

The rights of beneficiaries in a testamentary trust

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I recently had opportunity to consider the unreported judgement of the Northern Cape Division of the High Court in the case of Frederick Lodewicus van der Merwe v Louise Ellen Danielz NO and others.

Briefly the facts of the case were as follows: The deceased left his farm to a testamentary trust in favour of his two sons. This bequest was subject to a lifelong usufruct in favour of his wife, which usufruct, upon her death, was to pass to his sons for a further period of two years.

There was a cash shortfall in the estate and the executor decided to sell the farm to generate the cash required to settle the shortfall. As the brothers could not agree on the manner and conditions of sale the Master was requested in terms of section 47 of the Administration of Estates Act to consent thereto, which it did. Section 47 requires that heirs who have an interest in the assets to be sold have to agree in writing to the manner and conditions of the sale and, only if the heirs with such an interest fail to reach agreement, can the Master prescribe the manner of sale and the conditions subject to which the assets are to be sold.

Subsequent to the sale at auction the applicant approached the court to have the sale set aside because, so he averred, there was no cash shortfall in the estate.

The court in delivering its judgement confirmed following legal principles:

- a) Whether or not an estate asset is to be sold is the executor's decision. It is not for the Master to decide whether or not an asset will, in principle, be sold. Section 47 only authorises the Master to prescribe the *manner and conditions of sale*.
- b) The only other requirement of section 47 is for the *interested heirs* to agree on the manner and conditions of sale.
- c) The court then considered whether the brothers, as beneficiaries of the testamentary trust, qualified as heirs in terms of section 47.

The court confirmed that the brothers, in their capacities as beneficiaries of the testamentary trust, were not heirs as intended by section 47. The trust as the legatee and recipient of the farm was the heir. The brothers' agreement to the manner and conditions of the sale was therefore not required. Only the agreement of the trustee of the trust was required. The executor need not have tried to get the brothers' agreement to the conditions and manner of sale. The executor was also not required to obtain the Master's agreement to the manner and conditions of sale, provided that the trustee of the testamentary trust agreed thereto. The Master was therefore also unnecessarily and erroneously approached.

The court specifically pointed out that a beneficiary of a trust's recourse would be against the trustee should he be proven not to have met his fiduciary duty - something which was not done in this case.

- d) The court further found that as the applicant was not an heir for the purposes of section 47 he lacked the legal standing to bring the application to set aside the sale, which application would have had to be brought by the trustee of the testamentary trust should he have wished to do so.

This case highlights the necessity of distinguishing between the trust as heir (or legatee) in terms of a will and the beneficiaries of the trust. Although the beneficiaries may receive the ultimate benefit from the assets bequeathed to the trust they nevertheless do not, as a result thereof, qualify as heirs as intended by section 47 of the Act. The fact that a person may be a beneficiary of a trust does not in and of itself invest such person with the right to act on behalf of the trust in which he is a beneficiary, even if the trustees of the trust fail to act or act in a manner that the beneficiary does not agree with.