THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 153/2015

In the matter between:

IAN DAVID MITCHELL NO	**APPELLANT**
and	
SANDRA JANE WREN	**FIRST RESPONDENT**
YOLANDI MYNHARDT	**SECOND RESPONDENT**
THE MASTER OF THE EASTERN CAPE HIGH COURT, PORT ELIZABETH	**THIRD RESPONDENT**

Neutral citation:	*Mitchell NO v Wren* (153/2015) [2016] ZASCA 50 (1 April 2016)
Coram:	Leach, Seriti, Petse and Mbha JJA and Kathree-Setiloane AJA
Heard:	7 March 2016
Delivered:	1 April 2016

Summary: Will ─ two notes written by deceased immediately before her death – wording of notes and circumstances under which they were written manifesting that deceased intended them to be an amendment of her existing will ─ no direct evidence as to which written last ─ surrounding circumstances and probabilities as a whole indicating that one of the notes was written after the other and was to be accepted as a codicil to deceased's existing will.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Port Elizabeth (Revelas J and Eksteen J, sitting as court of first instance):

1 The appeal is dismissed.

2 The costs of the appeal on the scale as between attorney and client, including the costs of two counsel where employed, are to be paid out of the estate of the deceased Carolynn Ellen De Villiers.

JUDGMENT

Petse JA (Leach, Seriti and Mbha JJA and Kathree-Setiloane AJA concurring):

[1] The principal issue for determination in this appeal concerns the validity of two testamentary notes written by Carolynn Ellen De Villiers (the deceased), shortly before she committed suicide in the early hours of 9 June 2012. The court a quo found that one of the two notes, annexure A to the founding papers, should be accepted as a valid codicil to the existing will of the deceased. It is against that order that the appellant, the executor of the deceased's estate, appeals to this court with leave of the court a quo.

[2] It is necessary at the outset to briefly set out the background circumstances that are of relevance. The deceased and the first respondent, Sandra Jane Wren, who had been friends since 2007, were involved in a same-sex life partnership. They had lived together in the first respondent's house for almost a year before the deceased's death. The deceased had sold her house in January 2012, a fact that supports the conclusion that she regarded her relationship with the first respondent as permanent. The deceased and the second respondent, Yolandi Mynhardt, had been close friends for many years.

[3] The first respondent alleged that the deceased had, on the eve of her death, gone through her suitcases and boxes that she had brought with her when she moved into her residence which she had not yet unpacked. They had supper

together and, at approximately 22h00, she retired to bed leaving the deceased upstairs as the latter continued to go through her possessions. The next morning she discovered the body of the deceased who had committed suicide during the night. One knows from the time sms messages had passed between her and her friend, the second respondent, that the deceased took her life sometime after 01h00 the next morning.

[4] Immediately after her body was discovered, a friend who had arrived on the scene, found two handwritten notes that the deceased had written before she died. Both were attached to the founding papers as annexures A and B. They are reproduced as annexures to this judgment. Both contain pieces of writing that make testamentary dispositions. The relevant portions of each read as follows (the spelling is as they were written):

Annexure A

'My Last Will & testament
I want all goods in this house to ~~be lon~~ belong to
Sandy Jane Wren & Shee gets R1m from my estate
Yolande "Zozi" also gets R1m from my estate.
Dad & Barry there will be enough for you
Please grant my dieing wish.
Sorry to do this to you all but time to be with mom.[1]
Love y all
Life is toooo hard
take care I will be watching you.
Love Love
Lots.'

Annexure B

'My Larst will & testemonemt
This is my wish & if you ewer loved
me you will make sure it is seen through

[1] The deceased's mother committed suicide when the deceased was 15 years old.

I want Sandy to have legal rights of
everything in 5 Wodehouses.
I want Zozi to get R1m.
They are the best
the riest, more than enough is for u dad and barry

[5] It is accepted that the references to 'Zozi' in these notes is a reference to the second respondent. I must also mention that annexure B contains matters that are entirely unrelated to testamentary dispositions. Listed above the quoted passage were a number of notes of a domestic nature made by the deceased and the first respondent the previous evening before the latter had retired to bed. It also contains an additional note addressed to the first respondent that reads 'Sands – you are a good wife'. Annexure B was also signed and initialled by the deceased immediately below the disposition set out above.

[6] Apart from these two notes there were two other terse written notes which are annexures IDM4 and IDM5 to the papers. They respectively read as follows:

IDM4	IDM5
'Sorry I let u	'Dad & Barry
down my love	You will have
don't loose confidence	enough get
in yourself just let	shares.
people in.'	I love u guys.'

[7] Annexures IDM4 and IDM5 are uncontroversial, and it was accepted between the parties that they were written by the deceased. Similarly, the fact that the deceased had written annexures A and B was not in dispute. And the appellant's initial assertion that the deceased lacked capacity to execute the contested documents due to her having been intoxicated on the night in question was not persisted in.

[8] The deceased was survived by her father, Mr Ian David Mitchell, and brother, Mr Barry David Mitchell. On 18 July 2011 she had executed a will in terms of which she, inter alia, appointed her father as executor in her estate and nominated him and

her brother as joint heirs of the residue of her estate. She also bestowed certain bequests on several legatees. The respondents were not mentioned at all. There can be no doubt, regard being had to the tenor of the notes, that the deceased intended annexures A and B to be amendments to her existing will and to bestow bequests upon them. (See for example *Smith v Parsons NO & others* [2010] ZASCA 39; 2010 (4) SA 378 (SCA).

[9] The first and second respondents (the respondents), as applicants, later instituted motion proceedings against the appellant in his capacity as the executor of the estate of the deceased, and the Master of the High Court, Port Elizabeth, in which they sought a declaratory order that annexure A was intended to be the will of the deceased or an amendment thereof. It bears mentioning that this application had been prompted by the Master's refusal, pursuant to a request by the respondents, to accept annexure A as a testamentary disposition for want of compliance with s 2(1)(*a*)(i), (ii) and (iv) of the Wills Act, 7 of 1953 (the Act). In bringing the application, the respondent relied upon s 2(3) of the Act which, in material parts, reads:

'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, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills . . .'

[10] The application served before a full bench (Revelas et Eksteen JJ) which found in favour of the respondents. After noting that the respondents bore the onus of establishing the intention of the deceased when she wrote the contested notes, it found that both annexures A and B were supplementary to the deceased's existing will and had been executed for the purpose '. . . of adding to, or varying the provisions of her will'. It went on to find that read together they 'thus constituted a codicil'. For this finding the court a quo placed much store in *Kleyn v Estate Kleyn & others* 1915 AD 527 at 537 where this court said that '. . . in the ordinary course, a codicil is employed merely for the purpose of supplementing and making alterations in a will, and it is usually read as an annexure to the main document . . .' The court a quo held further that as the two notes were compatible in that annexure A merely

provided an additional bequest to the first respondent, it would be the appropriate document to declare to be a codicil amending the written will. Consequently , on 23 October 2014 it made an order that incorporated the following paragraphs:

'1 [That] annexure A to the notice of motion be . . . declared to be a codicil to the will of . . . Carolynn Ellen De Villiers.

2 [That] the respondent [the Master] is . . . ordered to accept annexure A for the purposes of the provisions of the Administration of Estates Act 66 of 1965, as a codicil.'

The remaining paragraph of the order dealt with costs and is not germane to this appeal.

[11] It is against this order that the appeal lies. I propose dealing first with the approach to be adopted where the deceased has left more than one will. Where a testator dies leaving more than one will and the last will does not revoke the earlier will, both wills must be read together and reconciled as far as the language used permits.[2] If the wills are inconsistent, the earlier testamentary disposition will be deemed to have been revoked by the latest testamentary disposition but only to the extent that its provisions are inconsistent with the later will.[3]

[12] But where the testator leaves two wills executed on the same day and they cannot be read together, they will both be invalid if it cannot be established which one of the two wills was executed last.[4] It is trite that the question whether or not two wills are capable of being reconciled is one of construction.[5] If there is uncertainty as to which one is the later will, evidence to establish that fact will be admissible.[6] These principles apply with equal force to codicils[7] which, ordinarily, are intended to amend or supplement a will.

[13] In the present case the appellant accepted that: (a) the contested notes comply with s 2(3) of the Act; (b) they were executed on the same day; and (c) the

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[2] *Ex parte Estate Watkins-Ritchford v CIR* 1955 (2) SA 437 (A) at 448D-E; *Price v The Master & others* 1982 (3) SA 301 (N) at 303G-H; *Pienaar & another v Master of the Free State High Court, Bloemfontein & others* [2011] ZASCA 112; 2011 (6) SA 338 (SCA) para 11.

[3] *Gentle v Ebden's Executors* 1913 AD 119; *Ex parte Adams* 1946 CPD 267 at 268.

[4] M M Corbett, Gys Hofmeyr and Ellison Kahn *The Law of Succession in South Africa* 2ed at 95.

[5] Corbett *et al* loc cit at 95.

[6] *Moskowitz v The Master & others* 1976 (1) SA 22 (C) at 24A-H.

[7] *Ex parte Estate Adams* 1946 CPD 267 at 268; see also s 1 of the Wills Act 7 of 1953 which provides that 'will' includes a codicil and any other testamentary writing.

deceased intended making bequests to the respondents. Thus, what remains for determination is the question whether or not they are compatible or, as foreshadowed in the preceding paragraph, a determination can be made as to which note was executed last.

[14] In argument, counsel for the appellant submitted that the two contested notes were irreconcilable as, on the one hand, in annexure B the deceased bequeathed R1 million to the second respondent and just household goods to the first respondent whereas on the other, in annexure A, the deceased made not only similar bequests but an additional bequest of R1 million to the first respondent. In advancing this argument, he emphasised that the contradiction between annexures A and B stemmed from the material negative impact that the additional bequest of R1 million to the first respondent would have on the value of the residue of the deceased's estate that fell to be divided between the deceased's father and brother who were the residual heirs.

[15] To my mind this argument is untenable. It has to be accepted as a matter of simple logic that an invariable consequence of any bequest of a specific legacy is that the value of the residue of the estate that ultimately devolves upon residual heirs is diminished by the value of such bequest. Accordingly, if the testator intended to provide a beneficiary with an addidional legacy by way of a codicil that does not affect another legacy to another beneficiary, effect must be given to it.

[16] But in any event, the question of which note was written last determines the issue. On this issue, counsel for the appellant contended that the form and structure of the contested suicide notes 'lends nothing to a conclusion either way as to what the deceased's intention was at the time of drafting'. In elaboration he submitted that whilst annexure A was written on a clean sheet of paper, it was not signed whilst annexure B was signed, albeit written on a piece of paper that bore unrelated scribblings. In consequence, so concluded the argument, it cannot reasonably be inferred which one of the two notes was written last and therefore intended by the deceased to reflect her final wishes concerning the bequests. (See in this regard *Van Wetten v Bosch & others* [2003] ZASCA 85; 2004 (1) SA 348 (SCA) para 21;

Anderson and Wagner & another v The Master & others 1996 (3) SA 779 (C) at 784G-785A.)

[17] This must be considered in the light of all the background and surrounding circumstances. In this regard the following factors bear mentioning: (a) the deceased executed a will a year previously in terms of which the respondents are not beneficiaries; (b) the electronic messages exchanged between the deceased and the second respondent immediately before the deceased took her life make plain that the deceased loved the respondents; (c) the deceased lived in a relationship with the first respondent on which she placed a high premium, describing the first respondent as 'a good wife' in annexure B, and they had discussed marrying; (d) when the deceased moved in with the first respondent after selling her own house they sold some of their furniture and household effects and purchased new furniture together; (e) the R2 million bequest bestowed on the respondents represented readily available moneys the deceased was holding in a bank; (f) the deceased and the first respondent had undertaken duties of reciprocal support; (g) the deceased's note to the appellant that 'there was enough for them' ─ meaning the appellant and his son ─ and that 'dad and Barry you will get enough shares' indicates that it was uppermost in the deceased's mind that the major source of their inheritance from the residue would be derived from the proceeds of the shares and that they were not to begrudge the respondents for having been bestowed with legacies amounting to R2 million.

[18] From this it can be inferred that the deceased well knew that she had not made any provision in her will for the benefit of the respondents. Hence she wrote the two contested notes bestowing bequests on the respondents. Her declaration in one of her electronic messages to the first respondent when she wrote: '. . . I have to live longer so I can change my will. . . . Checked on [first respondent] and she is fast asleep . . . I really need time with [first respondent]' to my mind reinforces this conclusion.

[19] Bearing the foregoing considerations in mind it is, in my view, inherently improbable that the deceased would have wished to leave R1 million to the second respondent only and be content to bestow no more than household goods on the

first respondent which were in any event jointly owned by them. The appellant would have this court accept that even in the face of the affectionate accolades heaped on the first respondent by the deceased, she could nevertheless have been content to leave the first respondent, ‘a good wife’, with no more than such household goods. Counsel for the respondents argued that annexure A is more formal both in appearance and its tenor. In contrast, annexure B is more informal, lacking in proper structure and contains unrelated scribblings. On behalf of the respondents it was further submitted that if annexure A was written first, endowing the deceased’s ‘good wife’ with a R1 million legacy, it was inherently improbable that the deceased would almost immediately thereafter decide to revoke that bequest by way of replacing annexure A with annexure B. On the known facts it is indeed inconceivable that the deceased would have wished this. That is not only inherently improbable but also flies in the face of reality of the facts encapsulated in the preceding paragraphs.

[20] The obvious inference from those facts, and knowing that the deceased had been conversing with the second respondent by sms immediately before she died, is that she decided to leave her a legacy out of the cash at hand she had in the bank. This gave rise to annexure B. Then realising that the second respondent was getting probably more than the first respondent, her ‘good wife’, she wrote annexure A so as to make a similar cash bequest to the first respondent as well. All of this accords with her statement in annexure B that the respondents ‘are the best’ as well as her statement to her father and brother in both annexure A and annexure IDM5 that the shares she was leaving them would be enough.

[21] Counsel for the appellant submitted that to find this to be the case would be to speculate on the events that occurred that fatal morning. I do not agree. It is the most probable inference that can be drawn that is consistent with the known facts and surrounding circumstances.. The conclusion to which I have therefore come is that annexure A was written last. Counsel for the appellant correctly conceded that should that be found to be the case, the appeal must fail.

[22] In regard to costs, the court a quo directed that the costs of the application, on the scale as between attorney and client, be recovered from the estate of the deceased. No appeal was noted against that order and in this court the parties were

in agreement that regardless of the outcome of the appeal, a costs order in similar terms be made. That is the customary order made in cases of this nature. The parties were further agreed that costs of two counsel, where so employed, should be allowed.

[23] In the result the following order is made:

1 The appeal is dismissed.

2 The costs of the appeal on the scale as between attorney and client, including the costs of two counsel where employed, shall be paid out of the estate of the deceased Carolynn Ellen De Villiers.

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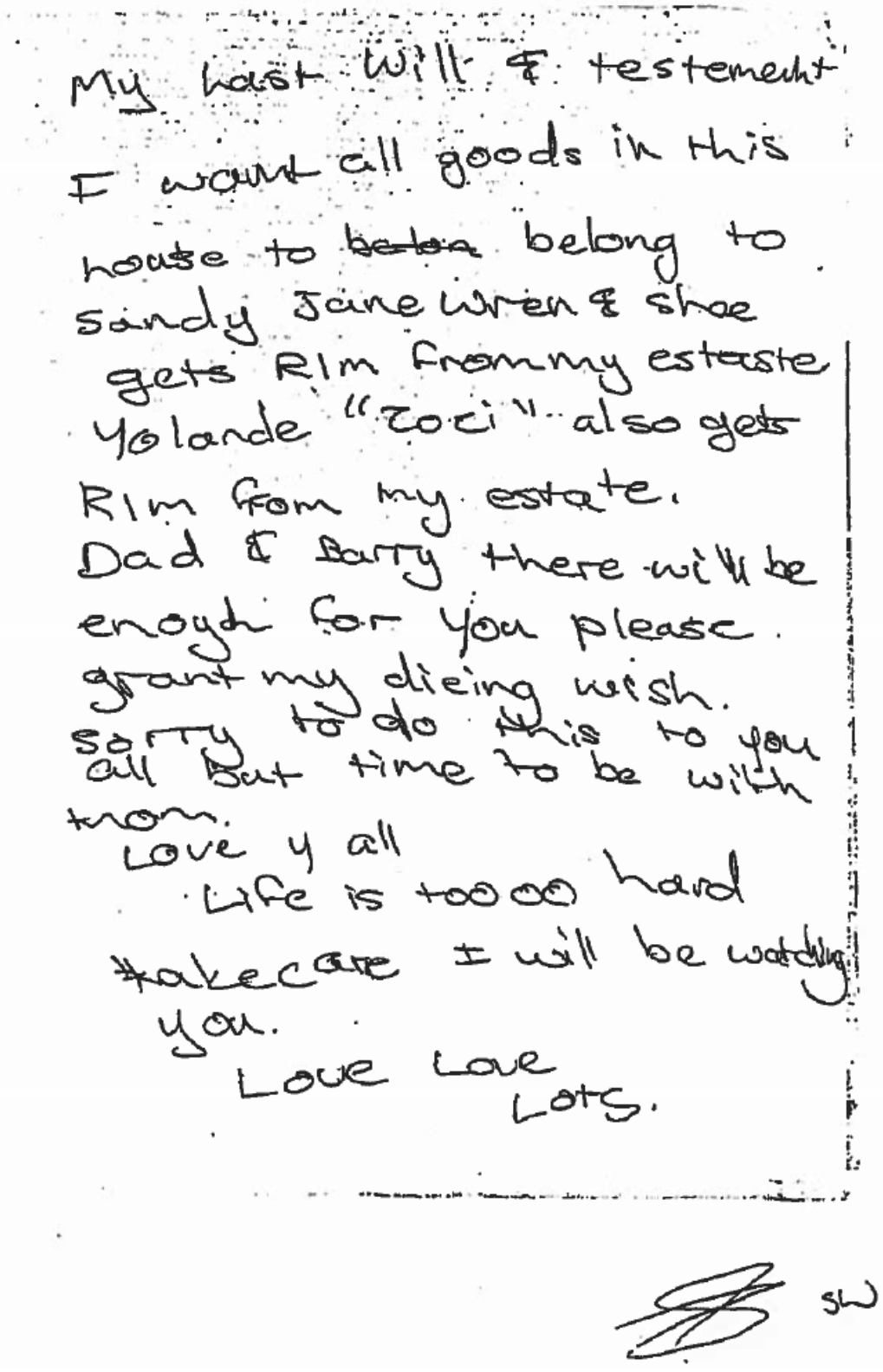
X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	A M Breitenbach SC Instructed by: De Villiers & Partners, Port Elizabeth Claude Reid Inc, Bloemfontein
For Respondents:	A Beyleveld SC (with D Bands) Instructed by: Boqwana Loon & Connellan, Port Elizabeth Webbers, Bloemfontein

ANNEXURE A



My last Will & testement
I want all goods in this
house to ~~beloa~~ belong to
sandy Jane Wren & shae
gets Rlm from my estaste
Yolande "Zoci" also gets
Rlm from my estate.
Dad & Barry there will be
enough for you please.
grant my dieing wish.
Sorry to do this to you
all But time to be with
mom.
Love y all
Life is tooo hard
#takecare I will be watching
you.
Love Love
Lots.

SW

ANNEXURE B

Spray for Borer, Beetel
arpet for under the chairs
Safe
Divider for toilet
Dustbin.
Kitz a bed.

- chores
- Danika Wednesday
- house
- Compramise
  - Bad Mood
- My time

Sandis
you good
a wife

Please thank Margie
I ~~also~~ want

Writneness

said Jane Wrtm

My wish c. de Villiers

My Larst will & testemondmt
This is my wish & if you ever loved
me you will make sure it is sean through
I want Sandy to have legal rights of
everything in 5 wodehouses
I want 2021 to get Rim.
thaey are the best the riest, nice,
than enough is for u dad and
Barry.

SW