REPUBLIC OF SOUTH AFRICA

Reportable

CASE NO: 311/96

In the matter between:

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| GARY RUPERT WEBB | Appellant |
| and | |
| RICHARD GERALD NATION DAVIS NO. | 1st Respondent |
| THE MASTER OF THE SUPREME COURT OF TRANSKEI | 2nd Respondent |
| COLLEEN WEBB | 3rd Respondent |

Coram: Mahomed, C J, Marais, Zulman, Plewman, J) A et Melunsky, AJ A Heard: 24 February 1998

Delivered: 17 March 1998

# JUDGMENT

MELUNSKY. ATA:

Ernest Rupert Webb ("the testator") executed his last will and testament at Umtata on 26 February 1976. In 1978 he suffered a severe stroke which resulted in his incapacitation. He died on 21 February 1990. He was survived by his only sons, the appellant, Gary Rupert Webb, (who was the applicant in the Court a quo) and Rodney Ernest Webb ("Rodney"), the younger son. Rodney died on 7 March 1993 as a result of injuries sustained in a motor accident. His widow is the executrix in his estate and the sole beneficiary under his will. She was cited as the third respondent in the Court a quo.

The first and second respondents - the executor in the testator's estate and the Master of the Transkei High Court - have taken no part in these proceedings and abide by the decision of this Court.

During his lifetime the testator was the owner of the Tafalehashi Trading Station which is situated in the Elliotdale district of Transkei. Shortly after the death of the testator's wife in 1972 Rodney joined him at the trading store and assisted him in running the business. On 27 February 1976, the day after the testator executed his will, he gave

Rodney a power of attorney which, in effect, authorised Rodney to conduct the business on his behalf. After the testator's incapacitation a curator bonis was appointed to take charge of his property but Rodney remained in effective control of the trading store until his own death. The third respondent moved to Tafalehashi in 1979. She assisted Rodney in running the business and married him in 1980. In the same year the testator was placed in a care centre in Margate where he remained until he died.

The Tafalehashi Trading Station was the most valuable asset in the testator's estate. The testator owned the business and the land on which the business was conducted. There were various buildings on the land including a shop and a dwelling house. According to the liquidation and distribution account the immovable property and the business had a "book value" of almost R600 000 and the only other asset in the testator's estate consisted of the proceeds of a policy amounting to R7 810. It is not disputed that the current value of the immovable property is considerably more than the "book value". The increase in value may, in part, be due to the fact that Rodney made substantial additions and improvements to the land and buildings. The testator

apparently owned another asset, a seaside cottage with a value of about R150 000, which is not mentioned in the estate account.

This appeal concerns the proper interpretation to be given to clauses 2 and 3 of the testator's will. These clauses read:

"(2) I give and bequeath to my son, RODNEY ERNEST WEBB, my Trading Station known as TAFALEHASHI, which is situate in the district of ELLIOTDALE, together with all my Estate and Effects, both movable and immovable, and wherever situate, nothing excepted, but subject to the condition as he is inheriting all my Estate and Effects, that he shall effect payment to my son, GARY RUPERT WEBB, of the sum of SEVENTY THOUSAND RAND (R70 000,00) and which bequest shall be subject to the following terms and conditions:-

(a) THAT the aforesaid sum of SEVENTY THOUSAND RAND (R70 000,00) shall be paid, free of interest, in equal annual instalments of TEN THOUSAND RAND (R10 000,00) each, the first instalment to be paid within one (1) year of the date of my death, and thereafter the sum of TEN THOUSAND RAND (R10 000,00) per annum, until the full sum of SEVENTY THOUSAND RAND (R70 000,00) has been paid. I direct that in the event of any one (1) instalment not being paid by the stipulated date, then the full balance then owing shall immediately became due and payable by him without notice.

(b) THAT the said RODNEY ERNEST WEBB, as security for his aforesaid indebtedness, shall register a First Mortgage Bond over the said TAFALEHASHI TRADING STATION, in favour of his brother the said GARY RUPERT WEBB. The cost of registering the said Bond shall be borne by the said RODNEY ERNEST WEBB. I direct that the said Bond shall be registered simultaneously with the transfer of the said TAFALEHASHI TRADING STATION into the name of RODNEY ERNEST WEBB.

(3) I direct that in the event of my son, the said RODNEY ERNEST WEBB failing to accept the inheritance as set out by me above, and subject to the said terms and conditions, in writing within thirty (30) days of the date of my death, or in the event of the said RODNEY ERNEST WEBB failing to comply with the terms and conditions of the inheritance as set out above, or in the event of the said RODNEY ERNEST WEBB not wishing to inherit the said TAFALEHASHI TRADING STATION, and to effect payment of the said sum of SEVENTY THOUSAND RAND (R70 000,00) to his brother, GARY RUPERT WEBB, then I direct that the aforesaid bequest shall fall away, and I then hereby nominate, constitute and appoint my sons, RODNEY ERNEST WEBB and GARY RUPERT WEBB, to be the sole and universal heirs, in equal shares, of all my Estate and Effects, both movable and immovable, and wherever situate, nothing excepted, and including the TAFALEHASHI TRADING STATION."

In terms of the liquidation and distribution account of the testator's estate, drawn by the first respondent and confirmed by the second respondent, the whole estate was

awarded to Rodney "in terms of clause 2 of the will and subject to clause 3 of the will

and the bequest price payable in terms of clause 2 of the will."

The appellant instituted motion proceedings in the Transkei Supreme Court. In an amended notice of motion he sought an order in the following terms:

1. 1.1 declaring that the provisions of the rider to clause 3 of the Will of the Testator, ERNEST RUPERT WEBB in his Last Will and Testament dated 26 February 1976 are applicable;

1.2 setting aside the award of the First Respondent and\or made or confirmed by the Second Respondent in the First and Final Liquidation and Distribution Account dated 12 November 1991 that the Tafalehashi trading site including land and buildings be transferred to RODNEY ERNEST WEBB; and

1.3 ordering that the said GARY and RODNEY be declared to be the sole and universal heirs in equal shares of the entire estate and effects of the late ERNEST RUPERT WEBB being both movable and immovable and wherever situate nothing excepted and including the Tafalehashi Trading Store.

2. Ordering that each Respondent pay the costs of this application only in the event of the Respondents or any one of them opposing the relief sought herein or such amended relief as this Honourable Court may deem appropriate, alternatively, that the costs hereof be paid out of the deceased Estate of the Late ERNEST RUPERT WEBB.

Beck JP dismissed the application with costs but granted the appellant leave to appeal to this Court.

As will appear later in this judgment what is in issue in this appeal is only whether, on a proper construction of the will, the bequest vested in Rodney a morte testatoris and, if it did, whether it was transmissible to his heirs. In order to appreciate the appellant's contentions on these issues, it is necessary to have regard to what occurred after the testator's death. Rodney complied with the first stipulation contained in clause 3 of the will by duly accepting the inheritance in writing within thirty days of the testator's death. During January 1991, and within a year of the testator's death, the third respondent, on behalf of her husband, sent the appellant a cheque for R10 000 which represented the first instalment of the R70 000 debt. Rodney's attorneys sent the

appellant a second cheque for R10 000 on 3 February 1992 and a further cheque for the same amount on 11 March 1993, some days after Rodney's death. The appellant received the cheques but he did not present them for payment or acknowledge receipt thereof During the course of a telephone conversation on 11 January 1994 between the third respondent's attorney and the appellant's attorney the former offered to pay the appellant the amount of R70 000. The offer was repeated in writing two days later, and some months before the commencement of these proceedings, but was rejected.

Before the re-incorporation of Transkei into the Republic of South Africa in 1994, a person who was not a Transkeian citizen could not acquire immovable property without the written consent of the Minister of Local Government in terms of s2 of the Acquisition of Immovable Property Control Act, 21 of 1977, which came into operation on 25 August 1977. Rodney was not a Transkeian citizen (although he had applied for citizenship as early as 1987) nor had he been able to obtain Ministerial approval to enable him to acquire ownership of the trading station. After the Act came into force and until his death Rodney was unable to take transfer or to register a mortgage bond over the

property in favour of the appellant as required by clause 2(b) of the will. Due to the re incorporation of Transkei into the national territory of the Republic the property can now be transferred to Rodney's estate and thereafter into the third respondent's name.

Various issues were raised in the affidavits of both parties but it would appear from the judgment of Beck J P that the only submissions made on the appellant's behalf in the Court a quo were that clauses 2(a) and (b) of the will contained suspensive conditions that had to be fulfilled before Rodney could acquire a vested interest in the testator's estate; and that as Rodney had neither paid the full amount of R70 000 nor caused a mortgage bond to be registered in favour of the appellant, his estate had not acquired a vested interest that could be transmitted to his heirs. The learned judge, however, accepted the argument put forward on behalf of the third respondent to the effect that the inheritance was left to Rodney sub modo, that it vested in him on the testator's death and that it was transmitted to the third respondent on Rodney's death. It was on those grounds that the application was dismissed.

On appeal to this Court counsel for the appellant put forward the same submission both in the heads of argument and in oral argument. There was also a further submission that even if the will provided for resolutive and not suspensive conditions "the same effect... will apply", i e that vesting was postponed. And in response to a question from the Court counsel made a third submission to the effect that even if vesting had occurred, the inheritance, on a construction of the will, was not transmissible to the third respondent. These are the only issues that require to be dealt with in this appeal.

I find it necessary to emphasise the restricted ambit of the issues that have to be decided because one of the matters raised by the Court during the course of argument was whether, on the assumption that vesting had occurred, the failure or inability to take transfer and to register the mortgage bond might have had the result that neither Rodney nor his estate could enforce the bequest. But as this question was not dealt with in sufficient detail in the affidavits or in argument it is inadvisable - and, indeed, not possible - for me to express any view thereon.

I turn to consider whether Rodney acquired a vested right to the testator's estate. Whether an heir acquires a vested right to his inheritance depends on the intention of the testator which must be gathered from the terms of his will (see Greenberg and Others v Estate Greenberg 1955(3) SA 361 (A) at 365 G-H). An estate normally vests in the heir on the death of the testator and vesting is postponed only if the bequest is made subject to a suspensive condition or if there is some other indication in the will that the testator intended vesting to be postponed. Where the bequest is dependent upon the fulfilment of a suspensive condition, the inheritance cannot vest until the condition is fulfilled (see Jewish Colonail Trust, Ltd v Estate Nathan 1940 AD 163 at 176). And once the interest has vested, the death of the beneficiary after the death of the testator normally, but not invariably, results in the interest being transmitted to the beneficiary's heir (see Corbett et al: "The Law of Succession in South Africa", 136). All of this is trite.

Counsel for the appellant's argument to the effect that the bequest to Rodney was subject to suspensive conditions was largely based on the words "fall away" used by the

testator in clause 3. He argued that this phrase, coupled with the expressions "subject to the conditions" in clause 2 and "terms and conditions" in clause 3, clearly and unambiguously show that testator had imposed suspensive conditions. This submission is not sound. The phrase "fall away" implies that an existing state of affairs has come to an end. It is suggestive of a resolutive, rather than a suspensive, condition. And the use of the word 'conditions' does not assist the appellant for the stipulations of a testator do not become conditions merely by giving them that name (see Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963(1) SA 632 (A) at 644 D-G and Wessels en 'n Ander v D A Wessels en Seuns (Edms) Bpk en Andere 1987(3) S A 530 (T) at 537 J-538 A).

In this case there is no need to try to glean the testator's intention from isolated words and phrases in the will. His intention can be gathered with relative certainty from the general scheme of the will and the material facts and circumstances known to him when he made it (see Allen and Another, NN.O v Estates Bloch and Others 1970(2) SA 376(C) at 380 B-C).

The testator obviously intended that Rodney should take transfer of the Tafalehashi immovable property before payment of any part of the R70 000. This is clear because the mortgage bond, which had to be registered simultaneously with transfer, was required to operate as security for Rodney's indebtedness to the appellant. Rodney was entitled to demand transfer of the property from the executor once he had accepted the inheritance in writing, and on registration of transfer into his name, he would have had a real right in respect of the property. As the testator required Rodney to become the owner of the immovable before paying his brother, he could not have intended that vesting would be postponed until the conditions were fulfilled. As counsel for the third respondent put it, dies cedit could not be subsequent in time to dies venit.

Moreover when the testator executed the will he must have contemplated that Rodney would continue to be involved in the business of the Tafalehashi Trading Station for on the following day he gave Rodney the power of attorney which authorised him to run the business. The third respondent alleges - and this is not disputed - that the business was Rodney's only source of income from which he could pay the appellant.

The testator must have known this. He and Rodney had apparently enjoyed a close relationship. They had worked and lived together for some years. It is obvious that the testator intended that Rodney would run the Trading Station and pay the appellant out of income generated from the business, a set of circumstances that is inconsistent with the notion that vesting would be postponed until payment was made.

It is also significant that the testator provided for payment to be made over a relatively lengthy period. It is unlikely that he contemplated that Rodney would have a mere spes and no vested right over the full seven years while he paid his brother, for during this period he would, in the ordinary course, be required to make important decisions and implement them for the proper conduct of the business.

Finally, and if the testator's intention was open to doubt, various presumptions that would come into play would all operate in favour of the third respondent. These are the presumption in favour of an immediate as opposed to a postponed vesting; the presumption in favour of an unconditional bequest; and the presumption that a provision

attached to a bequest is a modus rather than a condition. The presumptions are dealt with in Joubert: "The Law of South Africa", Vol 31, by de Waal, Erasmus, Gauntlett and Wiechers, para 310 and do not require further comment.

I have already mentioned that counsel for the appellant also submitted that if the conditions are to be interpreted as resolutive and not suspensive, the same result would follow, namely, that vesting would be postponed.

In the case of a suspensive condition the right to inherit is held in abeyance until the uncertain future event occurs. If it does not occur the right does not accrue to the beneficiary. Where a disposition is made subject to a resolutive condition the right is not contingent on the happening of the event but it is extinguished if the event takes place. Prof Dale Hutchinson puts the matter succinctly in 106 (1989) SAW at 7:

> "Prior to the fulfilment of the (resolutive) condition the "title" of the right is complete for all investitive facts have already occurred; in the technical sense, therefore, the right has already vested. The effect of the resolutive condition is merely to introduce an incomplete divestitive fact

the completion of which - should that ever occur - the right will be lost."

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I am therefore of the view that a resolutive condition does not affect the time when vesting occurs. I have already held that the bequest in favour of Rodney was not contingent on the fulfilment of a suspensive condition. The will provides, in essence, for Rodney to inherit the whole estate and to pay his brother a bequest price of R70 000. What the appellant had was a personal right against Rodney to claim payment of this amount and, in my view, the Court or quo correctly held that the disposition was subject to a modus which did not affect the vesting.

This conclusion is not affected by the testator's direction that the bequest "shall fall away" in the circumstances mentioned by him. By the use of these words he intended to provide for a divesting in the event of Rodney failing to comply with his requirements. In short a resolutive condition was attached to the modus. But this has no bearing on the question of vesting and, for the reasons given, the issue of divesting does not arise in this appeal.

The only remaining question is whether the will should be construed to mean that the rights which vested in Rodney were not transmissible to his heir. As Prof.D.V Cowen points out in 66 (1949) SALJ at 416, the concepts of vesting and transmissibility are different but closely related concepts. But a vested right is normally, though not necessarily, transmitted on the death of the beneficiary. (See Corbett at 179 and Cowen at 417).

Whether a vested interest is transmissible depends on the intention of the testator as expressed in his will. The intention may be gathered from the nature of the right and, in particular, whether it was intended to endure only for the lifetime of the beneficiary.

In this matter very little was said - or could have been said - in support of the proposition that the interest that vested in Rodney was not transmissible. The vested interest was a right to acquire ownership. It was not limited in time. It is true that the testator envisaged the possibility of a divesting, but this is not to say that he intended that the vested right would not be transmissible. On a proper construction of the will,

therefore, the interest that vested in Rodney was transmissible to the third respondent.

Accordingly the appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

L. S. Melunsky A J A

Mahomed, C J) Marais, J A) Zulman,
J A) Plewman, J A) concur