Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 45184/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE

In the matter between:

JACOBUS NICOLAAS DU PREEZ N.O.	First Applicant
W[…] C[…] J[…] G[...]	Second Applicant
H[…] M[…] G[...]	Third Applicant

and

THE MASTER OF THE HIGH COURT	First Respondent
HEINRICH GUNTER KLOKOUW N.O.	Second Respondent
J[…] M[…] G[...]	Third Respondent

JUDGMENT

MKHABELA AJ:

[1] This is an application in terms of section 2A(c) of the Wills Act[1] read together with section 8(4A) of the Administration of Estates Act[2] in terms of which the applicants seek an order declaring that the Late Theuns Johannes G[...] ("the deceased") revoked his last will dated 26 August 2013 when he concluded a divorce settlement agreement that was converted into a court order by the Pretoria Regional court on 25 or 31 October 2019.

[2] The third respondent, the ex-wife of the deceased, opposes this application , inter alia, on the main ground that the deceased did not amend his will within three months after the dissolution of the marriage as provided for in section 2(b) of the Wills Act. Section 2(b) of the Wills Act provides that:

"(b) no deletion, addition, alteration or interlineation made in a will executed on or after the said date and made after the execution thereof shall be valid unless –

(i) the deletion, addition, alteration or interlineation is identified by the signature of the testator or by the signature of some other person made in his presence and by his direction; and

(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

(iii) the deletion, addition, alteration or interlineation is further identified by the signature of such witnesses made in the presence of the testator and of each other and, if the deletion, addition, alteration or interlineation has been identified by the signature of such person, in the presence also of such other person; and

(iv) if the deletion, addition, alteration or interlineation is identified by the mark of the testator or the signature of some other person made in his presence and by his direction, a magistrate, justice of the peach, commissioner of oaths or notary public certifies on the will that the testator is known to him and that he has

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1 Wills Act, 7 of 1953.
2 Administration of Estates Act, 66 of 1965.

satisfied himself that the deletion, addition, alteration or interlineation has been made by or at the request of the testator."

[3] The first applicant is the executor of the deceased estate who was appointed by the first respondent, the Master of the High Court, Pretoria ("the Master") at the instance of the second applicant, the biological mother of the deceased and the third applicant who is the sister of the deceased.

[4] The second respondent is an interested party and a nominated executor in terms of the deceased's last will.

[5] The background facts are common cause and are briefly as follows:[3]

5.1 The deceased executed his will on 26 August 2013 and approximately a year later on 11 October 2014, he and his ex-wife concluded an antenuptial contract with accrual ("the ANC"). In terms of the ANC the parties agreed to exclude the immovable property of the deceased situated at […] R[…] S[…], Booysens, Pretoria, Gauteng ("the immovable property") from the accrual system.

5.2 On or about 3 October 2019, the ex-wife instituted divorce proceedings in the Pretoria Regional court and on 7 October 2019 the parties concluded a divorce settlement agreement which was made an order of court on 25 October 2019 but was stamped on 31 October 2019.

5.3 The main dispute between the parties centres around the part of the divorce settlement agreement and the court order relating to the immovable property which was excluded from the accrual system in the ANC. The relevant clauses of the settlement agreement are -

[3] The founding affidavit is unfortunately sparse and it appears that there is no replying affidavit.

5.3.1 Clause 2: immovable [property]

The parties record that:

"The defendant is the registered owner of immovable property situated at […] R[…] S[…], Booysens, Pretoria, Gauteng subject to a mortgage bond in favour of Standard Bank. The plaintiff will have no claim in respect of the immovable property and the defendant will stay the sole and exclusive owner thereof."

5.3.2 Clause 7 Entire Agreement:

"This is the entire agreement between the parties and the parties shall have no claim against each other arising from the marriage, except for the claims contained in this agreement. No amendments of this agreement shall be of any effect unless reduced to writing and signed by both Parties."

5.3.3 Clause 8 Court Order

"This agreement shall be incorporated in a Divorce Order and shall form part of the Divorce Order should it please the Court to make such order. This agreement will be binding on both parties' heirs, executors, administrators or assign."

[6] The deceased's will reads as follows:

"Ek bemaak my boedel aan JANETTA FERREIRA (gebore 1973/01/15). Indien Janetta Ferreira my nie oorleef nie, dan bemaak ek my boedel aan my ma, INA G[...]. Indien enige van my erfgename my nie oorleef nie, dan aan sy/haar afstammelinge by wyse van plaasvervulling en by gebreke aan afstammelinge, dan aan die oorblywende erfgename."

[7] Unfortunately on 5 May 2020, the deceased shot himself and subsequently succumbed to his injuries on 20 October 2020.

[8] In my view there are two issues that arise for determination. The first is whether the will of the deceased conflicts with the divorce settlement agreement which was converted into an order of court[4] and if the answer is in the affirmative the deceased

[4] According to the final decree of divorce granted by Magistrate A C Bekker dated 25 October 2019, the ex-wife is reflected as the plaintiff and the deceased as the defendant. This means that it was the ex – wife who instituted the divorce proceedings.

must be deemed to have revoked his last will as contemplated by Section 2A(c) of the Wills Act when he concluded the settlement agreement with his ex-wife.

[9] The second and final question is what was the intention of the court when it converted the settlement agreement into an order of court.

[10] Section 2A(c) provides as follows:

"Power of Court to declare a will to be revoked if a Court is satisfied that a testator has drafted another document or before his death caused such document to be drafted, by which he intended to revoke his will or part of his will, the Court shall declare the will or the part concerned, as the case may be, to be revoked."

[11] Section 8(4A) of the Administration of Estates Act provides that:

"In taking a decision concerning the acceptance of a will for the purposes of this Act, the Master shall take into account the revocation of a later will, but not the common law presumptions concerning the revocation of a will."

[12] The first applicant asserted that he was appointed at the instance of the mother and sister of the deceased on the premise that the deceased had no[5] will. All three applicants submit that it is important to take into account the fact that the deceased and his ex-wife were married out of community of property with the accrual system and that the immovable property was "pertinently" excluded from the accrual in terms of the antenuptial agreement.

[13] The applicants submit that the court should grant an order that the will of the deceased was revoked in light of the terms of the antenuptial agreement read together with the settlement agreement which was made an order of court.

[14] In other words, the submission by the applicants is that the interpretation of the settlement agreement must take into account the terms of the ANC in that the ANC

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[5] Although there is a tentative attack on the validity of the will, the applicants are not seeking any relief to set aside the will. I will therefore assume that the validity of the will is not an issue before me in these proceedings.

vested the ownership of the immovable property in the deceased and that the divorce settlement agreement specifically retained the immovable property in the sole ownership of the deceased.

[15] Both the Master and the second respondent do not oppose the relief that the applicants are seeking. In fact, the second respondent has filed a notice to abide the decision of this court. Accordingly, it is only the third respondent in her capacity as the ex-wife of the deceased who is opposing the relief that the applicants are seeking.

[16] The third respondent opposes the relief on five grounds:

16.1 the first is that the deceased was aware that his last will was in the possession of the second respondent and if he had the intention to revoke it, he would have contacted the second respondent or the ex-wife or would have made a prior note before shooting himself;

16.2 the second is that the exclusion of the immovable property in the registered antenuptial contract cannot be construed to mean that the deceased did not intend to bequeath his assets to her after his death;

16.3 the third is that the exclusion of the immovable property from the accrual system dealt with the assets whilst the deceased was still alive. The ex-wife asserts that both the antenuptial contract and the settlement agreement were documents which regulated the assets of the deceased whilst the deceased was still alive and that the only document that regulated the assets of the deceased in the event of his death was his will;

16.4 The fourth is that the reference in the settlement agreement to the effect that the agreement will be binding on both parties' heirs, executors,

administrators or assign, does not mean that the ex-wife is excluded from being an heir to the estate. It merely means that if an asset would have been transferred in terms of the settlement agreement, such a transfer would be binding on the deceased and the ex-wife's respective estates; and

16.5 The fifth is the reliance on section 2B of the Wills Act in that the deceased had failed to make a new will three[6] months after the divorce and consequently, the ex-wife contends that she is entitled to inherit in terms of the will.

The law dealing with settlement agreements which are made an order of court

[17] The practice of making a settlement agreement an order of court is encouraged and well-established and has existed[7] for a long time in South African law.

[18] It is also equally acceptable[8] to take the terms of a settlement agreement and convert them into a court's imprimatur. In converting a settlement agreement into an order of court, a court would be mindful that the settlement agreement is elevated to a court order and is enforceable, just like any[9] other order issued by a court.

[19] Since a settlement agreement that has been made an order of court is equivalent to any order of court, it is not surprising that it is generally interpreted like any other court order. In this regard, the following dictum is relevant:

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6 It is correct that the section deals with the disinheritance of a surviving spouse within three months of divorce. Section 2B of the Wills Act allows for that.
7 *Eke v Parsons* 2016 (3) SA 37 (CC) at para 8, read with para 23.
8 *Eke* supra at para 14.
9 *Eke* supra at para 29 read with para 53.

> *"The starting point[10] is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."*

[20] Turning to the present matter, it is evident from the decree of divorce that the court heard *viva voce* evidence prior to making the settlement agreement an order of court. Moreover, the court made the settlement agreement an order of court in the context of a divorce – which dissolved[11] the bonds of marriage between the deceased and his ex-wife.

[21] The will bequeaths the entire estate of the deceased to his ex-wife. On the other hand, the settlement agreement is unambiguous that the ex-wife *"will have no claim in respect of the immovable property and that the defendant will stay the sole owner and exclusive owner thereof"*.[12]

Interpretation of the agreement

[22] It is by now trite that the interpretation of the agreement between the parties which was elevated into a court order is a question of law. The law pertaining to the interpretation of a document has been aptly stated by Wallis J in *Natal Joint Pension Fund v Endumeni Municipality*[13] at para 18, as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

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10 *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal, South Africa Ltd & Others* 2013 (2) SA 204 (SCA) ("*Finishing Touch 163)* at para 13 – this approach was subsequently endorsed by the Constitutional Court in *Eke*.

11 This is clear from the terms of divorce decree.

12 Clause 3 of the settlement agreement.

13 2012 (4) SA 593 (SCA).

Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[23] It follows therefore that as a starting point, the contents of the settlement agreement should be considered having regard to the context provided by reading all the paragraphs of the settlement agreement and not only the quoted ones as well as the circumstances attendant upon its coming to existence.

[24] In this regard it is crucial to appreciate that it was the ex-wife that initiated the divorce and the rationale basis for the settlement agreement was to ensure a clean break with the ex-wife by dividing the assets between the parties.

[25] This view is borne by the facts concomitant with the language used, the context and the apparent purpose for which the settlement agreement was concluded.

[26] There is therefore little doubt in my mind that the settlement agreement is in conflict with the will in respect of the ownership of the immovable property. It is evident from reading the two documents that the deceased bequeathed the immovable property to the ex-wife in terms of the will and retains the very same property in accordance with the settlement agreement. Hence the conflict between the two documents.

[27] This entail that the deceased must have intended to revoke his will by concluding the settlement agreement if the interpretations cannons referred to are taken into account. This is clear from the strong language used in the settlement agreement which provides that " the plaintiff (ex-wife) will have no claim in respect of the immovable property and the defendant (the deceased) will stay the sole and exclusive owner thereof"[14]

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[14] Clause 2 of the settlement agreement.

[28] In addition, the context in terms of which the settlement agreement was concluded is that the deceased and his ex-wife wanted the settlement agreement to be made an order of court and to bind their executors[15]. This would entail that the settlement agreement is the living document that would regulate the division of the parties' s assets even after they have passed on.

[29] I now turn to deal with the major grounds upon which the ex-wife opposes the relief that the applicants are seeking. In view of the approach that I adopt, it is not necessary to deal exhaustively with all the grounds of opposition that the ex-wife raises.

[30] To reiterate, the first ground is that the deceased was aware that his will was in the possession of the second defendant and if he had the intention to revoke it, he would have done so by contacting the second respondent or his ex-wife.

[31] This submission is misguided. The question is whether the deceased had drafted another document or caused another document to be drafted, prior to his death which is on the face of it constitutes a revocation of his last will.

[32] It may have been true that the deceased knew that his last will was in the possession of the second respondent as the nominated executor, but it is common cause that the deceased did not go to the second respondent to amend his will nor did he draft a new will before he passed away.

[33] The intention of the Regional court in converting the settlement agreement into an order of court is apparent. It was to end the bond of marriage and to regulate the dissolution of the marital estate following the dissolution of the marriage.

[34] On the ex-wife's own version *"the deceased negotiated the terms of the settlement agreement"* and it must therefore be inferred that the deceased meant to be

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[15] Clause 8 of the settlement agreement.

unequivocally clear about the ownership of the assets – particularly the immovable property.

[35] The conclusion is irresistible that viewed cumulatively, the terms of the settlement agreement leads to one conclusion only and that is that the deceased must therefore be taken to have revoked his will in accordance with section 2A(c) of the Wills Act.

[36] I am also in agreement with the applicants' submission that the fact that the immovable property had been excluded in terms of the antenuptial agreement assist in interpreting the settlement agreement. Such a factor assist with the context of the of the whole scenario prior to the conclusion of the settlement agreement.

[37] The words sued in the settlement agreement to the effect that the deceased " will stay the sole owner support the interpretation that the deceased wanted to retain ownership of the immovable property during his life time during the subsistence of the marriage as well as after the divorce.

[38] The other ground relied on by the ex-wife is that the exclusion of the immovable property from the accrual system dealt with the assets, whilst the deceased was still alive and that the will was the only document that regulated the deceased's assets in the event of his death.

[39] This interpretation is not supported by the wording of the settlement agreement. For example the settlement agreement provides that the ex-wife and the deceased's executors would be bound by it.

[40] It is trite that one can only have an executor to administer one 's own estate once one is dead. The use of the word *"executor"* in the settlement agreement points to the deceased 's intention to revoke his will and to regulate his assets during his lifetime

commencing immediately after the divorce and after his death. Accordingly, the ex-wife's submission in this regard is not sustainable.

[41] For the sake of completion, I now deal with the last ground of opposition that is worthy of consideration, which is a reliance on section 2B of the Wills Act to the effect that the failure to make a new will or to amend the existing will three months after the divorce renders the ex-wife entitled to inherit in terms of the will. This submission would have been sustainable had the parties not concluded and signed the settlement agreement.

[42] The settlement agreement effectively amended the will by divesting the ex-wife of the immovable property and vesting it in the sole ownership of the deceased and thereby placing the settlement agreement within the purview of section 2A(c) of the Wills Act.

[43] The above conclusion is dispositive of the ex-wife's grounds of opposition to the relief that the applicants are seeking and renders it unnecessary to consider the ex-wife 's other grounds upon which she opposes the relief in question.

[44] For all the reasons outlined in the preceding paragraphs, the ex-wife's grounds for opposing the relief that the applicants seek fall to be rejected as meritless.

[45] In respect of costs, it is trite that costs are within a court's discretion which must be exercised judicially. In my view, there is nothing that militates against the rule that costs should follow the result in this case, accordingly, I award costs in favour of the applicants on an party and party scale.

Order

[46] In the result, the following order is made:

1. The deceased is declared to have revoked his last will dated 26 August 2013 by causing the settlement agreement to be drafted, signed and converted into a court order by the Pretoria Regional court on 25 or 31 October 2019.

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R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
PRETORIA

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 March 2024**.

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DATE OF THE HEARING:	22 August 2023
DATE OF JUDGMENT:	26 March 2024