CASE NO 620/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
In the matter between:

THE ADMINISTRATORS IN THE ESTATE
OF THE LATE JOHN HERBERT RICHARDS

Appelants

and

MARION JOAN NICHOL (born

FEYDER)

First Respondant THE

INTESTATE HEIRS IN THE ESTATE

OF THE LATE JOHN HERBERT RICHARDS

Second Respondant

CORAM :SMALBERGER,HARMS,SCOTT,ZULMAN et

PLEWMAN JJA

HEARD

:10 SEPTEMBER

1998 DELIVERED :25 SEPTEMBER

1998

JUDGEMENT

SCOTT JA/....

SCOTT JA:

The appellants are the administrators of the estate of the late John Herbert Richards ("the deceased") who executed a will in 1953 and died childless two years later. In his will he bequeathed to his widow certain movable property as well as the right to occupy the upper or lower portion of his immovable property in Sea Point, Cape, and thereafter directed the administrators (who were appointed as such in terms of the will) to "stand possessed" of the whole of the residue of his estate in trust and from the income to pay certain annuities to named beneficiaries, including the deceased's widow and stepdaughter. Any surplus income was to be used to pay annuities to certain other members of his family. On the death of the widow a house was to be purchased "at a cost not exceeding £3000" for use by the deceased's stepdaughter and stepgrandchild. The latter (who is the first respondent) was then, in addition, to be paid an annuity on an

increasing scale. Provision was made in clause 12 of the will for the establishment of a trust in respect of the residue of the estate upon the death of the longest living beneficiary under the preceding provisions of the will or at an earlier date if the administrators deemed this not to be inconsistent with their obligations to any remaining beneficiaries. The beneficiaries of the trust were to be selected by the trustees from two classes of persons to whom I shall refer later in this judgment.

Clause 12 included terms which the appellants considered may be invalid as constituting an improper delegation of testamentary power. The clause purported, for example, to empower the administrators to create a trust and to authorize them in their absolute discretion to determine such matters as who the trustees were to be, what they were to be paid and the terms and constitution of the trust. A consequence of the failure of the trust would have been a partial

intestacy. Although the appellants were of the view that the objectionable portions of clause 12 were severable from its remaining provisions and that the requirements for a valid testamentary trust had been satisfied, they nonetheless approached the Cape Provincial Division for an order declaring that the deceased had not died intestate as to the residue of his estate and that a valid trust had been created in respect of the residue, and for an order appointing the appellants as trustees with discretionary powers of investment.

In addition, certain relief was sought in relation to the present day value of the house to be purchased for use by the first respondent who by then was the sole surviving beneficiary under the preceding provisions of the will. That relief was ultimately granted and as it is irrelevant to the issue in the present appeal need not be referred to any further.

On 7 November 1995 Motala AJ issued a rule nisi in respect of the

relief sought and appointed a curator ad litem to represent the interests of absent heirs upon a possible intestacy. On the return day the matter came before Farlam J and Louw J who held the provisions in question to be invalid as constituting an improper delegation of testamentary power but nonetheless severable from the remainder of clause 12 of the will. The Court found that on a proper construction of the clause a valid trust had been created in respect of the residue of the estate and appointed the appellants as trustees to the trust. The judgment has since been reported. See Administrators, Estate Richards v Nichol and Another 1996 (4) SA

253 (C). The questions in issue in this appeal relate solely to the powers of investment afforded to the appellants so appointed.

In the notice of motion an order was sought:

> "... authorising Applicants, in their discretion, to invest and from time to time to reinvest, any assets in the estate in such suitable trustee investments and/or securities quoted on any licenced Stock Exchange and/or in licensed unit trusts as Applicants may deem appropriate."

Paragraph (d) of the rule nisi issued on 7 November 1995 was in terms identical to the above. The court a quo, however, declined to make paragraph (d) of the rule final. Instead, it substituted a new paragraph (d) in its order. In terms of the new paragraph the Johannesburg Stock Exchange was substituted for "any licensed Stock Exchange" and three provisos were added. The substituted paragraph (d) reads:

> "(d) ... authorising applicants in their discretion to invest and from time to time to reinvest any assets in the estate in such suitable trustee investments and/or securities quoted on the Johannesburg Stock Exchange and/or licensed unit trusts as applicants may deem appropriate, provided, however, that:
>
> (i) at no time may an amount exceeding 50% of the value of the trust assets be invested or reinvested in shares quoted on the Johannesburg Stock Exchange or in licensed unit trusts; (ii) before any such investment or reinvestment in shares or unit trusts is made applicants shall obtain advice from an independent stockbroker and the written approval of such stockbroker to each such investment or reinvestment; and (iii) a quarterly report shall be rendered to the Master setting out details of such investments in shares or unit trusts." (262 E -I)

The present appeal, with the leave of the Court a quo, is against the order just quoted to the extent that it differs from the order claimed in the notice of motion and repeated in the rule nisi.

It is necessary at the outset to refer by way of background to certain facts and circumstances which emerge from the papers and which have a bearing on the questions in issue.

The appellants who were appointed as executors and administrators in terms of the will (and who are now also the trustees) are a partner in a well-established firm of Cape Town attorneys and the Board of Executors. The latter is described in the papers as a leading financial institution. According to Mr Brian Bechet, its senior general manager in charge of the management of the portfolios of private individuals and trusts, all investment decisions are based on an on-going programme of investment analysis and research. Personal interviews are

conducted with the senior management of companies in which investment is being considered and the Board's investment strategy committee which comprises professionals with specialist knowledge and investment experience meets on a regular basis to review broad investment strategy. The Board, he says, deals with all South Africa's major stockbroking firms and receives and analyses their investment research. Its approach is a conservative one and according to Bechet, only those investments which measure up to the Board's "stringent criteria" are included in any portfolio.

The will makes no provision for the distribution of the capital of the trust - the deceased expressed the desire that the trust "shall continue in perpetuity". Clause 12 requires the income to be used as follows:

> "(a) Firstly, to assist brothers and sisters and children and grandchildren of brothers and sisters of either myself or my wife, the said HELEN MARGARET RICHARDS (born Wake) who shall apply to the Trustees for such assistance and shall appear to the Trustees to be in

> need of financial assistance through no fault or moral defect on their own part. If there be no applicants in any year or if there be a surplus of income after rendering such assistance as the Trustees shall deem desirable, then the Trustees may devote the income or the surplus thereof to the second object of the Trust. (b) Secondly, to assist such Institution of a charitable nature as the Trustees may from time to time select provided only that the Institutions selected shall have as their chief object the welfare, education, and/or maintenance of children orphaned or otherwise lacking the support of their parents or either of them, whether such children be European, Coloured or Native, provided further, however, that in selecting the particular Institution to be benefitted and the proportions payable to each respectively, the Trustee shall as far as possible endeavour to benefit Institutions in England and in South Africa in equal shares."

If the trust is to endure for a long period, if not in perpetuity, it is clear, having regard to the effect of inflation on the value of money, that the trustees will be obliged to invest the assets of the trust in such a way as not only to provide adequate income but also to obtain a capital growth to the extent of at least preserving the capital in real terms. Should the capital invested - which is now in

the region of R4 million - be permitted to erode in value in real terms, it is inevitable that the real income available for the trust beneficiaries will increasingly reduce and, unless the process is arrested, eventually cease to be of any significance.

Investigations carried out by the appellants show that many if not most of the potential beneficiaries in the first category live in England. There are also, it would seem, potential beneficiaries living in Canada. As far as the second category is concerned, the will expressly directs the trustees as far as possible to benefit institutions in England and South Africa in equal terms.

Finally it is necessary to refer to certain provisions in the will which confer powers of investment on the appellants. I shall ignore the provisions of clause 12 dealing with the powers of the trustees which were held to be invalid by the Court a quo; although the invalidity was, of course, a consequence of the

extensive nature of those powers. In terms of clause 4 of the will, the appellants in their capacity as administrators were afforded power in relation to the residue of the estate-

> "... at their own absolute discretion [to] retain, release or reinvest any proceeds of any realisation of the whole or part in such manner and upon such security as to my Administrators may seem fit."

Clause 11 (in terms of which the appellants were appointed as executors and administrators) similarly confers wide powers. After dispensing with the need for the furnishing of security, the clause concludes:

> "My Executors shall have the power to sell, deal with and dispose of any asset in my Estate and my said Administrators shall in addition to the powers of investment conferred upon them in Clause 4 of this my Will, have full power at their absolute discretion to realise or acquire property, both movable and immovable, also power to settle, adjust or compromise any claim due to or by me or my Estate, and power to deal with any investments and to apportion or discriminate between capital and interest in their discretion."

It is apparent from these provisions that the deceased had considerable confidence

in the appellants, being his chosen executors and administrators, and intended them to have wide discretionary powers of investment.

In Sackville West v Nourse and Another 1925 AD 516 this Court had occasion to consider the standard of care required of a trustee in relation to trust property. It was held that the standard was higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person, it was pointed out, was free to do what he liked with his property and not infrequently selected investments which were of a speculative nature, particularly when the potential profits were high. A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person, that is to say, the standard of the bonus et diligens paterfamilias of Roman law, and was accordingly, as Kotze JA concluded at 535, "obliged, in dealing with and investing the money of the beneficiary, to observe due care and

diligence, and not to expose it in any way to any business risks". The need to avoid risks was emphasized in the judgments of both Solomon ACJ and Kotze JA. Both contain dicta to the effect that a trustee is obliged to avoid investments which are "attended with risk" (at 520) or involve "business risks" (at 535) and which cannot be made without "safety and security" (at 534).

On the strength, no doubt, of these and similar dicta it was for many years the generally accepted practice for trustees, who had not been given wider powers of investment, to confine the investment of trust property to what are called trust or trustee investments. These include government or municipal stocks, fixed deposits, loans on mortgage bonds and also immovable property. (See for eg Jonsson v Estate Jonsson and Others 1945 NPD 66 at 70; Peffers, NO and Another Attorneys, Notariess and Conzveyancers Fidelity Guarantee Fund Board of Control 1965(2) SA 53 (C) at 55G - 56A.) But whether or not an investment

can be said to have been prudent or made with due care and diligence is a question which can only be decided on the facts of each particular case (Colonial Banking and Trust Co Ltd v Estate Hughes and Others 1932 AD 1 at 15 - 16); and circumstances change. An investment considered prudent in earlier times may rightfully be regarded as quite imprudent in the context of modem conditions. The ongoing and rapid decline in the value of money brought about by inflation, which has become a feature of our economy in the course of the past few decades, may well result in a sharp decline in the value of a monetary security within a relatively short period of time. In order to preserve the capital of the trust in real terms and so ensure the continued production of income, particularly in the case of a trust intended to be of long duration like the present, a trustee in such circumstances is of necessity obliged to invest in real assets with potential for capital growth. Such an investment, viz one where the capital is not fixed, necessarily involves some

element of risk; but the risk may be unavoidable if the capital of the trust is to be preserved in real terms. The acceptance of this element of risk as being unavoidable if the trust is to serve its purpose has inevitably led in more recent times to a change in investment thinking which involves a movement away from the more conservative approach developed in an age when inflation was either non-existent or of little consequence. In principle, therefore, I can see no justification at this stage for a hard and fast rule which precludes the investment of trust funds in quoted shares or licensed unit trusts; nor do I understand the ratio in Sackvelle West v Nourse and Another, supra, as imposing such a limitation on the investment of trust property. (The same may be said of s 9 of the Trust Property Control Act 57 of 1988 in terms of which a trustee is required to act "with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another".)

16 This was acknowledged in Ex parte van Hasselt 1965(3) SA 553 (W) where an order was granted investing a curator bonis with authority to invest and reinvest the patient's funds in preferent and ordinary shares on the Johannesburg Stock Exchange. Similar orders were granted in Ex parte Wagner NO: In Re de Bie 1988 (1) SA 790 (C) and Ex parte Ewing NO:In Re Sheridan 1995(4) SA 101

(D). In the Van Hasselt case, Hiemstra J, after referring to the Sackville West case and the effect of the declining value of money on guilt-edged securities, expressed himself as follows, at 555 H:

> "The seventeenth and eighteenth century writers referred to by the Appellate Division in 1925 expressed no preference for a particular type of security. They merely insist on prudence on the part of a trustee. To suggest that investment in a portfolio of shares ipso facto involves so much 'uncertainty and risk' that the whole undertaking automatically betrays lack of 'due care and diligence' is in my view unrealistic."

I agree. Nonetheless, it must not be overlooked that every investment in shares (and unit trusts) carries with it the inherent risk of capital loss. A trustee

exercising due diligence and care will bear this in mind when purchasing shares both in regard to their selection and the balance of his share portfolio. He will accordingly avoid investments which are of a speculative nature. The extent to which it will be prudent to invest in the share market must necessarily depend on the circumstances of each case. Generally speaking, however, a trustee will as far as is practicable seek to spread the investments of the trust over various forms of undertaking in order to obtain a balance of stability and growth in the capital value of the trust and the income it produces.

The Court a quo was prepared to authorize the appellants to invest trust funds in the purchase of quoted shares, and licensed unit trusts, but subject to the restrictions to which I have previously referred. It is these restrictions which form the subject matter of the present appeal and to which I now turn.

The basis upon which they were imposed is set forth in the following

passage in the judgment of Farlam J:

> "In regard to the relief set out in para (d) of the rule nisi, I do not think it appropriate for the applicants to have the power sought. In my view, it would be more appropriate to give a power to invest an amount not exceeding 50% of the value of the trust estate in shares quoted on the Johannesburg Stock Exchange, or licensed unit trusts, subject to the trustees obtaining advice from an independent stockbroker before buying and selling shares or unit trusts and such stockbroker approving all such investments and reinvestments in writing, and subject further to the rendering of quarterly reports to the Master setting out details of investments made in shares or unit trusts. This was ordered at least as far as shares were concerned in Ex parte Ewing NO; In re Sheridan 1995 (4) SA 101 (D) and I agree with the approach set out therein. It was argued that the requirement of the approval of an independent stockbroker is unnecessary because the Board of Executors has its own highly competent investment analysis and research staff. That may be so, but it is still desirable that independent stockbroking advice and approval be obtained." (259J - 260C)

It is convenient to consider seriatim each respect in which the order granted by the Court a quo departed from paragraph (d) of the rule nisi which, as I have indicated, reflected the order sought in the notice of motion.

The first is the restriction that no more than 50% of the value of the trust estate is to be invested in shares or unit trusts. There is nothing in the evidence to support the imposition of such a limit. On the contrary, Bechet in his affidavit stressed the need for flexibility in the administration of a trust, particularly one intended to be of long duration. The need for flexibility would seem to be self evident. The prudence of an investment and, indeed, of the overall spread of investments depends upon the circumstances prevailing at any particular time. Once it is accepted that a trustee may legitimately invest trust funds in shares and unit trusts I have difficulty in appreciating what justification there can be for the imposition of an arbitrary limit on the percentage of the value of the trust that may be so invested. What is prudent in particular circumstances may vary from well below 50% to well above it. The trust is intended to be of long duration. It is the trustees who will be best placed to make appropriate ad hoc decisions

from time to time as to what investments will best serve the interest of present and future beneficiaries of the trust. The Court is not in a position to do so in advance. As counsel for the appellant pointed out, the 50% limit could preclude the appellants from achieving a spread of investments which they consider prudent in the circumstances. Other anomalies may also arise. Counsel postulated the case of the appellants being compelled to dispose of shares at an inappropriate time for no better reason than that the value of the trust's share portfolio with the passing of time had increased so as to exceed the 50% limit, or the appellants finding themselves precluded from purchasing shares which they consider prudent to acquire or from participating in a favourable rights issue without first disposing of shares or unit trusts which they would otherwise have wished to retain.

The Court a quo gave no reasons for imposing the 50% limit. It appears to have done so solely on the basis that a similar order was granted in the

Ewing case. But in that case, as in the Wagner case, this is all that was asked for. Both were cases in which a curator bonis approached the court for greater powers than those originally afforded. In neither was the appropriateness or otherwise of such a limit considered by the Court. In the Van Hasselt case on which the judgments in Wagner and Ewing relied, no limit was imposed. In my view, therefore, the 50% limit imposed by the Court a quo was unjustified.

The second difference between the order sought and the order granted is that in the latter the appellants were restricted to purchasing shares quoted on the Johannesburg Stock Exchange as opposed to "any Licensed Stock Exchange". No reason was given for this restriction. In the Ewing case the curator bonis was authorised to purchase shares quoted on the Johannesburg Stock Exchange but once again this is all that was asked for. In the circumstances of the present case I can see no reason for this restriction, particularly in the light of modem

developments. It should also not be overlooked that approximately 50% of the beneficiaries in the present case will be people living in foreign countries. The extent of any such off-shore investment would of course be limited by local legislation.

Next is the requirement that the appellants obtain advice and approval in writing from an independent stockbroker before investing or reinvesting in shares or unit trusts. This requirement, too, was contained in the order granted in the Ewing case; but once again was one included in the terms of the relief asked

for. On the facts of the present case the provision in question would seem to me to be neither necessary nor appropriate. As previously indicated the appellants, according to the evidence, will enjoy the benefit of advice from a team of investment experts at the Board which consults with the major stockbroking firms in South Africa as well as the senior management of companies in which

investment is being considered. The trustees comprise the Board and a partner in a well-established firm of attorneys; in other words the Board is not the sole trustee. It is clear from the terms of the will that the testator had full confidence in the appellants. I can see no reason why their investment decisions should be subjected to the veto of some unspecified stockbroker; nor was any reason given by the Court a quo why they should be, save that it was desirable. To my mind the requirement is both unnecessary and contrary to the tenor of the will.

Finally, there is the requirement that the appellants render quarterly reports to the Master setting out details of investments in shares or unit trusts. The Master in his report did not suggest such a requirement. It has its origin once again in the order made in the Ewing case; but here too the order simply reflected the relief claimed. In the Van Hasselt case a similar order was sought. The Master expressed his misgivings about it. At 555H - 556A Hiemstra J said the following:

> "The Master rightly submits that, if the power should be granted, he does not want to be charged with the duty of approving share investments. That was the difficulty in Pratt's case, to which I have referred above. Share dealings were authorised, but subject to the approval of the Master. The Master is however not equipped for the discharge of such a duty, which involves great expertise and minute attention to detail. I do not think he should be burdened with such a responsibility."

This observation is as true today as it was in 1965.I can think of no good reason why such an order should have been made in the present case; nor was any reason advanced by the Court a quo. The Master, in any event, has wide powers in terms of s 16(1) of the Trust Property Control Act 57 of 1988 to call upon trustees at any time to account to him for their administration of trust property.

It follows from the aforegoing that the order made by the Court a quo in substitution of paragraph (d) of the rule nisi is wholly at variance with the order

which this Court would have made sitting as a Court of first instance. Save for the reference to Ewing's case and the view expressed that the substituted order was

"more appropriate" or was "desirable", no reasons were given by the Court a quo for departing from the relief claimed. As pointed out above, the Ewing case affords no support for the substituted order. To the extent, therefore, that the Court a quo relied on that case to justify its order, in my view, it misdirected itself. In all the circumstances, this Court is entitled to interfere even if it is accepted that the discretion exercised by the Court a quo was a discretion in the strict sense and hence of the kind considered in such cases as Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335 E; Commissioner of Inland Revenue v Da Costa 1985 (3) SA 768 (A) at 775 F - G, and Ontvanger van Inkomste, Lebowa, en 'n Ander v De Meyer NO 1993 (4) SA 13 (A) at 28 B - D. (For an example of a "discretion" of a different nature, see Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 360 D - 362 G.)

It follows that in my view the appeal must succeed.

The following order is made:

(a) The appeal is upheld and the judgment of the Court a quo is altered to the extent that paragraph (d) of the rule nisi dated 7 November 1995 is made final and the paragraph (d) substituted by the Court a quo is deleted.

(b) The costs of the appeal, including those occasioned by the employment of two counsel, are to be paid out of the trust estate

D G SCOTT

SMALBERGER JA)

HARMS JA) - Concur
ZULMAN JA)
PLEWMAN JA)