree only. In adopting this approach regard may be had to the statement in Galliers v Rycroft at 576 that "(i)t appears from later authorities, that in the case of a bequest to the testators' own 'children' the Courts of Holland required much slighter evidence of a desire to benefit further descendants than in the case of a bequest to the children of another person". As a matter of logic the position should be no different where grandchildren are instituted as heirs (as is the case under the testators' will).

Are there such indicia under the will? Both the WLD and the TPD answered this question in the affirma=

tive, relying on three such indicia. These are dealt with in the WLD judgment at 1136 A - 1137 D, and in the TPD judgment at 633 B - 636 F. I am in agreement with the conclusions reached and, to a large extent, with the reasoning behind them. I propose, however, to deal with the various indicia as I perceive them.

The first indicium is to be found in the use of the word "issue" in connection with the possible gift over to Annie's brothers or sister in the event of her dying "without leaving lawful issue her surviving". The word "issue" normally connotes blood relations in the descending line i e children, grandchildren and more remote descendants (Ex parte Estate Dowsett 1946 CPD 137

at 150 - 1; Boswell en Andere v Van Tonder 1975 (3) SA 29 (A) at 35 F - G). The deliberate change in termino= logy by the testators in the third proviso (from "lawful children" to "lawful issue" while dealing with the concept of Annie's descendants) is a strong indication that by "issue" they had in mind not only Annie's children, but also remoter descendants. The will appears to draw a clear distinction between "children" on the one hand, and "issue" and "remoter descendants" on the other. There is no justification for limiting the normal meaning of "issue" and regarding it as synonymous with "children". The gift over would therefore only take effect if Annie died without leaving any lawful descendants (i e children or more remote descendants). From this may be inferred

that the testators had in mind that Annie's branch of the family would not lose its share of the inheritance to Annie's brothers or sister provided Annie was survived by a lawful descendant or descendants (in the above sense). This is indicative of an intention on the part of the testators to benefit Annie's descendants. To limit the word "children" to children of the first degree would defeat such intention. Apart from that, it would leave an hiatus in certain circumstances as pointed out in the WLD judgment at 1136 B. It is true that the words "child" or 'children" in the will are normally used in their primary sense to refer to descendants of the first degree. Non constat that in a particular context the words cannot qualify for a wider

meaning / .....

meaning to include remoter descendants.

The second indicium that remoter descendants are in fact included under the concept of "children" in the third proviso is to be found in the phrase "any child or children or remoter descendants entitled to benefits hereunder" in the sixth proviso. On a proper interpretation of the will the "any child or children" entitled to benefits thereunder refer in the first instance to the testators' own children, but also to the children of Fay and Annie who are specifically instituted as heirs to their (i e Fay and Annie's) shares in the trust (in other words, the testators' grandchildren). "Remoter descendants" must therefore necessarily refer to descen=

dants / .....

dants more remote than children or grandchildren. While no specific provision is made for descendants more remote than grandchildren to be entitled to bene= fits, one must inevitably conclude that the testators contemplated that descendants more remote than grand= children might become entitled to benefits by way of substitution in the place of a predeceased parent. Had the testators intended to restrict the possible beneficiaries to their grandchildren one would have expected them to use the word "grandchildren" rather than the more comprehensive term "remoter descendants".

The third indicium lies in the fact that the testators throughout the will, with some slight bias in

favour / .....

favour of their sons, appear to have contemplated equal treatment to each branch of the family (see the provisions of the will aimed at providing each child with a house, and each branch of the family a more or less equal share in the trust corpus, except that the daughters would not become entitled to the capital). Logically one would have expected them to have intended equal treatment within each branch of the family as well. As pointed out by McEWAN, J, in the WLD judgment at 1137 C, "(i)n the cir= cumstances it appears anomalous that the testators should have intended at the stage of a death of a daughter to prefer her living children to her grandchildren whose parent was already deceased".

In the / .....

In the result there are sufficient indicia in the will to rebut the presumption on which the rule in Galliers v Rycroft is founded. In the context of the will the testators must have intended to include within the concept of Annie's "lawful children" any grandchildren who would be entitled to inherit by way of representation in the place of a predeceased parent. To this intention effect must be given. It follows that Richard and Elizabeth, the latter in the place of her deceased mother, Theda, are entitled to share equally in the corpus of the trust, and that Elizabeth was entitled to an order in terms of prayer 1 of the Notice of Motion. The appeal must accordingly succeed.

Costs / .....

Costs

Counsel for the parties were agreed that in the event of the appeal succeeding the costs of all parties, including the costs of the application and those of the curator ad litem, and where applicable, the costs of two counsel, should be paid on an attorney and client basis out of the testators' estate. There is merit in the parties' attitude. The application was necessitated not only by the difficulties experienced in interpreting the will of the testators (which in itself could justify an award of costs out of the estate - see Abraham-Kriel Kinderhuis v Adendorff, NO and Others 1957 (3) SA 653 (A) at 657 A), but also by the conduct of the administra=

tors in seeking a "ruling" in the somewhat haphazard manner in which they did. In the result it is only proper that the costs referred to should be borne by the testators' estate.

The petitions

In view of the conclusions that have been reached in this judgment, both petitions, and the attendant applications for condonation, fall to be refused. While counsel for Elizabeth and Richard were disposed to agree that the costs of each petition should also be paid out of the testators' estate no good reason was advanced why this should be so. I do not intend to traverse further the circumstances surrounding the launching of the two petitions.

Suffice / .....

Suffice it to say that no good grounds exist for departing from the general rule that costs should abide the result. It would in my view be proper to order that any costs incurred by the curator-ad-litem in respect of either petition be paid on an attorney and client scale.

Argument in respect of the appeal and the petitions was heard over a period of two full days. The petitions were both dealt with on the second day. For the guidance of the taxing master it is recorded that approximately one quarter of the second day's hearing was devoted to the petition of Elizabeth, and approximately one quarter to the petition of Richard.

Order / .....

Order

1) The appeal is allowed.

2) The order of the Court a quo dismissing the appellant's application, including its order as to costs, is set aside.

3) There is substituted for the order of the Court a quo the following order:-

"(a) It is declared that the share of the late Annie Brock in the corpus of the trust created under the will of the late Selig Hillel Hillman and Chane Rochel Hillman, will devolve as to one half upon Richard Brock and as to one half upon Elizabeth Rachel Horowitz, provided the latter survives to the age of twenty five.

(b) The costs of the application, including the costs incurred by the curator-ad-litem, and by the employment of two counsel, shall be paid out of the estate of the late Selig Hillel Hillman and Chane Rochel Hillman on a scale as between attorney and client."

4) The costs of appeal, including the costs incurred by the curator-ad-litem, and by the employment of two counsel, shall be paid out of the estate of the late Selig Hillel Hillman and Chane Rochel Hillman on a scale as between attorney and client.

5) The / .....

5) The petition of Elizabeth Rachel Horowitz is refused, with costs; and likewise the petition of Richard Brock is refused, with costs. In each instance the costs shall include the costs of two counsel.

6) The costs incurred by the curator-ad-litem in respect of the petitions referred to in (5) above shall be recoverable on a scale as between attor= ney and client.

J W SMALBERGER
JUDGE OF APPEAL

JOUBERT, JA)
GROSSKOPF, JA)
NICHOLAS, AJA) CONCUR
STEYN, AJA)