IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 9938/2020

DATE: 2020/10/29

In the matter between:

MOOSA SAMSODIEN Applicant

and

NAZEEMA SAMSODIEN

AND 3 OTHERS Respondents

JUDGMENT

DAVIS, J:

This is an unfortunate case. It concerns a dispute within a family that should be decided by way of ethical conduct by family members rather than by determination through a Court. However, as the parties are determined to ensure that an adversarial relationship continues to exist (I apportion no blame in this case to applicant), I am obliged to determine this case on the basis of law.

It is an opposed application. It has been brought as a matter of urgency for an order which, stripped to its essence, authorises the applicant to use/enjoy a seven sixteenths share of immovable property, Erf [...] Cape Town, known as [...], Athlone, or the fruits thereof. (the immovable property)

Briefly, the facts which give rise to this dispute are the following.

In terms of applicant's father's will, he inherited a seven sixteenths portion of the immovable property to which I have made reference. The terms of the will to the extent relevant, read thus:

> "I nominate, constitute and appoint as heirs and heiresses to my estate of whatsoever nature and wheresoever situated, whether movable or immovable, whether in possession, reversion, contingency or expectancy, nothing excepted, to the following persons:
>
> (a) My wife, Nazeema Samsodien, to whom I am married according to Muslim rights, as to one eighth share.
>
> (b) The rest and residue to my following children in shares calculated according to Muslim rights, that is my son to inherit twice the share of my daughter.

(i) My son, Moosa Samsodien, as to seven sixteenth share.

(ii) My daughter, Latiefa Daniels (born Samsodien), as to seven thirty-second share.

(iii) My daughter, Nuraan Samsodien, as to seven thirty-second share.

10 Clause 5 then provides:

> "I hereby give my wife, Nazeema Samsodien, to whom I am married according to Muslim rights, a lifetime usufruct over the immovable property known as [...], Crawford."

Therefore, in terms of the will of applicant's father, he was clearly regarded as a preferential beneficiary, although that is not necessarily decisive of this dispute.

20 In terms of the title deeds on the property, applicant's share of ownership was further restricted by certain conditions contained in the Deed of Partition Transfer number 5014 dated 14 July 1931, approved by the Administrator of the Province of the Cape of Good Hope under section 15 of Ordinance 13 of 1927 (the Deed of Partition Transfer), which includes the condition that no future

subdivision of the property may be less than 5 000 square feet in extent.

On the 31st of October 2002 at the age of 73, the applicant's father passed away. According to applicant, at that time applicant was 58 years old; the first respondent was 37 years old, and the second respondent was about five years old. They were all living at the property in peaceful cohabitation. Applicant's wife and minor children, however, were living in Manenberg at the time, as, according to applicant, they were having some marital problems.

Three days after his father's passing, first respondent's sister demanded that he leave the property. Shortly after he left the property, first respondent's entire family moved in. According to applicant, it came to his attention that she had also invited what he refers to as a stranger to erect a Wendy house in the backyard for residential purposes.

In terms of the founding affidavit to which he deposed in support of this application, he is unsure who still resides at the property today apart from the first and second respondents, and he also is not entirely sure whether a Wendy house was ever erected, although, as he states in his affidavit:

"A recent global image of the property on Google Maps does

indicate some form of a structure in the backyard."

The applicant has approached this Court because, as he correctly notes, first respondent enjoys a usufruct and she refuses him rights of occupation of part of the property. He contends that he is therefore unable to occupy his portion of the property to which he is entitled following the bequest from his father. He states:

> "I have been trying to negotiate with the first respondent amicably for years so that my family and I could possibly reside at the property, to no avail. I am also unable to enjoy or realise other benefits and/or fruits of my portion of the property, as the title deed restricts any subdivision of the property to no less than 5 000 square feet. The property is 6 662.86 square feet (619 square metres) in extent, and it is therefore impossible to subdivide the property according to the bequest in my father's will. Subdividing my portion alone would result in a portion of 2 915 square feet."

Applicant has therefore approached this Court, effectively, for relief, which is couched in the notice of motion as:

> "A lifelong usufruct bequeathed to the first respondent by the late Achmat Samsodien ... is cancelled forthwith in

terms of sections 2 and 3 of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 (the Act)."

Further:

"The prohibition against the late Achmat Samsodien's grandchildren residing at Erf [...], Cape Town ... is removed."

And further:

"That the applicant and his immediate family are authorised to use, occupy and enjoy, particularly reside and/or erect lawful residential buildings on his seven sixteenths of the share of the property."

He seeks this relief on the following basis. He claims, as stated in affidavit:

"I am at a crossroads where I am unable to occupy my portion of the property due to the first respondent's usufruct, but also unable to subdivide and sell my portion of the property due to the restrictions in the title deed. In addition, even if subdivision was allowed, the usufruct will

deter any future purchasers of the property, given the size of the purchasable property."

There is, therefore, a series of statements in the founding affidavit to the effect that the applicant finds himself in a powerless situation, living in accommodation which can be referred to as living on the margins, without the benefit of any kind of the seven sixteenths of a property which had been bequeathed to him. There lies the problem.

Ms Van Wyk, who appears *pro bono* for the applicant (and very commendably so) relied on section 2 of the Act in support of the relief which applicant seeks. It provides:

"(1) If any beneficiary interested in immovable property which is subject to any restriction imposed by will or other instrument before or after the commencement of this Act desires to have such restrictions removed or modified on the ground that such removal or modification will be to the advantage of the persons, born or unborn, certain or uncertain, who are or will be entitled to such property or the income thereof under such will or instrument, such beneficiary may apply to the Court for the removal or modification of such restriction."

In support of this application, Ms van Wyk referred to a judgment of De Vos Hugo J in *Ex Parte Wallace* 1970 (1) SA 106(NC) at 106, where the learned Judge said this:

> "Die grondslag van so 'n aansoek is dus die voordeel van die genoemde persone. Ingevolge artikel 3(1) kan die hof by wie so 'n aansoek gedoen word die beperking ophef as die hof oortuig is dat dit in die openbare belang of in belang van die persone genoem in artikel 2(1) sal wees om dit te doen. Hier word die openbare belang as alternatiewe grond ingevoer vir die opheffing van die beperking. Die vraag is dus of die beperking opgehef kan word omdat dit in die openbare belang of in die belang van die begunstigde is om dit te doen."

The learned Judge went onto holds:

> "Wat die belang van die begunstigdes betref, kan gesê word dat dit wel in die belang van die petisionaresse en haar kinders is dat die plaas tot geld gemaak word en dat die geld aangewend word om vir hulle 'n heenkome soos hulle verlang te verskaf. Op die oomblik is die petisionaresse se kapitaal in die plaas belê, en sy kan dit nie daar uitkry om vir haar kinders 'n beter toekoms te skep as die beperking nie opgehef word."

Further, Ms van Wyk referred to *Ex Parte Murison and Others* [1967] 3 ALL SA 1 (O) at 6, where Erasmus J held:

> "Moreover, section 2(1) of the Act empowers me in these applications merely to consider in all the circumstances the case whether the removal of restrictions or the modification of the will 'will be to the advantage' of the beneficiaries, not necessarily the best advantage."

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Accordingly, Ms Van Wyk submitted that the applicant, who is the beneficiary of the largest portion of the immovable property in terms of his late father's will, is confronted by restrictions by way of the registered usufruct and, further, the limitation on the subdivision of the property, which constitute a significant diminution of his right to *dominium.* He is, as a result, unable to use and enjoy even the fruits of the property. Accordingly, in her view, the facts of this case fall directly within the scope of the two judgments to which I have made reference.

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According to Ms Van Wyk, there are manifold advantages if the restrictions are removed. Including the fact that the applicant will finally have access to adequate and safe housing; the applicant will have an opportunity to realise his share of the property to provide his family, the applicant and the third respondent will

finally be able to benefit from the inheritance which was unquestionably the intention of their late father as is encapsulated in the will.

Again, I emphasise that the applicant got by far and away the largest portion of the *dominium*. But the problem with these submissions is that one has to examine the cases to which Ms Van Wyk referred within the factual context in which these judgments were given.

For example, in *Wallace* supra the Court had the following considerations which it took into account:

> "Die enigste twee ander belanghebbendes, naamlik die broer en die suster van die petisionaresse, het geen belang by die deel wat hulle mag toekom nie, en hulle steun hulle suster se aansoek. Hulle steun moet gesien word in die lig van die familie-omstandighede waarmee hulle goed bekend is, en in die lig waarvan hulle oortuig is dat hulle suster die volle voordeel moet geniet van die plaas wat aan haar verkoop is. Daar is geen rede hoegenaamd om te aanvaar dat die ouers van die petisionaresse enige onderskeid tussen hulle kinders wou gemaak het, en in die beperking van die petisionaresse se grond kan niks meer gesien word as die besorgdheid van die vader dat die grond tot voordeel

van die petisionaresse se kinders sou besit word nie."

Of course, in this case, apart from the fact that the only other interested parties – unlike in this case – showed a generosity of spirit which, sadly, is missing here, the application turned on the question of their fideicommissary interests.

In the *Murison* case, *supra* the point for decision was whether the applicants, without losing any benefits under the will, were entitled to approach the Court because of the following provision in the will:

> "It is a direction and instruction of this, my will, that should any of my legatees or other interested persons take legal proceedings to disturb any bequest or any provision of this, my will, or attempt to obtain an order of court for the purpose of realising my fixed property and converting it into cash (which is entirely against my wishes), then such person shall be absolutely dispossessed of and shall forfeit all benefits conferred upon him or her under the will."

The application which was made in terms of section 2(1) of the Act was designed to ensure that the inflexibility of the clause could be lifted so that the sale of properties could be effected, notwithstanding the clause in the will. These cases are significantly different to the one that confronts this Court.

In short, the crisp question for determination in this case is whether the power under section 2(1) of the Act covers the removal of a usufruct. In other words, the words of the statute refer to:

> "Any restriction imposed by a will or other instrument before or after the commencement of this Act." (my emphasis)

10 The question is: what are 'restrictions' within the memory of this section? Were this case to be purely about subdivision, which is part of the case, in that, as I indicated in the notice of motion, there is an application brought that the prohibition which is contained in relation to subdivision should be removed, then I would have little doubt that this would be the kind of restriction which the Act encompassed, and that on the basis particularly of Wallace and the facts of this case, the applicant would have justified the relief it seeks.

20 But the problem that faces this Court is that the respondent holds a usufruct over the property, and again, to repeat: this usufruct, in terms of clause 5 of the will, is a lifetime usufruct over the immovable property: Not over part of it, not over a quarter of it, not over nine sixteenths of it, i.e. absent the seven sixteenths enjoyed by the applicant but over the whole of the property. A

usufruct is a personal limited but real right that entitles a person, in this case the usufructuary, to enjoy the use and enjoyment of another's property and to take the fruits thereof. While the usufructuary holds no vested interest in the corpus of the property, he or she has a limited real right to be exercised within the scope of the usufruct so granted.

In my view, the word, 'restriction', does not include a usufruct. A usufruct is not a restriction. A usufruct is part of the panoply of rights which make up ownership, and accordingly, whilst the Act might justify a modification of the restrictions of subdivision, it cannot provide the power to this Court effectively to remove or restrict a usufructuary right which has been granted in the express manner in which it was in terms of clause 5.

I come to this decision with great regret, because the equities are manifestly with the applicant. But, sadly, the law is clear: restrictions are restrictions. If the Act had said removal of rights, it would have said so expressly. There is no linguistic wriggle room for me to produce a result which would be equitable.

However, I do not intend to award costs in this case; the refusal to do so reflects my attitude to the matter as a whole.

The application is dismissed.

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DAVIS, J

JUDGE OF THE HIGH COURT

DATE: ……