IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

[Reportable]
Case Number: 17064/2022

In the matter between:

DAVID FRANCOIS ROUX N.O. In his capacity as the trustee for the time being of The Willemse Boerdery Trust (Master's reference number: IT 319[…])	1st Plaintiff
CORITA VORSTER N.O.	2nd Plaintiff
And	
JOUBERT STEMMET N.O. In his capacity as duly appointed executor of the Estate late Leon Daniel Stemmet (Master's reference number: IT 017[…])	1st Defendant
JOUBERT STEMMET	2nd Defendant
BIANCA STEMMET	3rd Defendant

ANJA STEMMET 4th Defendant

MASTER OF THE HIGH COURT OF SOUTH AFRICA 5th Defendant

Date of hearing: **16 August 2023**
Judgment delivered: **23 August 2023**

JUDGMENT DELIVERED ELECTRONICALLY

PANGARKER AJ

Introduction

1. The Plaintiffs are the Trustees of the Willemse Boerdery Trust and instituted an action in October 2022 against the Defendants, who are respectively, the Executor of the deceased estate of the late Leon Daniel Stemmet, the three adult children of the deceased and the Master of the High Court. The late Leon Daniel Stemmet is referred to as "the deceased" in this judgment. At this stage of the proceedings, the Master of the High Court does not participate in the matter.

2. I am called upon to determine four grounds of exception raised by the second to fourth Defendants, and in this regard, it is necessary to set out the pleaded case as per the Particulars of Claim. In doing so, I exclude a reference to paragraphs 1 to 8 thereof which merely recite the parties' details. Where the Plaintiffs have referred to "POC5" as the "2021 will", I have mostly referred to the document as "POC5", so as to avoid confusion.

The Particulars of Claim

3. The deceased executed a will on 23 October 2018 at Montagu in terms of which his entire estate was bequeathed to his children, the second to fourth Defendants. A

copy of the Will is attached to the Summons and Particulars of Claim as "POC2". The first Defendant was nominated as the Executor of the deceased estate[1].

4. In July 2021, the deceased contracted the COVID 19 virus and as a result, he was admitted as a patient to the Medic-Clinic Hospital, Worcester. On 25 July 2021, the deceased indicated to Gawie Willemse[2] that he wished to revoke his 2018 will and requested the latter's assistance in this regard. This request was repeated to Willemse on 26 and 27 July 2021, respectively.

5. On 30 July 2021, and assisted by Medi-Clinic personnel, the deceased made contact with Willemse via video call. During this video call, the deceased again expressed to Willemse, his wish to revoke the 2018 will and that his final instructions regarding the disposal of his estate were that his entire estate was be left to the Willemse Boerdery Trust. It is pleaded that during the video call, the deceased requested Willemse's help to engage attorneys for purposes of drafting a will reflecting his final instructions.

6. After the video call, and on 30 July 2021, the deceased was transferred to the intensive care unit (ICU) of the hospital. In accordance with the deceased's wishes, Willemse conveyed the deceased's final instructions regarding the disposal of his estate to attorney Louis Benade, to prepare a will in accordance with the deceased's instructions, as expressed in the aforementioned video call.

7. It is pleaded that Benade did as was requested and on 31 July 2021, provided Willemse with a duly prepared will, "POC5". On the same day, Willemse attended the Medi-Clinic to deliver "POC5" to the deceased, but he was refused access to the ICU and prevented from delivering it personally to the deceased due to the latter's COVID

[1] POC4

[2] I was informed during the hearing of the exception that Mr Willemse is the deceased's farm manager

19 diagnosis and the COVID restrictions in place[3]. It is further pleaded that Willemse's request to the hospital personnel to deliver "POC5" to the deceased, was refused.

8. Willemse proceeded to leave "POC5" in the care of the hospital personnel, with a request that it be delivered to the deceased as soon as possible. During the evening of 31 July 2021, Medi-Clinic personnel attempted to deliver "POC5" personally to the deceased but the latter was unable to receive the document personally (when it was delivered) as he had been induced into a coma for purposes of being intubated.

9. The Plaintiffs plead that the deceased was unable to execute "POC5" or otherwise comply with the applicable formalities prescribed by the Wills Act 7 of 1953. The deceased did not recover from the coma and passed away on 8 August 2021.

10. At paragraph 31 of the Particulars of Claim, it is pleaded that as a result of the deceased's COVID 19 diagnosis and the COVID 19 policies in place at the Medi-Clinic, the deceased was prevented from receiving the 2021 will[4] on 31 July 2021 and it was thus impossible for him to execute it or to otherwise comply with the applicable formalities prescribed by the Wills Act in connection therewith. The deceased intended the content of the 2021 will, and thus the 2021 will, to constitute his final instructions regarding the disposal of his estate.

The Plaintiffs' claims

11. The Plaintiffs' claims are the following[5]:

[3] The Particulars of Claim refer to "POC5" as the 2021 will – I have excluded this terminology to prevent any confusion

[4] A reference to "POC5"

[5] The additional prayers, c and d, are costs and the usual further and/or alternative relief

Prayer (a) - an order declaring "POC2" (the Will signed by the deceased on 23 October 2018) to be the revoked in accordance with section 2A(c) of Act 7 of 1953;

Prayer (b) - an order directing the fifth Defendant to accept "POC5" as the will of the deceased.

The Rule 23 (1) Notice

12. Subsequent to service of the Summons, the Defendants gave notice in terms of Rule 23(1) that they intend to except to the Particulars of Claim on the basis that the pleading is vague and embarrassing. I pause to point out at this juncture that the objections were also that the pleading lacks averments necessary to sustain a cause of action, the detail of which become clearer below. The Defendants raised seven grounds of complaint initially and requested the Plaintiffs to remove the cause of complaint. Some of the complaints were minor and by virtue of a Notice of Amendment to the Particulars of Claim, three of the complaints were indeed addressed.

13. During argument, counsel for the Defendants confirmed that these minor complaints were not proceeded with and this is in fact the case in the Defendants' exception dated 28 November 2022, where they persist with four grounds of exception only. It is these exceptions which form the subject of this judgment. Before considering the exceptions in more detail, the principles relevant to exceptions warrant consideration.

Legal principles related to exceptions

14. An exception is a legal objection to a defect in the opponent's pleading. The Court's approach to exceptions should be a sensible one and not overly technical[6]. Furthermore, an exception is a mechanism *"to weed out cases without legal merit*[7]". Importantly, the facts as pleaded must be assumed to be correct[8].

15. In respect of an exception taken on the basis that the pleading lacks averments necessary to sustain a cause of action, it is perhaps useful to be reminded of the test as expressed by Wallis JA in ***Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others***[9]**,** which is expressed as follows:

> *"The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the Court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts."*

16. The main purpose of an exception is to avoid a situation where unnecessary evidence is lead[10]. Furthermore, the pleading must be considered holistically and no paragraphs should be read in isolation. A pleading which is vague and embarrassing is one which is capable of more than one meaning or the meaning is not capable of reasonable ascertainment. Furthermore, where averments are contradictory or the meaning thereof is so unclear that the opponent (excipient) is unable to determine *ex*

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[6] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006(1) SA 461 (SCA) par 3*

[7] *Telematrix, supra par 3*

[8] *Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd [2014] ZASCA 181 par 2; Trustees Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA) para 3 - 10*

[9] *[2012] ZASCA 182 par 36*

[10] *Dharumpal Transport (Pty) Ltd v Dharumpal 1959 (1) SA 700 (A) 706 D - E*

facie the pleading, the case he/she has to meet, the pleading is regarded as vague and embarrassing[11].

17. In the event that the excipient fails to discharge the onus on him where the objection is that the pleading discloses no cause of action (or no defense), the exception should not be upheld.[12]

The exceptions taken to the Particulars of Claim

18. My discussion of the exceptions does not follow in chronological sequence, mainly because the first and fourth exceptions overlap but also because, in my view, it is prudent to address the second exception first as it relates to prayer (a), the revocation of the 2018 will and section 2A(c) of the Wills Act (the Act).

The second exception

19. The second exception is that the Plaintiffs have applied for an order declaring the 2018 will to be revoked in accordance with section 2A of the Act. The Defendants contend that the Plaintiffs rely specifically on section 2A (c) of the Act which provides that a Court may declare a will to be revoked if it is satisfied that a testator, in this instance, the deceased[13]:

[11] Civil Procedure: Taking exception in the High Court, De Rebus Oct. 2006, p 53 D van Loggerenberg SC, L dicker, J Malan

[12] *Ocean Echo Properties 327 CC & Another v Old Mutual Life Assurance Co (SA) Ltd 2018 (3) SA 405 (SCA par. 9; see also van Staden v van Staden NO and Others [2023] ZAWCHC 105 par 23*

[13] The wording is taken from the Defendants' exception and reflects section 2A (c) of the Act

"...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 and the court shall declare the will or the part concerned, as the case may be, to be revoked."

20. Furthermore, the Plaintiffs plead that the deceased never had sight of the 2021 will, being the document that was allegedly intended to have revoked the 2018 will. The Defendants' raise the point that it was accordingly not possible for the deceased to have clothed "POC5" with the necessary *animus revocandi*. Furthermore, "POC5" accordingly does not satisfy the requirements for the revocation of the 2018 will as set by section 2A (c) of the Act, as the deceased had not drafted nor caused it to be drafted. The Defendants state that this renders the Plaintiffs' Particulars of Claim vague and embarrassing, alternatively, it lacks the averments essential to sustain a cause of action for the relief prayed for in prayer (a) of the Particulars of Claim.

21. It is evident that the second exception relates to the relief in prayer (a) that an order be granted that the 2018 will be revoked in accordance with section 2A(c) of the Act. The Defendants rely on ***Henwick v the Master and Another***[14] and ***Letsekga v The Master and Others***[15] in support of the argument that the requirements of section 2 A (c) of the Act were not met in relation to "POC5". The submission was further that the deceased never saw "POC5", hence could not have clothed it with the requisite *animus revocandi*. Furthermore, Mr Rabie on behalf of the Defendants, submitted that the intention of the testator to revoke a previous will must have been communicated in written form.

22. On behalf of the Plaintiffs, Ms Wharton submitted that the intention to revoke the 2018 will would be an issue for the trial Court to decide and not the Court hearing the exception proceedings. Furthermore, she disagreed with Mr Rabie's submission that the

[14] [1996] 4 All SA 440 (C)

[15] [1995] 4 All SA 226 (W) 231

deceased needed to have had sight of or seen “POC5” in order for the necessary intention to revoke the 2018 will to have kicked in. She has argued further that the deceased’s wishes should be respected.

23. A good starting point is the preamble of the Wills Act, which expresses the intention of the legislature as follows:

> *“To consolidate and amend the law relating to the execution of Wills”.*

24. Section 2 of the Act specifically sets out formalities required in the execution of a will. Section 2A, dealing with the power of a Court to declare a will to be revoked, was inserted by Section 4 of the Law of Succession Amendment Act 43 of 1992, and states that:

> ***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 a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked.*

[S 2A ins by s 4 of Act 43 of 1992.]

25. As the Plaintiffs rely on section 2A(c) of the Act, a consideration of the manner in which our Courts have approached the revocation of wills within the framework of the legislation, follows. In ***Henwick***[16], the Full Bench of this Division considered, *inter alia*, the Court's power to revoke a will in terms of section 2A(c) of the Act in circumstances where the testator was advised about drafting a joint will. Details obtained from the testator and applicant (wife) were recorded on a form by bank staff and forwarded to another department of the bank in order for the will to be prepared.

26. The testator died a few months later and neither the application form containing the testator's instructions nor the will, had been signed by him. Foxcroft J, in a unanimous judgment, applied a strict interpretation to section 2A(c), holding that there was insufficient evidence to show *"that the testator performed any act which resulted in the drafting of the will which it is claimed expresses his intention to revoke his earlier will"*[17].

27. In ***Letsekga***[18], a document written by the testator prior to his death set out certain amendments he wished to effect to his existing will but it did not comply with the formalities of the Wills Act. In an application for a *mandamus,* the Court held the view that from the wording of the document, it was evident that changes were still to be effected to the will and not that the will had been changed through this document.

28. The Court in ***Letsekga*** concluded that the document was not a final document revoking the will, as the probabilities indicated that these were the notes or reminders to the testator to redraft his will. In addition, the Court took into account that the document

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[16] Supra

[17] *Henwick supra, p335*

[18] Supra

was unsigned and in pencil, while the will itself was typed and ordered. The Court found that the document was not intended to revoke the existing will and that sections 2A and 2(3) of the Act were found not to have applied.

29. In ***Mdlulu v Delarey and Others***[19], Satchwell J, following the approach in ***Henwick***[20], held that section 2A of the Act required a cautious and strict approach and that oral revocation of wills was not accepted under the common law, therefore section 2A(c) presupposes that revocation of a will had to be done in writing[21].

30. Turning my attention to ***Grobler v The Master of the High Court and Others***[22]**,** the findings of the Supreme Court of Appeal (SCA) are relevant to the facts as pleaded herein. Briefly, the testator had a properly executed will at the time that he instructed a financial advisor to prepare a will as he wished to revise the existing will. Correspondence and adjustments ensued per email, until a draft will was sent to the deceased. The deceased was requested to inform the financial advisor should he wish to make adjustments to the draft will but this never transpired, and the testator died a year later.

31. On appeal, the SCA in ***Grobler***[23] held that the draft will was never drafted by the deceased[24] but that the document and its amendments were prepared by the financial advisor. In conclusion, the SCA held at paragraph 14 of its judgment that:

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[19] *[1998] 1 All SA 434 (W)*

[20] Supra

[21] From 449-453; see also Wille's Principles of South African Law, 9th Edition, Editor F du Bois, p698

[22] *[2019] ZASCA* 119

[23] Supra

[24] *Grobler supra par 14*

"In the absence of evidence that establishes that the deceased received, perused and approved all the contents of the draft will, I am unable to find that he intended it to be his will. The appeal must accordingly fail."

32. From the above discussion, it is apparent that section 2A(c) encompasses the following jurisdictional facts: the drafting of another document by the deceased, or causing a document to be drafted before his death, and an intention to revoke his/her will (or part thereof). It is evident from authorities such as ***Mdlulu***[25] that the intention of the deceased to revoke his/her will must be apparent from the document itself.

33. From the pleadings, it is apparent that the deceased, on 25, 26 & 27 July 2021 respectively, expressed to Willemse that he wished to revoke his 2018 will. He then, on 30 July 2021 via a video call, again expressed this wish to revoke his will and his instructions were that he wished to leave his entire estate to the Willemse Boerdery Trust. Having regard to the statutory requirements for revocation of a will, the question is whether the deceased drafted "POC5", or before his death caused "POC5" to be drafted. From the Particulars of Claim, it is evident that the deceased did not personally draft "POC5", the document which the Plaintiffs rely upon as revoking the deceased's 2018 will.

34. It is apparent from the pleadings, which I must assume to be correct, that the drafter of "POC5" was the attorney, Benade, who was instructed by Willemse whom, it is pleaded, conveyed the deceased's wishes to the former. Can it then be said that the deceased *"caused"* "POC5" to be drafted? From a consideration of ***Henwick*** and ***Grobler,*** I am inclined to say *No*. The instruction to Benade to draft a document – a new will - which culminated in "POC5", was given by Willemse, not the deceased.

[25] See p449

35. I am also in a position to accept from the facts as pleaded that the deceased never physically received “POC5”, never perused it, never approved of its content, and never signed it in the presence of witnesses as required by section 2(1)(a) of the Act. Furthermore, accepting that he was in a coma at the time that “POC5” was delivered to him by nursing personnel, it follows that the deceased was unaware of the content and was, at least objectively speaking, not in a position to confirm that the content of “POC5” correctly expressed his intentions.

36. Accordingly, I must agree with Mr Rabie’s submission that the necessary *animus revocandi* was absent. To conclude this point, the discussions between Willemse and the deceased, wherein the deceased orally indicated that he wished to revoke the 2018 will, do not assist as the authorities, such as ***Mdlulu***, make it clear that revocation of a will must be in written form.

37. There is a further point to make. It bears repeating that the pleading states that the deceased’s final instructions were that his entire estate should be left to the Willemse Boerdery Trust. Yet, when I have regard to “POC5”, which is annexed to the Particulars of Claim and relied upon by the Plaintiffs’, one sees that it is indicated that Amoret Kleynhans of Amoret Kleynhans Prokureurs, is appointed as the Executor of the deceased’s estate. I mention this as there is no indication in the pleading that this was an instruction given by the deceased to Willemse during the period 25 to 30 July 2021.

38. In view of the authorities referred to above, and also ***Bekker v Naude en Andere***[26]*,* the facts as pleaded do not suggest a section 2A(c) scenario for the following reasons: the deceased did not draft “POC5”; and he did not instruct Benade to draft “POC5” either. If the pleadings are accepted as they stand, which they must be, then paragraph 20 thereof gives the reader the only indication as to the ambit and content of

[26] *2003 (5) SA 173 (SCA)*

the deceased's final instructions for the dissolution of his estate which were that his entire estate was to be left to the Willemse Boerdery Trust, and not that someone other than the first Defendant was to be appointed as the Executor.

39. Ms Wharton has submitted that the trial Court would need to determine the issue of the testator's intention to revoke the 2018 will. The difficulty I have with this argument is that it ignores the fact that the exception, during argument, was mainly based on the ground that the pleading lacks the averment necessary to sustain a cause of action. Furthermore, Mr Rabie specifically argued that the second exception turns on a point of law, and I am ultimately in agreement with him.

40. Revocation of wills is approached very strictly, as can be seen from the authorities. Remembering that an exception is a mechanism to weed out cases without legal merit, from the above discussion, and *ex facie* the pleading, the jurisdictional facts in section 2A(c) of the Act have not been met to sustain a cause of action for relief in terms of prayer (a). Accordingly, this means that the second exception is upheld.

The first and fourth exceptions

41. These two exceptions overlap. The first exception is based on the objection that although the Plaintiffs concede that "POC5" does not comply with formalities for a valid will as required by the Act, they do not plead upon what basis or upon which provision of the Act they rely on for the relief claimed in prayer (b) of the Particulars of Claim. The Defendants contend that this failure renders the Particulars of Claim vague and embarrassing, alternatively, that it lacks the necessary averments to sustain a cause of action under prayer (b).

42. The fourth exception repeats much of the content of the first exception but adds that insofar as the Plaintiffs may rely on section 2 (3) of the Act to have "POC5" declared as a valid will, the Defendants' objection is that the Plaintiffs are not in a

position to place reliance on section 2(3) as the deceased did not personally draft "POC5" nor have sight of it. The Defendants rely on ***Bekker v Naude***[27] to contend that the legislature deliberately incorporated the stricter requirement of personal drafting of a document for relief under section 2(3). Thus, the pleading is vague and embarrassing, alternatively, it lacks the averments necessary to sustain a cause of action for the relief in prayers (a) and (b).

43. Prayer (b) of the Particulars of Claim seeks an order that the Master of the High Court accepts "POC5" to be the deceased's will. In my view, the exceptions turn on a point or conclusion of law. If I had any doubt that these exceptions are not to be determined on the "vague and embarrassing" ground, but rather on the "no cause of action" ground, then such doubt was erased when the Plaintiffs' raised the maxim *lex non cogit ad impossibilia,* or the impossibility principle, in their Heads of Argument as the legal principle on which their claim is based. The legal maxim is discussed below.

44. Prayer (b) is a claim that is founded on section 2(3) of the Wills Act which states that:

> **2. Formalities required in the execution of a will**
>
> …
>
> *(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, 1965 (Act 66 of 1965), as a will,*

[27] Supra

although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).

45. Authorities such as ***Anderson and Wagner NNO and Another v The Master and Others***[28] and ***Ex parte Maurice***[29] lend support for the view that section 2(3) must be interpreted strictly and narrowly and the SCA in ***Bekker v Naude***[30], confirmed the strict approach to be applied to section 2(3) of the Act.

46. Turning to the first exception, the objection is that the Plaintiffs do not plead the basis upon which they rely on for the relief in prayer (b), even though they concede that "POC5" does not comply with the formalities required by the Act for a valid will. Firstly, I accept, that "POC5" does not comply with the prescribed section 2(1) formalities for a valid will. It is furthermore apparent that the Plaintiffs do not rely on any other sections of the Act to support a claim in terms of Section 2 (3), thus the Defendants argue that they are prejudiced as they do not know what case to meet in respect of claim (b).

47. The question then arises in these proceedings, if the Plaintiffs, *ex facie* the pleading, admit that "POC5" does not comply with section 2(1) and do not rely on any other section of the Act, what do they rely on as their cause of action for the relief claimed in prayer (b)? This question was answered in Ms Wharton's Heads of Argument where reference was made to, and reliance placed upon, the common law maxim *lex non cogit ad impossibilia*, which I refer to interchangeably as "the maxim" or the "impossibility principle".

48. At the outset of the argument regarding the first and fourth exceptions, I posed two questions to counsel: firstly, should reliance on the maxim have been pleaded, and

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[28] *1996(3) SA 779 (C) at 785*

[29] *1995 (2) SA 713(C) 716; see also Mdlulu and Henwick supra*

[30] Para 16-20

secondly, do I need to deal with the maxim in these proceedings? On the first question, Ms Wharton referred me to paragraph 31 of the Particulars of Claim which pleads that due to the COVID 19 policies and the deceased's COVID 19 diagnosis, he was prevented from receiving "POC5" and it was impossible (for the deceased) to comply with the formalities of the Act. The argument is that the pleading refers specifically to the impossibility to comply with the law, that is, the Wills Act. Mr Rabie's view was that reliance on the maxim had to be pleaded.

49. In view of the submissions and for purposes of the exception, I am inclined to accept Ms Wharton's argument that the reference to the specific maxim need not have been pleaded and that it was sufficient to plead as was done at paragraph 31, an impossibility to comply with the formalities of the Act including an impossibility of the deceased to execute "POC5". I am also mindful that it would run counter to the usual approach in exception proceedings to be too technical.

50. As to the second question, Mr Rabie's submission was that he was taken by surprise when he read his colleague's Heads of Argument as he, for the first time, saw a reference to the impossibility principle, which he was unaware of at the time. He also provided a further note subsequent to Ms Wharton's Heads of Argument, which I have found to be most helpful.

51. Mr Rabie's submission was that the reliance on the impossibility principle does not assist the Plaintiffs in overcoming the exception taken to the Particulars of Claim, as the principle finds no place in the law relating to wills and succession, and if it did, the requirements for its application were *ex facie* the Plaintiff's pleading, not met. The argument went that the pleading lacks averments necessary to sustain a cause of action in respect of prayer (b) and that this Court should be mindful of the principles governing exceptions. Ultimately, the Defendants' views are that this Court is in a position to address the reliance on *lex non cogit ad impossibilia* as the Defendants persist that no cause of action is made out in the Particulars of Claim.

52. Ms Wharton's contention remained that it cannot be said that the maxim does not apply and that it would be the task of the trial Court to make that determination. Her view was that this Court was not tasked with determining the applicability or otherwise of the impossibility principle.

53. Having considered the submissions, my view is that I would not be able to make a finding on whether the Particulars of Claim sustain a cause of action for the relief under prayer (b), without deciding whether the conclusion of law the Plaintiffs rely upon in paragraph 31, is good in law based upon every interpretation placed on the facts. At the risk of repetition, the first and fourth exceptions turn on whether the pleading contains averments necessary to sustain a cause of action. Put another way, the Plaintiffs rely on the impossibility principle, in terms of prayer (b). In my view, this would necessitate a consideration of the impossibility principle at this stage of the proceedings.

54. The legal maxim *lex non cogit ad impossibilia* means *"the law does not compel the impossible*[31]*"*. As a defense, it has its origins in criminal law, but it is also found in the law of contract in the manner of impossibility of performance. In ***Gassner NO v Minister of Law and Order and Others***[32]***,*** Van Zyl J considered its application to the enforcement of the expiry period provided for in section 32(1) of the Police Act 7 of 1958, and found that this legal principle excused the non-production of a document which was a statutory requirement.

55. The Plaintiffs rely mainly on two Constitutional Court judgments to contend that the principle applies to the circumstances as pleaded, in other words, to the execution

[31] Also translated in certain authorities as "the law does not compel the performance of the impossible" – see S v Woniwe [2004] ZAWCHC 14, par 22

[32] *1995 (1) SA 322 (C) 325*

and revocation of wills. The first of these judgments is ***Mtokonya v Minister of Police***[33]***.***

56. Briefly, the matter dealt with section 12 (3) of the Prescription Act 68 of 1969 and its interpretation with reference to whether a creditor was required to have knowledge that the conduct of a debtor giving rise to the debt, was wrongful and actionable. The Plaintiffs in this matter rely on paragraph 137 of the minority concurring judgment by Jaftha J[34], where the learned Judge held that:

> *"[137] According to the maxim lex non cogit ad impossibilia, the law does not require a person to do the impossible. If performance in terms of a particular law has been rendered impossible by circumstances over which the person with interest had no control, those circumstances are taken as a valid excuse for not complying with what such law prescribes. The logic of this is apparent from the terms of both subsections (2) and (3) of section 12.* ***Notably this principle was applied to statutes that imposed time bars to the institution of legal proceedings".***[35] (My emphasis)

57. The second and most recent judgment is ***Van Zyl NO v Road Accident Fund***[36] in which three judgments were delivered, where the impossibility principle was considered with greater scrutiny. In the first judgment[37], Pillay AJ (as she was), found that the impossibility principle, which has its roots in natural law and justice, was

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[33] *2018 (5) SA 22 (CC)*

[34] Nkabinde ADCJ and Mojapelo AJ concurring

[35] Footnote 93 to the judgment: *Gassner* and *Montsisi* id and *Hartman v Minister of Police* 1983 (2) SA 489 (A).

[36] *2022 (3) SA 45 (CC)*

[37] Mogoeng CJ and Khampepe J concurring – see 46 D-F

grounded *"in nature, science and reality", "is an extension of logic"*[38] and that *"a law which is impossible to comply with cannot be applied as law"*[39].

58. In her judgment, Pillay AJ concludes that it is clear from the authorities discussed[40], that the principle has applied in instances where a litigant, through no fault of his/her own, found it impossible to comply with statutory time bars or time limits to prosecute a claim[41]. In those circumstances, it was found that the time limits did not run against such litigant. The judgment found the impossibility principle to apply to the litigant's claim against RAF, which it found not to have prescribed[42].

59. In the Jaftha J majority judgment in ***Van Zyl NO***, it was also held that the principle applied to time-barring or prescription related instances where a litigant was unable, due to no fault or circumstance under his control, to comply with the statute. In her minority judgment, Theron J warned that the language of section 23 of the Prescription Act was clear and that in the absence of a frontal challenge, the interpretation given to the section by the first two judgments, did not find favour.

60. It is thus apparent from authorities discussed above and those referred to in these judgments, that the impossibility principle is indeed very much alive in our law. More significantly, the ***Van Zyl NO*** judgments confirm that it applies in time-barring, prescription and time limit disputes.

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[38] para 52 – 53

[39] par 54

[40] Pillay AJ discussed the origin and application of the legal maxim at length in her judgment – see par 50 – 77

[41] Para 74 and 75

[42] See also *Montsisi v Minister van Polisie 1984 (1) SA 619 (A)*

61. Counsel have been unable to provide me with authority as to the applicability of the impossibility principle to the law of wills and succession. As indicated, Ms Wharton's view is that it cannot be said that the principle does not apply to the facts as pleaded by her clients. Mr Rabie's stance is that his research has indicated that the impossibility principle does not apply to wills specifically.

62. I have conducted my own research and found ***The Master v Gray NO***[43] as a case involving a will where a reference was made to *lex non cogit ad impossibilia.* The facts, briefly, were as follows: the deceased had executed a will at Beirut, Lebanon, and after his death, the original will had been accepted by the Lebanese Court for registration, and was not available for production in South Africa. The respondent, Gray NO, was appointed by the Master as executor dative as Barclays Bank, Cape Town, had forwarded a copy of the deceased's will to the Master after the deceased's death.

63. Correspondence indicated that it was not possible to obtain the original will and the issue was whether the Master could act upon a copy of the will in the absence of the original. The context in which the Court in ***Gray NO*** referred to the impossibility principle was during the Court's discussion about the impossibility (in the circumstances of the matter) of obtaining the original will where the law required it, and that such a provision in a statute should be read with reference to the rules relating to the admissibility of secondary evidence[44], in other words, the copy of the will.

64. In my view, the reference in ***Gray NO*** to the impossibility principle was very finite: it had to do with the Master's obligation to accept the original will, the inability to obtain it (as it was registered in Lebanon) and that in those circumstances, resort should be had to secondary evidence. The matter of ***Gray NO*** therefore***,*** in my view, does not serve as authority that the impossibility principle applies across the board to the formalities

[43] 1958 (3) CPD 525

[44] At 528B-D

related to the execution and revocation of wills. Absent any other authority, the recent Constitutional Court judgments which the Plaintiffs rely upon certainly indicate that the impossibility principle applies (aside from criminal and contract law) to instances where the law imposed time bars and prescription to the institution of claims. Accordingly, I do not understand ***Mtokonya*** and ***Van Zyl NO*** to be authority for a proposition that the impossibility principle may be adopted where a testator/deceased person did not comply with the formalities required to execute and revoke a will.

65. Furthermore, the law regarding revocation of wills and the formalities applicable to wills is regulated by the Wills Act and one sees from the authorities discussed, that sections 2(3) and 2A are interpreted and applied strictly. That said, it is accepted, and common cause, that at the time the deceased was admitted to hospital in July 2021, there was no legislative intervention in respect of the Wills Act in order to accommodate the circumstances which the COVID-19 pandemic and its restrictions may have brought. Thus, unlike some other jurisdictions such as New Zealand, Wales and England, which implemented emergency measures relating to the execution of wills, South Africa maintained the *status quo* applicable to wills[45].

66. In view of the above findings, the argument that the impossibility principle serves as a cause of action and point of law in respect of prayer (b)[46], is with respect, unconvincing. However, even if I am incorrect in reaching the conclusion as to the applicability of the impossibility principle in this matter, one then has to ask whether, objectively speaking, the requirements for its application arise from the pleaded case. The impossibility pleaded is that the deceased was prevented from receiving "POC5" and could not, on 31 July 2021, execute "POC5".

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[45] See *Electronic execution of wills (in the time of Covid – 19)* by Anel Gildenhuys, Faculty of Law, 10th Annual FISA conference, 12 November 2020

[46] The Heads of Argument also seem to indicate that the impossibility principle is relied on for claim (a)

67. The requirements for the impossibility principle to apply are as follows[47]: circumstances must exist which prevent a person from doing a statutory act (positive legal obligation); it must have been objectively impossible for anyone in the person's position to comply with the legal obligation in question; and, the person relying on the principle must not be the cause of the impossibility[48].

68. Having regard to the pleaded facts, Mr Rabie's submission that the deceased was never prevented from receiving "POC5" because it was delivered to him, is correct. Whilst Willemse was unable to personally deliver "POC5", I must accept from the facts as pleaded that the hospital personnel managed to deliver it to the deceased on 31 July 2021. The time is not pleaded. In the absence of any time indication, and considering the minimum pleaded facts objectively, the Defendants' argument that it was not objectively impossible for the positive legal obligation to have been met, has merit.

69. My final comment is that the strict interpretation and application of section 2(3) of the Wills Act is emphasised in the various authorities I refer to above, such as ***Bekker v Naude***, for example. Thus, even if the impossibility principle were to find application[49], the Plaintiffs, on the law, would at the very least have to overcome the requirement that "POC5" was drafted by the deceased.

70. In conclusion, on every reasonable interpretation of the pleaded case, I hold the view that the facts do not sustain a cause of action for a claim founded upon section 2 (3) of the Act. Accordingly, the first and fourth exceptions are upheld.

<u>The third exception</u>

[47] LAWSA Joubert ed Volume 6 para 55 – 59

[48] See LAWSA supra

[49] My earlier discussion and finding refer

71. As to the third exception, given the admission by Ms Wharton that no reliance was to be placed on the video call as a will, Mr Rabie did not pursue the third exception with any great vigour, and it will thus be dismissed.

Order

72. Mr Rabie has requested that I strike out the Particulars of Claim in the event that the exceptions are upheld on the basis that the pleading does not disclose a cause of action. The usual practice of our Courts where an exception is upheld on this basis, is to set aside the pleading and that the Plaintiff be given leave, if so advised, to file an amended pleading within a specified period.[50]

73. In the result, I grant the following order:

a. The first, second and fourth exceptions are upheld.

b. The third exception is dismissed.

c. The Particulars of Claim are set aside.

d. The Plaintiffs are granted leave to amend the Particulars of Claim, if so advised, within thirty (30) days of date of this order.

e. The Plaintiffs shall pay the first to fourth Defendants' costs.

M PANGARKER
ACTING JUDGE OF THE HIGH COURT

[50] *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) 593 (A) 602 D; Paulsmeier v Media 24 (Pty) Ltd and Others [2022] ZAWCHC 85*

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