IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Case number: 49534/2013

Date: 5 June 2014

Reportable

In the matter between:

HADAWAY HEIDI	Applicant
And	
MASTER OF THE NORTH GAUTENG HIGH COURT,	First Respondent
PRETORIA (Ref 27063/04)	
ABSA TRUST LIMITED (Reg. No. 1915/004665/06)	First Respondent
PRINSLOO, MARTHA MAGDALENA N.O	Second Respondent
ROETZ, ANNA MARIA ELIZABETH	Third Respondent
GREYLING ALLAN	Fourth Respondent
GREYLING BAREND CHRISTIAAN	Fifth Respondent

JUDGMENT

PRETORIUS J.

[1] In this application the applicant applies for a final interdict preventing the second and third respondents ("the Trustees") from alienating or encumbering or disposing of certain immovable property held by the

trustees in trust.

Background:

[2] The applicant is the daughter and only child of the deceased, her father. The deceased passed away on 18 November 2004. He was married and had been married for 36 years to the fourth respondent, in community of property. There were no children born from this marriage. The fifth respondent is one of the fourth respondent's children born from a previous marriage.

[3] On 13 May 2002 the deceased and fourth respondent executed a joint will which, inter alia, provided:

> "*Indien die TESTATEUR die eerssterwende van ons is, bepaai ons dat ons onderskeie boedei as saamgevoeg beskou moet word, ten opsigte van die bemakings in klousule 1.3 en 1.4 hieronder en beskik ons soos volg:"*

[4] and

> "*Om die netto inkomste aan die testatrise oor te dra en uit te betaal tot by haar afsterwe.*
>
> *Om soveel van die kapitaal as wat die trustee nodig mag ag,* ***aan te wend vir die onderhoud en algemene welsyn van die testatrise of vir enige ander doel in haar belang*** (Court s emphasis)

[5] A trust was formed which included two properties belonging to the joint estate, being business premises situated in Johannesburg and a residential property at 10 Cadogan Street, Bryanston.

Previous Application:

[6] A previous application was launched in the High Court, Witwatersrand Local Division. The relief sought were declaratory orders concerning the interpretation of the will and two co-existent documents, which was, *inter alia:*

> "*interdicting (the Trustees) from alienating or encumbering the aforesaid properties in the course of administering the estate of the deceased and/or the trust, or at all. ''*
>
> *That the trustees of the testamentary trust created by the will of (the deceased) be interdicted from selling, encumbering or in any way disposing of the immovable property in trust... pending the termination of the trust*; *without the consent of the Applicant and the leave of the Court.* "

[7] This application was brought in 2006 and on 28 July 2006 Gildenhuys J made an order which is not

relevant to the present application. He made the following order which is relevant:

> "*No order is made on the other prayers for declaratory orders brought by the applicant;"*

[8] The court held obiter in that matter:

> "*The will clearly authorizes the trustees of the trust to sell some or all of the immovable properties, should it become necessary for the maintenance or well-being of the fourth respondent In my view this power is not limited or executed by any provisions of the trust* "

The present application:

[9] The will makes it quite clear that the trustee shall pay the net income of the trust to the fourth respondent, until the date of her death. It must be stated that clause 1.4.3 does not only provide for maintenance for the fourth respondent, but that the capital should be applied for her general well-being and any other purpose of interest of the fourth respondent.

[10] Clause 5.2 of the will provides:

> "*Om in belang van die trust,* ***in sy diskresie, die bates te verhuur, te verkoop oftegelde te maak,*** *of om enige roerende en onroerende eiendom te huurofaan te koop."*

[11] I must agree with Gildenhuys J that it is evident that:

> "*the object of the trust is in the first instance to provide for maintenance and general welfare of the (Fourth Respondent) during her lifetime. "*

[12] The trust provides that as much of the capital, which the trustees deem necessary, must be applied for the maintenance, well-being and general interest of the fourth respondent. The applicant's argument is that is not necessary to sell the property the fourth respondent is living in, as the trustees can rent a property in a retirement home for the fourth respondent, whilst renting out the property at 1[...] C[...] Street, Bryanston.

[13] The trustees set out the reasons why they deem it necessary to sell the property, which are inter alia; the fourth respondent and her husband, the deceased, had been married for 36 years in community of property, which would have entitled her to a half share of all the assets. She, however, accepted the provisions of the will and thus forfeited her joint ownership of the assets, against the benefits accruing to her from the trust. The fourth respondent and her late husband maintained quite a high standard of living as can be gleaned from the facts that they regularly travelled overseas and they lived in the Bryanston property. The Bryanston property is a huge residential property that was the family home where the fourth respondent and her late

husband raised the applicant and the fourth respondent's two sons. The house is situated on a 4200 square meter erf and consists of, inter alia, a billiards room, a library, four bedrooms and five bathrooms. There is a swimming pool and a tennis court on the property. The property has been valued at R 5.4 million.

[14] The fourth respondent, who is 78 years old, does not want to live in this huge property on her own any more. She has decided to move to a retirement home, where she will enjoy security and support.

[15] The trustees came to the decision to sell the property as they regard her decision to move to a retirement home as a responsible decision, which is reasonable under the circumstances, having regard to her age and the large house she is living in all by herself.

[16] The fourth respondent has been spending R6000 per month out of her own pocket to maintain the trust property, thereby depleting her savings of R1.2 million continuously. The trustees pay out the whole net income of the trust to the applicant and the fourth respondent. The trust has no surplus funds to maintain the property.

[17] It is clear from the papers that the trustees had considered all the options, including renting out the Bryanston property as suggested by the applicant, before deciding to sell the house. The reasons they set out for not renting out the property are cogent and reasonable under the circumstances. They have weighed all the options and only came to a decision when they had all the facts. I am satisfied that the trustees did consider all the options available to the trust in a responsible and reasonable manner, which I cannot reproach in any way.

[18] There is no reason to interfere with the will of the deceased where the discretion was afforded to the trustees to determine which actions would be necessary for the maintenance and general wellbeing of the fourth respondent.

[19] The applicant contends that she has a *prima facie* right in the preservation of the trust assets, but cannot allege that she has a clear right in this regard. She can thus not request a final interdict.

[20] The wording of the will is explicit and clear. The deceased endeavoured to ensure that the fourth respondent would be able to live in the comfort she had enjoyed whilst he was alive, therefore he did not only provide for her maintenance in the trust, but also for her wellbeing and any other purpose in her interest.

[21] **Joubert, W.A., ed, The Law of South Africa, Volume 11, Second Edition,** paragraph 398 describes an injury as:

> *"The term* "injury" *should be understood to mean infringement of the right which has been*

established and resultant prejudice. Prejudice is not synonymous with damages and it is sufficient to establish potential prejudice. A reasonable apprehension of injury is one which a reasonable man might entertain on a balance of probabilities that injury will follow"

[22] In this instance the applicant has not proved an injury actually committed or reasonably anticipated and must fail in the request to grant a final interdict.

[23] The court finds that, after considering the trustees reasons for selling the immovable property and all facts put forward by the applicant, that the decision to sell the property is reasonable and does not infringe any right of the applicant in any way.

Res iudicata:

[24] In **National Sorghum Breweries v International Liquor Distributors 2001 (2) SA 232 SCA** Oliver JA found on 239 H - **I:**

"*The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly*; ***has the same issue now before the Court been finally disposed of in the first action****?"* (Courts emphasis)

[25] The court has taken into consideration that Gildenhuys J expressly did not make any declaratory orders as requested by the applicant in the previous application. The same issue now before court had not been finally disposed of in the first application.

[26]I have considered the plea of *res iudicata,* but due to the fact that Gildenhuys J did not make an order on these same issues, I am of the opinion that the plea of *res iudicata* should not be upheld.

[27] I have considered all the arguments, affidavits and evidence. I cannot find that the applicant has proved her case on a balance of probabilities and that she is entitled to the relief sought. There is no reason for this court to interfere with the decisions of the trustees.

[28] Therefor the following order is made:

1. The application is dismissed with costs.

Judge C Pretorius

Case number : 49534/2013

Heard on : 2 June 2014

For the Applicant : Adv Haskins SC

Instructed by : Shapiro & Ledwaba INC

For the Respondent : Adv Wagener SC

Instructed by : Weavind & Weavind

Date of Judgment : 5 June 2014