Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between: Case No: 586/09

JOSELLE RAYMOND REUBEN Applicant

and

THE MASTER OF THE HIGH COURT First Respondent
(WESTERN CAPE HIGH COURT, CAPE TOWN)

STANDARD BANK OF SOUTH AFRICA LTD N.O. Second Respondent

In re:
ESTATE LATE GILLIAN MARY WHITING

JUDGMENT DELIVERED ON 20 SEPTEMBER 2011

MANTAME, AJ

[1] This is a review application by the Applicant against the refusal of the First Respondent to sustain an objection in terms of Section 35(10) of the Administration of Estates Act 66 of 1965, herein referred to as the "Act".

Applicant seeks an order setting aside the decision of the First Respondent and a declarator that he be deemed a **legatee** of the Estate Late Gillian Mary Whiting and in addition that he be deemed **creditor** in terms of his claim for R253 075.00 against the Estate Late Gillian Mary Whiting. He further applies for condonation for the late filing of this application.

[2] In essence these proceedings relate to the interpretation of two documents that is, the **will** of the **Estate Late Gillian Mary Whiting** and a **written contract** entered into by Applicant, **Joselle Raymond Reuben** and **Gillian Mary Whiting** whilst they were involved in a romantic relationship, and the review of the refusal by First Respondent dated 8 May 2009, to sustain the objection of Applicant, dated 12 September 2008, against the final liquidation and distribution account of the Estate Late Gillian Mary Whiting.

[3] Applicant was legally represented by Mr. Steenkamp and the Second Respondent was represented in court by Mr. Gess. First Respondent elected to abide by the decision of this court.

[4] It is common cause that Applicant, Joselle Raymond Reuben and Gillian Mary Whiting, who will be referred to as "the Late Whiting", were involved in a life partnership since 1990, which lasted until the death of the Late Whiting on the 31st of December 2006.

[5] During 1994 Applicant and the Late Whiting decided to share a home and the Late Whiting purchased a property known as 53 Paradise Road, in Newlands that was bonded and registered in her name. For the sake of convenience the property will be referred to as the "Newlands Property".

[6] Whilst the relationship was in existence, Applicant was permitted by Late Whiting to erect a flat let adjoining the house on the Newlands Property, at his own expense. This project was completed during 1996. Upon the flat let being completed the expense was calculated and that the cost of the flat let represented 22 % of the total cost to date, in respect of the Newlands Property.

[7] Because Late Whiting was not in a position to immediately compensate Applicant for the improvement, an agreement in the form of a written contract was concluded whereby Applicant would receive consideration of 22% of the value of the Newlands Property upon its sale or upon the Late Whiting's passing.

[8] On 8 November 1997, a written agreement was concluded between the parties. The relevant clauses were as follows:

> ***"2. ACKNOWLEDGEMENT***
>
> *The parties acknowledge that:*

2.1 GMW is the registered owner of certain property situated at 53 Paradise Road, Newlands, Cape Town, being REMAINDER ERF 50004 CAPE TOWN AT NEWLANDS and ERF 50005 CAPE TOWN AT NEWLANDS (hereafter referred to as "the Property").

2.2 GMW gave permission to JRR to erect a flat let adjoining the house on the property, which flat let was completed during 1996, at JRR's cost.

2.3 In view of 2.2 above, JRR's investment represent a 22% (TWENTY TWO PER CENTUM) share in the property.

3. DISTRIBUTION OF SHARE

3.1 In the event of JRR predeceasing GMW, then on the death of JRR:

3.1.1 The executor in the estate of JRR shall procure a valuation of the property;

3.1.2 JRR's share representing 22% (TWENTY TWO PER CENTUM) of the valuation of the property shall be paid into his estate by GMW within a period of 2 (TWO) years from the date of death of JRR.

3.2 In the event of GMW predeceasing JRR, then on the death of GMW:

3.2.1 the executor in the estate of GMW shall sell the property, and pay over to JRR on registration of the transfer, an amount representing 22% (TWENTY TWO PER CENTUM) of the net proceeds of the sale.

4. SALE OF PROPERTY DURING LIFETIME OF GMW

4.1 In the event of GMW wishing to sell the property, she shall give JRR 2 (TWO) months written notice of her intention to do so before any offer or agreement of sale is signed.

4.2 On registration of transfer of the property, GMW shall pay over to JRR an amount representing 22% (TWENTY TWO PER CENTUM) of the net proceeds of the sale.

...

6. BINDING ON EXECUTORS AND ESTATES

This agreement shall be binding on the executors and the estate of the parties".

GMW represents Gillian Mary Whiting and

JRR represents Joselle Raymond Rueben as per the contract.

[9] On the 9 November 2005, whilst The Late Whiting owned and resided at the Newlands property, she executed her last will and testament. The relevant portions of the will were as follows:

"2.1 Cash Legacies

2.1.1 I bequeath an amount of R30 000 to Dr. Joselle Raymond Reuben.

...

...

2.2 Specific Bequests

...

2.2.2 I direct that my fixed property shall be sold to best advantage by the Executors and I bequeath to Dr. Joselle Raymond Reuben 22% (TWENTY TWO PERCENT) of the net proceeds thereof (that is after deduction of all costs related to the sale and after deduction of the amount of the bond, if any, outstanding on my fixed property

on the date of my death less 22% (TWENTY TWO PERCENT) of the balance of the bond outstanding at the date of my death".

[10] On 22 March 2006 the Newlands property was sold by the Late Whiting for an amount of R1 150 000.00. Thereafter transfer was duly registered in the records of the Registrar of Deeds. The 22% of the net proceeds of the sale of Newlands property represented an amount of R253 075.00.

[11] As the two parties were still in a romantic relationship, Applicant did not require immediate payment from the Late Whiting of the sum of R253 075.00, representing his 22% share of the net proceeds of the sale of the Newlands property.

[12] The Late Whiting then subsequently purchased a property in Rondebosch known as 33 Sangrove Drive, Rondebosch. For the sake of convenience this property will be referred to as "the Rondebosch Property".

[13] On the 31 December 2006 the Late Whiting passed away. At that particular time she was living in the Rondebosch Property. However the proceeds of the Newlands Property had not yet been paid to the Applicant.

[14] Applicant's contention was that he is entitled to the benefit as a legatee in terms of the will and in view of the provisions of clause 2.2.2 thereof.

Alternatively is entitled to the benefit as a creditor, regard being had to clause 3.2.1 as quoted above.

[15] Furthermore, Applicant contended that he is entitled to receive two amounts from the estate of Late Whiting over and above the bequest of R30 000 in clauses 2.1.1 of the will and testament as quoted above. Therefore, the Applicant submitted that the refusal by the First Respondent to grant him the two benefits does not have any foundation in law.

[16] Second Respondent initially recognized Applicant's claim as a **"legatee"** but dismissed his claim as a creditor. Second Respondent later made an about turn by then recognizing Applicant's claim as a **"creditor"**, but dismissing his claim as a legatee.

[17] On 12 September 2008, Applicant objected in writing to the subsequently amended liquidation and distribution account dated 12 August 2008 and contended that:-

17.1 He was entitled to R253 075.00 (representing 22% of the net proceeds of the Newlands Property in terms of the written agreement; and in addition thereto.

17.2 He was also entitled to 22% of the net proceeds of the Rondebosch Property in terms of the Will as a legatee in the amount of R223 716.42.

[18] On 8 May 2009 First Respondent refused to uphold the Applicant's objection and held that the second liquidation and distribution account correctly awarded R253 075.00 (being 22% of the net proceeds of the Newlands property) to the Applicant in terms of the written agreement. Furthermore, he found that the Applicant's claim to the legacy which he claimed 22% of the net proceeds of the Rondebosch property, had been correctly rejected.

[19] Mr. Steenkamp, counsel for the Applicant, argued that the executor incorrectly found an ambiguity in the will if regard is had to the written contract. According to Mr. Steenkamp, there is no ambiguity in the will. It is only when one reads the two documents when ambiguity arises. It is therefore upon this court to have regard on whether there is existence of this ambiguity.

[20] Mr. Gess, counsel for the Second Respondent, on the other hand argued that Section 35 of the Act deals with a review of a decision or refusal of the master to sustain an objection by an aggrieved party. Pursuant to that objection and the refusal to sustain same, the aggrieved may apply to court for an order setting aside the decision of the Master. He submitted further that this court has to determine whether the First Respondent was right or wrong in refusing the objection by the Applicant.

[21] Counsel for the Applicant referred to **Robertson v Robertson**[1], where it was held that, the golden rule for the interpretation of the testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the Court is bound to give effect to them unless it is prevented by some rule or laws from doing so.

[22] Mr Steenkamp referred further to **Aubrey – Smith v Hofmeyer**[2] where Corbett J (as he then was) approved the passage: "In construing a will the object is not to ascertain what the testator meant to do but his intention as expressed in the will." He made a concession though that our courts have not decided on this issue recently and as such the law is not settled on the point. There is no clear direction in our law in the form of authorities and or decisions on whether "armchair" evidence is to be allowed in instances where the words are clear and unambiguous.

[23] Mr Steenkamp argued that he had difficulty with this principle as it stands. It was hard to draw a line between "armchair rule" and the surrounding circumstances. The learned judge in **Aubrey – Smith v Hofmeyer** *(supra)* stated as follows:

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[1] 1914 AD 503 at 507

[2] 1973 (1) SA 655 (C) at 657 G-H

"Consequently where his intention appears clearly from the words of the will, it is not permissible to use evidence of surrounding circumstances or other external facts to show that the testator must have had some different intention. At the same time no will can be analyzed in vacuo. In interpreting a will the Court is entitled to have regard to the material facts and circumstances known to the testator when he made it: it puts itself in the testator's armchair."[3]

[24] Furthermore, he argued that though this court is dealing with the interpretation of a will, it must not lose sight of the fact that there is a contract to be interpreted in parallel.

[25] Mr. Steenkamp argued further that in **KPMG Chartered Accounts (SA) v Securefin Ltd & Another**,[4] Harms DP stated: "The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". At paragraph 20, he went further to say "Only if one relies on using the extrinsic evidence for policy considerations it is important that rules of interpretation be used."

[26] Mr. Steenkamp submitted that should the Court allow extrinsic evidence, it would have a potential of opening the floodgates for anyone to come and dispute

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[3] Allen & Another, NNO v Estate Bloch and Others 1970 (2) SA 376 (C) at 380

[4] 2009 (4) SA 399 (SCA) at paragraph 39

the contents of the will. Therefore Applicant is entitled to the so called double benefit.

[27] Mr. Gess, counsel for the Second Respondent contended that the KPMG decision could not be sustainable in the current matter, more particularly that the Supreme Court of Appeal dealt with a matter involving a contract and not the Will. The SCA did not state that evidence could or should not be reviewed to contextualize the document to establish its factual matrix or purpose, but rather stated that such evidence may be admissible ("since context is everything"). He stated further that such evidence should be used as conservatively as possible (at 409 G-J). These comments are made in the context of the parties having sought to introduce extensive inadmissible expert evidence to interpret a contract.

[28] The court did not state that evidence to contextualize the document to establish its factual matrix or purpose, was only admissible or receivable in circumstances where the contract was unclear or ambiguous.

[29] The court did not suggest, as was contended on behalf of the Applicant in the present matter, that a contract (or Will for that matter) should never be interpreted "in isolation" or *in vacuo*."

[30] The court did not purport to overrule (and did not even refer to) a long line of decisions of the Supreme Court of Appeal which state that in the interpretation of a Will, the so-called "armchair" evidence is always admissible, that a Will is not to be interpreted *"in vacuo"*, and that extrinsic evidence is receivable as to the facts and the circumstances existing at the time of the execution of the Will so as to assist in the determination of the intention of the Testator.

[31] Mr. Steenkamp made further reference to **Thirion v Die Meester en andere**[5] , where the court held that the content of the alleged will was clear and it was accepted by the parties that it had been drafted by the deceased in his own handwriting and at a time when he had probably been alone. In essence, one has to have strict interpretation of the document as expressed in the will itself.

[32] Regarding **Thirion**, *(supra)* Mr. Gess argued that there is not much that turns on it. In this case the Testator, who subsequently died, fell in love with an older lady. He wrote a will while he had a drinking problem at the time. He used alcohol excessively and was in a depressed state of mind. He wrote a suicide note and thereafter committed suicide. The issue to be decided was the capacity to execute and the validity of a will. It was not the intention of the testator as is the case *in casu*. The will had not been signed by witnesses at the time of the execution.

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[5] 2001 (4) SA 1078 (T)

[33] Mr. Steenkamp further argued that the agreement or contract was concluded on 8 November 1997, and the will was executed on the 9 November 2005. It is therefore evident that The Late Whiting was well aware of the terms of the agreement when she executed the will. With the knowledge of the terms of the agreement, the Late Whiting nevertheless elected not to make any cross reference to it in her will. One therefore has to accept that the existence of the agreement was a "fact" or "circumstance" consciously known to The Late Whiting when concluding the agreement. The Late Whiting intended to avoid a so called "double – benefit", she had the opportunity to do so by executing her Will accordingly. This goes against the Executors' inference that the Will and the agreement are mere duplicates of the same intention.

[34] As far as Applicant is concerned the Executor wishes to read additional words and/or phrases into the Will, which will have the effect of making a cross reference to the agreement. Further, there is no application for rectification of these documents before court and as such could not make any comment and therefore prays for the order as set out in the notice of motion.

[35] Mr. Gess emphasized that the "special bequest" was intended and meant to recognize the responsibility of the Late Whiting to the Applicant. She had no intention of awarding a double – benefit to the Applicant. When The Late Whiting executed the Will the obligations came to an end on the events cited on the

contract. On the day she executed the will, she intended to settle her responsibility *once* and not *twice*.

[36] Counsel for the Second Respondent submitted that a review such as the present is of the third type referred to in **Johannesburg Consolidated Investment Company v Johannesburg Town Council**[6] ;**Barnard v Cilliers N.O** [7], **Coetzee en 'n Ander v De Kock N.O en Andere**[8], where the court held accordingly that it was entitled to consider the matter de novo. He submitted further that the approach adopted by the Master (First Respondent), and supported by the Second Respondent was that adopted by the court in **Strydom's Curator v Jacob's Executor.**[9]

[37] There is no clear authority on this point. *In casu*, where a Testator is indebted to a legatee and makes a bequest to that legatee, the question arises whether the bequest is in addition to or in substitution of the original existing debt.

[38] *In Corbett Hofmeyr and Khan, The Law of Succession in South Africa 2nd Edition 2001 at pg 227,* there is a "presumption" that the Testator intended the

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[6] 1903 TS 111 at 116

[7] 1965 (3) SA 808 (0) at 813 F-H

[8] 1976 (1) SA 351 (0) at 361 A - C

[9] (1894) 11 SC 222

legatee to be paid both the debt and the sum bequeathed even though the amount of the latter is the same as the debt. See **Minter v Executors in the Estate Late Minter[10], and Friedman v Estate Friedman.[11]**

[39] Mr. Gess argued strongly that in Strydom (Supra), the court found that it was clear that the bequest was not in addition to the original debt, but was a reference thereto, and that there was no entitlement to both the bequest and payment of the debt.

[40] Furthermore, counsel for the Second Respondent made a distinction between Minter and Friedman (Supra). In Minter the court held that where a testator is indebted to a legatee and makes a bequest to him, it is presumed that the testator intended the legatee to be paid both the debt and the sum bequeathed even if the amounts are identical. However in Friedman, the matter was not decided on the basis of whether a legacy was intended to satisfy a debt, but on the interpretation of the provisions of a Will, which showed that there was a bequest of the proceeds of an insurance policy in addition to the payment of a debt (the proceeds of a separate insurance policy) contained in an antenuptial contract.

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[10] (1892) 9 CLJ 246

[11] (1922) 43 NLR 385

[41] Similarly, Mr. Gess referred to **Messina v Estate Messina**[12] ,where the court held that bequests of a similar amount in the Will and Codicil, separated in time by a month, and where there was at least one radically different term applicable to the amounts, were a cumulation. Once more, he made it clear that this decision is not authority for the proposition that where there is a debt, and a sum bequeathed, the creditor is entitled to both the repayment of the debt and the legacy.

[42] Emphasis was made further that it does not appear that there is any recent decision in place that has overruled **Strydom's Curator v Jacobs' Executor** (*supra*) for that matter. As such, it was submitted by Mr. Gess that there is no authority for the existence of the presumption referred to by Corbett et al at p227. It was submitted further that the Court is Strydom (*supra*) correctly interpreted the Will and the written agreement, against the background of the relevant *material* facts prevailing at the time of the "execution of the Will", established the intention of the Testator and in that case (as should be in the present case) held that debt recorded in the written agreement and the legacy into same amount were not a cumulative, but were rather a reference to a single obligation, and that the claimant was entitled to payment once only. He submitted that this approach should be followed in the present instance.

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[12] 1923 EDL 462

[43] Mr. Gess submitted that in the interpretation of a Will, it is an accepted principle that every document should be read in the light of the circumstances existing at the time of the execution of the document, and that evidence may rightly be received of every material fact which will place the Court as near as may be, in the situation of the parties to that document. This principle is called the *"armchair rule"*. In construing a Will, the Court places itself, metaphorically speaking, into the armchair of the Testator at the time the Testator executed the Will, and considers the Will in the light of the material facts and circumstances which are likely to have been known to the Testator at the time of the execution of the Will. It is the Testator/Testatrix's evaluation at the time of the execution of the Will which must be determined from the language used in the Will on the circumstances that exist and known to the Testator. See *Corbett J et al, The Law of Succession in South Africa, Second Edition at pg 463-466.*

[44] Mr. Gess submitted that there is considerable authority for the approach that the Court is entitled in the process of construing a Will and establishing the intention of the Testator at the time that the Will was executed, to have regard to the will as a whole, and apply the "armchair evidence" rule irrespective of whether or not any authority exists in the Will itself. See **Cumming v Cumming**[13] , the Court held that no will can be analyzed in *vacuo*. All material surroundings in every case have to be taken into account. The sole object is, of course to ascertain the intention of the testator from the Will.

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[13] 1945 AD 201 at 210

[45] I have taken note of Mr Steenkamp's submission that when regard is had to the two documents, they must be read in parallel. I cannot find any justification on this approach. In my view one could not separate one document from another as they are the primary cause of this litigation.

[46] I now turn to deal with the interpretation principles applicable to the Wills, as defined in *"The Law of Succession in South Africa, 2nd edition, Corbett J at p 447 at 463.* Mr. Gess argued that the principle that comes into play *in casu* is the "armchair rule". In essence, this principle as per Innes J suggests that "every document should be read in the light of the circumstances existing at the time" and that "evidence may rightly be given of every material fact which will place the court as near as may be in the situation of the parties to the document"[14]

[47] I am persuaded by Mr. Gess's submissions that in construing a will and establishing the intention of the testator, the court must put itself in the shoes of the testatrix when she executed the will, taking into account the principles as stipulated in Strydom *supra*:

> *"The general rule is that, in construing a will, the court is entitled to put itself in the position of the Testator with reference to which she is to be taken to have used the words in the will, to those facts and circumstances*

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[14] Richter v Bloemfontein Town Council 1922 AD 57 at 59

which were (or ought to have been) in the mind of the testator when he used these words"[15].

[48] In light of the surrounding circumstances in these proceedings, and the fact that there is a commonality in the two documents that are currently before court , the question to be answered is whether Applicant is entitled to the 44% in terms of the contract and in terms of the will.

[49] Reading the two documents together, I therefore come to the conclusion that the testatrix, Late Whiting had "good intentions in her heart" to compensate the Applicant for the flat let he erected at her premises. This conclusion is based on the fact that the Late Whiting had already benefited her partner by leaving him a cash legacy of R30 000.00. Though the debt was taken care of in the contract, the testatrix wanted to make sure that the Applicant got paid what was due to him and further inserted the clause in the will that is more or less the same as that one in the contract.

[50] Even before one can reach a stage of interpretation of both clauses, one must have regard to the fact that both documents were signed before the Rondebosch property was purchased. It is therefore highly unlikely that the testatrix intended to leave a *benefit in advance,* to the property that was not in existence at the time the will was executed and at the time the contract was

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[15] The Law of Succession in South Africa, Second Edition, Corbett et al page 464

entered into by the parties. The property that the Late Whiting had at that time was only the **Newlands property** and not any other property. The inference that this court can draw is that the 22% referred to in both documents is with reference to the Newlands property. It was somehow opportunistic that when the Late Whiting died, she was **the** owner of the Rondebosch Property, and Applicant used that opportunity to create a double-benefit for himself. This happened after the Newlands Property was sold on the 22 March 2006 and she died some nine (9) months thereafter on the 31 December 2006 without her paying over the proceeds of the sale of the said property to Applicant. Of major significance on both documents is that they refer to "payment of 22% of the net proceeds of the sale" to Applicant. Further, there is no cross-reference on the two documents.

[51] In my view if the Late Whiting intended to leave a "double – benefit" to her long term partner, she should have done so explicitly in the will as it was the last document to be executed by her. She would not have been short of words to say in addition to the contract the Applicant is entitled to benefit in terms of the will, and thereby making the benefit 44%. As I have stated above, on the 8th November 2007 when the contract or agreement was concluded and on the 9th November 2005 when the will was concluded, there was no **Rondebosch Property.** In this judgment, I am therefore confined to look at the property that was in existence at that particular time when interpreting these documents.

[52] Applicant is seeking to review the First Respondent's refusal to sustain his objection against the final liquidation and distribution account of the Estate Late Gillian May Whiting, alternatively that First Respondent's refusal to sustain objection of Applicant against the final liquidation and distribution account of the Estate Late- Mary Whiting, be sustained; that the objection of applicant against the final liquidation and distribution account of the Estate late Gillian Mary Whiting be sustained; that it be declared that applicant be deemed to be a legatee of the Estate Late Gillian Mary Whiting; that it be declared that, in addition to the aforesaid that applicant be deemed to be a creditor in terms of his claim of R253 075.00 against the Estate of late Gillian Mary Whiting and the order for costs.

[53] The Second Respondent initially prepared a first liquidation and distribution account in the Estate late Gillian Whiting and awarded the applicant the amount of R223 716.42 which represented 22% of the net value of the Rondebosch Property. Applicant was awarded nothing in terms of the written contract relating to the Newlands property.

[54] The Applicant then objected in writing to the First Respondent against the first liquidation and distribution account, on the basis that he was not only entitled to the amount of R223 716.42 (representing 22% of the net proceeds of the Rondebosch Property) but also that he was a creditor of the Estate late Whiting by virtue of the written agreement, and accordingly entitled to the further amount

of R253 075.00 plus interest representing 22% of the net proceeds of the Newlands property.

[55] Subsequent to that objection the first liquidation and distribution account was awarded and a new liquidation and distribution account was lodged on the 12 August 2008.

[56] On the amended liquidation and distribution account, Applicant was to receive 22% of the net proceeds of the sale of the Newlands property in terms of the written agreement (i.e. an amount of R253 075.00). Applicant was not awarded any benefit in terms of the Will.

[57] On the 12 September 2008, Applicant objected in writing to the amended liquidation and distribution account and contended that:

57.1 He was entitled to R253 075.00 representing 22% of the net proceeds in terms of the written contract.

57.2 He was also entitled to R223 715.42 representing 22% of the net proceeds of the Rondebosch property in terms of the will.

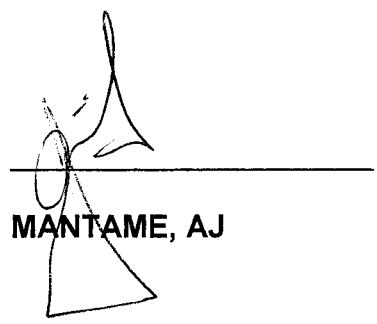
[58] On the 8 May 2009 the First Respondent decided to uphold the Applicants objection, and held that the second liquidation and distribution account correctly awarded R253 075.00 representing the 22% of the net proceeds of the Newlands property to the Applicant in terms of the written

agreement and found that the Applicants claim to the legacy which he claimed, representing 22% of the net proceeds of the Rondebosch property, had been rejected.

[59] I am of the view that the First Respondent took the same consideration as mentioned herein above. I fully agree that he made a fair and correct decision by only awarding benefit to the Applicant in terms of the contract and not in terms of the Will. It appears rational that the Late Whiting intended to repay the debt she owed relating to the Newlands property, as there was no other property at the signing of the contract and execution of the Will. I am of the firm view that no reasonable person can create an obligation to a property that is not yet in existence.

[60] Consequently, I make the following order:

- Applicants' application for condonation and review is dismissed;
- The amended liquidation and distribution account lodged on the 12 August 2008 will serve as the final liquidation and distribution account, in as far as the Applicant's credit and inheritance is concerned;
- There is no order as to costs.



MANTAME, AJ