THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 731/2017

In the matter between:

DOUGLASDALE DIARY (PTY) LTD	**FIRST APPELLANT**
MATTHEWS, ROWAN WAUCHOPE	**SECOND APPELLANT**
MATTHEWS, MARK ROWAN	**THIRD APPELLANT**
MATTHEWS, BIANCA ROSE	**FOURTH APPELLANT**
MATTHEWS, ELIZABETH TALLULAH	**FIFTH APPELLANT**

and

BRAGGE, ELIZABETH ANN	**FIRST RESPONDENT**
MATTHEWS, MICHAEL BRIAN	**SECOND RESPONDENT**

Neutral citation: *Douglasdale Dairy & others v Bragge & another* (731/2017) [2018] ZASCA 68 (25 May 2018)

Coram: Shongwe ADP, Willis and Swain JJA, Davis and Hughes AJJA

Heard: 09 May 2018

Delivered: 25 May 2018

Summary: Rights of *fideicommisaries* upon death of fiduciary – right of executor of fiduciary's estate to enforce eviction order granted to fiduciary – scope of *res judicata* where appeal does not deal with court a quo's factual findings.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Makhanya J sitting as court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Davis AJA (Shongwe ADP, Willis and Swain JJA and Hughes AJA concurring):

[1] A family feud can often defy all laws of rationality. Invariably the warring parties consider that if they are able to mass superior legal forces to those of their family rivals they will emerge victorious. Sadly, litigation of this kind invariably ends in costly trench warfare and with no sensible resolution in sight.

[2] This case is a textbook case of a family feud followed by lavish, extensive and acrimonious litigation. In 1957 Mr Brian Matthews bought Farm Douglasdale (the farm) from which dairy operations were conducted. In 1966 the dairy business was sold into a company being the first appellant. Brian Matthews retained ownership of the farm in his own name. On 21 January 2000 Matthews died. The critical provision in his will in respect of the farm read thus:

'I give, devise and bequeath of my wife, ELIZABETH ANN MATTHEWS, my immovable property, being PORTION 8 OF THE FARM DOUGLASDALE 65, PROVINCE OF GAUTENG, together with all buildings and improvements thereon, subject to the condition that upon her death the following shares in the property shall devolve upon my sons as to

60% thereof to my son ROWAN WAUCHOPE MATTHEWS and as to 40% to my son MICHAEL BRIAN MATTHEWS (or failing them or either of them, upon their issue then alive, per stirpes), as *fideicommissaries*.

I specifically direct that my said wife, ELIZABETH ANN MATTHEWS**,** shall be not entitled to sell the said property except with the express written consent of my said sons, ROWAN WAUCHOPE MATTHEWS and MICHAEL BRIAN MATTHEWS. . . .'

[3] Prior to the death of Brian Matthews, the shareholding in first appellant was as follows: Brian Matthews , 39%; first respondent 1%; their daughter Helen Ward 20%; second respondent 20% and second applicant 20% .In 2001, as befits a narrative characterized by acrimony a fall–out ensued between Helen and the rest of the family. The consequent litigation was ended by way of a settlement when Helen was paid out in settlement of the dispute and relinquished her 20% shareholding to second respondent (7.7%) and, second appellant (12.3%). When Brian Matthews died he bequeathed 31% members interest in first appellant, which at that time was a close corporation, to second appellant and 8% to second respondent.

[4] Subsequent to the death of Brian Matthews, a number of changes took place in respect of the shareholding of first appellant. Following the distribution of Brian Matthews' estate, first respondent held 1%, second appellant 63.3% and second respondent 35.7% of the shares of first appellant. Suffice to say for the purpose of this dispute, a holding company, MERB (PTY) Ltd (MERB) was created to hold 100% of the shares of first appellant. When second appellant decided to emigrate to Australia an agreement was reached between the two brothers so that each would hold 50% of the shares in MERB. Second appellant held a casting vote in the event of a deadlock, thereby retaining control of MERB and therefore of first appellant. Second appellant held his 50% interest through Wauchope (Pty) Ltd and second respondent held 26% of the shareholding himself and his nominee company Bernahara Ltd held 24%.

[5] Once the ownership of the farm and the dairy business were separately held, it was necessary to ensure that the dairy business could operate on the farm. On 10 September 1986 a lease was concluded between Brian Matthews and first appellant. The lease period was for ten years, terminating on 31 August 1996. The lease was

renewed on 18 March 1996 by Brian Matthews and first appellant. During the duration of this lease Matthews died. His executors and second respondent, acting on behalf of first appellant, entered into a second lease renewal which terminated on 31 January 2003. A third lease renewal was concluded on 5 February 2003 which was to last until 31 January 2006. Between 2006 and 2009 no formal written lease agreement was concluded. Subsequently, first respondent, who had been bequeathed the fiduciary interest in the farm, entered into a further lease renewal. As with all the other leases, the lessee, being first appellant, paid a rental on a monthly basis.

[6] Within three months after the expiry of this lease on 6 May 2014, first respondent brought an eviction application. This prompted a further application in which the two *fideicommissaries*, second appellant and second respondent, sought leave to intervene on the basis of a direct and substantial interest in the eviction application.

[7] A huge mass of paper was generated pursuant to these two applications. Much of the affidavit evidence reflecting upon the disintegration of any semblance of family cohesion. In the light of the approach I intend to adopt, it is sufficient to note that the court *a quo* granted the eviction application but dismissed the intervention application.

[8] With leave of this court, leave to appeal was granted against the order of the court *a quo*. Subsequent thereto, on 06 September 2016, first respondent died. This necessitated this court requesting of counsel representing the parties to address this court on the legal implications of the law relating to the death of the fiduciary who had successfully brought the eviction application.

The legal implications of the death of first respondent

[9] In *British South Africa Company v Bulawayo Municipality* 1919 AD 84 at 95, this court laid down the key principles pertaining to fiduciary and *fideicommissary* interests. Innes CJ said as follows: ‘a direction to an heir to hand over the inheritance to another upon the happening of a condition is sufficient to constitute a fideicommissum; if and when the condition happens the final beneficiary acquires a real right in the inheritance.’

[10] Following upon this principle, the court in *Eksteen and another v Pienaar and another* 1969 (1) SA 17 (O), dealt more fully with the question of ownership when the *fideicommissum* matures, upon the death of the fiduciary. Smit JP laid down certain key principles in particular at 19D: 'The owners in the case of a *fideicommissum* which has matured, are without a doubt the *fideicommissaries* themselves and not the fiduciary's estate. They obtained a real right on the death of the deceased fiduciary.' Smit JP cited with approval at 19H a work by Tambyah Nadaraja, The Roman-Dutch Law of *Fideicommissa* as applied in Ceylon and South Africa (1949): 'In the modern law, it would seem that in all cases the transfer of ownership takes place automatically at the time prescribed by the testator for the vesting of the fideicommissary's interest, and the fideicommissary is entitled from that time to the use and enjoyment of the property and to enforce his claims to the property against the fiduciary, his representatives, or other possessor.'

[11] Dealing with the position upon the death of the fiduciary where the property is registered in his name, the court confirmed that upon his death, ownership of the property was acquired by the *fideicommissaries*. Accordingly as owners, it is the erstwhile fideicommissaries who were the only ones who could claim the ejection of the lessee (at 20 A-D).

[12] This approach was followed in *Ex parte Puppli* 1975 (3) SA 461 (D) at 464 and *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C) at 805. Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 2 ed(2001) at 322 summarise the position thus:

'Inasmuch as the rights of the fiduciary terminate automatically upon fulfilments of the condition, ownership of the property could hardly continue to reside in the fiduciary or the fiduciary's estate. Moreover, this view is consistent with the fideicommissary being accorded a *rei vindicatio* for the recovery of the property from third parties.'

[13] First respondent's counsel accepted, as he was constrained to do, that ownership passes to the fideicommissaries on the death of the fiduciary. He raised three points in terms of which he sought to contend that his concession did not apply

in this case; hence, in his view, the order of eviction remained enforceable and of practical effect.

[14] He first submitted that first respondent had sought eviction, not only on the basis of her property right but also in terms of a lease agreement. Hence, as there was a cause of action and a possessory claim based upon the lease, the fact that ownership passed from the fiduciary, as had been held in the cases cited above, was not relevant to these proceedings.

[15] This submission requires a most imaginative reading of the founding affidavit upon which the eviction was sought. The relevant portion reads thus:

'11. On or about the 25th of March 2009 I concluded an agreement of lease with the respondent, in terms of which I let the property to the respondent subject to the terms and conditions set out in the written agreement of lease. . .

12. As appears from clause 2.1.2 of the lease agreement. . . the lease period commenced with effect from the 1st of March 2009 and as appears from clause 4 thereof it is subsisted for 60 months and then expired on the 28th of February 2014. The lease has not been renewed nor has any further agreement of lease been concluded with the respondent who presently occupies the property without my consent and without any right to do so

14. As stated in paragraph 12 above the respondent occupies the property without any right to do so.'

[16] Notwithstanding the imagination brought to bear on this affidavit, the meaning is clear: first respondent set out as the basis of her cause of action that she was the owner of the property. She then pointed out in her affidavit that the lease expired in February 2014. Thereafter, she contended that the respondent in the eviction application had no legal right of occupation by which to trump her rights of ownership; that is in respect of its possession. Nowhere is there any suggestion in this affidavit that reliance was being placed on alternative causes of action, being both ownership as the fiduciary and as a lessor.

[17] Faced with this insurmountable difficulty, counsel for both the first and the second respondent sought to invoke the provisions of the Subdivision of Agricultural Land Act 70 of 1970 (SALA). In particular, reliance was placed upon s 3 of SALA, which to the extent relevant, provides:

'Subject to the provisions of section 2 –

. . .

(b) no undivided share in agricultural land not already held by any person, shall invest in any person;

(c) no part or any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;

. . .

unless the Minister has consented in writing.'

[18] It was argued by respondents' counsel that ownership cannot pass to the second appellant and second respondent until such time as the Minister consents to the transfer of their undivided shares. The problem with this argument is that, on the evidence before this court, the land has not been classified as agricultural land and hence the provisions of the Act do not apply. That is made clear from an email of 9 March 2017 generated by Annette Stoltz of the Department of Agriculture Forestry and Fisheries:

'It seems that this is no longer agricultural land as per definition of SALA. I have send the application to our registry who will open a file and we will write a formal letter to confirm this.'

[19] In his founding affidavit in an application to intervene in these proceedings, the second respondent refers to this email from the Department to the effect that the property is no longer agricultural land and that SALA does not appear to be of application. He then states:

'As a result, I submit that I am, indeed, vested with real and personal rights in respect of the immovable property. Upon the passing of Elizabeth Bragge, on 06 September 2016, I became the owner of a 40% (forty percent) undivided share in the immovable property and I am entitled to registration of the undivided share in the immovable property in my name, not

in order to take transfer of ownership, but in order to record the fact of my ownership in the Dees Registry.'

[20] Reference was made to a further passage in the affidavit concerning the implications which may apply if the approach adopted by the Department is found to be incorrect. There was also an attempt by counsel for the first respondent to introduce evidence from the bar relating to possible review proceedings against the Department's decision. On all the admissible evidence placed before this court which deals with the position regarding the classification of the property, it cannot be said that the Act holds any implication for the present dispute.

[21] As a last resort, it was contended that the executor of first respondent's estate was obliged to give the two owners, being second appellant and second respondent *vacua possessio* which he could not do owing to the unlawful occupation of the property by the first appellant. This represented an attempt to raise, on appeal, a fresh cause of action which is nowhere to be found in the record placed before this court. Even if such a cause of action could be invoked in this court, on appeal, once first respondent died, ownership passed to second appellant and second respondent and hence no obligations were left for the executor to fulfil in this regard.

[22] In summary, after the death of first respondent ownership of the property passed to second appellant and second respondent in undivided shares of 60% and 40% respectively. This had the consequence that the order obtained in the court *a quo* by the first respondent is unenforceable and cannot have any practical effect. The evictee had become an owner of the property. The executor, being the representative of the estate of the first respondent, no longer had any entitlement to the property. There was not even a lease in existence which the executor could enforce.

[23] For this reason this case falls within the scope of s 16(2)(*a*)(*i*) of the Superior Courts Act 10 of 2013, namely the issue before this court, being an order granting the first respondent the right to evict first appellant from the property will have no practical effect or result; nor are there any exceptional circumstances which would justify an appeal. Thus the appeal can and must be dismissed.

Res Judicata

[24] Given this conclusion, appellants' counsel voiced concern that the findings of the court *a quo* would remain undisturbed. On the basis of the doctrine of issue estoppel and *res judicata,* the finding of the court *a quo* could now be used in pending litigation for the wrongful holding over of the property, as alleged by respondents.

[25] The requirements of res judicata are well established. (1) the same parties (2) the same cause of action and (3) the same relief. As Brand JA observed in *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) at para 23, an excessively rigid reliance on the second and third requirements 'may result in defeating the very purpose of res judicata'. Accordingly, 'issue estoppel allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties'. Brand JA was astute to the problem which presents itself in this case namely where the findings of the court *a quo* were not subjected to the rigours of an appeal. For this reason he qualified the ambit of issue estoppel as follows at para 26:

'. . .our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that deviation from the threefold requirements of res judicata should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings.

[26] It is impossible to provide a clear test as to what could give rise to unfairness. However, in the case of *Prinsloo*, Brand JA provides an example which certainly resonates in the present dispute, where the appeal is dismissed owing to a legally relevant new fact namely first respondent had died. Similarly, in *Prinsloo*, the court *a quo* had made inappropriate findings of fraud which did not require a finding on appeal. Given that these findings were irrelevant to the judgment on appeal Brand

JA, said: ‘In these circumstances I believe it would be patently inequitable and unfair to hold the appellants bound by those inappropriate findings in the present proceedings.’

Costs

[27] The approach adopted in this appeal means that the findings of the court *a quo* required no examination on appeal. For this reason it is not possible, as was argued by appellant’s counsel, to disturb the costs order so granted without a hearing and a decision on the merits. Hence this court is not in a position to reverse the costs order of the court *a quo* as requested by counsel for the appellant. Both parties sought to rely upon the judgment in John *Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) & another* (245/2017) [2018] ZASCA 012 in support of a positive cost order. In that case, the court made an order as to costs on appeal on the basis of the ‘very bleak prospects on the merits had the proposed appeal not become moot’ (para 16).

[28] In the present case, there has been no need to canvass the merits of the appeal as a result of a changed legal position caused by the death of first respondent after judgment in the court *a quo* had been delivered. The point on which this case was decided was raised by the court itself which required supplementary heads of argument from all parties. This in itself is sufficient reason to hold that neither party is deserving of a costs order on appeal.

[29] In the result, I grant the following order:
The appeal is dismissed with no order as to costs.

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D Davis
Acting Judge of Appeal

APPEARANCES

For the Appellant:	M R Hellens SC with G W Amm and L Peter
Instructed by:	Livingstone Crichton attorney (First Appellant)
	Steve Mechak Attorneys, (Second – Fifth appellant)
	Webbers attorneys, Bloemfontein
For the respondent:	J J Brett SC with D Mahon
Instructed by	Hogan Lovels Inc. (First Respondent)
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	Honey Attorneys, Bloemfontein