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. 1st Plaintiff

In his capacity as the trustee for the time being of

The Willemse Boerdery Trust

(Master's reference number: IT 3199/2008)

CORITA VORSTER N.O. 2nd Plaintiff

And

JOUBERT STEMMET N.O. 1st Defendant

In his capacity as duly appointed executor of the

Estate late Leon Daniel Stemmet

(Master's reference number: IT 0178844/2021)

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: **22 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 at the commencement to set out the Particulars of Claim. In doing so, I exclude a reference to paragraphs 1 to 8 thereof which merely recite the parties' details. The Plaintiff's case as pleaded from paragraphs 9 to 32 plus the Orders sought, are set out below.

The Particulars of Claim and relief sought

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].

[1] POC4

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. Benade did as 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 19 diagnosis and

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

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

8. Willemse left "POC5" in the care of the hospital personnel, with a request that it be delivered to the deceased as soon as possible. It is pleaded that 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 the 2021 will[4] 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, 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 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.

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

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[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"

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 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 issues 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. 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.

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

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]". 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]**,** 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 contents cannot be supported upon every interpretation that can be put upon the facts."*

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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] At paragraph 36

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 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 defence), the exception should not be upheld.[12]

The exceptions taken to the Particulars of Claim

18. For reasons which become evident during the judgment, I discuss the second exception first, thereafter the first and fourth exceptions and lastly, the third exception.

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

[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*

The second ground of 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 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 *(sic)* the deceased[13]:

> "...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 the *(sic)* "declare the will or 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, it was accordingly not possible for the deceased to have clothed the 2021 will with the necessary *animus revocandi*. The 2021 will 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 or caused the 2021 will to be drafted. The Defendants state that this renders the Plaintiffs' Particulars of Claim vague and embarrassing, alternatively, it lacks the averments to sustain a cause of action for the relief prayed for in prayer (a) of the Particulars of Claim.

[13] The wording is taken from the Defendants' exception

21. This exception relates to the Plaintiffs' prayer that the 2018 will be revoked by "POC5". The Defendants rely on ***Henwick v the Master and Another***[14] and ***Letsekga v The Master and Others***[15] 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, it is submitted on behalf of the Defendants, that the intention of the testator to revoke a previous will must have been communicated in written form.

22. On behalf of the Plaintiffs, counsel has 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, Ms Wharton disagreed with Mr Rabie's submission that the deceased needed to have had sight of or seen "POC5" in order for the necessary intention to revoke to have kicked in. She has argued further that the deceased's wishes should be respected.

23. A good point to start is the preamble of the Wills Act 7 of 1953 (the 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

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

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

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. It is evident that the Plaintiffs specifically rely on section 2A(c) of the Act in support of the relief that "POC5" revoked the 2018 will. Counsel have referred me to various authorities, which I thus consider in more detail in the discussion which follows.

26. In ***Henwick (supra)***, the Full Bench of this Division considered, *inter alia*, the Courts 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.

27. 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"*[16]. As a result of these findings, the application was dismissed.

28. In ***Letsekga (supra)***, a document written by the testator prior to his death set out certain amendments he wished to effect to his existing will. The document 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.

29. 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 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.

30. In ***Mdululu v Delarey and Others***[17]*,* Satchwell J held that section 2A of the Act required a cautious approach and that oral revocation of wills was not accepted under

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[16] *Henwick supra, p335*

[17] *[1998] 1 All SA 434 (W)*

the common law, therefore section 2A(c) presupposes that revocation of a will had to be done in writing[18].

31. Having regard to these authorities and the pleadings, the question is whether the deceased drafted another document, "POC5", or before his death caused such document to be drafted, to use the wording of section 2A(c). From the Particulars of Claim, it is evident that the deceased never personally drafted "POC5".

32. Turning my attention to ***Grobler v The Master of the High Court and Others[19]*****,** 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 wanted 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 but this never transpired and the testator died a year later.

33. On appeal, the SCA held that the draft will was never drafted by the deceased[20] 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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[18] See also Wille's Principles of South African Law, 9th Edition, Editor F du Bois, p698

[19] *[2019] ZASCA* 119

[20] *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."

34. 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 will (or part thereof). From the pleadings, it is evident 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 and his instructions that he wished to leave his entire estate to Willemse Boerdery Trust.

35. During the same video call, the deceased requested Willemse's assistance to appoint an attorney to draft a will according to the abovementioned instructions. "POC5" was drafted, as pleaded in accordance with the instructions and wishes of the deceased, and as conveyed by Willemse to attorney Benade, the drafter of "POC5". Benade then handed "POC5" to Willemse, who could not deliver it personally as the testator was in ICU, access was denied and COVID restrictions were in place. What can only be described as a second attempt to deliver "POC5" to the testator, then occurred on 31 July, thanks to the hospital staff, but personal receipt of the document was impossible because at that stage, the deceased was induced into a coma.

36. From the facts as pleadings, which I must assume to be correct, it is thus evident that the deceased never 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. I must add that from the pleadings, the deceased's instructions were that his entire estate be left to the Willemse Boerdery Trust. Yet, when I have regard to "POC5" which is an annexure to the Particulars of Claim, one sees that Amoret Kleynhans of

Amoret Kleynhans Prokureurs, is recorded as the Executor of the deceased's estate. Yet, no mention is made that this was an instruction given to Willemse.

37. 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 is based on the ground that it is vague and embarrassing, alternatively, 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.

38. In view of the authorities referred to above, and also ***Bekker v Naude en Andere***[21], 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. The instruction to draft "POC5" came from Willemse. 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 the deceased's final instructions for what I shall refer to as his new will. Those instructions were only that his entire estate was to be left to the Trust. The question then arises, if this was the deceased's final instruction for a new will revoking the 2018 will, why does "POC5" contain a paragraph about a new or different executor?

39. It follows that, as in ***Grobler supra*** where there was uncertainty as to whether the draft will was intended to be the deceased's will, here the same uncertainly comes to the fore, and the result in my view, is that *ex facie* the pleading read with "POC5", it cannot be said that the deceased intended to revoke the 2018 will. The argument

therefore that, from the facts as pleaded, and in view of the authorities, the deceased lacked the necessary *animus revocandi* as required by section 2A (c) of the Act, finds favour.

40. Remembering that an exception is a mechanism to weed out cases without legal merit, I agree with the Defendants' contention that there is no legal basis for the relief sought in prayer (a) of the POC. Accordingly, this means that the Particulars of Claim lack the essential averments necessary to sustain a cause of action for the relief prayed for in prayer (a), the revocation of the 2018 Will. In the result, 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

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[21] *2003 (5) SA 173 (SCA)*

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 supra*** to contend that the legislature deliberately incorporated the stricter requirement of personal drafting, for relief under section 2(3) of the Wills Act. 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 of a question of law, more specifically, is the relief prayed for, supported by the Particulars of Claim? 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 to counter the exceptions, but more about this maxim later in the judgment.

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

45. Decisions such as ***Anderson and Wagner NNO and Another v The Master and Others***[22] and ***Ex parte Maurice***[23] lend support for the view that section 2(3) must be interpreted strictly. More recently in ***Bekker supra***[24], the SCA 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, it is evident and I accept, that "POC5" does not comply with the prescribed section 2(1) formalities for a valid will in terms of the Act. 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). The Defendants thus 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? This question was illuminated in Ms Wharton's Heads of Argument where reference was made, and reliance was placed upon the common law maxim l*ex non cogit ad impossibilia*. I will refer to this interchangeably as "the maxim" or the "impossibility principle".

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[22] *1996(3) SA 779 (C) at 785*

[23] *1995 (2) SA 713(C) 716*

[24] Para 16-20

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

49. In view of the submissions and for purposes of the exception, I am prepared 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 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 run counter to the usual approach in exception proceedings which is to not 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 maxim, 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 maxim does not assist the Plaintiffs in overcoming the exception taken to the Particulars of Claim, as the maxim 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 pleadings, not met. The argument went

that the pleadings lack 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.

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 the no cause of action ground without first deciding whether the conclusion of law the Plaintiffs rely upon in paragraph 31 of the Particulars of Claim, cannot be supported 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.

54. Turning my attention to the legal maxim *lex non cogit ad impossibilia,* that is*, "the law does not compel the impossible*[25]*"*. As a defence it has its origins in criminal law, but also in the law of contract in the manner of impossibility of performance. In ***Gassner NO v Minister of Law and Order and Others***[26]**,** 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 the legal maxim excused the non-production of a document which was a statutory requirement.

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[25] 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

[26] *1995 (1) SA 322 (C) 325*

55. The Plaintiffs rely mainly on two Constitutional Court judgments to contend that the maxim applies to the circumstances as pleaded, in other words, to the execution and revocation of wills. The first is ***Mtokonya v Minister of Police*** [27]and the dissenting judgment by Jaftha J[28]. 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. At paragraph 137 of the minority concurring judgment, Jaftha J 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".*[29]

56. The most recent judgment is ***Van Zyl NO v Road Accident Fund***[30] in which three judgments were delivered, where the above legal maxim was considered with greater scrutiny. In the first judgment[31], Pillay AJ (as she was), found that the

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[27] *2018 (5) SA 22 (CC)*

[28] Nkabinde ADCJ and Mojapelo AJ concurring

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

[30] *2022 (3) SA 45 (CC)*

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

impossibility principle, which has its roots in natural law and justice, was grounded *"in nature, science and reality", "is an extension of logic"* [32] and that as Pillay AJ describes, *"a law which is impossible to comply with cannot be applied as law"*[33].

57. In her judgment, Pillay AJ concludes that it is clear from the authorities discussed, 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[34]. In those circumstances therefore, it was found that the time limits did not run against the litigant. The judgment found the legal maxim to apply to the litigant's claim against RAF, which it found not to have prescribed.

58. In the Jaftha J majority judgment, it is evident that a finding is made that section 23(1) of the Prescription Act was never intended to exclude the application of the maxim, as it would lead to an absurdity and inequality[35]. As with the minority judgment, it was held that that the legal maxim applied to time-barring or prescription related instances, where a litigant was unable, due to no fault or circumstance under his

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[32] para 52 – 53

[33] par 54

[34] para 74 and 75

[35] See para 112-115

control, to comply with the statute[36]. 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.

59. It is thus apparent from these 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.

60. The requirements for the impossibility principle to apply are as follows[37]: circumstances must exist which prevent a person from doing a statutory act; 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[38].

61. Applying the above discussion to the pleadings, more specifically paragraph 31 thereof, and the arguments presented, the following points are made: Firstly, the

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[36] In paragraph 124 of ***Van Zyl NO supra***, Japhta J states: *"Since here we are concerned with a statutory requirement, the lex non cogit ad impossibilia maxim applies, but this maxim does not apply to impossibilities arising from wills and contracts."* My understanding of the above statement is simply that the legal maxim does not apply (as some defence of justification) to impossibilities arising from wills and contracts

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

[38] See LAWSA supra

principle of impossibility, currently, does not apply to the law of succession, more specifically, the Wills Act. Having regard to the lengthy discussions of the history, origin and applicability thereof in ***Gassner***, ***Mtokonya*** and ***Van Zyl NO***, it would have been evident that the principle applied to the Wills Act, but it does not. That should be the end of the matter except that the Plaintiffs hold the view that it cannot be said that the principle does not apply to compliance with formalities related to a will, and the execution and revocation thereof.

62. The difficulty I have with this submission is that all three judgments referred to above involved the impossibility of acts which related to time limits or time constraints. The argument also ignores the warning issued by Theron J in ***Van Zyl NO*** about the interpretation of statutes and the intention of the legislature in enacting legislation. Certainly, the Plaintiffs are not mounting a constitutional challenge to section 2(3) and 2A of the Act.

63. Even more so, the law regarding revocation of the formalities applicable to wills is regulated by the Act. It is accepted, and common cause, that at the time the deceased was admitted to hospital in July 2021, during the COVID-19 pandemic, the Act still applied and there was no departure by the legislature, in order to accommodate COVID-19 restrictions. I find that the submission that there was a departure from legislative requirements in respect of wills in other jurisdictions such as New Zealand and England do not assist the Plaintiffs as there was no legislative intervention in relation to the Wills Act in South Africa.

64. In my view, the impossibility principle, after consideration of the authorities, does not find application as an excuse or justification for non-compliance with section 2 and 2A of the Act. Given the relief sought, sections 2A and 2(3) go hand in hand. However, even if I am incorrect in reaching the conclusion as to the applicability of the

legal maxim of impossibility to the set of facts as pleaded, one then has to ask (if the maxim applies to the facts), whether the requirements for its application, arise from the pleaded case.

65. From the pleadings, it is evident that the deceased made three requests to Mr Willemse to revoke his will on 25, 26 and 27 July 2021, and then repeated it a fourth time on 30 July 2021. *Ex facie* the pleading, and objectively considered from the Particulars of Claim, the deceased was in a position to communicate with Willemse and indicate his wishes. He was also, on what I shall call the "fourth day", in a position albeit it with some assistance, to communicate instructions and request the services of an attorney. Objectively considered, it is not pleaded that at that stage, it was impossible for the deceased to draft a new will or document and comply with section 2A(c) of the Act. The impossibility pleaded is that the deceased was prevented from receiving "POC5" and could not, on 31 July 2021, comply with the Wills Act.

66. Mr Rabie's submission that the deceased was never prevented from receiving "POC5" because it was delivered to him. While I agree with this view, it must be said that having been induced into a coma, he would not have been aware of its delivery and the content. Hence, it was not that the COVID 19 policies or restrictions prevented the deceased from receiving the document – it was delivered to him by nursing staff – it was that he was in a coma at the time of its delivery. I have difficulty that the fulfilment of the objective impossibility requirement as the deceased was conscious at the time of indicating an intention to revoke his will (on four separate occasions), participated in a video call. The argument that this is a time complaint has some merit.

67. In conclusion, on every reasonable interpretation of the pleaded case, no cause of action is established to warrant a claim found upon section 2 (3) of the Act. Accordingly, the fourth exception will be upheld.

The third exception

68. As to the third exception, given the admission that no reliance was to be placed on the video call as a will, the third exception is dismissed.

Order

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

2. The Third exception is dismissed

3. The particulars of Claim are struck out

4. The Plaintiffs shall pay the first to fourth Defendants costs of the exception

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M PANGARKER

ACTING JUDGE OF THE HIGH COURT

For Plaintiff: **Adv B C Wharton**

Instructed by:

For Defendant: **Adv P Rabie**

Instructed by: