IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 19/4/2005

CASE NO: 35279/2002

not reportable

IN THE MATTER BETWEEN:

LIZABÉ VENTER	PLAINTIFF
AND	
LEANA OOSTHUIZEN NO	1ST DEFENDANT
LEANA OOSTHUIZEN NO	2ND DEFENDANT
DINA MYBURGH NO	3RD DEFENDANT
LEANA OOSTHUIZEN NO	4TH DEFENDANT
THE MASTER OF THE HIGH COURT	5TH DEFENDANT

JUDGMENT

PATEL, J

I. *Introduction*

[1] Dr L A C Myburgh, the deceased, was a well-known surgeon in Pretoria. During his lifetime he had a passion for wild game and which eventually became a very lucrative vocation. He became one of the leading game farmers in this country

and as such he amassed a very large fortune at the time of his death on 6 July 1999.

II. *Issue*

[2] The plaintiff, Lizabé Venter, one of the deceased's three children, sues for an order declaring that the estate of the deceased is the owner of the wild game. These animals are not mentioned in his last will and testament.

[3] The crisp issue for determination is *first*, whether the game that were on the farms Wycombe, Doorenwaard, Gordon, Rietgaten and Doorvaart belonged to the deceased at the time of his death. The first three farms are collectively referred to as "Tshwarelano" and the latter two are collectively known as "Rietgaten". *Secondly*, whether the game on all these farms formed part of the deceased's personal estate and to be devolved as part of the remainder of his estate to the L A C Myburgh Family Trust.

[4] The remainder of the relief sought is regarding the administration of the deceased's estate contingent upon the determination of the issue referred to above and costs.

III. *Deceased's family*

[5] The deceased was married to Dina Myburgh. A daughter, Leana, was born of the marriage and they also adopted a daughter Lisabé and a son André-Chris. The

deceased loved and treated his children equally. Inspite, the deceased and his wife were divorced, he provided for her wellbeing. Presently, Ms Myburgh is 77 years old and suffering from Alzheimers disease.

IV. *Salient background*

[6] The three farms, known as Tshwarelano, were each wholly owned by three different companies, namely Betail Rouge (Pty) Ltd, Chrijaca (Pty) Ltd and Lesandre Myburgh (Pty) Ltd. Since the mid 1990's all the shares in these companies are held by the Leana Beleggingstrust. During the mid 1990's Rietgaten was transferred to Lisabé Beleggingstrust.

[7] Historically, Rietgaten was the first of the farms established by the deceased. He initiated and established game farming on all properties. Between 1965 and 1969 the deceased was appointed as a director and he held the shareholding in the three companies, that owned Tshwarelano. The deceased also obtained another game farm known as Wildland (Lubeslust).

[8] From the early 1990's the deceased and his accountant and auditor, Mr H Venter, engaged in extensive estate planning strategies. Three *inter vivos* trusts were established as well as a family trust. The three trusts, each for the sole benefit of each of the three children, effectively obtained the ownership of one or more game farms with game established on it. These farms were fenced and *occupatio* took place regarding the animals on the farms. Effective game farming was

conducted on these farms since the mid 1970's. By way of *occupatio* many animals on the farms are off-springs.

[9] The family trust was primarily established for the benefit of Ms Dina Myburgh as income beneficiary until her death and thereafter for the three children as income and capital beneficiaries. The salient considerations in the estate planning were compliance with the deceased's intentions to provide for his dependents whilst he retained the management and control of the farming operations until his death. The practical executability of the estate planning was to minimise risks as well as maximising the saving of estate duty and continuity of the plan immediately after his death and costs.

[10] Leana, who is cited in her various capacities as the first, second and fourth defendants, was of some concern to her father because of an eye defect which she was born with. In the deceased's opinion Leana was not able to look after herself and her family even though she is married with a child born who is still a minor. Lisabé was married to a wealthy businessman and living in Johannesburg. The deceased was of the opinion that he wanted her to have a game farm for the sheer pleasure of game established on it even though she would not need to rely on its operation to generate an income since she was well cared for. During 1995 the son André-Chris was in possession of Wildland which was virtually with all the game established on the property and it was sold at the behest of the deceased. The total proceeds of the property including the game, with the exception of

minor hunting rights granted to third parties for a limited period of time, was wholly disposed to the A C Beleggingstrust for the benefit of the son.

[11] The following appointments as trustees of the various trusts were made to-

- The Leana Beleggingstrust: the deceased and Leana 0osthuizen (sole beneficiary: Leana 0osthuizen).
- The Lisabé Beleggingstrust: the deceased (sole beneficiary: Lisabé Venter).
- The A C Beleggingstrust: the deceased but in his final testament of 16 May 1999 the deceased appointed all three children as trustees of this trust.

[12] All the farms with the game on them were managed by the deceased until his death. The allocation of species of game on these farms were at the discretion of the deceased. He also managed all financial transactions in his own name.

[13] The deceased left to Ms Dina Myburgh, *inter alia* in her own name, a freehold property with a dwelling in New Muckleneuk, Pretoria as well as a cash distribution of approximately R2,4 million to the L A C Myburgh Family Trust, for her benefit (at the time when the final testament and will was executed) which was adequate for the purpose which the deceased intended in this regard.

[14] The deceased expressly articulated his wishes and intention for both his daughters that "*julle moet mooi saam boer en julle moet nie baklei nie*". But he made no mention in any of the wills of the game, being the most valuable asset.

[15] It is against this background that the plaintiff is seeking an order that ownership of the game belongs to the personal estate of the deceased and that it should be transferred to the L A C Myburgh Family Trust. The plaintiff bears the *onus* to prove that she is entitled to such an order.

[16] From the evidence it appears that the plaintiff's version is virtually on the financial statements and certain entries submitted by the deceased's auditor, H Venter, and the inferences that might be drawn from the testimonies of Lisabé Venter and her auditor, Mr Van Tonder. 0n the other side Leana 0osthuizen, in all her capacities, is defending that deceased's actions and intentions. Besides her evidence there is the testimonies of Ms Elize Pienaar, Mr Herman Venter, Ms Koba Pretorius and Mr Edward Vorster regarding the wishes and intentions of the deceased.

V. *Analysis*

[17] In this case there is voluminous documentary evidence and oral testimonies, therefore an apt starting point in an analysis of all the evidence is to consider the various iterations of the deceased's wills. They reveal the way that the remainder of the estate would be dealt with since it was a major consideration in the

deceased's mind. In the first iteration (bundle B, p1 and 2) the remainder of the estate is left to the deceased's wife, but only after all "lewende hawe" had already been left to the trusts of the three children. In the second iteration (bundle B, p7 to 11) the remainder of the estate is left in equal parts to the three children, after the cattle ("vee") had been left to the trusts of the three children in equal parts. Then, in the third iteration (bundle B, p3 to 6) the remainder of the estate is again left in equal parts to the three children, after the "vee" has been left in equal parts to the two daughters. In the final iteration of the deceased's will (bundle A, p6 to 8) no animals are specifically dealt with and the remainder of the estate is left to the family trust. The expression "remainder of the estate" does not relate to inconsequential items but was dealt with as an integral part of the estate planning.

[18] The true extent of the assets in the deceased's estate cannot be determined from the inventory that was prepared after his death. The inventory (bundle A, p352 to 355) was completed by the offices of the deceased's auditors, using the annual financial statements of the 1998 financial year, which were already by then at least sixteen months old. These statements would in any event not have reflected the game as assets in the estate, due to the practice note of the Receiver of Revenue (exhibit "E"). It is common cause that the inventory is not complete or accurate. There are numerous assets in the liquidation and distribution account that do not appear in the inventory, and similarly there are various items that appear in the inventory that are not to be found in the liquidation and distribution account. This liquidation and distribution account (bundle A, p254 to 261) cannot

be used to determine the true extent of the estate of the deceased. It is clear from the evidence that the liquidation and distribution account was prepared as a result of the letter from E Y Stuart Attorneys dated 22 November 2001 (bundle A, p1 to 5) read with the letter of Venter & Co of 14 January 2002 (bundle A p 327). Further, account should rather be regarded as the formal source of the dispute between the parties as it resulted in the objection referred to in the letter of 5th defendant at bundle A, p345, read with p359.

[19] An analysis of the assets as listed in the liquidation and distribution account (bundle A, p255 to 256) shows that, on the defendant's version, the "remainder of the estate" would consist only of "huishoudelike meubels en toerusting en klerasie" valued at about R100 000,00 and of which a certain quantity would in any event also devolve to the two daughters in terms of clauses 6.4 and 6.6 of the deceased's last will and testament (bundle A p7). The remainder of the assets listed in the liquidation and distribution account are legacies that have been bequest to specific persons. The probabilities appear to be that the deceased would not have dealt with the remainder of his estate in the manner alluded to since that remainder entailed only the items indicated in the liquidation and distribution account.

[20] The best source of information to determine whether the wild animals form part of the estate of the deceased are the financial documents that were prepared by the deceased himself and by his auditors during his life. These documents were

prepared contemporaneously and there is no reason why they should not be regarded as accurately reflecting the true state of affairs.

(a) *Documentary evidence*

[21] An examination of the documentary evidence in the light of the undisputed facts reveal that except for a number of impala and kudu that were on the various farms at the time that they were fenced-in, all the animals concerned were purchased and brought onto the farms. The only animals over which ownership was obtained by *occupatio* were a number of the impala and kudu. The evidence also shows that more impalas and kudus were purchased and brought onto the farms and all the animals of that species were dealt with as part of the farming operations. No distinction was made between the species and the remainder of the animals. Effective control measures were put in place so that the ownership of the game was at no time lost. Thus, it appears that the owners of the land could not be the owners of the wild animals if such effective control measures were not present. The transactions during which animals were purchased were all alike. There is no dispute that certain of the animals purchased should be dealt with otherwise than the remainder of the animals. Further, regarding each of the agreements whereby the wild animals were purchased by the deceased in his own name. He paid for them and arranged for their transport in his own name. He claimed the VAT that he paid on the purchases as input taxes in his personal VAT returns. These facts are evident of *prima facie* proof that the deceased was personally the contracting party in each of the transactions and that he did not

enter into them in a representative capacity. This is fortified by the uncontested evidence of Mr Marius van Tonder that the deceased could not have claimed such input taxes in his own name if he was acting for a third party.

[22] Mr Wagenaar rightly submitted on the plaintiff's behalf that the consequence of the deceased entering into agreements for the purchaser and paying for the game himself and taking delivery of the animals himself on a balance of probabilities demonstrate that he became and was the owner of the animals. The only alternative would be if he acted as an agent or representative of a third party. However, inferentially if he acted for any of the owners of the land, be it in his capacity as director, trustee, agent or in a representative capacity then the transactions should have been contained in at least the annual financial statements of the three companies. If the owners of the land were the purchasers of the game acting through the deceased then the game should have been reflected as assets in the accounting records and annual financial statements of the three companies in accordance with the provisions of sections 284, 286 and Schedule 4 of the Companies Act 1973. Further, the evidence of Mr Venter and Mr Erasmus was to the effect that wild animals are not considered to be assets that have to be listed in the accounting records and annual financial statements is far-fetched. The two witnesses base their point of view on the practice note of the Receiver of Revenue (exhibit "E") but the note pertains only to the opening and closing stock of a *bona fide* farmer, and relates to the annual financial statements only as opposed to the accounting records.

[23] In analysing the documentary evidence it is evident that if the owners of the land had become the owners of the game at the time the deceased purchased the game he would not have been entitled to deal with them. In his capacity as the director of the three companies and also in his capacity as the sole trustee of the Lizabé Beleggingstrust, the deceased would have been obliged to deal with the assets of each of these entities separately from each other and from his own estate. In the case of the three companies he would have been obliged to utilise the assets of the companies for the benefit of those companies. In the case of the Lizabé Beleggingstrust he would have been obliged to use the assets of the trust for the benefit of the beneficiaries of the trust. It is not disputed that during the entire period the deceased operated a single farming operation spread over all of the farms and used the income indiscriminately without distinguishing between the beneficiaries of the proceeds.

[24] 0n the basis of the documentary evidence, I find that the game formed part of the deceased's own estate and none of his farming operations would have been in breach of his various fiduciary obligations. The evidence shows that the deceased was a meticulous, honest and well-organised businessman. He was an individual to whom the breaches of fiduciary duties cannot be ascribed. Mr Van Tonder's undisputed evidence was that any suggestion that the conduct of the farming operations in the name of the deceased in circumstances where the game was the property of the owners of the land would not only tantamount to breaches of the

fiduciary obligations on the part of the deceased, but would also represent a scheme to defraud the South African Revenue Services. The deduction of expenses incurred by one tax payer from the profits of another tax payer, is not admissible and neither is the claiming of VAT as an input if one is not a party to the agreement concerned. This fortifies my finding that the game formed part of the deceased's estate.

(b) *Evidence of witnesses*

[25] The evidence of the deceased's auditor, Mr Venter, who is also Leana's auditor, is that the deceased had ten objectives that could only be attained if the wild animals did not form part of his estate, but were in fact included in the estate of each of the owners of the land. With the exception of one of these objections, namely estate taxes, it is respectfully submitted that the objects are attained equally if game formed part of the estate of the deceased. The *first* such objective was nothing but a general statement of intent that the deceased wished to execute his wishes. The *second* such objective was that the deceased wanted to provide for his dependant, more particularly his wife and the first defendant. If the wild game form part of the remainder of the estate and thus devolves to the family trust, with the trustees (being essentially the first defendant and people working with her) continue the farming operations in exactly the same manner that they have done thus far, a substantial income (R1 million to R1,5 million per year) would be generated that could be used for the maintenance of the first defendant and the deceased's wife. In this regard it should be noted that the first defendant testified

that she makes a very good living from the farming activities. The family trust being a discretionary trust, it would not have to treat the income beneficiaries equally but would have to be objective regarding the treatment of the income beneficiaries so that the needs of the first defendant and of the deceased's wife would obviously be attended to first.

[26] The *third* objective was that the deceased wanted to retain control over the assets so that he could manage it in his own discretion for the benefit of the beneficiaries. This objective supports the plaintiff's case. This objective would best be met if the deceased retained ownership over the game. Any transfer of the ownership to the land owners would limit the ambit of the discretion with which the deceased would have been able to deal with the animals because of the fiduciary duties. The *fourth* objective was that the planning had to accommodate the circumstances. Thus the objective could be met equally whether the game formed part of the deceased's estate or whether it belonged to the land owners. The evidence is that the farming operations on Rietgaten and Doorvaart were not self-sufficient and would require the inputs from Tswarelano and Gordon, as happened during the life of the deceased when he operated a single farming operation over all five the farms. Consequently an attempt to operate Rietgaten and Doorvaart as a separate farming operation would require greater inputs from the plaintiff than would otherwise be the case. The plaintiff's uncontested evidence in this regard is that she was forced to sell the farm due to the fact that her attempt at independently operating Rietgaten and Doorvaart due to the attitude

taken by the first defendant regarding the ownership of the game resulted in her being obliged to sell the farm concerned. The *fifth* objective was that the estate planning had to be practical and also adaptable if circumstances changed. The estate planning would, during the life of the deceased, not have been practical if the ownership of the game had somehow been transferred to the owners of the land. The retention of ownership of the game in the name of the deceased would have resulted (from a farming perspective) to be much more practical and it accords with the manner in which the deceased operated a single farming operation over the five farms.

[27] Then, the *sixth* objective was to protect the assets against risks. There are no risks if the animals belong to the family trust due to the fact that the plaintiff is a businesswoman. The deceased also wanted to protect the assets against the risk arising from marriages, which he did by way of clause 5 of the last will and testament and which would certainly also be the case if the game concerned belong to the family trust. This risks that the deceased wanted to address are the risks contained in the farming operation itself. In this regard it was put to Mr Van Tonder that the structure by which the deceased operated the farming operations regarding the game was that he retained some usufruct whilst the remainder of the *dominium* was transferred to the owners of the land. None of the witnesses for the defendants, however, gave any evidence to support these submissions that had been made on behalf of the defendants to Mr Van Tonder. Instead Mr Venter initially testified that the businesses were separated into two groups, being asset

undertakings and operation undertakings with the result that all assets belonged in the asset undertakings and all the operations were done by the deceased in his own name thus protecting the assets of the asset undertakings. This structure is effective in estate planning when the assets are used for certain purposes, but not when they are alienated as part of the business. However, it can hardly be said that the assets (the wild animals) of the asset companies are alienated by the operational arm of the business without the asset entity becoming an integral part of the operation. When this conundrum was put to Mr Venter he changed the nature of this evidence and started testifying that there was in fact a "deelboerdery" which, when analysed, is nothing other than a partnership between the deceased and the various land owners. Such a partnership would certainly not assist in protecting any of the assets of the various entities and would in fact have brought the farms into the partnership estate, which certainly is not a good idea from an estate planning point of view. The *seventh* objective is the saving of estate taxes, and it is readily conceded that the retention of ownership of the wild animals in the estate of the deceased will lead to a substantial increase in estate taxes.

[28] The *eighth* objective is the continuity of the game farming after the demise of the deceased. There was no evidence to suggest that there has been any disruption of the game farming activities. Each of the actions taken by the first defendant in her capacity as the director of the three companies could as well have been taken by her in her capacity as the executor of the estate. The only practical result

would be that the benefits of the operation would not accrue to the first defendant in any capacity, but to the estate. That is purely financial and not practical. In this regard the first defendant raised queries about the relationship between the estate on the one hand and the three companies on the other hand, seeing that the estate would use the properties of the three companies for the game to exist on. As executor of the estate, and later as trustee of the family trust, the first defendant would be obliged and entitled to make reasonable provisions in this regard and would thus have been able to make an arrangement of a suitable nature between the estate and the family trust on the one hand, and the three companies on the other hand for matters to continue exactly as they have in any event.

[29] The *ninth* objective was to bring about income tax advantages. Under cross-examination Mr Venter conceded that this was a very insignificant consideration in the factual circumstances. Finally, the *tenth* objective was to bring about savings in costs in implementing the estate plan. Mr Venter mentioned two costs that would be involved, being transfer duty and stamp duty. If the wild animals were not to be transferred from the estate of the deceased to any other entity then clearly there would be no transaction which would be taxable or create costs in any way. The retention of the ownership in the estate of the deceased would thus be the easiest way to attain the objective concerned. Under cross-examination Mr Venter conceded that if the value of the wild animals were to be added to the value of the fixed properties that were transferred as part of the estate planning,

that both the transfer duties and the stamp duties would increase as the value of the property would be higher.

[30] In assessing the totality of evidence Mr Marius van Tonder, the plaintiff's expert witness, was a competent and a good witness. The only contradiction in his evidence was pertaining to whether wild animals should be indicated in the accounting records and annual financial statements of a company other than as opening and closing stock. His evidence is preferred over the evidence of Mr Venter and Mr Erasmus because the expert conclusion reached by Mr Van Tonder that the deceased was the owner of the game and that the three companies were not the owners was not contradicted. But the only evidence in this regard by Mr Venter was that there was a good explanation why the game was not reflected in the statements of the three companies. He, however, did not contradict the opinion of Mr Van Tonder regarding the ownership of the wild animals based on an analysis of the financial documents. Mr Venter's evidence regarding the ownership of the wild animals was based on his subjective interpretation of the wishes of the deceased as expressed to him. What is crucial is that the deceased expressly requested his two daughters that they "*moet saam boer*". The plaintiff has control over two of the five farms on which the single farming operation was exercised and is also a joint owner of all the farming implements. She would thus not farm together with the first defendant in her personal capacity but would farm together with the first defendant in her capacity as the managing trustee of the family trust. The evidence is clear that the single farming operation on all five the

farms was of such a nature that all of the facilities required to farm effectively and productively were not on each farm but that they had utilised the facilities on the other farm to effectively proceed with the farming operations.

[31] The evidence of the plaintiff herself and André-Chris Myburgh that the deceased had an intention of treating his children equally. This certainly lends credence to the deceased's express wish that the two sisters "moet saam boer" and accords with the provisions of the will. However, the same cannot be said for the evidence of the witnesses of the defendant and her witnesses. The first defendant was under the impression that she would end up with one third of the animals from which she would not be able to make a living for herself. There is no basis in law or otherwise as to why this situation would arise. Thus, she clearly misunderstood the legal position that would prevail if the game formed part of the family trust.

[32] Mr Venter's evidence is coloured since he is acting on the direct instructions of the first defendant and is bound in that regard to present his evidence that is in accordance with his manner of administering the deceased estate, whether he personally agrees therewith or not. He conceded to holding a different point of view earlier during the events specifically at the meeting that resulted in the invoices that the plaintiff issued on behalf of the estate. His attempts to distance himself from that earlier point of view are not persuasive. He was not capable of explaining the essence of the various transactions whereby the owners of land

would become the owners of the animals concerned. He contradicted himself directly and when he could no longer explain the contents of the transactions he resorted to avoiding questions by giving long-winded answers that did not relate to the questions concerned. Mr Venter and even the first defendant repeatedly said that "*dit is wat die dokter bedoel het*" or words to that effect every time that they were confronted with any contradictions in their evidence or the illogical results of their approach. Mr Venter was an unsatisfactory witness and his evidence is indeed susceptible to being rejected especially when compared to the evidence of Mr Van Tonder or any of the other plaintiff's witnesses.

[33] The evidence of Mr Erasmus was also unsatisfactory because he stated that he had no knowledge of the facts of the specific case and that his evidence was tendered *in vacua* and does not relate to the facts of this matter. The evidence of Ms Pienaar, Ms Pretorius and Mr Foster did not contribute to the resolution of the dispute at all. Ms Pienaar conceded under cross-examination that she had only very superficial knowledge of the affairs of the deceased and could not testify regarding any particulars thereof. Ms Pretorius did not present a single word of evidence regarding the ownership of the game and her evidence related only to the ownership of the farms which is not in dispute in this action. She did not take the evidence so far as to even suggest that the game was the property of the owner of the land. Mr Foster's evidence is to the effect that the game belong to the first defendant and the plaintiff personally but he provided no facts whatsoever to

support this evidence which is not only contradictory to the plaintiff's case but also to all the evidence tendered on behalf of the defendants.

VI. *Conclusion*

[34] 0n an analysis of all the evidence the plaintiff on a balance of probabilities discharged the *onus* that the game on all the farms belonged to the deceased at the time of his death. And that all the game on all the farms formed part of the deceased's estate. The game is to be devolved as part of the remainder of the deceased's estate to the family trust. Therefore, I find that the plaintiff is entitled to the relief claimed in her particulars of claim.

VII. *Costs*

[35] The second and third defendants were joined in the action since they have a direct and substantial interest in the subject-matter of the action. It was stated that no costs order would be sought against them unless they opposed the action. However, they elected to oppose the action together with the first and forth defendants. All of them were represented by Mr Snijmann SC. Therefore the plaintiff is entitled to a costs order against the first, second, third and fourth defendants to be paid jointly and severally including the costs of the plaintiff's expert witness.

VIII. *0rder*

[36] In the result an order is granted in terms of prayers 1, 2 and 3 of the particulars of claim, the costs to be paid jointly and severally by the first, second, third and fourth defendants and such costs to include the costs of qualifying and presenting the plaintiff's expert witness Mr Van Tonder.

E M PATEL
JUDGE OF THE HIGH COURT

35279-2002