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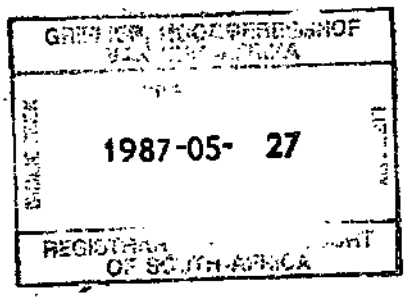

Case No 304/85
WHN

SHIRLEY J HARRIS ..... Appellant

and

ASSUMED ADMINISTRATOR ESTATE

LATE LESLIE MacGREGOR ..... Respondent

JOUBERT, JA :

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SHIRLEY J HARRIS ..... Appellant

and

ASSUMED ADMINISTRATOR ESTATE

LATE LESLIE MacGREGOR ..... Respondent

Coram: RABIE ACJ et JANSEN, JOUBERT,
GROSSKOPF JJ.A et KUMLEBEN A.JA.

Date Heard: 11 May 1987

Date Delivered: 27 May 1987

J U D G M E N T

JOUBERT, JA :

/The .....

The judgment of the Court a quo (delivered by TEBBUTT J., and concurred in by BERMAN J.) is fully reported in 1985(4) SA 302 (C) under the heading: Ex Parte Harris : In re Estate MacGregor. The essential facts may be briefly stated as follows.

The appellant was married out of community of property to Leslie MacGregor ("the testator") who died on 18 December 1943, leaving a will dated 18 September 1941 in which he created a trust in respect of the whole of his estate, in terms of which the trust in= come was to be paid to the appellant during her life= time while on her death the trust capital was to devolve

/on .....

on the child or children born of his marriage to the appellant. In the event of no issue of his marriage surviving the appellant the trust capital was to devolve on his brother Alexander Gordon MacGregor "subject to the condition that in the event of the death of my brother, ALEXANDER GORDON MacGREGOR, before my wife, SHIRLEY JUNE MacGREGOR, leaving legal issue him sur= viving, that the capital of my Estate shall upon the death of my wife SHIRLEY JUNE MacGREGOR, devolve upon and be payable to such issue in equal shares and by representation per stirpes." The will, however, made no provision for the contingency should his

/brother .....

brother Alexander Gordon MacGregor predecease the appel=
lant without lawful issue surviving him.

No children were born of the marriage of the testator to the appellant. The testator was survived by the appellant, his mother Marie/Mary June MacGregor (born Oosthuizen), who died on 17 February 1960, and his brother Alexander Gordon MacGregor who died on 17 October 1979 leaving no lawful issue. The position is therefore that the contingency for which the will made no provision has occurred, viz. that Alexander Gordon MacGregor predeceased the appellant without lawful issue surviving him. It follows that there is now an intes= tacy as regards the devolution of the trust capital upon the capital beneficiaries.

/The .....

The appellant and the respondent are the co-administrators of the trust. While they agreed that the trust capital should devolve upon the intestate heirs of the testator, they disputed the date for determining them. The appellant, who applied to the Court a quo, contended that the correct date was the date of the death of Alexander Gordon MacGregor as being the event which gave rise to the intestacy. The respondent's contention was that the correct date was the death of the testator. After a comprehensive analysis of our case law the Court a quo, with clearly expressed reluctance, upheld the respondent's

/contention .....

contention. With leave of the Court a quo the appellant now appeals to this Court.

The crisp point for decision is whether the intestate heirs of the trust capital should be deter= mined with reference to the date of the death of the testator or to the date of the death of his brother Alexander Gordon MacGregor when the valid and operative will of the testator became inoperative as a result of the occurrence of an unprovided for contingency, viz. the predecease of his brother Alexander Gordon MacGregor without leaving lawful issue.

/I .....

I start with an investigation of the position in our common law, my approach being : melius est petere fontem quam sectari rivulos. As early as the first half of the 3rd century A.D. several cele= brated Roman jurists such as Gaius, Ulpian, Papinian and Paul applied themselves to the question of the date of vesting of an intestate estate or inheritance in the nearest agnate or agnates of a testator whose valid will became inoperative or void after his death. The expressions used to describe such a will were testamentum ruptum, testamentum irritum, testamentum infirmatum, testamentum destitutum. Gaius Inst 3.13 concisely stated the principle to be applied as follows:

/Ideo .....

> Ideo autem non mortis tempore quis proximus fuerit requirimus, sed eo tempore, quo certum fuerit aliquem intestatum decessisse, quia si quis testamento facto decesserit, melius esse visum est tunc requiri proximum, cum certum esse coeperit neminem ex eo testamento fore heredem.
>
> (Poste's translation: The date for determining the nearest agnate is not the moment of death, but the moment when intestacy is certain, because it seemed better, when a will is left, to take the nearest agnate at the moment when it is ascertained that there will be no testamentary heir.)
>
> (My underlining.)

The other Roman jurists while agreeing with Gaius expressed their views in greater detail. See, for example, D 28.2.9.2 (Paul) :

/Si .....

Si filium exheredavero nepotemque ex eo praeteriero et alium heredem instituero et supervixerit filius post mortem meam, licet ante aditam hereditatem decesserit, non tamen nepotem rupturum testamentum Iulianus et Pomponius et Marcellus aiunt. Diversumque est, si in hostium potestate filius sit et decesserit in eodem statu : rumpit enim his casibus nepos testamentum, quod moriente avo filii ius pependerit, non abscisum ut superiore casu fuerit. Sed et si heres institutus omiserit hereditatem, erit legitimus heres, quoniam haec verba 'si intestato moritur' ad id tempus referuntur, quo testamentum destituitur, non quo moritur.

(Watson's translation: If I have dis= inherited my son and, passing over my grandson by him, have instituted someone else as heir and my son has survived my death, Julian, Pomponius, and Marcellus say that although he died before the in= heritance was accepted, nevertheless, my grandson will not break the will. And

/it .....

> it is different if the son is in captivity and died in that state; for in these cases, the grandson does break the will, because on the death of the grandfather, the right of the son is in suspense and not cut off as it was in the previous case. But also if the instituted heir should not accept the inheritance he will be legitimus heres, because the words 'if there is a death intestate' are referred to at the time at which the will is abandoned, not at the time of death.)
>
> (My underlining.)

See also D 28.3.6 pr (Ulpian), D 38.6.7 pr (Papinian), D 38.16.1.8 (Ulpian), D 38.16.2.5 et 6 (Ulpian). In Inst 3.1.7 Justinian endorsed the views of the Roman jurists in the following manner:

/Cum .....

Cum autem quaeritur, an quis suus heres existere potest : eo tempore quaerendum est, quo certum est aliquem sine testamento decessisse : quod accidit et destituto testamento. Hac ratione si filius exheredatus fuerit et extraneus heres institutus est, filio mortuo postea certum fuerit heredem institutum ex testamento non fieri heredem, aut quia noluit esse heres aut quia non potuit : nepos avo suus heres existet, quia quo tempore certum est intestatum decessisse patrem familias, solus invenitur nepos. Et hoc certum est.

(Moyle's translation : In ascertaining whether, in any particular case, so and so is a family heir, one ought to regard only that moment of time at which it first was certain that the deceased died intestate, including hereunder the case of no one's accepting under the will. For instance, if a son be disinherited and a stranger instituted heir, and the son die after the decease of his father, but before it

/is .....

> is certain that the heir instituted in the will either will not or cannot take the inheritance, a grandson will take as family heir to his grandfather, <u>because he is the only descendant in existence when first it is certain that the ancestor died intestate</u>; and of this there can be no doubt.)
>
> (My underlining.)

The aforementioned texts postulate the situation where a testator died leaving a valid will in which he instituted a <u>heres extraneus</u> (i.e. an heir not subject to his <u>patria potestas</u>) but where after his death the will was rendered inoperative or void owing to any of the following circumstances, viz.:

/(i) .....

(i) the repudiation of the inheritance under the will by the instituted heir, or

(ii) the death of the instituted heir who survived the testator but died before he could adiate his inheritance or who died before the fulfilment of his conditional institution as an heir, or

(iii) the legal disqualification of the instituted heir to inherit since he lacked testamenti factio passiva.

In these instances the Roman jurists maintained that the testator's supervening intestacy occurred after his death. He did not die intestate since he died leaving a valid will which ousted intestate succession. See

/D. .....

D 29.2.39 (Ulpian), D 38.16.1 pr (Ulpian), Inst. 3.2.6.

When his valid will, however, became inoperative or void after his death for any of the abovementioned reasons intestacy of the testator ensued <u>when it first became certain that there could be no testamentary succession</u>. It was at that stage, and not at the death of the tes= tator, that the identity of his intestate heirs had to be determined. It could accordingly happen that a <u>suus heres</u> who was not <u>proximus</u> to the testator at his death could be <u>proximus</u> at the time when it first became certain that the testator died intestate in consequence of events occurring after his death which rendered his will inoperative or void.

/Justinian .....

Justinian in Inst 3.2.6 clearly sets out the two different stages at which intestacy could occur, depending on whether the deceased died without leaving a valid will or died leaving a valid will which sub= sequently became inoperative or void :

> Proximus autem, si quidem nullo testamento facto quis decesserit, per hoc tempus requiritur, quo mortuus est is cuius de haereditate quaeritur. Quod si facto testamento quisquam decesserit, per hoc tempus requiritur, quo certum esse coeperit nullum ex testamento heredem extaturum: tum enim proprie quisque intelligitur intestatus decessisse. Quod quidem aliquando longo tempore declaratur : in quo spatio temporis saepe accidit, ut proximiore mortuo proximus esse incipiat, qui moriente testatore non erat proximus.

/(Moyle's .....

(Moyle's translation : If a man dies without having made a will at all, the agnate who takes is the one who was nearest at the time of the death of the deceased. But when a man dies, having made a will, the agnate who takes (if one is to take at all) is the one who is nearest <u>when first it becomes certain that no one will accept the inheritance under the testament</u>; for until that moment the deceased cannot properly be said to have died intestate at all, and this period of uncertainty is sometimes a long one, so that it not unfrequently happens that through the death, during it, of a nearer agnate, another becomes nearest who was not so at the death of the testator.)

(My underlining.)

Von Savigny (1779-1861), the great German legal historian and jurist, in his <u>System des heutigen Römischen Rechts</u>, 1849, vol 8, p 485-486 furnishes

/us .....

us with a very lucid exposition, based on Roman law, of the aforementioned two stages at which intestacy could occur.

Donellus (1527-1591), the well-known French jurist, in his Commentarius de Jure Civili, 1941 Lib. 2 cap. 8, stresses, on the authority of the relevant texts from the Corpus Juris Civilis, that supervening intestacy occurs at the time when it first becomes certain that a testator's will has become inoperative or void after his death. See also the German jurist, Brunneman (1608-1672) ad D 28. 2.9.2 nr 2 and ad D 38.6.7 pr nr 1.

/Roman-Dutch .....

Roman-Dutch law adopted the abovementioned principles of Roman law relating to the vesting of intestate inheritances. See the comprehensive com= mentary of Vinnius (1588-1657) ad Inst. 3.1.7 and Inst. 3.2.6. See also Paul Voet (1619-1667) ad Inst 3.1.7. Of the utmost importance is the fact that Van der Vorm, the leading Roman-Dutch authority on intestate succession, stated unequivocally in his Verhandeling van het Hollandsch, Zeelandsch en de West= vrieslandsch Versterfrecht, 1774, Tweede Deel van Erfenisse by Versterf, p 7, para 4 the following:

> Hier staat te noteren, dat, als een testament eerst na dood van den Testateur zyne kracht

/verliest, ...

> verliest, men dan niet moet inzien, wie de naaste is geweest tot de successie ten tyde van 't overlyden, maar wie de naaste is ten tyde van 't verval van het testament : D 38.16.1.8, 2.5 et .6, Inst. 3.1.7, 3.2.6 et ibi Vinnius, want de erfenis by versterf heeft niet plaats voor dat het zeker is, dat niemand erfgenaam uit het testament zyn zal D 29.2.39.
>
> (My underlining).

The position according to our common law regarding the vesting of an intestate estate and the determination of the intestate heirs may therefore be summarized as follows :

1. Where a deceased dies without having made a valid will at all, or without leaving a valid will, his intestate

/estate .....

estate vests on the date of his death when his in=

testate heirs have to be determined.

2. Where a testator died leaving a valid will which took effect on his death but which subsequently became in= operative, either in toto or pro parte, intestacy then occurs and his intestate estate vests on the date when it first became certain that his will had become inoperative. His intestate heirs have to determined, not at his death, but when intestacy occurred.

In Union Government (Minister of Finance) v. Olivier, 1916 AD 74 this Court had to decide an issue concerning the exemption from paying transfer

/duty .....

duty in terms of sec. 4(1) of Act 30 of 1908 (OFS).

In the course of construing this section JUTA, AJA, stated at p 90 :

> "By the words 'a descendant who is also an heir ab intestato of such deceased person' is meant one who, if the deceased had died without a will would have been an heir ab intestato. In determining who are the heirs ab intestato of a deceased person regard must be had to the date of his death."
>
> (My underlining).

It is clear from the first sentence of this dictum that JUTA, AJA, confined himself to intestacy which occurred where a deceased had died without a valid will. As I have indicated supra, the vesting of

/the ....

the intestate estate of such a deceased person will, according to our common law, occur at the date of his death when his intestate heirs have to be determined. The second sentence of the dictum, read in conjunc= tion with the first sentence thereof, is therefore correct in regard to a deceased who died without a will or a valid will. The second sentence of the dictum does not, and was not intended to, deal with the in= stance of supervening intestacy where a testator died leaving a valid will which took effect on his death but which subsequently became inoperative. Unfortunately there are some cases in which our courts, without

/having .....

having had regard to the principles of our common law, wrongly assumed that the second sentence of the dictum was a universal principle of our law which was also applicable to instances of supervening intestacy where a testator died leaving a valid will which subsequently became inoperative. Such cases were clearly wrongly decided and should therefore not be followed.

When the testator in the present case died leaving a valid will which took effect on his death, intestacy was ousted. Intestacy subsequently occurred when his will became inoperative to provide testamentary beneficiaries for his trust capital. That occurred when his brother

Alexander Gordon MacGregor died on 17 October 1979 leaving no lawful issue. On that date the appellant in terms of sec. 1(1)(d) of the Succession Act no 13 of 1934 became the testator's sole statutory intes= tate heir of his trust capital.

The appellant is now the sole income be= neficiary of the trust income while she also became the sole heir of the trust capital on 17 October 1979. That being so, the appellant is entitled to waive her right to receive the income under the trust during her lifetime, by claiming payment of the trust capital, as she does, in her Amended Notice of Motion. The

/respondent.....

respondent does not oppose her prayer for the distri=

bution to her of the trust capital. Compare In re

Estate Ansaldi, 1950 (4) SA 417(C) at p 420 A.

The result is that the appeal must succeed.

The following order is made:

(a) The appeal is upheld with costs. The costs of the parties are to be paid out of the capital of the estate of the late Leslie MacGregor.

(b) The order of the Court a quo is set aside and the following order is substituted therefor:

/"An .....

"An order is granted in the following terms :

1. Shirley June Harris (formerly MacGregor, born Oates) is the sole intestate heir of the late Leslie MacGregor.

2. The administrators in the estate of the late Leslie MacGregor are authorised to pay forthwith to the said Shirley June Harris the capital of the said estate.

3. The costs of the parties in this application are to be paid out of the capital of the said estate."

C.P. JOUBERT J.A.

RABIE A CJ
JANSEN JA
GROSSKOPF JA
KUMLEBEN A JA

Concur