THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no : 345/10

NADINE BLOM	First Appellant
ELMARI BROWN	Second Appellant
and	
CECILIA GETRUIDA BROWN	First Respondent
GERT VAN SCHALKWYK	Second Respondent
THE MASTER OF THE HIGH COURT PRETORIA	Third Respondent

Neutral citation: ***Blom v Brown*** **(345/10) [2011] ZASCA 54 (31 March 2011)**

BENCH: **PONNAN, TSHIQI and SERITI JJA**

HEARD: **14 MARCH 2011**

DELIVERED: **31 MARCH 2011**

SUMMARY: **Wills Act 7 of 1953 – section 4A – interpretation of.**

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ismail AJ sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

PONNAN and SERITI JJA (TSHIQI JA concurring):

[1] The first appellant, Nadine Blom (born Brown) and her sister, the second appellant, Elmari Brown are the children of Alfred Samuel Brown (the deceased). Their parents divorced in 1984. On 27 September 1985 the deceased married the first respondent, Cecilia Getruida Brown, out of community of property. No children were born of his marriage to the first respondent. On 28 March 1995 the deceased executed a will (the first will), in terms whereof he left to the first respondent his entire estate provided that she survived him by at least seven days.

[2] On 24 August 2007 prior to travelling to Ulundi in KwaZulu Natal, where he expected to spend one month on a work related assignment, the deceased asked to see the first will because, as he put it, he did not want the first respondent to struggle, should something happen to him whilst he was in Ulundi. His concern was triggered, it would seem, by him having been hospitalised for a lung infection during the course of the preceding month. The first respondent informed the deceased that he ought not to be concerned as he had a valid will, but she could not immediately lay her hands on it when she searched for it, and was thus unable to put his mind at ease. The deceased then asked her to call her nephew, Heinrich Kossatz and the latter's girlfriend, Natasha Gerber, who were living in a granny flat on their property. In their presence he then

dictated a will which the first respondent wrote out in her own handwriting. After first reading it, he signed that will (the second will) in the presence of the first respondent, Kossatz and Gerber. Each of the latter two then signed as witnesses. In terms of the second will he revoked all of his previous wills and codicils and once again bequeathed his entire estate to the first respondent.

[3] On 28 August 2007 and whilst in Ulundi the deceased met his death. After his death First National Bank lodged the first will with the third respondent, the Master of the High Court, Pretoria. The first respondent consulted with an attorney and pursuant to that consultation on 24 September 2007 she lodged the second will with the Master. As the second will made no provision for an executor, she also sought the appointment of Angelique Scheepers, an attorney, as executor of the deceased's estate. The Master took the view that Ms Scheepers, not having been exempted by the deceased, was obliged to furnish security for the due discharge of her duties as executor. Ms Scheepers was unwilling to do so and in consequence the Master declined to appoint her.

[4] On 13 March 2008 the Master wrote to the first respondent enquiring about:

'the relationship between the writer of the handwritten portions of the will and the witnesses to the signature of the testator and the beneficiaries under the will.'

She responded fully in writing to the Master that very day. Shortly thereafter the first respondent called on the office of the Master in an endeavour to resolve the appointment of an executor. She was informed that if she were appointed executor it would not be necessary for her to furnish security. As the first respondent was an unrehabilitated insolvent and thus did not qualify for appointment, she made application to court and on 24 April 2009, by order of the North Gauteng High Court (Pretoria), an order for her rehabilitation issued. Armed with the order she once again approached the office of the Master and was duly appointed executor. She was also informed that she was disqualified from benefiting under the will by virtue of s 4A of the Wills Act 7 of 1953.

[5] The first respondent on the advice of attorney Gert van Schalkwyk, the second respondent, then launched an *ex parte* application to the North Gauteng High Court (Pretoria) for an order in the following terms:

'1 Dat verklaar word dat die oorledene, Alfred Samuel Brown, se eggenote, Cecilia Getruida Brown, bevoeg is om die voordele te ontvang wat aan haar bemaak is in die testament van gesegde oorledene gedateer 24 Augustus 2007.

2 Dat verdere of alternatiewe regshulp aan die Applikant verleen word.'

That application succeeded before Pretorius AJ.

[6] During May 2009 the appellants caused application proceedings to be instituted in the North Gauteng High Court against the first and second respondents, as also the Master. The relief sought was:

'1 Rescinding the order granted on 14 July 2008 in case no. 28005/2008 and replacing it with the following:

"1 Dit word verklaar dat die Applikant (Cecilia Gertruida Brown) in terme van Artikel 4A(2)(b) van die Wet op Testamente, Nr 7 van 1953, bevoeg is om 'n voordeel uit die testament van Alfred Samuel Brown gedateer 24 Augustus 2007 te ontvang, onderhewig daaraan dat die waarde van sodanige voordeel nie 'n kindsdeel soos in die Wet of Intestate Erfopvolging, Nr 81 van 1987 bedoel, sal oorskry nie;

2 Dit word verder verklaar dat gemelde Alfred Samuel Brown se twee afstammelinge, Nadine Blom en Elmari Brown, ingevolge die bepalings van die Wet op Intestate Erfopvolging, Nr 81 van 1987, bevoeg en geregtig is om in gelyke dele die restant van voormelde Alfred Samuel Brown se boedel te erf."

2 In the alternative to paragraph 1 above, rescinding the order granted on 14 July 2008 in case no. 28005/2008 and granting leave to the First and Second Applicants in this application to oppose the application in case no. 28005/2008 and to deliver their notice of intention to oppose within 10 days from date hereof;

3 That the First Respondent be removed from office of executor in the administration of the deceased estate of Alfred Samuel Brown, Master's reference no. 19545/07, in terms of the provisions of Section 54(1)(a) of the Administration of Estates Act, No. 66 of 1965 and that she be ordered to forthwith return her letters of executorship to the Third Respondent;

4 That the First and Second Respondent be ordered to pay the costs of this application, jointly and severally, the First Respondent in her personal capacity and the Second Respondent *de bonis propriis*;

5 That further and/or alternative relief be granted.'

[7] In an affidavit filed in support of the relief sought the first appellant states:

'10

It is now a well-known fact that the First Respondent was involved in the execution of my father's last will (Annexure "A" hereto), because she, as his wife, wrote out the will for him in her own handwriting. This is more fully explained by herself in an affidavit which I shall later refer to more fully.

11

I am advised that in this regard the provisions of Section 4A(1) read with subsection (2)(b) of the Wills Act, No. 7 of 1953, are applicable, as the First Respondent, being my late father's wife, would have been entitled to inherit from him if he had died intestate.

12

In terms of Section 4A(1) read with subsection (2)(b) of the Wills Act such person shall be disqualified from receiving any benefit from that will, but that a court may declare such a person competent to receive a benefit which shall not exceed the value of the share to which that person would have been entitled in terms of the law relating to intestate succession.

13

In terms of Section 1(1)(c) of the Intestate Succession Act, No. 81 of 1987, where a person dies intestate and is survived by a spouse as well as a descendant, such spouse shall inherit a child's share (or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister) and the descendant shall inherit the residue.

14

In terms of Section 1(4)(f) a child's portion, in relation to the intestate estate of a deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased, plus one.

15

This means, I respectfully submit, that the First Respondent would only be entitled to inherit one third (a child's portion) of my father's nett estate, whilst the Second Applicant and I would be entitled, in terms of the law relating to intestate succession, to the remainder of this estate divided equally between us.

16

Therefore, at all relevant times hereto, the Second Applicant and I, as my late father's only two children, had (and still have) a direct and substantial interest in all matters relating to the inheritance and liquidation of my father's deceased estate.'

[8] Of the second respondent's involvement in the matter and in explaining why he has been cited as a respondent, the first appellant states:

'26

On or about 12 June 2008 I received a telephone call from the Second Respondent who informed me that because my late father failed to appoint an executor, the First Respondent was about to apply for the appointment of an independent executrix in the deceased estate of my father. At no stage was I informed that the First Respondent had already issued an application for the relief claimed in terms of the *ex parte*

application referred to above or that the First Respondent would apply to be appointed as executrix herself. The *ex parte* application was also never served on me or the Second Respondent.

27

During or about the beginning of March 2009 I called the Second Respondent to enquire about the state of affairs with regard to my late father's estate. When I asked him if an executrix had already been appointed, he informed me that the First Respondent is the executrix.

28

This came as a shock to me and I immediately telephoned my attorney of record who then conducted a search in the office of the Third Respondent where she noticed a copy of the *ex parte* application and the court order. I refer in this regard to the confirmatory affidavit of my attorney of record which is attached hereto as Annexure "F".

29

On 9 March 2009 my attorney addressed a letter to the Second Respondent in this regard. A copy thereof is attached hereto as Annexure "G". In this letter my attorney pointed out that we were not given notice of this application and that the Second Applicant and I intend to apply for the necessary relief.

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On 12 March 2009 the Second Respondent replied in writing and a copy of his letter is attached hereto as Annexure "H". In this letter he alleges that he invited me to collect a copy of the application in case no. 28005/2008 at his offices and that he was of the view that it was not necessary to serve the application on me. I deny any reference to this application or that he invited me to collect a copy thereof at his offices. He only informed me about the First Respondent's intention to apply for the appointment of an independent executrix in the deceased estate of my father.

31

This new explanation is an afterthought to cover up his deliberate failure to give me proper notice and to have the said application properly served on me. Furthermore, there is no explanation or supporting affidavit by the Second Respondent in the *ex parte* application (case no. 28005/2008) that he had a telephonic conversation with me with regard to the application itself.'

[9] In support of the contention that the first respondent should be removed as executor, the first appellant stated:

'32

I am advised by my attorney of record that according to the Third Respondent's file, the First Respondent has already been appointed as the executrix in my father's deceased estate. A copy of her letters of executorship is attached hereto as Annexure "J". The Second Respondent is apparently assisting the First Respondent in the execution of her duties.

33

Due to the circumstances described above, I have lost all confidence in the First and Second Respondents. The First Respondent has, in collaboration with the Second Respondent, launched an *ex parte* application without giving any notice thereof and has already obtained an order to which she was not entitled to.'

[10] And finally in support of their entitlement to a rescission or variation of the order granted by Pretorius AJ, the first appellant states:

'35

As I have already pointed out above, the Second Applicant and I have a direct and substantial interest in matters relating to the inheritance and liquidation of my father's deceased estate. Notwithstanding this, the First and Second Respondents erroneously sought and obtained an order in the absence of the Second Applicant and myself under circumstances where we are each entitled to a child's share of my father's deceased estate as more fully explained above.'

[11] Ismail AJ dismissed the application for rescission with costs essentially because he was satisfied that the order made by Pretorius AJ was correct, but, granted leave to the appellants to appeal to this court. Neither the second nor the third respondent take any part in this appeal.

[12] Two issues arose for decision before the high court. First, the interpretation of s 4A of the Act and second, whether the first respondent should be removed as the executor of the deceased's estate in terms of s 54(1)(a) of the Administration of Estates Act 66 of 1965. Before us the second was specifically abandoned by counsel and accordingly warrants no further consideration.

[13] I thus turn to s 4A. A useful starting point is *Smith & another v Clarkson* 1925 AD 501, where Kotze JA (at 503-4) after an elaborate examination of the common law, summarised the position as follows:

'The rule of the *Roman Law*, adopted in our own law, is that no one, in writing out the will of another, can derive any benefit for himself under it; and it has been held by this Court that being appointed executor in a will is a benefit within the meaning of the rule *Benischowitz v The Master* (1921 AD 589). The Roman law on the subject is contained in the *Digest* (lib. 48 tit. 10) and in Code (9.23). But even in the Roman law, as Brunnemann in his Commentary on this passage of the Code observes we find instances mentioned which go to show that the rule was not extended beyond cases where the reason for the rule

did not apply. Thus if a slave or a son wrote out a will; in which he was instituted heir or otherwise benefited, the mere subsequent general superscription, by way of confirmation by the testator was sufficient; but, in the case of a stranger writing out a will, the special superscription of the testator, to the effect that he had dictated and acknowledged the will (*dictavi et recognovi*) was necessary in none of these instances was the penalty of the *lex Cornelia de falsis*, nor forfeiture of the benefit, incurred *Dig.* (48.10.1.8). So, in the Code (9.23.1) we find a similar instance put of a son writing out a will at his father's dictation in his own favour. It was there held that as the son, even without the will, would have succeeded to his father's estate, and was merely writing at his father's dictation, it was as if his father had himself written the will. If this reasoning amounts to anything, it can only hold on the ground that the circumstances removed all suspicion of falsity or fraud on the part of the son.'

[14] The South African Law Commission in its Review of the Law of Succession, observed in June 1991 (Project 22 para 4.35):

'The Commission holds the view that the rules concerning the disqualification of persons involved in the execution of the will frustrate the intention of the testator while they seldom succeed in preventing fraud. The persons who are usually available to write out the will or who sign as witnesses are precisely the family and friends whom the testator wishes to benefit. Those who intend forging a will usually see to it that they are not disqualified by the rules. The witnesses or a writer whose benefit appears from the will is penalised, while persons who may covertly receive a benefit are not affected. The disqualification has been described as "unfair" and "a trap for the unwary".'

It thus recommended (para 4.38):

'The Commission recommends that the rules concerning the disqualification of persons involved in the execution of a will be abolished. This may be done by repealing sections 5 and 6 of the Wills Act 7 of 1953 and by substituting for them a provision that will cause the writer of and witnesses to a will not to be incapable of inheriting.'

[15] Sections 5 and 6, prior to their repeal, provided:

'5 A person who attests the execution of any will or who signs a will in the presence and by direction of the testator or the person who is the spouse of such person at the time of attestation or signing of the will or any person claiming under such person or his spouse, shall be incapable of taking any benefit whatsoever under that will.

6 If any person attests the execution of a will or signs a will in the presence and by direction of the testator under which that person or his spouse is nominated as executor, administrator, trustee or guardian, such nomination shall be null and void.'

The Law Commission's recommendations were not accepted by the Legislature. By s 7 of the Law of Succession Amendment Act 43 of 1992, the Legislature did, however, repeal sections 5 and 6 and in their stead, inserted s 4A into the Act.

[16] Section 4A, to the extent here relevant, provides:

'(1) Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.

(2) Notwithstanding the provisions of subsection (1) —

(a) a court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will;

(b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession.'

[17] It is immediately apparent that the classes of persons previously disqualified by the now repealed ss 5 and 6 were extended by s 4A to include someone who writes out a will or any part thereof in his or her own handwriting. And unlike those repealed sections which admitted of no qualifications or exemptions, s 4A does. Prior to the 1992 amendment the general rule was that a person who had written out a will on behalf of the testator was disqualified from taking any benefit under that will. The rationale for disqualifying such persons was to prevent fraud. But, our courts have always recognised that at common law exceptions should be made. It was put thus *In Re Estate Barrable* 1913 CPD 364 at 368:

'The object of the stringency of the law, and of the rules laid down, was the prevention of falsity, and fraud, and of the exertion of undue influence over people in bad health or in feeble state of mind; yet in some cases it was recognised that all the circumstances and even the document itself so entirely disproved fraud that exceptions should be made from the pains and penalties laid down.'

Using *Barrable* as its lodestar *In Re Estate Maxwell* 1949 (4) SA 84 (N) held that a son, who had completed and read over the will of his mother during her last illness, after she

had told him how she wished to dispose of her estate, was entitled to the benefits reserved to him by the will.

[18] Counsel for the appellants submitted:

'(a) Subsection (2)(a) applies to persons who are not family members of the testator and who are disqualified (and will remain disqualified), unless a court is satisfied that the testator was not defrauded or unduly influenced;

(b) Subsection (2)(b) applies to persons who are family members (i.e. a spouse, descendant, parent or other blood relation). As far as this category of persons is concerned, the intention is not to disqualify them, but to entitle them to inherit a benefit, the value of which shall not be more than his/her intestate portion. This is to ensure that other family members are not prejudiced and are treated equally in terms of the law relating to intestate succession.

It is therefore respectfully submitted that the legal principle underlying Section 4A of the Wills Act can be formulated as follows: *Only those persons who are disqualified shall have locus standi to apply for an order in terms of subsection (2)(a).* In other words, disqualification is a prerequisite. The question is which persons are disqualified and which are not?'

[19] In my view that foundational premise, upon which the rest of counsel's argument rested, is untenable. Section 4A(1) provides that a person who writes out a will (and the spouse of that person) shall be disqualified from receiving any benefit from that will. That general principle set out in subsection 1 is subject to the qualification and exceptions set out in subsection 2. To answer the question posed by counsel: Section 4A(1), which encapsulates the general rule, operates without more to disqualify a particular class of persons, namely those who attest, sign (as a witness or in the presence of and by the direction of the testator) or write the will, from benefitting under that will, unless they are exempted by either subsections (a) or (b) of section 4A(2). Subsection 2(a) empowers a court to declare any such person who may be disqualified by the operation of subsection 1 to be competent to receive a benefit from the will if it is satisfied that such person (or such person's spouse) did not defraud or unduly influence the testator in the execution of the will. Unlike subsection 2(a), subsection 2(b) applies automatically - that is without the necessity for an order of court to be obtained. But like subsection 2(a), it too serves to exempt those who fall within the ambit of its scope from

the operation of the general rule envisaged in subsection 1. There is, to my mind, nothing in s 4A to suggest that the applicability of subsection 2(a) is dependent on the inapplicability of subsection 2(b). If it was the intention of the legislature that a person contemplated in subsection 2(b) was to be excluded from the ambit of subsection 2(a) then one would have expected the section to contain words such as 'other than a person referred to in paragraph (b) of sub-section 1' to appear in subsection 2(a).

[20] Moreover, I have some difficulty in appreciating why the legislature would have seen fit to differentiate between a stranger, on the one hand, and 'a spouse, descendant, parent or other blood relation', on the other, as counsel postulates. Let us take two scenarios for illustrative purposes: In the first a neighbour, A, writes out a will for a testator, T, and in the second a spouse, B, writes out a will for her husband, the testator, T. If Counsel's submission is correct then, notwithstanding the fact that both A and B may be able to show that they did not defraud or unduly influence T in the execution of his will, the former will be entitled to all of the benefits reserved to him in terms of T's will but the value of B's benefit will be limited to what she would have been entitled to on intestacy - presumably one child's share. Why the legislature would subject two similarly placed beneficiaries to such differential treatment is not readily apparent to me.

[21] In addition to the considerations that I have just alluded to, counsel's argument, in my view, finds no support in the plain language of the section. Subsection 1 refers to 'any person' who inter alia 'writes out the will' of the testator. And subsection 2(a) refers in terms to 'a person or his spouse referred to in subsection 1'. It is that person, namely the person who writes out the will that a court may declare to be competent to receive a benefit under that will. In that respect as Kotze JA made plain in expatiating on the common law, sections 4A(2)(a) and (b) do no more than afford to a beneficiary remedies to reverse the effect of a disqualification. Those remedies, as the other authorities to which I have referred illustrate, were available to such beneficiary under the common law. As it was put by Wessels J in *Casserley v Stubbs* 1916 TPD 310 at 312

‘It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention.’

In a similar vein Innes CJ stated in *Johannesburg Municipality v Cohen’s Trustees* 1909 TS 811 at 823:

‘In considering the question of the extent to which the common law is abrogated by statute, the rule which as been adopted by the English courts is thus laid down by Byles, J., in *Reg. v Morris* (1 CCR 95): “It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law.” ’

[22] Where a beneficiary acts as a testator’s amanuensis there is almost always room, I would imagine, for the suspicion that the testator may have been improperly influenced by that self-interested beneficiary. It is perhaps for this reason that the common law disqualification in respect of persons who wrote out the will in their own handwriting, was retained in s 4A(1) of the Act. What the section seeks to achieve, consistent with the common law, however, is to permit a beneficiary, who would otherwise be disqualified from inheriting, to satisfy the court that he or she (or his or her spouse) did not defraud or unduly influence the testator in the execution of the will.

[23] In this case, the first respondent gained no unfair advantage over anybody, and there is no room for any falsity or fraud. Nothing can be clearer than the absolute bona fides of the first respondent. Nowhere on the papers was her bona fides as the writer of the will questioned. Nor, given the existence of the deceased’s first will, which left his entire estate to her, could it have been. She was merely acting at his special request as his amanuensis and she gained absolutely nothing by so doing, nor did she attempt to gain anything. In my opinion she ought to receive the benefits reserved to her by the will.

[24] It follows that the appeal must fail and it is accordingly dismissed with costs.

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V M PONNAN
JUDGE OF APPEAL

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W SERITI
JUDGE OF APPEAL

APPEARANCES:

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