95/55

G.P.-S.14242—1947-8—5,000.

U.D.J. 445.
Late S.C. 7.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN ~~CRIMINAL~~ Civil CASE.
APPÈL IN ~~KRIMINELE~~ SAAK.

Exors. Est. late Aslan L. Sanua

Appellant.

versus

S. G. Hinde —
Master of the High Court of Southern Rhodesia,

Respondent. + Ors.

Appellant's Attorney 330 Maguire & Tudge [illegible] *Respondent's Attorney* [illegible]
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate [illegible] *Respondent's Advocate* [illegible]
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Monday 24th Oct, 1955. I 1, 2, 4, 7, 11
Op die rol geplaas vir verhoor op:—

(S.R. 1)

(9.50 — 12.10)

CAV

[illegible]

— Appeal allowed and that part of the order made by the High Court of S/R declaring the will of the testator Aslan Sanua null and void is struck out and an order is substituted in terms of paragraphs (a) and (b) of Applicant's petition. — The order as to costs made by the High Court is to stand and the costs of appeal of the appellants & 3rd Respt are to be paid by the estate of the testator.

Centlivres, C.J., Schreiner, Hoexter, de Beer, & Fagan, JJA.

21/10/55.

[signature]
Registrar

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter of :

MOISE LEVY and NISSIM MERDJAN Appellants

&

SIDNEY GEORGE HINDE in his capacity as the Master of the High Court of Southern Rhodesia First Respondent

&

RACHEL SANUA (formerly Halfon, born Capouya) Second Respondent

&

RONALD PAUL BERTIN in his capacity as Curator as Litem for Fortunee Sanua

Third Respondent

CORAM : Centlivres C.J., Schreiner, ~~van den Heever~~ Hoexter, de Beer et Hall JJ.A.

Heard :- 24th October 1955. Delivered :- 31-10-55

J U D G M E N T

CENTLIVRES C. J. :- On October 9th 1954 Aslan Leon Sanua (to whom I shall refer as the testator) made his last will and testament. At ~~the~~ that time he was a widower. Clause 5 of the will refers to Rachel Halfon "as my intended wife..... "whom I am about to marry" and in seven other clauses he refers to her as his intended wife. Certain bequests were made by

the testator to his intended wife. Those bequests were made "conditional on her becoming my wife." Clause 16 is as follows :-

" In the event of my remarriage I direct and desire that this will shall remain of full force and effect."

Two days after the execution of the will the testator married Rachel Halfon who survived him. He died on January 3rd, 1955. The Master of the High Court of Southern Rhodesia refused to issue letters of administration to the appellants whom the testator had in his will appointed as the executors and administrators of his estate. The Master based his refusal on the terms of Sec. 7 of the Deceased Estates Succession Act (Chapter 51) of Southern Rhodesia. That section reads as follows :-

" Except in the case of a party to a joint will who has adiated a will, other than a joint will of an intended husband and wife who have thereafter married each other, executed by any person prior to marriage shall become null and void on marriage, unless such person endorses on such will that it is desired that the same shall remain of full force and effect. Such endorsement shall be duly signed and witnessed in the manner required in the case of a will. "

The appellants applied to the High Court of Southern Rhodesia for an order :-

" (a) Declaring the Will executed by the deceased, ASLAN LEON SANUA, at Salisbury on the 9th day of October, 1954, to be the last valid will and Testament of the said ASLAN LEON SANUA ;

(b) Directing the Respondent to issue Letters of Administration to the Petitioners in terms of the said Will . "

The High Court granted an order declaring the testator's will "to have become null and void on the testator's "marriage to Rachel Halfon." The appellants now appeal from this order.

The word "remain" in Sec. 7 of the Act is indicative of an intention on the part of the Legislature that an endorsement prior to marriage should have the effect of preventing a will from becoming null and void on marriage. The language used is inconsistent with the notion of reviving a will which has become null and void on marriage. If, therefore, the testator had, immediately after completing the execution of the will, made a separate endorsement in the language used in Clause 16 of the will and if the endorsement had been signed and witnessed in the manner required in the case of a will there can, to my mind, be no doubt that his will would not have become null and void on his marrying Rachel Halfon. I am therefore unable to agree with the contention raised by

Mr. Bertin, who appeared as curator-ad-litem to a mentally disordered child of the testator, that the endorsement referred to in Sec. 7 can only be made after marriage.

The learned Acting Chief Justice, who delivered the judgment in the High Court, based his decision on the ground that "the legislature contemplated and required that the "testator should express his desire in a writing (called "an endorsement) on a will which had already been written, "and that the signing and witnessing of that expression of "his desire should be separate from the signing and witnessing "of the will itself. With those requirements clause 16 does "not comply."

The words "endorses on such will" may at first sight suggest that before an endorsement is made there must be a duly executed will but one must endeavour as best one can to ascertain what the intention of the Legislature was in enacting Sec. 7 of the Act. It seems to me that the Legislature did not intend that a will should become null and void on marriage if there was some clear indication by

the testator in or on his will that it should not become so null and void. The language it has used to express this intention could, no doubt, have been better chosen but if we were to hold that the words "endorses on such will" are capable of meaning only that there must be a duly executed will before an indorsement can be made then the intention of the Legislature would be defeated in a case such as this where the will clearly indicates that it should remain of full force and effect after the marriage of the testator. There were seventeen clauses in the will : it would be absurd to hold that the will became null and void on the testator's re-marriage because he used the language of Sec. 7 of the Act in Clause 16 of the will instead of using it in an addendum to the will, ~~having that addendum~~ signed by himself and ~~having his signature~~ witnessed by the same persons as witnessed the will. Such an absurdity is avoided if effect is given to what must have been the intention of the Legislature viz: that it must be clear from something in or on the will that the testator intended that his will should remain of full force and effect notwithstanding his marriage. For these reasons it seems to me that the narrow meaning given by the Court a quo to the words "endorses on such will" defeats the real object of the Legislature and that a wider meaning should be given to those

words, if such a wider meaning is permissible.

There can be no doubt that the word "endorse" is capable of more than one meaning. One of those meanings is a writing on the back of a document. But this definition is not of universal application : an endorsement may equally be on the face of a document. See Stroud's Judicial Dictionary, 3rd edit. Vol. 2 p. 952. On the face of the will there is Clause 16 which was, together with the other clauses in the will, duly signed and witnessed. This, in my opinion, is a sufficient endorsement within the meaning of the words "endorses on such will". In my opinion it was not necessary for the testator in order to keep the will alive after his marriage to make a separate writing on the will, sign it and have it duly witnessed. It may be that the Legislature used the words "endorses on such will" in order to ensure that the testator had in mind a particular will which he desired to be kept alive : and it may be that a writing wholly separate from the will would not have the effect of keeping it alive, even although that writing is in testamentary form.

The appeal is allowed and that part of the order made by the High Court of Southern Rhodesia declaring the will

of the testator to have become null and void is struck out and an order is substituted in terms of prayers (a) and (b) of the appellants' petition ; the order as to costs made by the High Court is to stand and the costs of appeal of the appellants and the third respondent are to be paid by the estate of the testator.

Schreiner J.A. (
Hoexter J.A. (Concur.
de Beer J.A. (
Hall J.A. (