Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 10805 / 2023

In the matter between:

ALEX DE FERM — **First Applicant**

MARIA DE FERM — **Second Applicant**

ANNA DE FERM — **Third Applicant**

LUCIA DE FERM — **Fourth Applicant**

and

HANS HEINRICH FERDINAND OTTO

VON LIERES UND WILKAU N.O. — **First Respondent**

(In his capacity as the duly appointed executor of the estate late Ludovicus Anna De Ferm)

DEAN WILLIAMS — **Second Respondent**

DIRK COUTURIER N.O. **Third Respondent**

MASTER OF THE HIGH COURT (CAPE TOWN) **Fourth Respondent**

VON LIERES, COOPER & BARLOW

ATTORNEYS **Fifth Respondent**

Coram: Wille, J

Heard: 14 August 2023

Delivered: 11 October 2023

JUDGMENT

WILLE, J

Introduction:

[1] This opposed application was presented to me in the urgent fast lane. The applicants sought an order that the first respondent be interdicted and restrained from distributing the proceeds of the sale[1] of a specific immovable property bequeathed to the second respondent.[2]

[2] Further, that: (a) the first respondent be directed to retain the funds in the trust account of the fifth respondent (in a separate interest bearing account), alternatively to invest the funds in a separate interest bearing account with a reputable financial institution; (b) when the time arrived for the first respondent to distribute the funds, the first respondent be directed to make payment of the funds (on behalf of the second respondent), directly to a specified external tax authority[3], alternatively, to make

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[1] An amount of €435,517.11 or the South African Rand equivalent thereof ('the funds').
[2] Erf 1681 Camps Bay, situate at 5 Fiskaal Close, Bakoven (the property).
[3] The Flemish tax authorities (the 'tax authority').

payment thereof to the third respondent, on the basis that he, in turn, shall make payment thereof to the external tax authority on behalf of the second respondent.

[3] The initial application was postponed. It was brought urgently and on short notice for interim relief, pending a final decision on the return day. No interim order was sought or granted as the first and second respondents served a preliminary answering affidavit, a notice requesting the discovery of specific documents and a notice asking for security for the costs of the application. The applicants initially sought a rule for anti-dissipation relief.[4]

Overview:

[4] In summary, the applicants are seeking payment of the funds on behalf of an external tax authority. They are seeking an order directing the executor of the deceased estate to pay the funds out of the proceeds of a sale of an immovable property, which funds form part of a local deceased estate. These funds are to be paid on behalf of the second respondent, a beneficiary. The precise computation of the amount of the funds at this stage is uncertain. The applicants concede this. Put another way, the tax authority still needs to assess the precise quantum of tax for which it seeks to hold the second respondent liable.

[5] This disputed liability has its genesis in a legacy of the property made by the applicant's late brother in favour of the second respondent. The applicants are asking the court to order that the funds be settled out of money in the local estate, which the first respondent is required to deal with under the local will of the deceased.[5] Put another way, when the time comes for the first respondent to distribute the proceeds out of the local deceased estate, the first respondent is to make payment of the external inheritance tax directly to the tax authority. Moreover, this payment is to be made on behalf of the second respondent (not the estate) and without any consideration for that which would be reflected in the estate's liquidation and distribution account.

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[4] In essence a 'Mareva' injunction.

[5] This in terms of the Administration of Estates Act, 66 of 1965, the Estate Duty Act 45 of 1955 and the local will of the deceased.

[6] The applicants accept that this account is yet to be drawn up.[6] In the alternative, these funds are requested to be paid to the third respondent so he can pay the external tax authority, who is the alleged executor of the deceased's external estate.

Consideration:

[7] In as much as the applicants are claiming this relief in their capacities, they do not state that they have disbursed the funds in question based on what they say is their liability under external tax law. This bears further scrutiny. In addition, it is highly questionable if the second respondent is even liable to pay the funds following our local legislation. Moreover, the original application piloted by the applicants has undergone a chameleonic change. The applicants now belatedly agree that their application does not satisfy the requirements for an injunction.

[8] In summary, the application is now directed against the first respondent to ensure that the first respondent (as executor of the deceased estate to which the second respondent is a beneficiary) does not pay out the funds to the second respondent. Thus, I do not see any grounds for anti-dissipation relief. The applicants first sought anti-dissipation relief premised on an alleged concern that the second respondent would not settle any liability which may ultimately accrue. The applicants have now distanced themselves from this claim because it is not disputed that the second respondent can settle any monetary claim the applicants may be able to prove against him in due course. Passing now to the alleged claims by the external tax authority and the applicants. It seems that neither the external tax authority nor the applicants are creditors of the deceased estate. Thus, the claim for retention is beset with difficulties as it would be untenable to order the first respondent to retain and then pay out the funds from the estate to third parties who are not creditors of the estate.

[9] This position is exacerbated by the fact that the other legatees have not been cited as parties to the application and would be relying on the first respondent to comply with his obligations as the local executor of the estate and look after their

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[6] In terms of section 35 (1) of the Administration of Estates Act, 66 of 1965.

interests. This exhibits scant respect for our local legal system, which requires executors in the first respondent's position to recognise the second respondent's rights in the administration of the deceased estate.

[10] As duly appointed executor of the deceased's estate, the first respondent, acting under letters of executorship, is entrusted with the statutory task of winding up and distributing the local assets in the deceased's estate according to his wishes in his local will, following our local laws.

[11] Most importantly, the first respondent is authorised and required to pay the liabilities of the deceased estate after the account has been opened for inspection and no objection to it has been lodged.[7] Concerning creditors where the estate is solvent, the executor must pay the creditors as soon as funds sufficient for that purpose have been realised out of the estate. The first respondent is only permitted to pay creditors of the estate, and he is obliged to pay those creditors whose claims appear from the liquidation and distribution account drawn up and published once this has rested free from objection. Thus, the first respondent is not permitted to pay anyone who is not a creditor of the estate or an heir or legatee under the will. Therefore, the money the applicants wish to have interdicted in terms of the order they seek is not money due by the estate to any creditor.

[12] The guiding principle is that the first respondent occupies a position of trust (and apart from his fiduciary duties to all beneficiaries and local creditors and his local statutory obligations), his actions should be dictated by considerations which will serve best the interests of the beneficiaries.[8] The relief contended for by the applicants is in direct conflict with these legal obligations. Moreover, the applicants do not seek relief for an interdict *pendente lite,* pending the determination of some action which has been instituted or which will be instituted between the parties.

[13] It is also unclear why the second respondent would be liable for the inheritance imposed by an external tax authority as a matter of law. The executor is obliged to submit to our local tax authority a return disclosing the amount claimed by the person

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[7] Administration of Estates Act 66 of 1965, section 35(12)(a) thereof.
[8] *Mujuru NO & others v Mujuru & another* [2006] JOL 17603 (ZH).

submitting the return to represent the dutiable amount of the estate together with full particulars regarding the deceased's property (as of the date of his death).

[14] The local tax authority will assess the duty payable for every estate liable for the duty and, thereupon, issue a notice of assessment to the executor. The duty payable shall be paid on such date as may be prescribed in the notice of assessment issued at the instance of the local tax authority. The person liable for the assessed duty shall be the executor and, in this case, it is the first respondent.[9]

[15] Most importantly, some provision is made for relief from 'double' taxation.[10] It provides that agreements may be entered into with other countries whereby arrangements are made with a view to the prevention, mitigation or discontinuance of the levying, under our local laws and the laws of such other countries, of estate duty in respect of the same property or to the rendering of reciprocal assistance in the administration of, and in the collection of estate duty under the laws relating to the estate duty in force in locally and, in such other external countries.

[16] No such agreement has been reached regarding inheritance tax with the external country at play in this matter.[11] This at least seems to be a matter of common cause between the parties. Thus, there seems to be no legal basis on which the applicants can obtain an order against the first respondent. It is also doubtful if this court has the requisite jurisdiction to entertain the claim by the applicants. Passing now to the issue of whether the applicants are vested with the required standing to advance any claim on behalf of the external tax authority.

[17] The external tax authorities do not claim against the deceased estate or the first respondent as representative of the deceased estate. Accordingly, I am doubtful that this court has jurisdiction over the claim even if it was brought directly by the external authority, whether against the first or the second respondent. I say this because

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[9] Section 11(1)(a)(I) of the Estate Duty Act.
[10] Section 26 of the Estate Duty Act.
[11] In terms of section 108(2) of the Income Tax Act, 1962 (Act No 58 of 1962), read in conjunction with section 231(4) of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income set out in the schedule to that notice has been promulgated. This convention was entered into with the Government of the Kingdom of Belgium and was approved by Parliament in terms of section 231(2) of the Constitution, the date of entry into force being 9 October 1998 in terms of paragraph 1 of Article 28. Notably, this does not deal with estate duty or inheritance tax.

neither the applicants nor the external tax authorities have any claim against the estate.

[18] The estate duty due by the estate is due in terms of local legislation and is calculated on the value of the property in the estate. By contrast, the inheritance tax the applicants claim they will need to pay in due course is payable by them and can, according to them, be reclaimed from the second respondent as legatee, not against the deceased's estate. Moreover, the applicants have no pending claim against the second respondent, nor do they claim to have instituted action or intend to institute action against the second respondent to reimburse any such inheritance tax which may become due and payable.

[19] From a practical point of view, the application is one in which payment of what is claimed to be an inheritance tax due to the external tax authorities is being claimed from the second respondent, a local citizen, through this court. The applicants purport to endow on the testator's implied intention through silence to the effect that he did not intend for the applicants to pay their inheritance tax and that this could be recovered from the proceeds of the sale of the local immovable property.

[20] In terms of our common law, our courts will not entertain a claim by a foreign government for taxes due to it and will not even enforce a foreign judgment for such taxes.[12] The applicants concede that in the absence of any express intention by the testator in any of his wills it is at best to be liberally inferred from the will that the testator wished for his relatives to pay the tax due to the external authorities. It seems clear, at least to me, that the applicants cannot claim payment of the tax on behalf of the foreign government as they appear to be doing through this court process. Put another way, the first respondent is under no obligation to make any payment to the external authorities.

[21] The first respondent is the executor of a local estate, appointed under a local will and must comply with our local laws in administering and winding up the estate. There is no claim by the applicants against the estate. Their case is premised on an

[12] *COT v McFarland (27 SATC 15).*

alleged claim by an external tax authority, and that claim is a potential claim against the second respondent and not against the estate or the executor.

[22] It must be so that the international comity does not extend to the recognition of tax liabilities imposed by a state on its subjects for its domestic management and regulation. Thus, in my view, this court does not have the power to order the attachment of assets for the purposes of enabling a foreign state to recover taxes owed to it nor, for that matter, to order the first respondent to pay what is claimed to be tax allegedly owing to an external tax authority.

[23] Absent is any legislative provision or some double taxation agreement permitting this, and in the absence of such authority, this court has no jurisdiction to do so.[13] Thus, a foreign state may not have a claim for taxes payable to its fiscus enforced in another state, as this would be equivalent to derogation of the another state's territorial supremacy.[14]

[24] As a general proposition, comity and convenience have established usage among civilised states by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into effect under specific regulations and restrictions, which vary in different countries. Thus, judgments of courts of foreign countries are recognised by some other countries because of comity due from one nation to another, and to its courts and judgments. Such recognition is granted to judgments rendered by courts of other nations with due regard to international duty and convenience, on the one hand, and to rights of citizens and others under the protection of its laws, on the other. I am however enjoined to give effect to independence and should not yield to considerations of convenience. International agreements can attain convenience, and in this case, none entitles the external tax authority or anyone on their behalf to extract inheritance tax from the second respondent, who is not a citizen of that country, through the conduit of the executor of a local deceased estate which is being administered by the first respondent as duly appointed executor to that estate, under our local laws.

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[13] In *Re Delhi Electric Supply & Traction Co Ltd* [1953] 2 All ER 1452 (CA).
[14] *Government of India, Ministry of Finance (Revenue Division) v Taylor and Another* [1955] AC 491 [1955] 1 All ER 292 (HL).

[25] Equally vague is the applicants' claim for the reimbursement of any monies expended by them regarding the inheritance tax for which they are liable less any sums which the second respondent would be liable to pay under our local laws to our local tax authorities. I say this because there is no allegation that they have disbursed these monies or intend to do so. Under our laws, a claim of a surety against a co-surety, for example, for payment of an *aliquot share* or a claim under an insurance policy for indemnification for compensation, all possess their specific requirements. A surety who has fully discharged a primary debt has a claim against the principal debtor. Still, the surety must discharge the debt fully before proceeding against the principal debtor.[15]

[26] Similarly, in this matter, until the applicants have made the payment, or at least until they have committed themselves firmly to doing so, and in a fixed sum, any claim to reimbursement they say they have (accepting for the moment that that claim is recognised under our law) will be incomplete until they have paid that which they say they need to pay. Thus, the second respondent's obligation to repay might have arisen in some general way. Still, the performance employing a pecuniary compensation that the applicants may wish to claim would not be due or claimable from the second respondent.

[27] Put another way, until the applicants have made the payment (or at least until they have committed themselves firmly to doing so) renders their cause of action incomplete. No money is accordingly immediately or presently payable to the applicants by the second respondent nor claimable by them from the second respondent. Whatever unspecified claim the applicants may be suggesting they could have against the second respondent at some stage in the future is uncertain and has not been established on these papers.

[28] Unmoved, the applicants seek directions that the first respondent make payment of the external inheritance tax directly to the external tax authority on behalf of the second respondent, alternatively, to the third respondent, on the basis that the third respondent makes payment thereof to the external tax authorities on behalf of

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[15] *Absa Bank Ltd v Scharrighuisen* [2000] 1 All SA 318 (C).

the second respondent. This is against the canvass of the third respondent, who initiated the process and in the absence of any treaty between the countries regarding the inheritance tax.

[29] The applicants seek to rely on the external 'assessment', which creates no liability for the second respondent and is not enforceable in our law. Notably, the third respondent did not provide the second respondent with an opportunity (relating to his rights) regarding this external process concerning any rights he may have had under foreign law. The third respondent made the representations regarding the external inheritance tax without considering the second respondent's position under the deceased's local will or our local law.

[30] Moreover, given the circumstances of this estate, where reduction of legacies is required, and the ultimate quantification of any liability is still to be finalised, it must be so that the external inheritance tax cannot be determined to any degree of certainty at this time. Put another way, the inheritance tax is calculated on what the legatee receives in due course, not the property's value in the will. Thus, if the claim is one of reimbursement, then that claim would be dependent on and only arise when the sum of such disbursement has been determined.

[31] Our local succession laws' core principle is that specific bequests or legacies are received without restriction or encumbrance, absent any contrary stipulation. The special bequest to the second respondent is the immovable property. Thus, the second respondent contended that the intention of the deceased was that the external inheritance tax was not intended to be for his account and that he was entitled to receive the property free of encumbrance and by the same token, the proceeds from the sale of that property free from external inheritance tax. I agree with his submission based on a plain reading of the will of the deceased.

[32] I say this because it is clear from the will that the deceased intended the second respondent to inherit the fixed property as opposed to an undefined share of the residue after the inheritance tax in respect of the property had been deducted. This was an 'out-and-out' special bequest made by the deceased to the second respondent.

[33] As the executor of the estate, the first respondent is duty bound to give effect to this intention of the deceased as expressed in his will. A presumption applies that the legatees should obtain the legacy free from the burden thereon. The burden must be discharged from other assets.[16] This doctrine is an extension of a fundamental principle of our local laws of succession, being the freedom of testation. The testator is free to deal with his or her property as he or she wishes and that includes making a bequest to a legatee free of cost or encumbrance which means others must bear such costs, being the residuary heirs.

[34] The testator's will is silent about whether the testator intended for the second respondent or the applicants to pay the tax imposed by the external tax authority concerning the bequest of the local immovable property. Moreover, I believe the applicants have not established any right for the payment of the external inheritance tax. The presumption regarding legacies that a legatee receives them without any encumbrance militates against any inference that the deceased wanted the second respondent to be liable for the payment of any inheritance tax on the property.

[35] On a proper construction of the will, the testator disposed of the whole of his external estate by making specific bequests and did not provide in his will for the inheritance tax on any of these to be paid by the second respondent. The applicants advance that the payment of these external taxes places them in a perilous position and that they would have to pay the taxes out of their own pockets.

[36] This must be viewed against the canvass that the applicants have each inherited some two million Euros and the inheritance tax payable by them under the second respondent's legacy would approximately amount to seventy thousand Euros each, leaving them with a not insignificant inheritance.

Conclusion:

[37] For the reasons set out herein, the applicants have not advanced any grounds that would entitle them on the facts and in law to the relief they seek, and their

[16] *Lutheran Church v Bam 1916 CPD 376 and Sorge v Estate Preuss* 1933 CPD 61 and *Bell v Swan* 1954 (3) SA 543 (W).

application must fail. There is no reason why costs should not follow the result. Thus, the following order is granted:

1. That the application is dismissed.

2. That the applicants (jointly and severally, the one paying the others to be absolved) shall be liable for the costs of the application (which costs are to include the costs of the application for urgent interim relief) on the scale as between party and party (inclusive of the costs of senior counsel where so employed) as taxed or agreed.

E D WILLE
CAPE TOWN