

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2024-03-06

DATE

SIGNATURE

Case Number: 2023-041644

In the matter between:

SIMON ETIENNE CORNELIS AVIS N.O.

First Applicant

EMILY RIORDAN

Second Applicant

and

MEIERT CONOR JULIAN SABIAN AVIS N.O.

First Respondent

MASTER OF THE HIGH COURT, PRETORIA

Second Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 6 March 2024.

JUDGMENT

POTTERILL J

[1] The applicant, one of the Trustees of the MC Avis Testamentary Trust NO MT 190/68 [the Trust] as well as being a beneficiary of the trust to an extent of 43,75 % of the benefits of the Trust is seeking together with the second applicant, Emily Avis Riordan, a beneficiary to the extent of 12,5 % of the benefits of the Trust that:

- “2.1 It is ordered that the property situated at [...] B[...] S[...], H[...], Holland is not liable to be transferred to the names of the Trustees of the MC Avis Testamentary Trust;
- 2.2 The MC Avis Testamentary Trust is terminated and wound up;
- 2.3 Alternatively, the first respondent is removed as a Trustee of the MC Avis Testamentary Trust; and
- 2.4 The costs of this application and Part A of the Notice of Motion shall be paid by the MC Avis Testamentary Trust.”

At the end of the hearing it was submitted that the applicants request that prayers 2.1, 2.2 and 2.4 be granted.

[2] The first respondent, is the brother of the applicants and is a trustee of the Trust and the third beneficiary of the trust being entitled to 43,75 % of the benefits of the Trust. The second respondent is the Master of the High Court [Master]. The

Master has not opposed the application, but the first respondent opposes the application.

The common cause facts setting out the background

[3] The first applicant and respondent are brothers and the second applicant is a cousin to the brothers. They are the grandchildren of the testator, their grandfather.

[4] Their grandfather left an elaborate will of more than 24 pages when he died in 1967. In the will a testamentary trust was provided for. The estate was finalised and the liquidation and distribution account did not reflect the property in Haarlem Holland. The Trust has been in existence for 57 years.

[5] As for the Trust, there has not been compliance with FICA and the Trust is unable to process any banking transactions at all. The Trust's bank accounts are frozen. The Trust cannot pay the Trust's accountant, Mr Spanner. It failed to pay the Municipality in Delmas for rates on a property owned by the Trust in Delmas. It cannot render tax returns or pay tax. The Trust cannot make any payments or distribution to its beneficiaries. This is due to the businesses that existed at the time of the death of their grandfather, no longer existing and there is thus no source of revenue for the Trust.

[6] The Haarlem property is only referred to in the liquidation and distribution account in the estate duty addendum to the liquidation and distribution account. The liquidation and distribution account does not reflect the Haarlem property as being distributed in terms of the will to the Trust, whereas numerous other properties are

specifically so to referred in the liquidation and distribution account. The Haarlem property is still registered in the name of the deceased.

[7] In the will clause (i)(1) reads as follows:

“I direct that the TRUST constituted in terms of this my Will shall continue for an initial period of TWENTY-FIVE (25) YEARS and that it is my wish that it shall continue thereafter for further periods of TWENTY-FIVE (25) years each, so long as economically, financially, technically, politically possible and advisable and that the businesses comprising my Organisation may not be liquidated, sold or otherwise disposed of, except in terms of Clauses 4(h) and 4(i) of this my Will, unless found unavoidable by my Trustees.”

[8] Clauses (3) to (5) of the will reads as follows:

“(3) It is my most definite wish that the M.C. AVIS TRUST, both Personal and Business Estates, jointly and separately, as defined in Clause 4(c) sub-clauses (i) and (ii), shall continue in terms of the foregoing and that my Trustees and Descendants shall use (e)very endeavour to ensure this.

(4) If at any time after the expiration of the original TRUST of TWENTY FIVE (25) years, my Trustees, after consultation with and approval of my Wife, the aforesaid EDITH PATRICIA AVIS, my daughter, the aforesaid PATRICIA MARIE MURPHY (born AVIS) and my grandchildren or the descendants of my grandchildren who shall have attained the age of TWENTY-FIVE (25) years and the then leading executives of the businesses constituting my Organisation, shall decide that it is inadvisable or unpropitious to continue all or any of the businesses, I direct that my Trustees shall then cause accounts to be taken of all the Assets constituting the Trust. In such event I direct that all such

Assets shall devolve upon my Wife, the aforesaid EDITH PATRICIA AVIS, my daughter, the aforesaid PATRICIA MARIE MURPHY (born AVIS) and my grandsons, the aforesaid SIMON AVIS and MEIERT CORNELIUS AVIS, in equal shares. Should my Wife, the aforesaid EDITH PATRICIA AVIS, pre-decease me or die prior to this sub-clause coming into effect, her share shall devolve upon my grandsons, the aforesaid SIMON AVIS and MEIERT CORNELIUS AVIS, in equal shares, whom failing, their lawful issue per stirpes. Should my daughter, the aforesaid PATRICIA MARIE MURPHY (born AVIS) die prior to this sub-clause coming into effect, one-half ($\frac{1}{2}$) of her share devolve upon my granddaughter, EMILY AVIS MURPHY, whom failing, upon her lawful issue per stirpes, and the remaining one half ($\frac{1}{2}$) thereof shall devolve upon my grandsons SIMON AVIS and MEIERT CORNELIUS AVIS in equal shares, whom failing, upon their lawful issue per stirpes. Should any of my grandchildren, the aforesaid SIMON AVIS, MEIERT CORNELIUS AVIS and EMILY AVIS MURPHY die prior to this sub-clause coming into effect, leaving no lawful issue him or her surviving, the share to which such grandchild would have been entitled had he or she lived shall devolve upon my surviving grandchild or grandchildren in equal shares, or failing them, their lawful issue, per stirpes. Should all, my wife, the aforesaid EDITH PATRICIA AVIS, my daughter, the aforesaid PATRICIA MARIE MURPHY (born AVIS) and my grandchildren, the aforesaid SIMON AVIS, MEIERT CORNELIUS AVIS and EMILY AVIS MURPHY, die prior to this sub-clause coming into effect leaving no lawful issue any of them surviving, then and only then, I direct that the Trust Assets shall devolve in equal shares upon those direct male descendants of my youngest brother, P.K. AVIS, now of Hoofddorp, Haarlemmermeer, Holland, who bear the surname 'AVIS' and none others."

[9] The relevant paragraphs of the will start off with paragraph 4 thereof. In paragraph 4 of the deceased's will he specified legacies in favour of his wife and bequeathed the remainder of his estate to the administrators and trustees in Trust. Income accruing from the trust assets were to be utilised to pay certain benefits to the deceased's wife and also made provision for certain payments to be made on a monthly basis for *inter alia* the two brothers, and maintenance for the second applicant. The provisions included payments of school fees, medical, dental, optical and hospital and university tuition. Provision was also made for an escalation of payments to the beneficiaries. In 1989 there was litigation and the agreement that was concluded was made an order of court. The parties therein agreed to dispose of all the businesses.

[10] It is not disputed that in 2016 monthly maintenance of payments was terminated by the Trust. The monthly payments were an amount of R11 688.25 to the two brothers and R3 946.15 to the second applicant. The monthly obligation is R39 000 per month which the Trust cannot afford. The property in Haarlem can be sold.

Non-joinder

[11] The first respondent raised a point *in limine* that the non-joinder of the beneficiaries over the age of 25 is fatal to the application. Much of this was made in the answering affidavit but in the heads of argument little of substance was argued. The main argument was that these beneficiaries have a right and thus should have been joined.

[12] Upon a reading of the clauses of the will referred to, which I find unnecessary to quote, the descendants over the age of 25 would only be entitled to any payment as a beneficiary on a *per stirpes* basis. As there can be no dispute that the Trust Deed only references Trust Deed entitlement on a *per stirpes* basis, the long list of beneficiaries as recorded by the first respondent is simply incorrect. The correct

position is that any assets would only devolve upon the descendants of the deceased's grandchildren if the grandchildren were deceased prior to the terms of the will taking effect.

[13] The test for joinder is that a party joined must have a direct and substantial interest in the subject-matter; that equates to a party having a legal interest in the subject-matter which may be affected prejudicially by the judgment of the court. A mere financial interest or that a party may have an interest is insufficient for a plea of non-joinder.¹

[14] The descendants of the applicants and respondent have no rights accrued to them and cannot be prejudiced by the judgment. The non-joinder point is bad in law and is dismissed.

Must the MC Avis Testamentary Trust be terminated?

The terms of the Trust deed itself

[15] The Trust deed provides that the Trust's initial duration would be 25 years and then could continue another 25 years, but it had to "be economically, financially, technically, politically possible and advisable and that the businesses comprising by Organisation may not be liquidated, sold or otherwise disposed of, except in terms of Clauses 4(h) and 4(i)² of this my Will, unless found unavoidable by my Trustees." Interpreting this clause in the Trust Deed, the language used in the light of the ordinary rules of grammar and syntax within the context in which the provision appears and its purpose, the only sensible interpretation is that on the common cause facts, after 57 years, it is not advisable for the Trust to continue, and it must be terminated. Without the businesses the continued existence of the Trust makes no business sense.³ The businesses comprising the testator's Organisation do not exist anymore. The Trust is not economically and financially sound; in fact it is

¹ *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at 176I-177A

² These clauses are not relevant to the issue at hand

³ *Natal Joint Municipal Pension Fund v Ednumeni Municipality* 2012 (4) SA 593 (SCA) par [18]

insolvent. The two trustees are at a complete loggerhead, in fact a deadlock on all issues pertaining to the Trust. I am satisfied that on the interpretation of the Trust deed itself, the Trust must be terminated and I do not need to address, or exercise my discretion in terms of section 13 of the Trust Property Control Act 57 of 1988.

Is the Haarlem Property an asset in the Trust?

[16] It is common cause that the property is still registered in the deceased's name. The Haarlem Property is not registered in the name of the Trustees. The respondent relies on two legal opinions obtained that the Haarlem Property could be regarded as a Trust Asset in the Netherlands. These opinions would not be needed if the Haarlem Property was a Trust Asset. These opinions were obtained to assert that the property is to be deemed a Trust Asset, and it could be dealt with as a Trust Property. Why, if it is a Trust Asset? The necessity to obtain such opinions in fact negate the submissions that the property is a Trust asset.

[17] The first respondent also relies on acquisitive prescription as a basis for the Trust to have acquired the Haarlem Property. It was submitted that "the Trust has a strong legal claim to ownership of the Haarlem Property." The fact that one has to resort to these arguments only strengthen the applicants' case that the Haarlem property is not an asset in the Trust and has to resort to opinions to render it an asset in the Trust.

[18] The reliance by the First Respondent on the two Hague Conventions also takes the matter no further. The estate was wound up in accordance with the law of that time and no Convention has retrospective effect. On the common cause facts I find that the Haarlem Property is not a Trust Asset and I need not resort to the *Plascon-Evans* rule.⁴

⁴ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) 623 (A); *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)

[19] I accordingly order as follows:

- 19.1 It is declared that the property situated at [...] B[...] S[...], H[...], H[...] is not liable to be transferred to the names of the Trustees of the MC Avis Testamentary Trust;
- 19.2 The MC Avis Testamentary Trust is hereby terminated and wound-up;
- 19.3 The MC Avis Testamentary Trust is directed to pay the costs of this application and that of Part A of the Notice of Motion.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 2023-041644

HEARD ON: 27 February 2024

FOR THE APPLICANTS: MR. K.J. VAN HUYSSTEEN

INSTRUCTED BY: Fluxmans Inc.

FOR THE FIRST RESPONDENT: MR. R. WARNER

INSTRUCTED BY: Russel Warner Attorneys

DATE OF JUDGMENT: 6 March 2024