THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 579/10

In the matter between:

NELRI PIENAAR	First Appellant
CHRISMARI STEVEN	Second Appellant

and

MASTER OF THE FREE STATE HIGH COURT, BLOEMFONTEIN	First Respondent
CYNTHIA MERLE DU TOIT	Second Respondent
SUZETTE MALHERBE	Third Respondent
DERICK DU TOIT	Fourth Respondent

Neutral citation: *Pienaar v Master of the Free State High Court* (579/10) [2011] ZASCA112 (01 June 2011).

Coram: LEWIS, CACHALIA, SHONGWE, THERON and MAJIEDT JJA

Heard: **10 May 2011**

Delivered: **01 June 2011**

Summary: Will ─ Revocation by later testamentary instrument ─ Both wills dealing with entire estate ─ Later will different from earlier ─ Later will impliedly revoked the earlier will in so far as inconsistent with it.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Kruger J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with:

‘(a) It is declared that the testament of the testator, Frederik Jacobus du Toit, dated 28 May 2007, impliedly revoked the earlier testament dated 27 November 2006 in so far as inconsistent with the latter.

(b) The Sanlam Personal Portfolio is to form part of the residue of the estate of the testator.

(c) The second respondent is to pay the costs of this application.’

JUDGMENT

THERON JA (LEWIS, CACHALIA, SHONGWE, THERON and MAJIEDT JJA concurring):

[1] The testator, Frederik Jacobus du Toit, executed a will in November 2006. Approximately six months later, in May 2007, he executed another will. The question for determination is whether the later will impliedly revoked the earlier will, in part.

[2] The appellants are the daughters of the testator. Their parents had divorced. The testator subsequently married the second respondent, Cynthia du Toit (Du Toit), and they had a son, Derick du Toit (Derick), the fourth respondent. The testator and Du Toit divorced on 19 October 2006, prior to the execution of both wills. The testator died on 30 June 2007.

[3] I do not propose to set out the content of each will but merely to describe their essential terms. In terms of the 2006 will the deceased expressly revoked previous wills and bequeathed: (i) his Sanlam Personal Portfolio to Du Toit, in the event of it being payable to his estate; (ii) an immovable property and a motor vehicle to Derick; and (iii) the residue of his estate to the appellants. That will also made extensive provision for the appointment of an executor and the general administration of the estate.

[4] In terms of the 2007 will, the deceased bequeathed an immovable property to each of his three children (the appellants and Derick) while Du Toit was granted lifelong use of the property bequeathed to Derick. A cash amount was awarded to the first appellant and Derick, and as in the previous will, the residue of the estate was to be shared by the appellants. In the later will the Volkswagen motor vehicle was bequeathed to the testator's son-in-law. In the 2006 will it was bequeathed to Derick.

[5] The dispute in this matter revolves around a Sanlam investment policy (the policy) valued at approximately R827 000. Clause 1.1 of the 2006 will reads as follows:

'My Sanlam Persoonlike Portefeule, indien betaalbaar aan my boedel, [is bemaak] aan my vorige eggenote [Du Toit] en indien sy voor my te sterwe sou kom, sal hierdie bemaking aan haar verval en deel vorm van die restant van my boedel.'[1]

[1]My Sanlam Personal Portfolio, if payable to my estate, is bequeathed to my ex wife and if I should survive

It was common cause that at the time of his death the testator had three investments in his Sanlam Personal Porfolio. The first was made on 1 March 2002 and in it the testator had nominated his first wife as the beneficiary. The investment date of the second investment was 2 March 2007, and Du Toit was appointed the beneficiary. The third and disputed investment was made on 22 March 2007 and no beneficiary was appointed in respect of this policy.

[6] In October 2009, the third respondent prepared a first and final distribution account, in terms of which the policy was regarded as part of the residue of the estate. Du Toit and Derick lodged an objection against the account with the Master. The Master sustained the objection and determined that the proceeds of the policy should be paid to Du Toit.

[7] The appellants instituted proceedings in the Free State High Court (Bloemfontein) in which they sought an order, inter alia, to the effect that the estate of the testator be administered in terms of the 2007 will, alternatively that the 2007 will had impliedly revoked the 2006 will, and more specifically that the bequest of the policy to Du Toit in the 2006 will had been impliedly revoked by the 2007 will.

[8] The application in the high court was not opposed by the Master and the third respondent. The testator had nominated Sanlam Trust Limited as executor of his estate and the third respondent was the latter's representative. The Master did, however, file a report in support of his decision. He explained that the policy was awarded to Du Toit as a bequest in terms of the 2006 will, while the testator did not deal with it in the 2007 will. The Master concluded as follows:

' … daar [is] geen botsende bepalings in die twee testamente … wat betref die Sanlam Persoonlike Portefeulje nie. Omdat die twee testamente saamgelees

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her, this bequest will lapse and form part of the residue of my estate.'

moet word, volg dit dat die Sanlam Persoonlike Portefeulje as 'n legaat aan die oorledene se vorige eggenote toegeken moet word.'[2]

In respect of the motor vehicle, the Master concluded that there was an inconsistency between the two wills and that the bequest in respect of the motor vehicle in the 2006 will had been impliedly revoked by the 2007 will.

[9] Du Toit did not file any opposing affidavits in the high court but raised certain questions of law for determination. The essence of the questions raised were whether the Master had correctly determined that the 2007 will did not revoke the 2006 will, whether the two wills should be read together and whether the bequest of the policy had been revoked by the later will.

[10] The high court (Kruger J) dismissed the application reasoning that:

'Die 2007 testament verander net die manier waarop bates vererf; die 2007 testament herroep niks nie. Die standard herroepingsklousule wat die 2006 testament inlei, is afwesig uit die 2007 een. Die testateur wou in 2007 nie die 2006 testament herroep nie; hy wou dit aanpas.'[3]

The court found that it could not be established that the testator had, in the later will, intended to revoke the earlier bequest to Du Toit. The appellants appeal to this court with the leave of the high court.

[11] Where a testator dies leaving more than one testamentary disposition the wills must be read together and reconciled and the provisions of the earlier testaments are deemed to be revoked in so far as they are inconsistent with the later ones.[4] Where there is conflict between the provisions of the two wills, the

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[2]'. . . there are no conflicting provisions in the two testaments . . . regarding the Sanlam Personal Portfolio. Because the two testaments must be read together, it follows that the Sanlam Personal Portfolio must be awarded to the deceased's ex-wife.'

[3]'The 2007 testament merely changes the manner in which the assets devolve; the 2007 testament revokes nothing. The standard revocation clause at the beginning of the 2006 will is absent in the 2007 will. The testator did not intend for the 2007 will to revoke the 2006 will; he wanted to amend it.'

[4]*Ex parte Estate Adams* 1946 CPD 267 at 268. The court referred to Van Leeuwen *Censura Forensis* 1.3.11.9; *Ex parte Scheuble* 1918 TPD 158 and *Ex parte Mark's Executors* 1921 TPD 284.

conflicting provisions of the earlier testament are deemed to have been revoked by implication.[5]

[12] As I have said, the 2006 will revoked all previous wills, codicils and other testamentary writings while the 2007 will did not contain a revocation clause. But it is clear from a reading of the wills that the testator's intention in each was to dispose of his entire estate. He started both wills with the words 'Ek bemaak my boedel soos volg'.[6] He then, in both wills, proceeded to dispose of his entire estate. The 2007 will has a different scheme to that of the 2006 will. In the later will the testator bequeathed an immovable property to each of his children and Du Toit was granted a right of lifelong use in respect of the property bequeathed to Derick. In the later will the testator dealt more specifically with his property. In my view, the 2007 will represents, in the words of Broome J in *Price v The Master,* 'a completely new and different scheme and not simply a later set of dispositions to be superimposed on an earlier set'.[7] Broome J went on to explain that where there are two wills, which to some extent contain similar provisions, but are in effect different, and each of the wills deal with the entire estate, then they cannot stand together and the later will must be construed as having impliedly revoked the earlier.[8]

[13] The testator dealt with the residue of his estate in both wills. In the later will he disposed of the residue differently. And herein lies the inconsistency between the two testaments. It must be assumed, in the absence of evidence to the contrary, that the testator had knowledge of the meaning of the word 'residue'. In the earlier will the residue consisted of, inter alia, a farm, two properties in a sectional title scheme and other movable property, while in

[5] *Vimpany v Attridge* 1927 CPD 113; *Bredenkamp v The Master* 1947 (1) SA 388 (T); *Gentle v Ebdens Executors* 1913 AD 119.
[6] 'I bequeath my estate as follows.'
[7] *Price v The Master* 1982 (3) SA 301 (N) at 304D-E.
[8] At 304C-D.

terms of the later will the residue comprised, inter alia, the policy, the farm and certain movable property as the testator had made specific bequests of the other two immovable properties to each of the appellants.

[14] The golden rule for the interpretation of wills is to ascertain the wishes of the testator from the language used. Once the wishes of the testator have been ascertained a court is bound to give effect to them.[9] It follows that where a bequest has been made in an earlier testamentary disposition it would require clear and unambiguous language in a later testamentary disposition to justify a court finding that the testator had intended to revoke such bequest.[10] It is clear from the language used in the 2007 will that the testator intended that the policy should fall within the residue of his estate. Such an intention can be gathered with relative certainty from the scheme as well as the terms of the later will. As has already been mentioned, at the time of his death, the testator had three investments in his Sanlam Personal Portfolio. In respect of two of these, he had nominated his first wife and Du Toit as beneficiaries, respectively. And the last Sanlam investment was merely a part of his estate. It is further clear from the 2007 will that he intended to leave the unspecified assets to the appellants. Those unspecified assets included the third Sanlam investment. The necessary inference is that the testator intended to change his previous will.

[15] There was thus no need to revoke the previous will: it contained important provisions for the administration of the estate that did not need to be changed. Where change was intended it was clearly prefaced with the words that he bequeathed his estate ‘as follows’.

[16] For these reasons the following order is made.

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[9] *Robertson v Robertson’s Executors* 1914 AD 503 at 507; *Cuming v Cuming* 1945 AD 201 at 206*; Cohen NO v Roetz NO* 1992 (1) SA 629 (A) at 639A.
[10] *Ex parte Adams* 1946 CPD 267 at 268.

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L V THERON
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	C A Human Instructed by Hefer Attorneys, Bloemfontein
SECOND AND FOURTH RESPONDENTS:	S J Reinders Instructed by McIntyre & van der Post, Bloemfontein