169/90

N v H

DALE GORDON COHEN

versus

CORNELIS JOHANNES ROETZ N O and OTHERS

SMALBERGER, JA -

169/90
NvH

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DALE GORDON COHEN N O — Appellant

and

CORNELIS JOHANNES ROETZ N O — First Respondent

IN RE

ESTATE LATE A J A HEYNS

CATHERINE ELAINE BAXTER — Second Respondent

JENNIFER ANN HEYNS — Third Respondent

MICHAEL TSELENTIS N O — Fourth Respondent

CORAM: CORBETT, CJ, SMALBERGER, VIVIER, EKSTEEN, JJA, et VAN COLLER, AJA

HEARD: 11 November 1991

DELIVERED: 28 November 1991

J U D G M E N T

SMALBERGER, JA :-

In terms of their mutual will dated 8 July 1947 ("the will"), Matthys Marthinus Heyns and

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Margaretha Susanna Heyns ("the testators") bequeathed certain farm properties ("the properties") to their three children Andries Johan Adam, Martha Johanna and Johanna Jacoba in undivided shares. The bequest was made subject to a number of special conditions. The first provided for a life usufruct over the properties in favour of the survivor. The second contained directions as to how the properties were to be divided amongst the three children. Then came the following conditions:

> "(iii) In the event of any of our said children predeceasing us or dying subsequently, without leaving descendants, our surviving children or grandchildren shall be entitled to succeed in equal shares per stirpes to such deceased child's share in the aforesaid properties unrestrictedly.
>
> (iv) That our said son and daughters are restricted and shall not have the right to mortgage, encumber, sell or otherwise alienate their respective properties set out in

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> subclause (ii)(a), (b) and (c) hereof, an advantageous contract in respect of minerals on the properties not being debarred, however. The respective portions of the said farms are entailed and shall devolve on the eldest child of each of our aforesaid three children after their death, to the fourth generation, the succeeding descendant's eldest child always succeeding his or her parent."

The testatrix passed away in 1948, and the testator in 1973. The one-third share of the properties that devolved upon Andries Johan Adam Heyns ("the deceased") was transferred into his name in 1949, subject to the testator's life usufruct and special conditions (iii) and (iv) of the will. The second respondent, Catherine Elaine Baxter ("Catherine") was born on 18 April 1956. She was the daughter of the deceased's wife, Catherine Salome Heyns, by a previous marriage. On 1 March 1967 Catherine was adopted by the deceased under the provisions of the Children's Act

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33 of 1960 ("the 1960 Act"). The third respondent, Jennifer Ann Heyns ("Jennifer"), was born to the deceased and his wife on 6 May 1967. She was the eldest of three daughters born of their marriage. The deceased passed away on 3 October 1987.

The first respondent is the executor testamentary in the estate of the deceased. The terms of the will require him to transfer the deceased's one-third share of the properties from the estate of the deceased to the deceased's "eldest child". The first respondent was unsure as to whether Catherine or Jennifer qualified as the deceased's "eldest child". His uncertainty in this regard related to whether the term "eldest child" included an adopted child (in which case Catherine, by reason of the fact that she was older than Jennifer, would qualify as such), or was limited to natural children (in which case Jennifer,

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being the eldest child born of the deceased's marriage to Catherine Salome Heyns, would be the one to benefit). The first respondent accordingly sought a declaratory order in the Witwatersrand Local Division so that the matter might be determined. Prior to the hearing of the application, the fourth respondent was appointed as curator ad litem to the minor and unborn children of Catherine; the appellant was appointed as curator ad litem to the unborn children of Jennifer. In due course they both filed reports with the Court, each ascribing a different meaning to the words "eldest child" in special condition (iv) of the will. The matter eventually came before COETZEE J. He came to the conclusion that Catherine qualified as the "eldest child" and ordered that the deceased's one-third share in the properties was to devolve upon her and, on her death, on her eldest child. Leave to appeal to this

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Court was granted by the learned Judge a quo.

The issue on appeal is whether Catherine or Jennifer is the "eldest child" of the deceased in terms of special condition (iv) of the will. The answer lies in the proper interpretation to be given to those words. At the hearing of the appeal Mr Doctor represented the appellant on behalf of the unborn children of Jennifer; Mr Tselentis (the fourth respondent), represented the minor and unborn children of Catherine. Neither Catherine nor Jennifer were represented, both having elected to abide the decision of this Court.

The will took effect on the death of the testatrix in 1948 - in keeping with the general principle that a will takes effect on the death of a testator or, in the case of a mutual will, on the death of the first-dying (Greeff v Estate Greeff 1957(2) SA

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269 (A) at 275 C). At that time adoption and its effects were governed by the relevant provisions of the Children's Act 31 of 1937 ("the 1937 Act"). Sec 71(2) of the 1937 Act provided:

> "Subject to the provisions of section seventy-nine, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption -
>
> (a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect inter vivos or mortis causa), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child;
>
> (b) inherit any property ab intestato from any relative of his adoptive parent."

(Sec 79 deals with the effect of adoption on marriage and has no relevance to the present appeal). The 1937 Act was in due course replaced by the 1960 Act. Sec

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74(2) of that Act re-enacted in identical terms sec 71(2) of the preceding Act. By the time the deceased died in October 1987 the 1960 Act had been replaced by the Child Care Act 74 of 1983 ("the 1983 Act"). The equivalent section in the 1983 Act to secs 71(2) and 74(2) of the 1937 and 1960 Acts respectively is sec 20(2). The provisos that were attached to its predecessors have been omitted, and sec 20(2) simply reads:

> "An adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage."

I shall later consider whether this change in wording has any effect on the present appeal.

Special condition (iv) of the will created a fideicommissum "to the fourth generation". The deceased was a member of the first generation, having

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acquired his rights in the properties through his parents, the testators. The identity of the deceased's "eldest child" (the fideicommissary) fell to be ascertained on the death of the deceased (the fiduciary). But it had to be ascertained with due regard to what the testators had in mind by the use of the term "eldest child" - in other words, did they intend those words to be limited to blood relations or to have wider application. This is so because "the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used" (per INNES ACJ in Robertson v Robertson's Executors 1914 AD 503 at 507; Horowitz v Brock and Others 1988(2) SA 160 (A) at 183 G - H). In endeavouring to ascertain the wishes of the testators the will must in general be read in the light of the circumstances prevailing at the time it was made

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(Perrin and Others v Morgan and Others [1943] AC 399 at 420; Ex Parte Bosch 1943 CPD 369 at 371-2), and the words of the will must be interpreted accordingly. Only when the intention of the testators has been ascertained in this manner is it appropriate to enquire whether the 1937 or 1983 Acts in any way preclude effect being given to such intention. For it is the duty of the first respondent, as executor testamentary, to give effect to the wishes of the testators unless he is precluded by statute or the common law from doing so. With these principles in mind I now turn to the relevant provisions of the will with a view to establishing the meaning of the words "eldest child" in special condition (iv).

There are in my view strong indications in the will that the testators only intended to benefit blood relations. The will commences with a bequest of the properties to the testators' three named

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children. One must assume, in the absence of any evidence or indications to the contrary, that all three were natural children. Special condition (iii) is a si sine liberis decesserit clause which provides for a gift over to the testators' surviving children or grandchildren "in the event of any of our children predeceasing us or dying subsequently, without leaving descendants" (my emphasis). There is much to be said for the view that the ordinary meaning of the word "child" or "grandchild" does not go beyond a testator's own child (his ""bloedkind"), or an own child of such child (Boswell en Andere v Van Tonder 1975(3) SA 29(A) at 35 in fine; Corbett et al: The Law of Succession in South Africa, at 551-3). If that were so, an adopted child would, in the absence of clear indications to the contrary, be excluded. This is the position in English law where the word "child" has been held not

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normally to include adopted children (Re Marshall (deceased). Barclays Bank, Ltd v Marshall and Others [1957] 3 All E.R. 172 (CA) at 178 H; Re Valentine's Settlement. Valentine and Others v Valentine and Others [1965] 2 All E.R. 226 (CA) at 229 E; Re Brinkley's Will Trusts. Westminster Bank, Ltd v Brinkley and Another [1967] 3 All E.R. 805(Ch) at 808 E). It is, however, not necessary to reach a firm conclusion on this point. What is significant is the use by the testators of the word "descendants". West's Legal Thesaurus/Dictionary defines a descendant as "(t)hose persons who are in the bloodline of an ancestor, e.g., children, grandchildren, great-grandchildren (the descendants shared equally in her will)." Black's Law Dictionary says of "descendent": "Those persons who are in the blood stream of the ancestor. Term means those descended from another,

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persons who proceed from a body of another such as a child or grandchild, to the remotest degree...". The Oxford English Dictionary (2nd ed), vol (iv) gives as one of the meanings of "descendant": "One who 'descends' or is descended from an ancestor; issue, offspring (in any degree near or remote)", and "descend" means "(t)o be derived in the way of generation; to come of, spring from (an ancestor or ancestral stock)". The word "descendant", in its normal or usual meaning, therefore includes only blood relations in the descending line and excludes adopted children. The same is true of its Afrikaans equivalent "afstammeling" (Boswell en Andere v Van Tonder (supra) at 35 F - H). There is nothing to indicate that the testators intended to use the word other than in its normal sense. The reference in special condition (iii) to the testators' "said

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children" or "our surviving children" are clearly to those children named in the will (ie the testators' own children). Having regard to the meaning of the word "descendant", the reference to "grandchildren" can, in the context, only be to grandchildren descended by blood from the testators. The gift over provided for in special condition (iii) was accordingly only intended to be to a blood relation.

Special conditions (iii) and (iv) must be read as complementing each other. In the event of conflict, they would need to be reconciled. But no such conflict exists, as in my view a consideration of special condition (iv) leads inevitably to the conclusion that the fideicommissary substitution provided for was also intended to be limited to blood relations. It will be recalled that the relevant provision stipulates that "(t)he respective portions of

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the said farms are entailed and shall devolve on the eldest child of each of our aforesaid three children after their death, to the fourth generation, the succeeding descendant's eldest child always succeeding his or her parent". The term "eldest child" per se suggests a natural child, conveying as it does the concept of the first-born child and the corresponding right of primogeniture. Further colour is lent to these words by the later use of the word "descendants" in the phrase "the succeeding descendant's eldest child always succeeding his or her parents". This strongly suggests that the testators had in mind a line of descent through the bloodline. The entailment of the properties to the fourth generation also seems to reflect a wish to keep the properties in the family ie the natural family. A further consideration is this. It seems fairly apparent from the terms of the will that it was drawn up by a professional person, probably

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an attorney. At the time the provisions of sec 71(2) of the 1937 Act were operative. The effect of the first proviso thereto was clear. No child adopted after the execution of an "instrument" could inherit property devolving on any child of his adoptive parent under such instrument unless it "clearly conveys the intention that the property shall devolve upon the adopted child". If the testators had intended to benefit adopted children they would presumably have been advised of the need to include such class of children in express terms in the will (cf Kinloch NO and Another v Kinloch 1982(1) SA 679(A) at 693 G - H). Their omission to do so is indicative of the fact that they had no such intention. All the above considerations lead inexorably to the conclusion (as a matter of pure interpretation) that by the use of the words "eldest child" the testators intended to benefit

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a natural child only ie someone in the same bloodline as the testators. It is this intention that must be given effect to unless there are legal considerations which necessarily preclude this from happening.

I turn now to consider what effect, if any, the provisions of sec 71(2) of the 1937 Act or sec 20(2) of the 1983 Act, whichever is applicable, have on the devolution of the deceased's one-third share of the properties, bearing in mind the intention of the testators. The Judge a quo came to the conclusion that the 1937 Act was applicable and that, applying its provisions, an adopted child was entitled to inherit as a child under the will. He accordingly held that Catherine was the "eldest child" in terms of the will. The gist of his reasoning is contained in the following passage in his judgment:

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> "Mr Tselentis argued that unless there are express statements to exclude adopted children then 'child' and 'descendants' include adopted children because both categories have been enlarged by the fiction contained in section 71. Therefore in clauses (iii) and (iv) the categories are similarly enlarged. In my view this contention is correct. I do not accept Mr Doctor's submission that clauses (iii) and (iv) show a deliberate intention on the part of the testator to exclude adopted children. The will in my view does not specifically exclude adopted children from the category of 'children'."

With due respect to the Judge a quo it seems to me that he clearly misinterpreted the provisions of sec 71(2) of the 1937 Act. It is apparent from the wording of proviso (a) to sub-sec (2) that an adopted child (in the position of Catherine) would not qualify as a child under the will, and would therefore not be entitled to any property devolving thereunder, unless the will "clearly conveys the intention that the property shall devolve upon the adopted child". In

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concluding that the will did not specifically exclude adopted children from the category of "children" the Judge a quo applied the wrong test. The test is not whether they were specifically excluded by the will, but rather whether the will clearly conveyed an intention to include them (so that any property under the will might devolve upon them). No such intention is conveyed by the will. On the contrary, for the reasons given, the intention of the testators was not to include adopted children under the will. If therefore the provisions of the 1937 Act were applicable, Catherine would have been precluded from qualifying as the "eldest child" by virtue of proviso (a) of sec 71(2).

Mr Tselentis, alive to this fatal flaw in the judgment of the Judge a quo, submitted on appeal that the provisions of the 1983 Act governed the

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present matter. He argued that although the will took effect on the death of the testatrix, that is not necessarily the relevant date for determining when rights to particular bequests vest or benefits are to be ascertained when dealing with a fideicommissum. The condition on which the fiduciary interest of the deceased ceased and the fideicommissary interest of his "eldest child" began was the death of the deceased. It was only then that the identity of the "eldest child" was ascertainable, and only then that such child's fideicommissary rights vested (cf Estate Kemp and Others v McDonald's Trustee 1915 AD 491 at 500). One therefore had to have regard to the law as at the date of the deceased's death in 1987, at which time the 1983 Act was the operative one.

If the date of the fideicommissary substitution is the relevant date to look at in order

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to determine when the fideicommissary right took effect, then there is force in the argument that the provisions of the 1983 Act apply. The basis for such argument would be that any legislation affecting a will, which comes into operation between the date of execution of a will and the date on which the terms of such will take effect, applies (cf R v Grainger 1958(2) SA 443 (A) at 448 C - 449 C). It is, however, not necessary to decide the point for I am prepared to assume, for the purposes of the present appeal, that the 1983 Act applied. This assumption also renders it unnecessary to consider Mr Tselentis' alternative argument that the 1983 Act is retrospective in its operation.

Sec 20(2) of the 1983 Act is couched in very wide terms. Mr Tselentis argued that its provisions were indicative of a legislative intent to equate natural and adopted children for all purposes

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whatsoever, without any qualification. If this were so the effect thereof would be, in the case of a will, to create a rule of interpretation. Any reference to children, issue or descendants in a will would, in consequence of such rule of interpretation, include an adopted child, irrespective of when the will was executed or what the intention of the testator was. To give the words of sec 20(2) so absolute and unqualified a meaning could detract from the principle of freedom of testation and run counter to testamentary intention. It would also, in my view, be contrary to the decision of this Court in Boswell en Andere v Van Tonder, the correctness of which was not challenged on appeal. In order, therefore, properly to interpret sec 20(2) it is necessary to have regard to the decision in that case. For the sake of convenience I shall refer to it as "Van Tonder's case".

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The mutual will in Van Tonder's case bequeathed specified properties to named children of the testators in that case. The bequests were made subject to, inter alia, the following conditions: (1) that after the death of one of their children the farm or farms bequeathed to them were to go to their "wettige afstammelingen", and (2) that if one of their children should die "zonder een kind of kinders na te laten", the property of such child should devolve upon the testators' other children "of hunne wettige afstammelingen". The property "Klipfontein" was bequeathed to the testators' daughter, Johannes Wilhelm van Zijl ("JW"), and in due course transferred to her subject to the conditions of the mutual will. She married D F van Tonder and died in 1973, having appointed her husband her sole heir by her will. She and her husband had no children of their own, but in

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1949 had lawfully adopted a son, Dan Johan.

On appeal it was accepted that the applicable provision was sec 74(2) of the 1960 Act, and the matter was argued on that basis. It was common cause that Dan Johan could not succeed to "Klipfontein" on his mother's death as a fideicommissary because of the wording of proviso (a) to sec 74(2), as the will of JW's parents had been made in 1926 prior to the date of the adoption order. The point in issue was whether JW's husband had succeeded to "Klipfontein" on JW's death, on the ground that JW had not died without leaving lawful descendants but on the contrary had left a "lawful descendant" (ie the adopted son Dan Johan), so that, although the latter could not himself succeed under the mutual will, the property nevertheless remained an asset in JW's estate and therefore devolved on her husband as her heir.

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In order to reach a conclusion in the matter, this Court in Van Tonder's case was called upon, inter alia, to interpret the words "an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent" ("the deeming provision") in sec 74(2) of the 1960 Act. In the course of doing so it held that:

(1) The Legislature did not intend to interfere with the freedom of a testator to dispose of his property as he wishes (at 40 A);

(2) The deeming provision did not embody a rule of interpretation applicable to all testamentary instruments, namely, a rule that words such as "children" or "descendants" appearing in such instruments were not to bear their ordinary, everyday meaning but a wider meaning which included an adopted child (at 38 D-E; 39 E-F);

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(3) Had the Legislature intended to make such a rule one would have expected an express provision to that effect, in terms at least similar to those of sec 13(2) of the English Adoption Act, 1950 (at 38 E-F);

(4) In contrast to the relevant provisions of the English Adoption Act, sec 74(2) did no more than describe the consequences of an adoption (at 38 G-H);

(5) The deeming provision created a legal fiction whereby an adopted child was for all purposes whatsoever deemed in law to be a legitimate child ("bloedkind") (at 36E; 38H);

(6) The presumption in favour of the operation of such a fiction could be displaced if by applying the ordinary rules of interpretation a contrary testamentary intention appeared (at 40 F-G).

(It should be noted that the findings in (1) to (6)

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above, which constitute the ratio decidendi in Van Tonder's case, were arrived at independently of a consideration of the provisos to sec 74(2), although proviso (a) was seen as strengthening the Court's conclusion (at 39 B).) In the result the Court held, for reasons that appear from the judgment, that since the legal fiction established by the deeming provision was in conflict with the manifest scheme and intention of the testators in that case, which was clearly that only children related by blood were to be regarded as "kinders" for the purposes of the will, JW had to be regarded as having died "zonder een kind of kinders na te laten." Accordingly "Klipfontein" did not devolve on her husband.

Do the findings in Van Tonder's case still hold sway in the light of the altered wording of sec 20(2) of the 1983 Act? In my view they do. The words

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of the deeming provision in sec 74(2) of the 1960 Act have, with one non-material exception, been re-enacted at the commencement of sec 20(2). The only difference is that the word "whatsoever" has been replaced by the word "whatever", which is a word of identical meaning. (That this is so is abundantly apparent from the Afrikaans texts where the corresponding words "vir alle doeleindes" feature in both sec 74(2) of the 1960 Act and sec 20(2) of the 1983 Act.) The concluding words of sec 20(2) "as if he was born of that parent during the existence of a lawful marriage" are new, and provisos (a) and (b) to sec 74(2) of the 1960 Act have been deleted. The meaning accorded the deeming provision in Van Tonder's case is in my view unaffected by the concluding words of sec 20(2). Those words merely state what was presumed in Van Tonder's case to be the effect of the deeming provision. In the words

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of JANSEN JA (at 39 A-B):

> "Dit is nie die omskrywing in die testament wat in 'n ander sin as die gewone alledaagse betekenis gelees word nie, maar wel die aangenome kinders wat geag word die wettige bloedkinders van die testateure (die aannemende ouers) te wees en derhalwe geag word uit hul huwelik gebore te wees."

It is not necessary to speculate on the reason for the repeal of the provisos to sec 74(2) of the 1960 Act. Whatever the reason for their repeal, that in itself does not detract from what was said in Van Tonder's case, bearing in mind that the deeming provision was interpreted separately from such provisos.

There is no reason why sec 20(2) of the 1983 Act should be interpreted as going further than sec 74(2) of the 1960 Act, and in fact laying down a rule of interpretation. Van Tonder's case was one of considerable importance, being the first case in this Court to deal with succession to, or through, adopted

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children. The Legislature must be taken to have been aware of the construction placed on the deeming provision in Van Tonder's case. Furthermore, the point was clearly made in Van Tonder's case that had the Legislature intended sec 74(2) of the 1960 Act to create a rule of interpretation it would have used more explicit and appropriate language. Nothwithstanding this, sec 20(2) of the 1983 Act was enacted in a form which does not differ in essence from the deeming provision in sec 74(2) of the 1960 Act. The most probable inference to be drawn from this fact is that the Legislature did not seek to alter the law as laid down in Van Tonder's case. There is sound reason for the Legislature adopting such an approach. The principle that a testator is free to dispose of his property as he wishes, and that effect must be given to his intention, is so deeply rooted in our law that the

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Legislature would understandably be reluctant to do anything which might detract from the due recognition of such principle. It follows that sec 20(2) of the 1983 Act must be interpreted in a manner consonant with the interpretation of the deeming provision in sec 74(2) of the 1960 Act in Van Tonder's case.

To revert to the facts of the present matter. In keeping with what was held in Van Tonder's case, the legal fiction created by sec 20(2) of the 1983 Act must give way to a contrary intention in the testators' will. For the reasons already given, such a contrary intention is manifest on a proper interpretation of special conditions (iii) and (iv). It is clear from them, applying the normal rules of interpretation, that the testators did not intend to include an adopted child within the meaning of "eldest child". It follows that Catherine is excluded from inheriting under the

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will, and that Jennifer qualifies as the deceased's eldest child. In the result the appeal must be allowed. The parties are agreed as to the costs order that should follow such result.

The following order is made:

(1) The appeal is allowed.

(2) Paragraph 1 of the order of the Court a quo is amended by substituting the words "second respondent" (ie Jennifer Ann Heyns) for the words "first respondent" wherever those words appear in that paragraph.

(3) The costs of all parties to the appeal are to be paid out of the estate of the late Andries Johan Adam Heyns on the attorney and own client scale.

J W SMALBERGER, JA

CORBETT, CJ)
VIVIER, JA)
EKSTEEN, JA) CONCUR
VAN COLLER, AJA)