THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 823/2020

In the matter between:

JAKOB MARIUS WALLAGE	**APPELLANT**
and	
DAVID HOWARD WILLIAM-ASHMAN N O (in his capacity as executor of the estate late Nicola Jean Wallage)	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT, GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG	**SECOND RESPONDENT**
JOHN BURTON CHAPLIN	**THIRD RESPONDENT**
ISABELLE NOEL FERREIRA	**FOURTH RESPONDENT**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**FIFTH RESPONDENT**
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	**SIXTH RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	**SEVENTH RESPONDENT**
THE TRUSTEES FOR THE TIME BEING OF THE BASIC RIGHTS FOUNDATION OF SOUITH AFRICA	***AMICUS CURIAE***

Neutral citation: *Wallage v Williams-Ashman N O and Others* (823/2020) [2023] ZASCA 44 (31 March 2023)

Coram: SALDULKER, MBATHA and MOLEFE JJA and KATHREE-SETILOANE and UNTERHALTER AJA

Heard: 23 March 2023

Delivered: 31 March 2023

Summary: Constitutional challenge to section 2B of the Wills Act 7 of 1953 – freedom of testation – deprivation of property – arbitrariness – sufficient reasons for the deprivation of property – procedural fairness – whether s 2B of the Wills Act violated the appellant's rights under s 25(1) and s 34 of the Constitution.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Sher J, sitting as the court of first instance):

1 The appeal is dismissed;

2 The appellant is ordered to pay the costs in the appeal of the third and fourth respondents, including the costs consequent upon the employment of counsel.

JUDGMENT

Unterhalter AJA (Saldulker, Mbatha and Molefe JJA and Kathree-Setiloane AJA concurring):

Introduction

[1] The appellant, Jakob Marius Wallage, was married to Nicola Jean Wallage (née Chaplin) on 11 June 2011. Days before their marriage, Nicola Wallage made a will. She bequeathed her entire estate to the appellant. In August 2016, the appellant and Nicola Wallage agreed that their marriage had irretrievably broken down, and they signed a 'consent paper' that recorded their agreement as to the division of assets upon their divorce. A final decree of divorce was granted by the Regional Court, Cape Town (the regional court), on 24 October 2016. On 8 December 2016, Nicola Wallage committed suicide. Her death occurred less than 3 months from the date of her divorce from the appellant.

[2] Section 2B of the Wills Act 7 of 1953 (the Wills Act) reads as follows:

'If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person has executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of dissolution concerned, unless it appears from the will that the testatrix intended to benefit his previous spouse notwithstanding the dissolution of his marriage.'

I will refer to this provision as s 2B.

[3] Section 2B provides for specific circumstances in which an ex-spouse will not take under the will executed by their former spouse. The appellant could not succeed to the estate of Nicola Wallage, though appointed her sole heir, by reason of the application of s 2B. Nicola Wallage executed her will before her marriage. She died within three months of her divorce from the appellant. As a result, her will must, in terms of s 2B, be implemented as if the appellant had died before the date of the decree of divorce, that is 24 October 2016. This means that a beneficiary who predeceases the testatrix acquires no rights, nor does his estate or heirs. It is common ground between the parties that this is the position of the appellant. He is disinherited by operation of law. Nicola Wallage must be taken to have died intestate, since the appellant was the sole heir under her will. In consequence, her parents inherit her estate.

[4] The appellant challenged the constitutional validity of s 2B before the Western Cape Division of the High Court, Cape Town (the high court). The challenge was formulated in the following way. First, the appellant claimed that s 2B amounts to an arbitrary deprivation of property in violation of s 25(1) of the Constitution. That deprivation came about because s 2B thwarts Nicola Wallage's freedom to choose the appellant as her sole heir, hence her right to dispose of her property as she wishes was infringed. Second, the appellant was deprived of his inheritance. This too amounts to an infringement of his rights in terms of s 25(1) of the Constitution. Third, s 2B is contrary to public policy. It

offends against public policy because the legal fiction that s 2B imposes can only be undone by a showing that it appears from the will of the testatrix that she intended to benefit her previous spouse. This, the appellant claims, is too narrow. The statutory fiction should be capable of being reversed by relevant evidence that is probative of the testatrix's intention. The evidentiary limitation in s 2B constitutes an arbitrary deprivation within the meaning of s 25 of the Constitution. It also amounts to an infringement of the appellant's right of access to the courts, secured by s 34 of the Constitution.

[5] The application cited the following respondents (who are so cited before this Court): the executor of Nicola Wallage, David Howard Williams-Ashman N O (the first respondent), the Master of the Gauteng Division of the High Court, Johannesburg (the Master and the second respondent), Nicola Wallage's parents, John Burton Chaplin and Isabelle Noel Ferreira (the third and fourth respondents), the Speaker of the National Assembly (the fifth respondent), the Chairperson of the National Council of Provinces (the sixth respondent) and the Minister of Justice (the seventh respondent). The application was opposed by the Master and the parents of Nicola Wallage. Her parents have since died, and the litigation has been pursued by the executors of their estates, who have been substituted as parties by consent. I shall reference these two respondents as the parents. The remaining respondents gave notice to abide the decision of the high court.

[6] The application was heard by Sher J in the high court. He first decided an interlocutory application brought by the parents to strike out certain paragraphs of, and attachments to, the founding affidavit. Sher J granted the order sought, with costs. That order was appealed by the appellant. Before us, however, this aspect of the appeal was not further pursued. And nothing more need be said of it.

[7] The high court found that s 2B did cause the appellant to suffer a deprivation of his right to inherit the property that may have been bequeathed to him, hence s 25 of the Constitution was of application. However, the high court found that s 2B serves a legitimate and compelling social purpose; the deprivation it effects is not arbitrary in terms of s 25(1) of the Constitution (either substantively or procedurally); and s 2B does not limit the right of access to court in breach of s 34 of the Constitution. The high court accordingly dismissed the application, and ordered each party to pay their own costs. With the leave of the high court, the appellant appeals that order to this Court.

The issues

[8] In the course of developing his oral argument, the appellant's counsel, helpfully, clarified the basis of the appellant's constitutional challenge and the issues we are asked to decide in this appeal. First, has the appellant been deprived of property, within the meaning of s 25 of the Constitution, by reason of s 2B? Second, if he has, the appellant does not contest the proposition that s 2B has a legitimate object. Rather, the appellant submits that the deprivation effected by s 2B lacks sufficient reason, and it is therefore arbitrary, because s 2B does not permit of the consideration of evidence outside of the will to determine whether the testatrix intended to benefit her previous spouse, notwithstanding the dissolution of the marriage. Whether this constraint amounts to arbitrary deprivation in terms of s 25 of the Constitution is the issue upon which the appeal turns. If it does not amount to arbitrary deprivation under s 25, then the appellant accepts that there is no independent basis to complain of an infringement in terms of s 34 of the Constitution.

Analysis

[9] I commence with the first issue: has the appellant been deprived of property within the meaning of s 25 of the Constitution? The appellant offered two reasons for his contention that he was so deprived by the application of s 2B. First, s 2B infringed Nicola Wallage's freedom of testation, and her right to dispose of her property in her will as she wished. Second, the appellant is deprived of the inheritance he would have enjoyed but for the application of s 2B.

[10] The first reason is not one that the appellant can advance. He has no claim upon the enjoyment by Nicola Wallage of her freedom of testation. That was her freedom to enjoy, and any diminution of that freedom brought about by s 2B, is not his property.

[11] The appellant's second reason occasions greater difficulty. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another (First National Bank)*[1] remains the leading authority on s 25 of the Constitution. There, Ackerman J was at pains to warn of the practical impossibility of providing a comprehensive definition of property for the purposes of s 25.[2] Since then, the Constitutional Court has found the meaning of property in terms of s 25 to be capacious. It has held that an enrichment claim is property for the purposes of s 25[3] on the basis that in other jurisdictions personal rights have been recognised as constitutional property. And in *Shoprite Checkers (Pty) Limited v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others*,[4] it considered a grocer's wine licence to be property.

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[1] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702.
[2] Ibid para 51.
[3] *National Credit Regulator v Opperman & Others* 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) para 63.
[4] *Shoprite Checkers (Pty) Limited v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

[12] There is good reason to exercise caution in expanding the meaning of property in s 25 of the Constitution to include every kind of personal right. There are important distinctions between real rights and personal rights. It is not at all obvious that a personal right to performance should carry constitutional protections against arbitrary deprivation, on the basis that such rights constitute constitutionally protected property.

[13] What rights did the appellant enjoy by reason of his appointment as the heir in Nicola Wallage's will? This has long been settled. Upon the death of Nicola Wallage, were s 2B not of application the appellant would have had a vested interest in the deceased estate *(dies cedit).* After the liquidation and distribution account of the estate had been confirmed, the appellant might have acquired a right to claim his inheritance from the executors of the estate, if the estate was solvent[5] *(dies venit).* That is a personal right.

[14] Whether the prospective enjoyment of such a right by the appellant amounts to property within the meaning of s 25 of the Constitution is an issue of no small difficulty. It is certainly a right that relates to the acquisition of property if it accrues. Section 2B extinguishes any prospect of the appellant securing that right. While the death of Nicola Wallage gave rise to no rights of ownership by the appellant to the assets of her estate, absent s 2B, the appellant might have acquired the right to claim those assets. The contrary position is that a prospective personal right to claim an inheritance that might never accrue, is too remote an interest to amount to property to trigger the constitutional protections of s 25.

[5] *Greenberg & Others v Estate Greenberg* 1955 (3) SA 361 AD at 364 – 365.

[15] For reasons I shall explain, I do not need to decide this point of law. Rather, I shall assume in the appellant's favour, without deciding the matter, that the rights that might have accrued to the appellant, following upon the death of Nicola Wallage, absent s 2B, amount to property within the meaning of that concept in s 25 of the Constitution. I will also assume in favour of the appellant that s 2B deprived him of that property in terms of s 25.

[16] I now turn to the central issue in this appeal: is s 2B an arbitrary deprivation of the appellant's property that s 25 of the Constitution does not permit?

[17] Under the framework in *First National Bank*,[6] s 2B will be judged an arbitrary law for the purposes of s 25 of the Constitution if it does not provide sufficient reason for the particular deprivation in question or if it is procedurally unfair. What constitutes sufficient reason is to be decided by having regard to criteria set out in *First National Bank*, including an evaluation of the relationship between the means employed, that is the deprivation in question, and the ends sought to be achieved, that is the purpose of the law in question.

[18] Sensibly, the appellant does not contest the legitimacy of the purpose of s 2B. This legislative intervention came about as a result of the recommendations of the South African Law Commission in 1991. The amendment of the Wills Act, effected by s 2B, took place in 1992. The Commission, in summary, found that divorce is a parting of ways. It brings about a division of assets. A person who divorces may not recognise that their will, executed in happier times, which benefits their ex-spouse, continues to do so, unless revoked. The Commission considered that an appropriate period of time should be afforded to such a person to revise their will, during which their

[6] Fn 1 above para 100.

former spouse cannot inherit. Without a legislative intervention of this kind, a divorced person may continue to benefit their former spouse under their will, when nothing of the kind was intended. The proprietary finality that the divorce was meant to bring about could be undermined by a will that continues to benefit a former spouse, when the testatrix would in fact wish otherwise. And so, based on these recommendations, the legislature amended the Wills Act by introducing s 2B.

[19] Section 2B is structured as follows. Should the testatrix die within 3 months of the dissolution of her marriage, the previous spouse is taken to have died before the dissolution of the marriage. Since succession is conditional on survivorship, the previous spouse cannot then succeed to inherit under the will. The purpose of this intervention is to afford the testatrix an opportunity to amend or revoke her will. The predicate of this statutory intervention is that a testatrix would not want her ex-spouse to inherit after a divorce or annulment. Section 2B thus disinherits the previous spouse, by operation of law, should the testatrix die within the 3 months period. However, if the testatrix does not die in the 3 months period, her will, as written, is taken to express her intention, and will be given effect. In other words, if the testatrix does not change her will in the 3 months period, and it reflects the appointment of her previous spouse as her heir or legatee, the testatrix will be taken to have intended this testamentary disposition.

[20] Section 2B provides for a carve-out from the disinheritance of the previous spouse should the testatrix die within the 3 months period. If it appears from her will that the testatrix intended to benefit her previous spouse, notwithstanding the dissolution of their marriage, then that intention will be given effect. The disinheritance of the previous spouse by operation of law is then not of application. The paramountcy of the testatrix’s intentions, expressed

in her will, trumps the presumptive intention that a testatrix who dies within 3 months of the dissolution of her marriage would not have wished to benefit her previous spouse. I shall refer to this provision in s 2B as 'the paramountcy carve-out'.

[21] It is the paramountcy carve-out that forms the basis of the appellant's constitutional challenge to the validity of s 2B. The appellant does not question the purpose of s 2B, only the means used by the legislation to achieve that purpose. In particular, the appellant contended that the paramountcy carve-out is too restrictive because it only permits the testatrix's intentions to be ascertained from the will, rather than by recourse to relevant evidence, extraneous to the will, that is probative of the testatrix's intention to benefit her previous spouse, notwithstanding the dissolution of their marriage.

[22] It is important to be clear as to the scope of this challenge. As the protective purpose of s 2B is not questioned by the appellant, the appellant does not contend that the legislature cannot intervene to disinherit a previous spouse in the immediate aftermath of a divorce, on the assumption that the testatrix would not want to benefit their former spouse. The protection thus afforded by s 2B is not claimed to be constitutionally suspect. Hence, the appellant accepts that the deprivation of property entailed by the disinheritance of the former spouse is permissible to protect the testatrix for a period of 3 months after the dissolution of the marriage, during which time, it is presumed, the testatrix, should she die, would not have wanted to benefit her previous spouse.

[23] The appellant's challenge is limited to the contention that the paramountcy carve-out is too narrow. This is reflected in the remedy sought by the appellant, which seeks a reading in of the words 'or to the satisfaction of the court from evidence extraneous to the will' as an alternative to what appears

from the will itself. It does not challenge the presumptive disinheritance of the previous spouse in the 3 months period should the testatrix die, and it accepts that there is sufficient reason for the legislature to impose this outcome to secure the protective object of s 2B. It follows that the legislative imposition of presumptive disinheritance of the previous spouse does not amount to arbitrary deprivation. Rather, it is the restriction placed upon what evidence may be considered to make out the paramountcy carve-out, that founds the appellant's constitutional challenge. Put simply, if s 2B permitted of the consideration of relevant evidence beyond the will to determine the intention of the testatrix, it would be beyond constitutional reproach.

[24] The appellant's challenge then comes to this. Section 2B provides for the paramountcy carve-out. The legislature did so because fidelity to the testatrix's actual intention should prevail over a presumption that the testatrix would not have wished to benefit her previous spouse in the immediate aftermath of a divorce. If the testatrix's intentions are paramount, then they should be ascertained on the basis of all relevant evidence. To do otherwise, is to deprive the appellant of his right to inherit, even though that is indeed what the testatrix intended. In this sense, the limitation in s 2B gives rise to an arbitrary deprivation of property. It is arbitrary because the limitation fails to provide sufficient reason for the disinheritance of the appellant, when a fuller consideration of the relevant evidence might show that Nicola Wallage did intend to benefit the appellant, notwithstanding their divorce. And the limitation is also procedurally unfair.

[25] I turn to consider this challenge. The paramountcy carve-out does give paramountcy to the actual testamentary intentions of the testatrix, and allows that these intentions will trump the presumed intention that the testatrix would not have wished to benefit her recently divorced former spouse. It is important

however to be precise as to what intention is being accorded primacy. It is the intention of the *testatrix* as to who should succeed to her estate upon her death, notwithstanding *the dissolution of her marriage.* A testatrix gives expression to her intention in her will, properly executed in conformity with the Wills Act. It is this intention that is relevant to the paramountcy carve-out. In addition, what must be determined is not some general wish to benefit the previous spouse, but an intention to do so, in her will, notwithstanding the dissolution of the marriage. That is to say, on the facts of this case, did Nicola Wallage intend, as a testatrix, to benefit the appellant in her will, even though she and the appellant had divorced and parted on terms agreed upon, and made subject to a court order as to the division of their assets. It is what the testatrix intended to provide in her will in contemplation of her recent divorce that signifies. Hence, the warranted limitation to ascertain that intention from the testatrix's will.

[26] It has long been a foundational principle of our common law and the legislation that has governed the law of testamentary succession that a will, properly executed, is the document that authoritatively reflects the genuine and voluntary dispositions of a testatrix.

[27] The limitation in the paramountcy carve-out is justified by the need to treat a duly executed will as dispositive of the testatrix's intention. There is nothing arbitrary in so doing. The limitation is supported by sufficient reasons in that it limits disputes as to what the testatrix intended by stipulating that the will is the authoritative and binding expression of the testatrix's intentions. This fosters certainty and curtails fraud, when the testatrix can no longer speak for herself. That the appellant would seek to engage a more wide-ranging exploration of evidence to ascertain the testatrix's intention would undermine these durable principles, so long part of our law.

[28] Nor does the limitation offend against procedural fairness. The limitation simply frames how we ascertain a testatrix's intention to limit the scope for disputes after the testatrix's death. That the will is authoritative as to Nicola Wallage's intentions is, for the reasons given, a justified stipulation. The appellant may press his claim by seeking to show that Nicola Wallage intended to benefit him, notwithstanding their divorce. That he must do so within the confines of the paramountcy carve-out visits no procedural unfairness upon him. A constraint as to the proof of intention may be a procedural limitation, but it is a justified one. Once that is so, it cannot be unfair to require the appellant to comply with a procedure that is fully justified. This is a case where the reasons that render s 2B non-arbitrary, also make the provision one that does not want for procedural fairness. If, under the limitation in the paramountcy carve-out, the appellant lacks a supportable case, that entails no unfairness.

[29] The appellant contended that the arbitrariness of the limitation in the paramountcy carve-out is reinforced when regard is had to s 2(3) of the Wills Act. That provision permits a court to recognise a document as a will, although it does not comply with all the formalities required by s 2(1) of the Wills Act. That flexibility, contended the appellant, is precisely what s 2B lacks.

[30] Section 2(3) of the Wills Act does not assist the appellant. Section 2(3) confers a power on the courts to identify and recognise a document as a will, even though it does not comply with the formalities otherwise required by the Wills Act, provided the court can find that the person in question intended the document to be her will. But that is not the difficulty facing the appellant. There is no issue as to the identification of Nicola Wallage's will, nor as to what it says. The appellant wants to go outside the will to establish that Nicola Wallage intended the appellant to be her heir, notwithstanding their divorce. That is to adduce evidence of what Nicola Wallage intended, after her divorce, even

though her will has nothing to say on this score. Section 2(3) of the Wills Act allows for no such exploration. It permits a court some flexibility in identifying a will. It does not dilute the authority of its contents. Section 2(3) is entirely consistent with the embedded principle of our law that the will, once identified, is entirely dispositive of the testatrix's intentions as to who will succeed to her estate.

[31] The appellant also argued that the limitation in the paramountcy carve-out was inconsistent with this Court's interpretative guidance as to the interpretation of statutes and contracts. The triad of text, context and purpose, canonised by *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*[7] is at odds, it was argued, with the restrictive approach taken in s 2B. This too is unavailing. There is no issue as to what Nicola Wallage's will means. It simply records that she bequeathed her entire estate to her husband, the appellant. She had nothing at all to say in her will about whether the appellant was to remain her heir, notwithstanding their divorce. That lacuna is not cured by principles of interpretation as to what the will means. The appellant would only be assisted if evidence was permitted as to the manifestation of Nicola Wallage's intention outside of the will. That is something entirely outside the domain of *Endumeni*.

[32] For these reasons, the appellant has not shown that s 2B permits an arbitrary deprivation of property that infringes s 25 of the Constitution. The formulation of s 2B does not lack sufficient reasons for the deprivation of property that I have assumed the appellant to have suffered. Nor does s 2B entail any procedural unfairness. It follows also, as the appellant conceded, that if he makes out no case for procedural unfairness in terms of s 25 of the

[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] All SA 262 (SCA) para 18.

Constitution, he has no separate basis for complaint in terms of s 34 of the Constitution. Section 2B infringes neither s 25 nor s 34 of the Constitution.

[33] The appellant also made submissions that s 2B is arbitrary because it impacts differently upon persons married under different marital regimes, for example persons married according to Islamic law. These submissions were apparently prompted by an invitation made by the high court to the parties to file supplementary heads of argument on this issue. Whatever the provenance of these submissions, they cannot be entertained. The founding affidavit made out no case for arbitrariness on this basis. The appeal must accordingly fail.

[34] As to costs, the court below ordered each party to be liable for their own costs on the basis that the matter involved novel issues of law (the costs in respect of the striking out were a different matter). Before this Court, the appellant submitted that the appeal was brought not only in his private interests, but also in the public interest. He asserted as much in his founding affidavit, though he provided no basis for saying so.

[35] There is no basis to interfere with the exercise by the high court of its power to make orders as to costs. I incline to the position that in respect of the costs occasioned by the prosecution of the appeal before this Court, there is a distinction to be drawn between the costs of the Master and those of the parents. The Master represents the public and it may be said that there are sufficient elements of public interest in deciding the point of law on appeal that the appellant should not suffer a costs order in respect of the Master. However, the dispute between the appellant and the parents is one between heirs who would enjoy an inheritance. Here the costs should follow the result. The costs of the parents, on appeal, should be borne by the appellant.

[36] In the result, I make the following order:

1 The appeal is dismissed;

2 The appellant is ordered to pay the costs in the appeal of the third and fourth respondents, including the costs consequent upon the employment of counsel.

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D N UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	H Loots SC, G Solik and M de Beer
Instructed by:	Clyde & CO Inc, Cape Town
	Lovius Block Attorneys, Bloemfontein
For the second respondent:	T Golden SC
Instructed by:	The State Attorney, Cape Town
	The State Attorney, Bloemfontein
For the third & fourth respondents:	M T A Costa SC
Instructed by:	Cox Yeat Attorneys, Cape Town
	Pieter Skein Attorneys, Bloemfontein
Attorney for amicus curiae:	Dr F Moosa
Instructed by:	Fareed Moosa & Associated Inc, Cape Town
	Webbers Attorneys, Bloemfontein.