REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 19759/16

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

27/10/17
DATE

SIGNATURE

In the matter between:

HANNES ROOS Applicant

and

PEARL SAAIMAN NO First Respondent

MARA DOHERTY Second Respondent

THE MASTER OF THE NORTH GAUTENG HIGH COURT Third Respondent

JUDGMENT

TEFFO, J:

INTRODUCTION

[1] This is an application for a declaratory order that the will signed by the late Bronwyn Doherty-Roos on 28 September 1994 ("*the contested will*") was revoked by her on 5 December 2011 and does not constitute her last will and testament.

[2] The applicant also seeks an order declaring that the late Bronwyn Doherty-Roos died intestate and he being the surviving spouse of the late Bronwyn Doherty-Roos, inherit the intestate estate in accordance with section 1(1)(a) of the Intestate Succession Act, 81 of 1987 ("*the Intestate Succession Act*").

[3] The applicant further seeks an order directing the third respondent to refuse to accept the contested will for the purposes of the Administration of Estates Act, 66 of 1965 ("*the Administration of Estates Act*").

[4] Over and above this the applicant seeks an order directing the first respondent to administer the estate of the late Bronwyn Doherty-Roos on the basis that he inherits the intestate estate as set out in paragraph [2] above.

[5] The applicant is the surviving spouse of the late Bronwyn Doherty-Roos (the "*deceased*" and "*testator*" of the contested will).

[6] The first respondent is an employee of Absa Trust Estate Services and the executrix in the estate of the deceased in terms of the contested will. Her appointment as executrix is subject to the issuing of the letters of executorship by the Master of this Court.

[7] The second respondent is the mother of the deceased and a potential beneficiary nominated in terms of the contested will.

[8] The third respondent is the designated authority appointed in terms of the Administration of Estates Act.

[9] For convenience's sake in this judgment the first, second and third respondents will be referred to separately as the first or second or third respondent.

[10] The first and third respondents do not oppose the application. The application is only opposed by the second respondent.

[11] I was advised at the commencement of the hearing that the replying affidavit was filed late and that the second respondent does not object to its late filing. Condonation for the late filing of the replying affidavit was accordingly granted.

BACKGROUND

[12] On or about 28 September 1994 the deceased signed a will bequeathing her entire estate to the second respondent ("*the contested will*").

[13] The deceased and the applicant met each other in 2009. Shortly thereafter on 7 May 2010 they got married in terms of an Antenuptial Contract.

[14] The deceased signed a document addressed to Absa Trust Cancellation Division dated 5 December 2011 which reads:

> "*VAN: Bronwyn Doherty Posbus 11269,*
> *Queenswood 0121 082 891 9879*
>
> *AAN: ABSA TRUST KANSELLASIE AFDELING*
>
> *Testament – Bronwyn Doherty ID 730507 0035 08 0*
>
> *Bogenoemde testament is in 1999 reeds gekanselleer maar blykbaar nie op u rekords nie.*
>
> *Ek gee hiermee opdrag dat u die verouderde testament by ABSA kanselleer en vernietig.*
>
> *Dankie*
>
> *Bronwyn Doherty, geteken te Pretoria op 5 Desember 2011.*"

[15] In a letter dated 8 December 2011 addressed to the deceased, Absa Trust wrote the following:

> "*VERNIETIG VAN TESTAMENT: (41001587098)*

Ons verwys na u versoek.

Ons bevestig dat ons u instruksies om u Testament gedateer 28 September 1994 te vernietig/kanselleer aangeteken het op ons rekords.

Neem asseblief kennis dat u nuutste testament 'n klousule moet bevat wat alle vorige testament herroep.

Die uwe,

A CAMPHER (MEV)
SPANLEIER"

[16] The deceased passed on on 14 December 2015 following a motor vehicle accident.

[17] No children were born of the marriage between the deceased and the applicant.

[18] The contested will was returned to Absa Trust by the second respondent on 3 February 2016.

[19] In a letter dated 4 March 2016 hand delivered and addressed to the second respondent from Absa Trust the following is stated:

"*Estate Late : B Doherty-Roos (PS) 319386*

We refer to the above estate.

Having regard to the deceased's request that the last will and testament held with Absa Trust be cancelled, we are thus not nominated as executors and cannot take up appointment as executors in the estate. We attach all the documents received by our office.

We trust you find the above in order.

Yours faithfully

pp BRANCH MANAGER-ESTATE SERVICES."

[20] There is no other will that was executed by the deceased subsequent to the letter addressed to Absa Trust dated 5 December 2011.

[21] Eventually the first respondent received the deceased's file for purposes of acting as the appointed Estate Administrator. The first respondent has proceeded to report the deceased's estate to the Master of this Court under reference number 2692/2016.

[22] The issue for determination is whether the deceased intended to revoke the contested will in the letter addressed to Absa Trust Cancellation Division dated 5 December 2011.

THE PARTIES' CONTENTIONS

[23] The applicant contends that according to the letter from the deceased dated 5 December 2011 to Absa Trust, the contested will was revoked by her. In the absence of any later valid will, the deceased died intestate and that he, as the surviving spouse, inherits her estate in accordance with section 1(1)(a) of the Intestate Succession Act.

[24] The second respondent denies the allegations. She made the following averments in her answering affidavit in support of the denial of the revocation of the will:

24.1 That at no stage did the deceased ever intimate to her that she executed a further will after 5 December 2011;

24.2 The deceased did not intend to revoke the will as would seem to be the import of the letter dated 5 December 2011. The letter was written on the advice of Absa Bank officials following her visit to the bank with the deceased.

24.3 The reason the letter was written was to terminate Absa's safekeeping of the will in order for the deceased not to incur any further charges for the safekeeping.

24.4 She was nominated by the deceased as the sole beneficiary of her policies which policies commenced on 1 May 2004, November 2008 and 1 December 2012 respectively.

24.5 She also disputed that she kept various wills of the deceased and the applicant in her possession.

The second respondent also invited the applicant to appoint any expert to perform the necessary tests on her computer in order to satisfy himself that she had not executed or drafted any will from him or the deceased.

[25] The applicant further contends that after his marriage with the deceased they both made new wills in 2010 with the assistance of the second

respondent. He verily believes that the 2010 will of the deceased appointed him as the primary beneficiary. This also applies to the 2015 will executed by the deceased.

[26] He further alleged that the second respondent was in charge of the process and kept a copy of the deceased's 2010 will. He never requested a copy of the 2010 will as he never saw the need thereof and never anticipated that the current situation would prevail. The second respondent was also in possession of his will which was executed in 2010. He also contended that the deceased executed another will in 2015 which is also in the possession of the second respondent. He has never seen the deceased's 2010 and 2015 wills.

[27] The applicant submitted that having regard to the denial by the second respondent that the deceased's 2010 and 2015 wills do exist and the insistence that the only will that exists is the contested will, he accepts the second respondent's advice in this regard.

[28] On the other hand the second respondent contends that in so far as the applicant intimates that the deceased executed a further will ostensibly revoking the 1994 will, such revocation of the old will was conditional upon the efficacy of the execution of a new will. He submitted that the revocation on which the applicant relies fails and the original will remains in force.

WHETHER THERE ARE ANY DISPUTES OF FACTS INCAPABLE OF BEING RESOLVED ON THE PAPERS

[29] It was argued on behalf of the second respondent that there is a clear *bona fide* dispute of fact revolving around the setting in which the letter dated 5 December 2011 had been drafted.

[30] The second respondent contends that at some stage after the deceased was hospitalised for almost a year, she informed her that she intended cancelling a debit order for the safekeeping of the will with Absa. She and the deceased went to Absa where a bank official advised them to write the letter dated 5 December 2011. When they returned to the bank, she typed the letter as advised and gave it to the deceased to sign. The letter was then taken to the bank.

[31] Before I even deal with the merits of the matter I am of the view that the dispute of fact referred to above is not a genuine and *bona fide* dispute of fact for the following reasons:

31.1 The letter dated 5 December 2011 makes no reference to any cancellation of a debit order that the deceased had with Absa nor any problem relating to the safe keeping of the will with Absa Trust.

31.2 The letter introduces a completely different topic as against the cancellation of a debit order or problems relating to the safe keeping of the will as alluded to by the second respondent. Instead the letter states that the contested will was cancelled in 1999 but Absa's records were not updated to reflect same. It instructed Absa Trust to cancel and destroy same as it was outdated.

[32] In my view this dispute of fact is far-fetched. It is therefore rejected.

ANALYSIS

[33] The *onus* rests on the applicant to show that the deceased intended to revoke the contested will in accordance. (*De Reszke v Maras and Others* 2003 (6) SA 676 at 689 (C)).

[34] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 at 603E-604C [para [19]] of the judgment, the current state of our law with regard to the interpretation of documents was summarised 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 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 unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or business-like 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."

[35] I must mention that the cases referred to are not direct to the point and I could also not find any.

[34] I have to apply the principles of interpretation as outlined in the *Endumeni* judgment above and looked at the language used in the letter in the light of the ordinary rules of grammar and syntax, the context and the purpose to which it is directed. What is also important is the background to the preparation and the production of the document.

[37] The letter dated 5 December 2011 was addressed to Absa Trust Cancellation Division. It states that the above will ("*the contested will*") has already been cancelled in 1999 but Absa's records do not reflect same. The letter further gives an instruction to cancel and destroy the outdated will.

[38] It is important to note that this instruction was given in 2011 while there was a prior instruction to cancel the will in 1999. The instruction is to cancel and destroy the outdated will. "*Outdated*" means no longer serving the

purpose. Already in 1999 there was an instruction to cancel. In 2011 the words "*cancel*" and "*destroy*" the "*outdated will*" are used.

[39] In my view taking into account the language used in the letter in the light of the ordinary rules of grammar and syntax, the context and the purpose to which it is directed, there can be no doubt that all what the deceased wanted was for Absa to cancel and destroy the outdated will and then proceed to update their records accordingly. There has not been any instruction to stop the debit order or charges on her account and return the will. Whether the letter was written by the second respondent or the deceased, is immaterial. The deceased was the daughter of the second respondent. According to the second respondent she and the deceased discussed whatever she wanted to do with her life. If the deceased was unhappy with what the second respondent typed on the letter, she would not have signed it. The letter is clear and straight to the point. It cannot therefore be concluded in my view that there was any ambiguity in the deceased's intention as contained in the letter.

[40] In my view the letter dated 5 December 2011 reflects the intention of the deceased in so far as the contested will was concerned. This is supported by the reply of the letter by Absa on 8 December 2011 advising the deceased after confirming that it noted her instruction to destroy/cancel her will dated 28 September 1994, that she should include a clause that invalidates all previous wills made in the new will. Further to this after the second respondent returned the will to Absa Trust on 3 February 2016, it advised the second

respondent in a letter dated 4 March 2016 that having regard to the deceased's request that the last will and testament held with it be cancelled, it is thus not nominated as an executor and cannot take up the appointment as an executor in the estate.

[41] While the second respondent accepts that with the commencement of section 2A of the Wills Act the requirement that the intention to revoke the will should be contained in a testamentary instrument has been done away with, it has been argued on her behalf that in the *Marais* judgment Didcott J referred to the *Law of Succession in South Africa (LAWSA)* by Corbett, Hahlo, Hofmeyer and Kahn where the authors state at 86-7:

> "*A mere informal expression of intention to revoke ..., not contained in a testamentary instrument or not accompanied by an act of destruction ... does not constitute an effective revocation.*"

[42] It was further submitted that it however remains a requirement for revocation by way of destruction that the act of destruction should have taken place. It was accordingly pointed out that it is not in dispute in the present matter that the act of destruction did not occur hence the existence of the contested will which is currently in the possession of Absa Trust. Therefore there was no effective revocation of the will.

[43] The first respondent, Pearl Saaiman confirmed in an email to Johan Verwey of the Master's Office (the third respondent) that it is Absa's Will Control Centre's policy to return the will to the client and not to destroy same

in the event of a client requesting it to cancel/destroy same (see annexure "N" attached to the replying affidavit).

[44] In the *Marais* judgment the court held that the destruction of a copy of the will did not necessarily symbolise the destruction of the original but that everything depended on the circumstances. This case is in fact distinguishable in that in the present matter a letter giving instructions to cancel and destroy the contested will was sent to Absa Trust. Absa Trust did not destroy nor cancel the contested will but returned it to the deceased. Absa's explanation that it is its policy not to destroy or cancel the will but to return it to the testator cannot be faulted. Whatever happened to the contested will after it was returned to the deceased is, in my view, immaterial. The fact of the matter is that Absa Trust returned the will to the deceased after it was instructed to cancel or destroy it. That is how it understood the instruction. Whether it has been destroyed or cancelled that does not take away the instruction in the letter dated 5 December 2011. The letter is clearly indicative of the deceased's *animus revocandi*.

[47] I am of the view that the keeping of an outdated will cannot revive it where there was a clear written instruction to cancel and/or destroy it. The letter dated 5 December 2011 which clearly states the deceased's intention, cannot be ignored. The contested will has been outdated as stated in the letter and the deceased gave an instruction that it should be cancelled and destroyed as the instruction to cancel was already given in 1999. It was clear that she wanted Absa Trust to update their records accordingly.

[48] In any event the statement relied upon by the second respondent as outlined in paragraph [42] of the judgment regarding what the authors Corbett and others say in *LAWSA* is to the effect that either the expression of the intention to revoke ... is not contained in a testamentary instrument, or not accompanied by an act of destruction. Reliance on the fact that there was no act of destruction does not take the case of the second respondent any further. It is immaterial taking into account that the letter itself constitutes a document signed by the testator in which she revoked the will. The letter in my view constitutes the document referred to in section 2A(c) of the Wills Act.

[49] Sections 2(3) and 2A of the Wills Act 7 of 1953 ("*the Wills Act*") read:

> "2. *Formalities required in the execution of the will*
>
> *(1) ...*
>
> *(2) ...*
>
> *(3) If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act 66 of 1965,as a will, although it does not comply with all the formalities for the execution or amendment of the Wills Act referred to in ss (1).*
>
> *(4) ...*
>
> 2A. *Power of court to declare a will to be revoked*
>
> *If a court is satisfied that a testator has –*
>
> *(a) made a written indication on his will or before his death caused such indication to be made;*

(b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or

(c) 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."

[50] Section 2A(c) of the Wills Act effectively codified the position that existed prior thereto that there is no reason "*why effect should not be given to the document signed by the testator in which he revokes his will, even if the document is not otherwise executed in a testamentary form and the written revocation is, in that sense, informal*" (see *Marais v The Master* 1984 (4) SA 288 (D) at 291, *The Law of South Africa*, Vol 31, first reissue, p 177 paragraph 269).

[51] In my view in the absence of a further will executed subsequent to the revocation of the contested will by means of the letter dated 5 December 2011, the deceased died intestate. I am persuaded that the deceased's estate should therefore devolve in terms of the provisions of section 1(1) of the Intestate Succession Act.

[52] Consequently the application succeeds.

[53] Mr Kellerman on behalf of the second respondent requested that costs should be payable from the estate and Mr Acker on behalf of the applicant disagreed. In my view costs should follow the result.

[54] In the result I grant the following order:

54.1 The application succeeds and the second respondent is ordered to pay the costs of the application.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant	C Acker
Instructed by	Pagel Schulenburg Inc
For the Second Respondent	L Kellerman SC
Instructed by	RIC Martin Inc
Date Heard	18 April 2017
Date Handed Down	27 October 2017