# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
# JUDGMENT

Case No: 192/2013

**Reportable**

In the matter between:

**N[…] E[…] NO** Appellant

and

**ESTATE LATE B[…] C[…] B[…]** Respondent

**Neutral citation:** *N[…] E[…] NO v Estate Late B[…]* (192/13) [2014] ZASCA 27 (28 March 2014)

***Coram:*** Mthiyane DP and Petse, Willis and Saldulker JJA and Legodi AJA

**Heard:** **17 March 2014**

**Delivered:** **28 March 2014**

**Summary:** A grandchild is not disqualified from inheritance as a result of the fact that one or both of the grandchild's parents predeceased his or her grandparents – in the absence of clear indications to the contrary in a will, the grandchild of a predeceased parent will inherit *per stirpes.*

---

## ORDER

---

On appeal from: **North Gauteng High Court, Pretoria (De Vos J sitting as court of first instance):**

1 The appeal is upheld;

2 The order of the high court is set aside;

3 The following order is substituted for that of the high court:

'(i) The fideicommissa established in terms of the wills of the late J[…] A[…] J[…] B[…], dated 20 March 1969 and the late J[…] H[…] B[…], dated 26 March 1969 entitle J[...] B[…] (Identity number 0[…]) to inherit such bequest as her late father, J[…] B[…], would have inherited were he still alive;

(ii) The executor of the estate of the late B[…] C[…] B[…] is to distribute the properties subject to the fideicommissa established in terms of the said wills to J[…] A[…] J[…] B[…] and J[...] B[…] as fideicommissaries respectively, J[...] to inherit *per stirpes*;

(iii) The fideicommissa established in terms of the aforesaid wills of the late J[…] A[…] J[…] B[…] and the late J[…] H[…] B[…] will terminate in respect of the fideicommissary bequest to J[...] such that she receives ownership unrestricted by the considerations of any generation succeeding her;

(iv) The costs of the application and counter-application as well as the costs of J[...]'s curator-ad-litem are to be borne by the estate of B[…] C[…] B[…].'

4 Any pending rule nisi in this matter is discharged.

5. The costs of this appeal are to be borne by the estate of B[…] C[…] B[…].

## JUDGMENT

**Willis JA (Mthiyane DP, Petse and Saldulker JJA and Legodi AJA concurring):**

[1] This case is concerned with the interpretation of two separate but related wills of two different persons. These two persons were the great-grandfather and great-great-grandmother of a minor child ('J[…]'). The great-grandfather was the father of J[…]'s paternal grandfather. The great-great-grandmother was the mother of that great-grandfather. J[…]'s father, J[…] B[…] (J[…]) had predeceased his father, the late B[…] C[…] B[…], (the deceased).

[2] The deceased was a fiduciary of fideicommissa established by the respective wills of his father (the minor child's aforesaid great-grandfather) and grandmother (the minor child's previously mentioned great-great-grandmother). The issue for determination in both the high court and this court was whether J[…] could inherit, as a fideicommissary, when her father had predeceased the deceased. In the judgment of the high court (De Vos J) on 23 February 2013 it was found that J[…] could not. On 4 March 2013 it granted the appellant leave to appeal to this court. The appellant was N[…] E[…], the mother and surviving natural guardian of J[…], who was born on 1[..] J[…] 2[…].

[3] J[…] A[…] B[…] (the excecutor), who is the son of the deceased and the duly appointed executor of the deceased's estate, brought an application before the high court for an order declaring that the fideicommissum established in favour of J[…] B[…], in terms of the wills of the late J[…] A[…]

J[…] B[…] (the first testator) dated 20 March 1969 and the late J[…] H[…] B[…] (the testatrix or second testator) dated 26 March 1969, terminated upon the death of J[…]. J[…] died on 26 August 2001. J[…] was the son of the deceased and the brother of the executor. The deceased died on 22 February 2009. J[…] therefore predeceased his father, the deceased. The deceased was the son of the first testator and the grandson of the testatrix. The testatrix was the mother of the first testator. The executor has two children. The elder is J[…] A[…] J[…] B[…], born on 7 July 1998, who was named after his paternal grandfather, the first testator. The younger is A[…] B[…], born on 8 January 2000. These two children are still living. The first testator is J[…]'s great-grandfather to whom reference has already been made. The testatrix is J[…]'s aforesaid great-great-grandmother.

[4] The executor brought the application ex parte. At the instance of the executor, a rule nisi was issued and served on all interested parties, including the appellant. Consequent upon the issue of the rule nisi, the appellant received notice of the application and successfully applied to be joined as a party. The appellant opposed the application and brought a counter-application for an order that J[…] should inherit that part of the deceased's estate which her father, had he still been alive, would have inherited. An advocate, Ms Elani Botha, was appointed as curator-ad-litem for J[…] on an interim basis. Ms Botha was, by agreement, discharged from her duties before the hearing of the application.

[5] The will of the first testator dated 20 March 1969 was comprehensive. The first testator provided in clause six thereof:

'Ek bemaak my plaas G[…], 3[…] m[…] g[…], aan my seun B[…] C[…] B[…] onderhewig aan die voorwaarde dat dit by sy dood sal gaan na sy kinders by wie se dood die plaas weer sal oorgaan na my seun se kleinkinders. Indien my seun te sterwe sou kom, sonder om kinders na te laat óf indien sy kinders geen kinders nalaat nie sal gemelde plaas oorgaan na C[…] M[…] B[…] (gebore D[…] J[…]), my half-suster J[…] D[…] J[…] se dogter, by wie se dood die plaas na haar kinders sal oorgaan.

DIE bemaking is onderhewig aan die verdere voorwaarde dat my moeder J[…] H[…] B[…] 'n lewenslange reg van habitatio sal hê ten opsigte van die huidige woonhuis op die plaas.'

The first testator therefore bequeathed the farm G[…] to the deceased on condition that, upon the death of the deceased, ownership of the farm would pass to the deceased's children, upon whose death, in turn, ownership of the farm would pass to the deceased's grandchildren. The will therefore envisages the passing of the ownership of the farm to the deceased's grandchildren, of whom J[...] was one, there being neither distinction nor discrimination among them on account of the early demise of a parent.

[6] The relevant portion of the will of the testatrix dated 26 March 1969 is to be found in clause three thereof. The pertinent parts of clause three read as follows:

'Ek bemaak my boedel, roerend en onroerend as volg:

A My gedeelte van die plaas G[…], 100 morge groot, aan my kleinseun B[…] C[…] B[…] onderhewig aan die voorwaarde dat dit by sy dood sal gaan na sy kinders by wie se dood die plaas weer sal oorgaan na my kleinseun se kleinkinders. Indien my kleinseun te sterwe sou kom sonder om kinders na te laat, sal gemelde plaas oorgaan na C[…] M[…] B[...] (gebore d[…] J[…]), die dogter van J[…] D[…] J[…], by wie se dood die plaas sal oorgaan na haar kinders. Die bemaking is onderhewig aan die verdere voorwaarde dat M J J[…] 'n lewenslange reg van *habitatio* sal hê ten opsigte van die huis opgerig vir hom en tans deur hom bewoon op my deel van gemelde plaas.'

Ex facie the will of the testatrix, she left her portion of the farm to the deceased but provided that, upon the death of the deceased, that portion would devolve on his grandchildren in the event that he died having surviving children.

[7] J[...] is the only surviving child of J[…] who, as we have seen, predeceased the deceased. The appellant, N[…] E[…], was married to J[…] on 5 […]. J[...] was born of the marriage between the appellant and J[…]. The appellant, as the mother and natural guardian of J[...], opposed the executor's application and brought the counter-application in the interests of J[...]. The

appellant and J[…] were divorced. Subsequent to J[…]'s death, the appellant remarried.

[8] The provision in the will, stipulating the succession of the ownership of the farm over several generations, is known in our law as a fideicommissum. In Corbett et al's *The Law of Succession in South Africa*[1] it is said that:

'A testamentary fideicommissum is a disposition of property by will to a beneficiary (known as the "fiduciary") subject to a provision requiring the fiduciary, either absolutely or upon the fulfillment of a condition, to pass on the property either wholly or in part, to another beneficiary (known as the "fideicommissary").'

[9] Upon the death of the first and second testators, the properties in question were duly transferred to the deceased in accordance with the testamentary dispositions of the deceased's father (the first testator) and grandmother (the testatrix or second testator). There are, in fact, three properties, subject to the fideicommissa in contention, which the deceased inherited:

(i) Portion 28 of the farm G[…] 86, Registration Division I S, Province of Mpumalanga, in extent 85,8532 hectares, which the deceased inherited in terms of the will of testatrix;

(ii) The Remaining Extent of the farm G[…], in extent 226,9096 hectares, inherited in terms of the first testator's will;

(iii) The Remainder of Portion 9 of the farm G[…], in extent 98,4298 hectares, inherited in terms of the first testator's will.

Portion 28 of G[…] was transferred to the deceased on 4 August 1976. The Remaining Extent of G[…] and the Remainder of Portion 9 were transferred to him on 31 January 1997. These three farms have been treated as a single unit, fenced as such and known as 'G[...]'.

[10] The estate of the deceased had been sequestrated while he was still living. The properties in question were sold by public auction on 6 August 1993 to LCJ and JC Bezuidenhout Boerdery Beperk. These properties were

[1] M M Corbett, G Hofmeyr and E Kahn 2 *The Law of Succession in South Africa* 2 ed (2001) at 260.

transferred to the purchaser on 31 January 1997. The transfers took place subject to the fideicommissa provided for in the wills of the first and second testator respectively.

[11] There is a difference between the will of the first testator, on the one hand, and that of the testatrix, on the other: the first testator stipulated that, upon the death of the deceased, the farm was to pass to the deceased's children whereas the will of the testatrix provides that, upon the death of the deceased, the portion of the farm was to pass to the grandchildren of the deceased. Nothing turns on this.

[12] The high court correctly found that:

'Die tersaaklike gedeelte van beide testamente is dat die plase by B[…] C[…] B[…] (the deceased) se dood sal gaan aan al sy kinders en dat by die kinders se dood die plase sal oorgaan na B[…] C[…] B[…] se kleinkinders.'

This may be translated as follows:

'The relevant portion of both wills is that the farms shall be inherited by all of the children of B[…] C[…] B[…] and that, upon the death of these children, the farms shall pass to B[…] C[…] B[…]'s grandchildren.' (My translation.)

J[...] is, as has already been mentioned, one of the deceased's grandchildren.

[13] The high court relied strongly on the following passage in *Jewish Colonial Trust Ltd v Estate Nathan*:[2]

'In the ordinary form of fideicommissum, created by will where the fiduciary is a human being taking a beneficial interest and the fideicommissary is a human being, there is implied in the bequest to the fideicommissary a condition of survivorship (viz that his institution as heir is conditional on his surviving the fiduciary).'[3]

[14] Referring to J[...], the high court found that:

'Op die feite voor my het geen vestiging uit die fideicommissiêre beskikking plaasgevind nie omdat die fideicommissarius voor the die fiduciarius gesterf het. Die testamente is duidelik en bepaal dat vestiging sou plaasvind by die dood van die

---

[2] *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163.
[3] At 176.

fiduciarius. Tot daardie gebeurtenis plaasgevind het, het die dominium gevestig in die fiduciarius. By die nie-vervulling van die fideicommissiêre voorwaarde, word die ontbindende voorwaarde, waaronder die fideicommissarius se "reg" gebuk gaan, vervul en vind dienooreenkomstige uitwissing van die ius in personam plaas…'

This may be translated as follows:

'On the facts before me, no vesting of the fideicommissiary dispensation took place because the fideicommissary died before the fiduciary. The wills are clear and stipulate that vesting takes place on the death of the fiduciary. Until that event occurs, ownership vested in the fiduciary. Upon non-fulfillment of the fideicommissiary condition, the resolutive condition, whereby the fideicommissary's "right" had been burdened, is fulfilled and the corresponding termination of the personal right occurs.'

(My translation.)

[15] The high court dismissed the appellant's counter-application and ordered that the rule nisi issued on 6 July 2012, as amended on 12 August 2012 be confirmed. In other words the high court issued an order declaring that:

(i) The fideicommissum established in terms of the wills of the late J[…] A[…] J[…] B[…] (J[...]'s great-grandfather) dated 20 March 1969 and the late J[…] H[…] B[…] (J[...]'s great-great-grandmother) dated 26 March 1969 terminated upon the death of J[…] B[…] (J[...]'s father) on 26 August 2001; and

(ii) J[...] was not entitled to inherit in terms of the aforementioned wills of the late J[…] A[…] J[…] B[…] and the late J[…] H[…] B[…].

The high court ordered that the costs of the application and counter-application as well as the costs of J[...]'s curator-ad-litem be borne by the estate of the deceased.

[16] In terms of s 6(1) of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, any fideicommissum created in respect of immovable property after the commencement of that Act is limited to two successive fideicommissaries. J[…]'s father was the fiduciary of G[…]. J[…], having predeceased his father, did not become a fideicommissary thereof.

Accordingly, if J[...] otherwise qualifies, she would be the first fideicommissary in terms of the wills of both the first and the second testators.

[17] Mr Muller, who appeared for the respondent, fairly and correctly conceded that the respective wills had obviously been drawn with this Act in mind and that the clear intention of the testators had been to pass down the farm G[…] to as many generations as the Act would allow. That, in itself, favours J[...].

[18] Where a fideicommissum provides for the fideicommissary property to be passed on to successive fideicommissaries, as in this case, the fideicommissum is termed a *fideicommissum multiplex*.[4] This contrasts with the situation where the fideicommissum provides for the property to be passed on once only, which is known as a *fideicommissum unicum* (or *simplex*).[5]

[19] The high court lost sight of the following qualification to that which has been quoted earlier from *Jewish Colonial Trust*, viz:

'In the ordinary form of fideicommissum, created by will where the fiduciary is a human being taking a beneficial interest and the fideicommissary is a human being, there is implied in the bequest to the fideicommissary a condition of survivorship (viz. that his institution as heir is conditional on his surviving the fiduciary)…<u>But this implication does not exist in every form of *fideicommissum*</u>…'(My emphasis.)

[20] In Corbett et al's *The Law of Succession in South Africa*[6] it is said that a *fideicommissum multiplex* constitutes an exception to the general rule stated in the aforsaid passage in *Jewish Colonial Trust* and, referring with approval to *Ex parte Swanepoel*,[7] the learned authors say that where a fideicommissum is *multiplex*, the death of the fideicommissary prior to vesting does not result in the termination of the fideicommissum but brings about the

---

[4] See *Executors Estate Fatha Mahomed v Moosa* 1946 NPD 516 at 518; M M Corbett, G Hofmeyr and E Kahn *The Law of Succession in South Africa* (supra) at 262-3.
[5] See, for example, J Voet (1723) *Commentarius Ad Pandectas* 36.1.27 and 28; *Ex Parte Dell* 1957 (3) SA 416 (C).
[6] M M Corbett, G Hofmeyr and E Kahn *The Law of Succession in South Africa* (supra).
[7] *Ex parte Swanepoel* 1960 (2) SA 357 (O).

acceleration of the interest of the substitute.[8] Effect has to be given the intention of a testator expressed by creating a *fideicommissum multiplex*.[9]

[21] Johannes Voet, in his *Commentarius Ad Pandectas*, says:

'*Ac proinde cum in Hollandia unius fratris filii et alterius fratris nepotes simul ad intestato ad patrui defuncti hereditatem non in capita, sed in stirpes veniant, etiam voluntas haec testatoris eam recepit interpretationem, ut in stirpes potius, quam in capita, hereditas fratrum liberis ac nepotibus delata intelligatur*.'[10] (My emphasis.)

[22] Sir Percival Gane's translation of this passage by Voet is the following:

'Since therefore in Holland the sons of one brother and the grandsons of another brother come together in intestacy into the inheritance from a deceased uncle not by heads'[11] but by stocks,[12] this wish of the testator has also received the interpretation that the inheritance is understood to have been conferred on the children and grandchildren of brothers by stocks rather than by heads.'[13]

Voet also records that, in a context such as this, where a clear intention to the contrary is absent in a will, it is presumed that that the direction is that the succession of descendants follows the order upon intestacy (i e *per stirpes* rather than *per capita*).[14] The relevant portions of the original text read as follows: '… *in dubio…potius successive secundum ordinem dilectionis et successionis ab intestato*.'[15] (My emphasis.)

[23] The principle of representation[16] in our law of succession entails that, where an ancestor leaves descendants, a presumption arises that the descendants should inherit *per stirpes* (each stem of the family taking the

---

[8] At 296-7.
[9] See *Jewish Colonial Trust Ltd v Estate Nathan* (supra) at 176; M M Corbett, G Hofmeyr and E Kahn *The Law of Succession in South Africa* (supra) at 262-3.
[10] J Voet (1723) *Commentarius Ad Pandectas* 28.5.17.
[11] '*Capita*', in this context, refers to the phenomenon whereby only the survivors in a particular generation inherit, but do so in equal shares.
[12] 'Stem' in my respectful opinion is a better translation for '*stirps*' (plural: '*stirpes*') than 'stock'. See, for example, *The Oxford Latin Dictionary*. Moreover, when genealogies are considered, we commonly use botanical imagery (e g 'roots' and 'branches').
[13] (1956) Butterworth & Co (Africa) Ltd: Durban.
[14] J Voet (1723) *Commentarius Ad Pandectas* 28.5.20.
[15] Ibid.
[16] *Parkin & others v Estate Parkin & others* (1908) 25 SC 346 at 349; *Herold v Visser* 1937 CPD 67 at 75.

same share).[17] This principle has the natural consequence that, in our law, in circumstances where a grandchild's parents predeceased that grandchild's grandparents, the grandchild will ordinarily inherit from his or her grandparents. A grandchild is not disqualified from inheritance merely as a result of the fact that one or both of the grandchild's parents predeceased his or her grandparents.

[24] The strength of J[...]'s claim to inheritance is compounded by the presumption in our law against a testator having the intention to disinherit descendants.[18]

[25] The clear intention of both the first and second testators was that, without distinction among them, the grandchildren of the deceased should inherit under the respective fideicommissa. As such a grandchild, J[...] was entitled to inherit thereunder. She inherits *per stirpes*. The appeal must succeed.

[26] The following order is made:

1 The appeal is upheld;

2 The order of the high court is set aside;

3 The following order is substituted for that of the high court:

'(i) The fideicommissa established in terms of the wills of the late J[…] A[…] J[…] B[…], dated 20 March 1969 and the late J[…] H[…] B[…], dated 26 March 1969 entitle J[...] B[…] (Identity number 0[…]) to inherit such bequest as her late father, J[…] B[…], would have inherited were he still alive;

---

[17] See, for example, J Voet *Commentarius Ad Pandectas* 28.5.17 read with 28.5.20.; *Human v Human's Executors* (1893) 10 SC 172 at 175-6; *Stegmann v Board of Executors* (1894) 11 SC 421 at 427; *Wannenberg v Le Roux* (1895) 12 SC 383 at 386; *Board v Titterton* (1896) 13 SC 164 at 168; *Parkin & others v Estate Parkin & others* (1908) 25 SC 346 at 349; *Jansen NO v De Bruyn* (1909) 26 SC 266 at 270; *Hopkins v Estate Smith* 1920 CPD 558 at 566; *Tredgold v Estate Arderne* 1926 CPD 25 at 32; *In Re Estate Swanepoel* 1929 OPD 98 at 102; *Erasmus v Van der Hoven* 1935 OPD 194 at 195-6; *Herold v Visser* 1937 CPD 67 at 75; *Ex parte Platt* 1951 (4) SA 394 (N) at 400; *Coetzer NO v Bester* 1952 (4) SA 73 (O) at 78; *Ex parte Swanepoel en Andere* 1960 (2) SA 357 (O) at 360; *Reek NO v Registrateur van Aktes* 1969 (1) SA 589(T) at 592F.

[18] See, for example, *Michau v Michau's Executor* (1894) 11 SC 362 at 365; *Executor of A Neveling v Executor of P Neveling & others* (1909) 26 SC 196 at 207; *Ex parte Oakeshott* 1910 TS 895 at 900; *Ex parte Honikman* 1943 CPD 98 at 102 and *Ex Parte Schroder NO* 1956 (2) SA 148 (E) at 153.

(ii) The executor of the estate of the late B[…] C[…] B[…] is to distribute the properties subject to the fideicommissa established in terms of the said wills to J[…] A[…] J[…] B[…] and J[...] B[…] as fideicommissaries respectively, J[...] to inherit *per stirpes*;

(iii) The fideicommissa established in terms of the aforesaid wills of the late J[…] A[…] J[…] B[…] and the late J[…] H[…] B[…] will terminate in respect of the fideicommissary bequest to J[...] such that she receives ownership unrestricted by the considerations of any generation succeeding her;

(iv) The costs of the application and counter-application as well as the costs of J[...]'s curator-ad-litem are to be borne by the estate of B[…] C[…] B[…].'

4 Any pending rule nisi in this matter is discharged.

5 The costs of this appeal are to be borne by the estate of B[…] C[…] B[…].

_____

N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

| | |
|---|---|
| For the Appellant: | J G Bergenthuin SC<br>Instructed by:<br>Els Attorney, Pretoria<br>c/o Phatshoane Henney Inc, Bloemfontein |
| For the Respondent: | G C Muller SC<br>Instructed by:<br>Stopforth Swanepoel & Brewis Inc, Pretoria<br>c/o Webbers, Bloemfontein |