OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No.: **14270/2015**

In the matter between:

MARIA MAGRIETHA LOUW N.O. Applicant/First Defendant

(In her capacity as duly appointed Executrix
in the deceased estate of the late Pierre Koekemoer
with Master's reference: 5233/2015)

and

ANNA CATHARINA KOCK First Respondent/Plaintiff

THE MASTER OF THE HIGH COURT, CAPE TOWN

Second Respondent

JUDGMENT delivered **31 OCTOBER 2016**

MEER J.

Introduction

[1] This application concerns the interpretation of Section 2B of the Wills Act 7 of 1953 ("the Act"), which provides as follows:

> ***"2B Effect of Divorce or Annulment of Marriage on Will.*** *– If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage."*

[2] The First Respondent is a surviving previous spouse as contemplated in Section 2B of the Act ("Section 2B"). In 2004 her deceased previous spouse, the late Pierre Koekemoer ("the deceased"), together with her executed a joint will in which, at clause 1, they each nominated the survivor of them as sole and universal heir. They divorced on 17 October 2014 and the deceased died within three months after the divorce on 7 January 2015. The Master, the Second Respondent, has refused to give effect to clause 1 of the Will for the reason that Section 2B prevents the First Respondent from inheriting.

[3] The First Respondent, in turn, as Plaintiff, instituted an action ("the main action") against *inter alia* the Applicant as First Defendant, who is the executor of the deceased's estate. For ease of reference I shall refer to these two parties as they are cited in the main action. In her action the Plaintiff sought to compel the Master to give effect to clause 1 of the will. She claimed that she is entitled to inherit under the will as no other person is nominated as heir to the deceased, and because it appears that the deceased did not intend to benefit any other person upon his death. The First Defendant in her capacity as executor of the estate of the late Pierre Koekemoer seeks the dismissal of the Plaintiff's claim.

Background Facts

[4] The Plaintiff and the deceased were married for some 29 years. During the subsistence of their marriage and some 11 years before his passing, they implemented the aforementioned joint will on 6 July 2004. Clauses 1 and 2 of the will read as follows:

> **"1.AFSTERWE VAN DIE EERSSTERWENDE**
>
> Ons benoem die langslewende van ons as die enigste en algehele erfgenaam van die boedel van die eerssterwende van ons."
>
> **2. AFSTERWE VAN DIE LANGSLEWENDE**
>
> Indien die langslewende van ons te sterwe kom sonder om 'n verdere geldige testament na te laat bemaak sodanige langslewende sy of haar boedel soos volg:
>
> 2.1 Ons bemaak aan die vader van die testateur Johannes Magiel Koekemoer (geboortedatum ../../1934) die vaste eiendom, of indien hy nie die langslewende van ons oorleef nie, dan aan die Dierebeskermingsvereniging.
>
> 2.2 Die restant aan die Dierebeskermingsvereniging."

[5] Upon their divorce on 17 October 2014 the Plaintiff and the deceased concluded a settlement agreement regulating the proprietary consequences of

their marriage in full and final settlement thereof. The settlement agreement was made an order of Court. Thereafter, as aforementioned, on 7 January 2015 within three months of the divorce, the deceased passed away of natural causes.

[6] It appears as though the Plaintiff had remarried before the deceased's passing. On the night that the deceased passed away the Plaintiff and her present spouse took occupation of the deceased's residence where they still reside. On 12 January 2015 the Plaintiff signed the notice of death form, wherein she noted her relationship to the deceased, as spouse, even though they were at the time divorced. On 1 June 2015 the Plaintiff's attorneys of record addressed a letter to ABSA Trust to which a next of kin affidavit was attached. Therein too, the Plaintiff described herself as the surviving spouse.

[7] The will was lodged with the Master who refused to give effect to clause 1 on the basis, as aforementioned, that the statutory disqualification at Section 2B prevents the Plaintiff from inheriting. On this scenario, given that the beneficiary mentioned at clause 2.1, the deceased's father, Johannes Magiel Koekemoer is pre-deceased, the estate stands to devolve to the Society for the Prevention of Cruelty to Animals.

[8] Given the Master's attitude, it is hardly surprising that in July 2015 the Plaintiff instituted the main action against the First Defendant, various alleged intestate heirs and the Master, in which she sought to compel the Master to give effect to clause 1 of the will. Her particulars of claim state that no other person but the Plaintiff is nominated as heir to the deceased in the will, and that the deceased did not intend to benefit any other person apart from her upon his death.

[9] On 8 October 2015 the First Defendant filed both a notice in terms of Uniform Rule 23(1) claiming that the particulars of claim were vague and embarrassing, and an exception thereto. The exception stated *inter alia* that Section 2B was applicable, and that as the particulars did not allege that it appears from the will that the deceased intended the plaintiff to inherit, notwithstanding the dissolution of the marriage, the particulars did not support the relief claimed by the plaintiff. On 19 April 2016 pursuant to an order of this Court, the exception was upheld and the Plaintiff was granted leave to amend her Particulars of Claim within 10 days of the date of the order. The Plaintiff failed to file her Rule 28 Notice of intention to amend her Particulars of Claim within the time specified in the Court order. Thereafter the First Defendant brought the current application to dismiss the Plaintiff's claim.

[10] In this application the First Defendant contends that the Plaintiff's claim in the main action stands to be dismissed, not only as the Plaintiff failed to file her notice to amend her Particulars of Claim timeously, in compliance with the Court order, but also because the claim is bad in law and without merit. The Plaintiff, it is contended, is also delaying the final liquidation and distribution of the deceased estate and is acting *mala fide*.

[11] In response the Plaintiff in this application reasserts her stance that as she is the only person nominated as heir, the deceased did not intend to benefit any other person, should he predecease her. She avers moreover that it was the deceased's intention at all times that she should inherit notwithstanding their divorce. In her answering affidavit she states that she has sufficient evidence to rebut the presumption created by Section 2B. She avers that she should inherit as there is no evidence from which it can be deduced that it was the deceased's intention that she should not inherit.

Discussion

[12] Section 2B was introduced by Sec 4 of the Law of Succession Amendment Act, Act 43 of 1992. The preamble to the Amendment Act states that it is intended to:

> "… regulate the effect of a divorce or the annulment of a marriage on a will".

No further indication is given as to the legislature's intention and in the 24 years subsequent to the section's inclusion, no cases appear to have come to court regarding its application.

[13] In his article *"Die Doodgewaande Gade en die Wil van die Testateur"*[1] Professor J C Sonnekus states that the rationale behind Section 2B was clear. The legislature created a three month 'grace period' during which divorcees could draft new wills that take proper account of their altered circumstances. Failure to alter a will during the three month period would leave the will – and any bequests to the ex-spouse – intact, should the testator come to death after the 3 month grace period. The operation of the section leaves the remainder of the will unaffected, and therefore other beneficiaries will still be entitled to the benefits allotted to them by the testator.

[14] Similar provisions to Section 2B preventing a surviving former spouse from inheriting under the will of a deceased previous spouse, unless a contrary intention appears from the will, can be found in statutes pertaining to wills in the jurisdictions of England and Wales[2], Australia[3] and the United States of

1 Tydskrif van die Hedendaagse Romeins Hollandse Reg 1996, (59) page 294

2 Section 18A of the Wills Act of 1837, as amended, under the law of England and Wales,

3 Section13(1) of the Succession Act 2006 of New South Wales

America[4]. Interestingly, neither the English, Australian, nor American provisions are subject to any time limit, akin to the three month period at Section 2B. I could also find no case law relating to the English and Australian provisions. Presumably, the reason for the absence of judicial interpretation is because the meaning of these provisions is clear, and this has made debate on their interpretation unnecessary.

[15] Likewise, the meaning and effect of Section 2B is clear and unambiguous, and Counsel did not suggest otherwise. The section clearly means that the death of one of the previous spouses within three months after a divorce, will result in the surviving previous spouse being deemed to be predeceased and thus unable to inherit, unless it appears from the will itself that the deceased testator intended to benefit the surviving previous spouse. This is the only meaning that can be attributed to Section 2B if one considers the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed. See Natal *Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 603 G to 604A

[16] Whilst the plaintiff has not taken issue with the interpretation of Section 2B, she considers herself not to be disqualified from inheriting notwithstanding the proviso contained in the section:

> "… unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage."

She contends that it so appears. The issue then becomes the interpretation of the will itself.

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4 US Uniform Probate Code of 1969 at Sections 2 – 508 and Sections 2 – 804

[17] The rules pertaining to the interpretation of wills are trite. In *Verseput and others v De Gruchy, NO, and another* [1977] 4 ALL SA 339 (W) at 342 Franklin, J stated:

> "In construing a will the cardinal principle is to ascertain from the language used therein the true wishes of the testator. In construing wills the Court has in the course of time evolved a number of presumptions, such as the presumption against intestacy and the presumption that, if the language used in the will is ambiguous or doubtful, that meaning ought to be given to the will which is in accord with the general wishes of the testator to be gathered from the terms of the will read as a whole, and so as to make a bequest effective, rather than that which makes it null and void. But these presumptions may only be resorted to if the language of the will is of doubtful import."

[18] *In Parker and others v Estate Fletcher*, 1932 CPD 202 at page 205 Watermeyer AJP (as he then was) stated:

> "Undoubtedly the first rule of construction is that the Court must endeavour to ascertain the intention of the testator from the terms of the will taken as a whole, but if an event has occurred which was not contemplated by the testator at the time he made his will the Court is not entitled to surmise what his intention would have been if he had contemplated the occurrence of that event and to give effect to such surmise. To do so would be to add something to the will and not to construe it."

[19] Both Mr Benade for the Plaintiff and Mr Coston for the First Defendant agreed that the words used in Clauses 1 and 2 of the will are clear and unambiguous. They agree moreover that the intention of the deceased (and indeed the First Defendant, as co-testator to the joint will), was that the "langslewende" or longest living of the two spouses who had effected the will, would be the sole and exclusive heir of the deceased. An analysis of the will indeed reveals that both the content and intent thereof are clear and unambiguous. This being so, the will does not call for interpretation.

[20] In support of the Plaintiff's stance that the statutory disqualification at Section 2B does not apply to her, Mr Benade submitted that the application of Section 2B is subject to a finding as to what the intention of the testator was. In the event of a finding that there can be no doubt that the testator intended the plaintiff to inherit, Section 2B, he submitted, cannot be enforced. As the intention of the testator is clearly expressed, namely that the longest living should inherit upon the death of the first dying, the Plaintiff could inherit, so his argument continued. Had the deceased not wanted the plaintiff to inherit, submitted Mr Benade, he would have said so in the will or would probably have executed another will the day after the divorce. Citing the case *Bothma Batho Transport v S Bothma & Seun* Transport 2014 (2) SA 494, he submitted moreover, that extrinsic evidence could be adduced to determine the intention of the deceased. In *Bothma*, which pertained to the interpretation of a contract, Wallis JA stated at paragraph 12 that the process of interpretation does not stop at the perceived literal meaning of words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. Finally, noting that the plaintiff would have been able to inherit had the deceased died three months and one day after the dissolution of her marriage of 29 years, Mr Benade submitted that it was in the interests of justice to find in favour of the plaintiff.

[21] The difficulty with Mr Benade's argument is that it ignores the existence and substance of Section 2B, both the interpretation and applicability of which have been agreed to by the parties. It is so that it is not the Plaintiff's case that Section 2B does not apply to the circumstances of this case. It is her case in defence of this application that the statutory disqualification which prevents previous spouses from inheriting, does not apply to her, as it appears from the will that the testator intended to benefit her. The other fallacy of Mr Benade's

argument is that it accords to the testator by his mere intent the extraordinary power to override a provision in an Act of Parliament, a consequence, that I am quite certain could never have been intended by the legislature. I note also that as neither the period of a marriage nor the harsh consequences of the timing of death impact on the statutory disqualification at Section 2B, these are not factors that I am at liberty to consider. I note in any event that upon divorce the Plaintiff was party to a settlement agreement regulating the proprietary consequences of her marriage.

[22] With regards to the extrinsic evidence, referred to by Mr Benade, it is so that the Plaintiff seeks to show, as alluded to in her answering affidavit, that she is able to show by means of statements made to others that the testator did indeed intend to benefit her regardless of their divorce. The difficulty with this is firstly that Section 2B does not permit extraneous evidence, and secondly that, as aforementioned there is no need for interpretation as the intention of the testator is clear from the will itself. As was said in *Aubrey-Smith v Hofmeyer* 1973 (1) SA 655 C at 657 E by Corbett J,:

> "Generally speaking, in applying and construing a will, the Court's function is to seek and to give effect to, the wishes of the testator as expressed in the will. This does not mean that the Court is wholly confined to the written record. The words of the will must be applied to the external facts and, in this process of application, evidence of an extrinsic nature is admissible to identify the subject or object of a disposition. Evidence is not admissible, however, where its object is to contradict, add to or alter the clearly expressed intention of the testator as reflected in the words of the will."

It can be said with reference to *Bothma supra* that the intentions of the testator are clearly expressed, in the literal meaning of the words, considered in context, including the circumstances in which the document came into being. In keeping

with the principle of freedom of testation, the provisions of the will call neither for interpretation nor interference.

[23] It must be borne in mind that the will in question was the joint will of two spouses who were married to each other at the time of its implementation. That clause 1 refers to the "langslewende" as opposed to the surviving spouse as being the sole heir does not detract from this simple fact. The will correctly attracted the attention of Section 2 B when the deceased died within 3 months of the divorce. As clause 1 in effect nominated the surviving spouse who outlived the deceased as the sole heir, the proviso in section 2B was triggered.

[24] This being so, the Plaintiff as surviving spouse can only inherit if it appears from the will that the deceased intended her to inherit notwithstanding the dissolution of the marriage. Such an intention does not appear from the will. The will provides for the longest living to be the sole heir of the first dying, no more no less. For the intention the Plaintiff advocates to have appeared, the will would have had to provide for the longest living to be the sole heir of the first dying notwithstanding the dissolution of their marriage, or words to that effect. The will simply cannot be construed to enable a surviving spouse like the first defendant to inherit after divorce, and thereby not only rebut the statutory presumption created by Section 2B but also circumvent its provisions.

[25] I am therefore inclined to agree with Mr Coston for the First Defendant that if the deceased intended the Plaintiff to inherit after divorce, the will would have explicitly stated so or he would have made a new will indicating as such.

[26] An interpretation of the will and the clear and unambiguous wording of Section 2B in my view excludes the first defendant from inheriting. The fact that this may be a harsh consequence and that the Society for the Protection for Animals is the sole heir as a consequence, does not detract from this.

[27] Finally, I note that it is so as contended on behalf of the First Defendant, that the Plaintiff failed to plead material facts that would sustain an intention on the part of the deceased that he did not intend to benefit any other person apart from the Plaintiff notwithstanding the divorce. Nor did she so plead in the purported amendment to the Particulars of Claim. I am inclined in the circumstances to agree with the First Defendant that these pleadings remain expiable.

[28] In light of all of the above I am of the view that the Plaintiff's claim in the main action is incompetent in law and excluded by the provisions of Section 2B of the Will's Act. I am accordingly inclined to grant the First Defendant, being the Applicant in this application the relief she seeks.

Costs

[29] As the application succeeds the Plaintiff's claim stands to be dismissed with costs. Such costs ought in my view to include the costs of the exception as well as the costs of this application.

[30] I accordingly grant the following order:

1. The claim of the First Respondent/Plaintiff against the First Defendant/Applicant under case no. 14270/2015 is dismissed.

2. The First Respondent/Plaintiff shall pay the costs such to include the costs of the exception as well as the costs of this application, on the scale as between party and party.

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Y S MEER

Judge of the High Court