



REPUBLIC OF SOUTH AFRICA

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case number: 61/2001
Reportable

In the matter between:

SAMUEL LIEBENBERG NO

Appellant

and

MGK BEDRYFSMAATSKAPPY (EDMS) BPK

Respondent

CORAM: VIVIER ADP, FARLAM, NAVSA, MPATI JJA et
HEHER AJA

HEARD: 27 AUGUST 2002

DELIVERED: 25 SEPTEMBER 2002

SUMMARY: TESTAMENTARY TRUST – INTERPRETATION OF – WHETHER
TRUSTEE EMPOWERED TO SIGN UNLIMITED SURETYSHIP IN RESPECT OF DEBTS
OF A BENEFICIARY IN ABSENCE OF EXPRESS POWER CONFERRED BY WILL.

JUDGMENT

FARLAM JA

[1] This is an appeal against a final sequestration order granted on 27 September 2000 by Coetzee AJ, sitting in the Transvaal Provincial Division of the High Court, in terms of which it was ordered that the estate of the Hugo Frederik Mokken Trust (Trust no 471/90), be sequestrated for the benefit of the creditors and that the costs of the sequestration application, including those occasioned by the employment of two counsel be costs in the sequestration. The appellant is the present trustee of the trust.

[2] In both the Court *a quo* and this Court there was only one point in dispute between the parties, viz whether the trust deed under consideration in the present case, which was contained in the will of the late Hugo Frederick Mokken (to whom I shall refer in what follows as ‘the testator’) empowered the trustee of the trust to bind the trust property by means of an unlimited deed of suretyship for the proper compliance by Jan Alexander

Mokken, the testator's eldest son and one of the beneficiaries of the trust, of all his obligations, present or future, to the respondent.

It was common cause between the parties that if the Court were to find that the trustee was so authorised a final sequestration order would have to be made.

[3] In his will the testator, after making two bequests, directed that the residue of his estate should be transferred to the trustee to be held in trust for the purposes and upon the trust set out in the will, which was to be known as the 'HF MOKKEN WILL TRUST'.

In the will the expression 'the Trust Estate' was used as a collective reference to the residue transferred to and all investments made by the trustee.

The testator appointed his widow as executrix and trustee under the will.

[4] The powers of the trustee were set forth in Paragraph 4 of the will, the material provisions of which read as follows:

- ‘(1) The Trustee shall have the power
- (a) to leave the Trust Estate in the actual state of investment in which it is received by her;
 - (b) to vary and transpose investments regardless of limitations or restrictions imposed by Statute or otherwise on persons in a similar capacity;
 - (c) to sell, alienate or otherwise dispose of the assets of the Trust Estate in such manner, for such consideration (in money or otherwise) and upon such terms and conditions as she, in her sole discretion, may determine and to receive the consideration and grant discharge therefor
 - (d) to invest and re-invest the assets of the Trust Estate or the proceeds of each sale of trust assets in any manner and in any form of investment she deems fit anywhere in the world and whether within the Republic of South Africa or elsewhere; the intention being that the Trustee shall have the widest possible powers of investment to ensure that the real value of the capital of the Trust Estate does not diminish with time and with that intention in mind to obtain advice from investment consultants from time to time and to pay their fees from the income of the Trust Estate;
 - (e) to purchase, sell, transfer and otherwise deal in immovable property and incorporeals, in all cases upon all such terms and conditions as she in her sole discretion may deem fit, provided that any immovable property acquired by the Trustee in terms of this Will shall be registered in the name of the Trust;
 - (f) to borrow money upon such security as she in her sole discretion may deem fit, including the passing of Mortgage Bonds over immovable property belonging to the Trust and to accept donations from any person and on any terms and conditions;
 - (g) to secure the payment of any borrowings by the Trustee by mortgaging or pledging any asset of the Trust;

- (h) to call in, recover, collect and sue for all moneys owing to the Trust, to foreclose bonds and to buy in security;
- (i) to allow time for the payment of any debts due to the Trust and to compromise, compound or submit to arbitration any such debt and any claim made against the Trust;
- (j) to exercise all the voting rights attaching to any shares, debentures or other securities forming part of the Trust Estate;
- (k) to enter into, vary and cancel agreements relating to the holding, disposal and exercise of votes in respect of shares in any company or companies forming part of the Trust Estate;
- (l) to enter into any agreement with a company reducing its capital and in which the Trust holds shares and receive any capital returned in the form of cash, securities or otherwise;
- (m) to consent to any reorganisation or reconstruction of any company or companies, the securities of which are from time to time held by the Trust and to consent to any reduction of capital or other dealing with such securities;
- (n) to improve and develop immovable property forming part of the Trust Estate by erecting buildings thereon and otherwise to expend the Trust Estate upon the preservation, maintenance and upkeep of any such property and to demolish any buildings;
- (o) to allow any person to occupy an immovable property or use any immovable property forming part of the Trust Estate at such rental or consideration as he in his sole discretion may determine, provided that should such occupier or user be a beneficiary of the Trust, the Trustee may dispense with the payment of rental or consideration.
- (p) to determine whether any amount received by the Trust, including all profits made on the realisation of investment or other assets, represents for the purpose hereof, capital or income;
- (q) to pay out of the Trust Estate all taxes and other imposts levied and imposed on or calculated by reference to the capital or income of the Trust or to any heir on account of his interest in the Trust or which may be imposed on the Trustee in respect of matters arising out of the Trust;

- (r) to determine whether and to what extent any amounts disbursed are on account of capital or income;
- (s) to employ agents and other people to assist in carrying out the objects and purposes of the Trust and to pay their reasonable fees, commission and remuneration and other charges out of the Trust Estate;
- (t) to institute legal proceedings of every nature on behalf of and in the name of the Trust and to defend any legal proceedings which may be instituted against the Trust;
- (u) to grant credit on terms of such nature as she may deem fit in respect of the payment of the purchase price of any asset forming part of the Trust Estate, sold by her;
- (v) to transfer all or any of the assets forming part of the Trust Estate to any place outside the Republic of South Africa and to administer the Trust Estate or such transferred assets at such place;
- (w) to enter into partnership or any joint venture with any person or body corporate for the purpose of carrying on any trade, business or industry;
- (x) to sign all documents of whatsoever nature and to do all things necessary to give effect to any of her decisions;

and generally all such powers as are allowed by law; the intention being that the Trustee shall have the widest possible powers and unfettered discretion to exercise such powers subject only to the limitations placed on her by law.

- (2) I direct that my Trustee shall expend so much of the income derived from the Trust Estate as she in her sole discretion shall deem fit on the maintenance of my wife and on the maintenance and education of our children. In exercising her discretion as to the amounts so to be expended, my Trustee shall have regard to my wish that my wife shall continue to enjoy a standard of living not lower than that enjoyed by her at the date of my death and to my further wish that each of my children shall be given the opportunity of benefitting from a university or other post-matriculation education up to the attainment by him of a bachelor's degree or other comparable qualification. Should any child of mine cease to attend an educational institution or not be as diligent in the pursuit of his studies as my Trustee shall consider to be reasonable or should any such child fail to attain results which my Trustee shall consider to be reasonable, my Trustee shall be entitled to withhold, wholly or to such extent as she shall consider to be proper, financial support for such child's education for such period or periods as she shall

- deem to be desirable in the circumstances. My Trustee shall continue to exercise the powers granted to her in terms of this Sub-paragraph until all my children shall have attained bachelors' degrees or shall have ceased to qualify for financial support for their education as hereinbefore provided. All income derived from the Trust Estate and not so expended shall be invested as part of the capital thereof.
- (3) With effect from the date on which my Trustee shall cease to exercise the powers granted to her in terms of Paragraph (2) of this Paragraph and until the date of distribution as hereinafter defined, all income derived from the Trust Estate shall accrue to and be paid to my wife and my children in the proportions of two-fifths to my wife and one-fifth to each child.
- (4) My Trustee shall further be entitled but not obliged from time to time in her absolute discretion to make advances out of the Trust Estate to or on behalf of my wife and any of my children for any special reason such as illness or for any business undertaking or for purposes of travel or, in the case of my children, for marriage or for any other special reason which my Trustee in her sole discretion may deem to be for the benefit of my wife or such child or children. All such advances shall be brought into account in making the final distribution of the Trust Estate as hereinafter provided.
- (5) For the purposes of this Paragraph the expression "the date of distribution" shall mean the date on which my youngest child shall attain the age of 25 (TWENTY-FIVE) years or, in the event of his earlier death
- (a) the date on which he would have attained such age; or
 - (b) the date on which my Trustee elects to terminate the H.F. Mokken Will Trust;
- whichever is the earlier.
- (6) On the date of distribution my Trustee shall pay and transfer the whole of the Trust Estate to my wife and my children in equal shares provided that:
- (a) All advances that may have been made in terms of Paragraph (4) hereof shall be taken into account;
.....
- (7) (a)
- (b) Until a beneficiary shall have received from the Trustee the whole of his share in the said Trust Estate, so much of the income therefrom as the Trustee in her absolute discretion will decide to distribute, shall be paid to or on behalf of the beneficiary for his maintenance and education as the Trustee shall deem fit or for the purpose of paying any taxation assessed

upon the income accruing to a beneficiary from the said Trust. Any income which is not distributed by the Trustee in terms of this Sub-paragraph shall be added to and treated as part of such beneficiary's share of the said Trust Estate;

- (c) Notwithstanding anything to the contrary hereinbefore contained, the Trustee shall be entitled, from time to time, to pay to and apply for the benefit of a beneficiary, before the due date for payment thereof as hereinbefore provided, the whole or any portion of the share of such beneficiary of the said Trust Estate held by the Trustee on behalf of the beneficiary, if in the opinion of the Trustee the same is reasonably required by or for the benefit of the beneficiary. Further, the Trustee shall be entitled, if she sees fit to do so, to postpone the due date for payment of the whole or any part of the capital to which a beneficiary is entitled in terms hereof for such period or periods as she may, in her discretion, deem fit, but not beyond the date that such beneficiary attains the age of 30 (THIRTY) years
.....'

[5] The testator's widow was granted a letter of authorisation in terms of section 6(1) of the Trust Property Control Act 57 of 1988 on 8 August 1990.

On 28 September 1995 she signed a document in which she purported to bind the trust as surety and co-principal debtor in *solidum* in favour of the Magaliesbergse Graankoöperasie Beperk (to which I shall refer in what follows as 'the co-op'), the predecessor in title to the respondent, for the proper and prompt repayment by her eldest son, Jan Alexander Mokken, of each and every amount which he then owed or in the future might owe to the

co-op and also for the prompt and proper performance by him of all other obligations of whatever nature which he then had or might incur towards the co-op.

[6] Not much care and consideration appears to have preceded or accompanied the execution of the deed of suretyship in the present matter. I say this because the deed of suretyship signed by the testator's widow, purportedly in her capacity as trustee, was headed 'Borgakte (Algemeen Maatskappy)'. It appears that a form used by the co-op when companies stood surety in favour of the co-op for the debts of others was used. In the deed the trust, after being initially named, was throughout referred to as 'die Maatskappy'. Annexed to the deed was what purported to be an extract from the minutes of a meeting of directors of 'die Maatskappy' at the foot of which the testator's widow certified that the transaction was in accordance with the Memorandum and Articles of Association of 'die Maatskappy' and

she purported to indemnify the co-op against any losses arising from any action should the transaction be *ultra vires* 'die Maatskappy'.

[7] The judge in the Court below held that the testator's widow was authorised in terms of the trust deed contained in the will, in her capacity as trustee, to bind the trust estate in respect of an unlimited suretyship.

[8] In his judgment he referred to the fact that the words 'in her sole discretion' were repeatedly used in the trust deed and he placed considerable emphasis on the unnumbered paragraph which follows paragraph 4 (1) (x) in which it was specifically provided that the trustee was to 'have the widest possible powers and unfettered discretion to exercise such powers subject only to the limitations placed upon her by law'. It was held that it was clear from the use of these words that the testator's widow had a very wide discretion with regard to the management of the affairs of the trust. The judge found it significant that the trustee's discretion in terms of paragraph

4(4) to make advances out of the trust estate to or on behalf of the beneficiaries was described in the will as an absolute one. He held that the execution by the trustee of a deed of suretyship to the respondent in respect of her eldest son was incidental to the making of an advance to him to enable him to acquire his own farm.

[9] It was accordingly held that a provision was to be implied in the trust deed that the trustee could stand surety to secure the debt of a beneficiary and to protect the interests of that beneficiary and of the trust itself.

The reference to the interests of the trust itself was based on a finding that the testator's eldest son had incurred the debts which were covered by the suretyship not only in respect of his own farming business but also in order to carry on the farming activities of the trust.

[10] The judge held in terms that because the trust deed authorised the making of an advance to one of the beneficiaries it also authorised the

provision of a deed of suretyship because this was reasonably necessary in order to render the making of an advance meaningful.

[11] He pointed out that nowhere in the trust deed was there a provision requiring the trustee to obtain security in respect of an advance made from the trust capital to a beneficiary and said that he saw no difference in principle between placing the trust at risk by making an unsecured advance and doing so by means of the provision of suretyship. This fitted in with the intention of the testator, so it was held, that the trustee should be vested with unlimited powers to benefit one or more of the beneficiaries over the others. She was empowered, so the judge said, to spend all the trust capital for one or more of the beneficiaries to the exclusion of the others.

[12] Having held that the trustee was empowered to bind the trust by signing a deed of suretyship, the judge proceeded to say that he could not see any distinction between an unlimited suretyship and a limited one. The

trustee could, so it was said, monitor the extent of the production credits extended to her son and the loans made to him and if it appeared that his conduct was putting the trust at risk, she could terminate the suretyship and avoid further exposure for the trust. The fact that she failed or may have failed to do so could not in his view play a role in the interpretation of the will and the fact that a proper division or one envisaged by the deceased could not take place was a fortuitous event which was in the judge's view irrelevant to the interpretation of the will.

[13] The question to be considered in my opinion is whether the court *a quo* was entitled to find that the wide language of the trust deed, in particular the repeated use of the words 'in her sole discretion' as well as the fact that in the unnumbered paragraph which follows paragraph 4(1) (x) she was given 'all such powers as are allowed by law, the intention being that the Trustee shall have the widest possible powers and unfettered discretion to

exercise such powers subject only to the limitations placed on her by law', indicated that the testator intended her to have the power to bind the trust estate by an unlimited deed of suretyship. It is not necessary to make a finding on the question as to whether she was empowered to provide a limited suretyship on behalf of the debts of a beneficiary for an amount less than his or her anticipated share on the final distribution of the trust estate.

[14] In my view, as counsel for the appellant correctly submitted, although wide powers were given to the trustee in the trust deed, all these powers were given to her so as to achieve the objects of the trust, which do not include the provision of unlimited deeds of suretyship. The wide powers given to the trustee are clearly subject to the express provisions and the purpose of the trust deed that the real value of the trust assets must not diminish and it must be possible for the trustee on the termination of the trust to make an equal division of the trust assets among the beneficiaries,

viz, the widow and the testator's three children. Although provision is made for advances to be made to some or all of the beneficiaries it is clearly provided in paragraph 4(4) that all such advances must 'be brought into account' in making the final distribution.

Although the phrase 'brought into account' may be ambiguous, it is to be interpreted restrictively in this case and its clear meaning appears to be that the adjustments necessitated by the fact that advances were made are to be effected in the accounts of the final distribution, so that some beneficiaries may receive less than others, possibly nothing at all, provided that what each receives (by way of advances received and final distribution) is an equal share of the trust estate at the date of distribution plus the sum of the advances made. The testator does not appear to have intended that one or more of the beneficiaries should receive as an advance more than what it was envisaged would be his or her final share, with the result that a payment in

would be required, because, if the beneficiary concerned were unable to pay in the amount required, the testator's purpose in seeking to ensure an equal distribution among the beneficiaries of the trust on its termination would thus be defeated.

[15] In my view the provisions in the trust deed have to be read against what one may call the common law background, viz that a trustee has no power (absent a provision to that effect in the trust deed) to expose the trust assets to business or farming risks: see *I A Essack Family Trust v Soni and Others* 1973(3) SA 625(D) at 627 G-H and *Honoré's South African Law of Trusts*, 5 ed, § 181. A trustee who contends that such a power is necessary to preserve the value of the trust property must apply to court for the necessary power: *Honoré loc cit*. In the present case it is important to note that the testator conferred a whole raft of powers on the trustee including the

power to conduct a business and to deal with the properties but significant in its absence from the powers so conferred was the power to stand surety.

[16] It appears from the summary given above of the reasons given by the judge in the Court *a quo* that he said at one point that the power to stand surety was reasonably incidental to the power to make advances. At another point he said that the provision of a deed of suretyship was reasonably necessary to render the making of an advance meaningful. As far as his statement that the provision of a deed of suretyship is reasonably incidental to the making of an advance is concerned it is clear that the wrong test was applied. In interpreting a will (and the same principle must apply where a trust deed incorporated in a will is to be interpreted) it is clear words can only be read in by necessary implication. This has been repeatedly laid down by the courts. For present purposes it is sufficient to refer to *Heymans v Van Tonder* 1985(3) SA 864(A) at 877 C-E.

The principles to be applied in implying a provision in a will are the same as those to be applied when tacit terms are sought to be implied in a contract: see *CIR and Others v Sive's Estate* 1955(1) SA 249(A) at 260 C-D.

[17] On the application of those principles, it is clear in my view that it is impossible to imply a provision in the will in the present matter that the trustee was empowered to execute an unlimited deed of suretyship in favour of one beneficiary under which the trust could be liable to the full amount of the trust assets and possibly beyond, so that the other beneficiaries could on the termination of the trust receive nothing.

[18] Both in the court *a quo* and in this court the respondent endeavoured to contend that the deed of suretyship in the present case had been provided to protect the interests of the trust and that the debts covered by the suretyship were incurred in order, *inter alia*, to carry on the farming activities of the trust. In my view it is not necessary to make a finding on

this issue for two reasons: first, because, as I have pointed out, the trust deed did not expressly or by necessary implication confer the right to provide an unlimited suretyship on the trustee so that if it were indeed necessary to preserve the trust assets that she should have the power to stand surety she would have had to approach the court for the power; and second, because it is clear that the suretyship she provided went far beyond any endeavour to protect the trust assets because it related to every indebtedness, present or future, of the testator's eldest son, for whatever cause arising, that is to say whether or not it had anything to do with the preservation of the trust assets. Indeed when the point was put to counsel who appeared for the respondent he, quite correctly in my view, conceded that the suretyship could not be partly valid in respect of debts relating in some way to the trust estate and partly invalid in respect of all other debts.

[19] In my view the trustee in the present case was not authorised to execute an unlimited suretyship for a beneficiary's debts. It follows that the trust estate should not have been sequestrated.

[20] The following order is made:

1. The appeal is allowed with costs, including those occasioned by the employment of two counsel.
2. The order made in the court *a quo* is set aside and replaced by the following:

‘The provisional order of sequestration is discharged with costs.’

CONCURRING:

VIVIER ADP

NAVSA JA

MPATI JA

HEHER AJA

.....
IG FARLAM
JUDGE OF APPEAL