IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/2236
REPORTABLE
OF INTEREST TO OTHER JUDGES

In the matter between –

STRAUSS, HEIN	PLAINTIFF
AND	
STRAUSS, ZELMA (formerly PISTORIUS, born STRAUSS)	FIRST DEFENDANT
GERICKE, SONJA (born STRAUSS)	SECOND DEFENDANT
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, NORTHWEST DIVISION, MAHIKENG	THIRD DEFENDANT

Neutral Citation: *Strauss v Strauss and Others* (Case No. 2020/2366) [2023] ZAGPJHC 377 (24 April 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Interpretation of will – unitary exercise to determine the meaning, or the intention of the

testators as expressed in the document

Principles set out in Endumeni case apply to wills

Massing of assets in a joint or mutual will presupposes the identification of beneficiaries to inherit when the last testator dies

Order

[1] I make the following order:

1. *The amendment of the plea and counterclaim sought by the first and second defendants is granted;*
2. *It is declared that in terms of the last will and testament of Jan Hendrik Strauss and Encasn Strauss: -*
    2.1. *The plaintiff is to inherit the immovable property known as Erf [...], Klerksdorp, situated at* […]*, Klerksdorp;*
    2.2. *The plaintiff is to inherit the member's interest in Encasn Eiendomme CC;*
    2.3. *The plaintiff is to inherit the member's interest in Tien Jaar Beplan CC;*
3. *The first and second defendants are to inherit the remainder of the estate of the late Escasn Strauss in equal portions.*
4. *The first and second defendants' counterclaim is dismissed.*
5. *The plaintiff's costs of this action, including the costs of the amendment, shall be paid by the first and second defendants jointly and severally, such costs to include the costs consequent upon the employment of Senior Counsel.*

[2] The reasons for the order follow below.

Introduction

[3] The late Mr. and Mrs. Strauss were married in community of property. They made a mutual[1] will on 27 March 2014. The will stipulated that in the event of the death of one of them the surviving spouse shall inherit the estate of the other[2], and be nominated as executor or executrix.[3]

[4] In the event of them passing away art the same time or within 30 days and the surviving spouse had not made a new will, the following applied under the heading *'Gelyktydige Afsterwe'*:

4.1 In terms of clause 4.1 the first defendant was nominated as executrix together with a third party, Mr. Snyman;

4.2 Clause 4.2 provided as follows:

> *"Slegs indien ons gelyktydig of binne 30(dertig) dae na mekaar te sterwe kom, in sodanige omstandighede waarin die langslewende nie 'n verdere testament maak nie dan in daardie geval bemaak ons die geheel van ons boedel soos volg:…"*

4.3 In terms of clauses 4.2 the couple bequeathed a residential property in Klerksdorp and their members' interest in two close corporations to the plaintiff.

[5] In terms of clause 5 the 'restant' (the residue) of the estate is left to the first and

---

1 See De Waal et al 'Wills and Succession, Administration of Deceased Estates and Trusts' *Law of South Africa* vol 31, 1st reissue 2001, par. 361 for the distinction between a mutual will and other joint wills, A mutual will is a joint will.

2 Community of property comes to an end at the death of either of the parties. Two separate estates come into existence at that moment. See *Danielz NO v De Wet and Another* 2009 (6) SA 42 (C) paras [41] to [43] and *Maqubela and Another v the Master and Others* 2022 (6) SA 408 (GJ) par. [27].

3 Clauses 2 & 3.

second defendants ("the defendants") in equal parts. Clause 5 is a free-standing clause and not subject to the proviso that appears in clause 4.

[6] Mr. Strauss passed away in 2015 and Mrs. Strauss three years later. She never made a new will. The question now is whether clause 4.2 is applicable or whether the estate must devolve in accordance with the law of intestate succession.[4]

[7] The will is an inelegant and very badly drafted document. A will is however held void for uncertainty only when it is impossible to put a meaning on it.[5] Any document must be read to make sense rather than nonsense. In *Ex parte Mouton and Another,*[6] Van den Heever JA said:

> *"Die feit dat 'n testamentêre beskikking in sigself dubbelsinnig of selfs 'veelsinnig' is bring nog nie mee dat dit nietig is nie. In so 'n geval is dit - wanneer dit nodig word - die Hof se plig om na oorweging van al die omstandighede en met behulp van erkende vooropstellings en presumpsies vas te stel welke van die moontlike vertolkings waarskynlik die bedoeling van die testateur weergee en dus ten uitvoer gelê moet word. (Sien Voet 28.7.30; D. 34.2.2.33; 33.10.3.5; 35.1.19). Dit is juis daardie dubbelsinnigheid wat eksterne bewyse toelaat"* [emphasis added]

---

4 See section 1(1)(b) of the Intestate Succession Act, 81 of 1987.

5 Kellaway *Principles of Legal Interpretation of Contracts, Statutes and Wills* 1995, 534, referring to *Manchester Ship Canal v Manchester Racecourse Co* (1900) 2 Ch 352 at 360.

6 *Ex parte Mouton and Another* 1955 (4) SA 460 (A) 465E-F.

The plaintiff's interpretation

[8] The plaintiff alleges in the particulars of claim that clause 4.2 must be interpreted to also apply when the two testators died more than thirty days apart and the surviving spouse had not made a new will. The Afrikaans word 'of' ['and'] must then be read into[7] the quoted clause so that it reads as follows:

> *"Slegs indien ons gelyktydig of binne 30(dertig) dae na mekaar te sterwe kom, of in sodanige omstandighede waarin die langslewende nie 'n verdere testament maak nie dan in daardie geval bemaak ons die geheel van ons boedel soos volg: …"*

[9] On this interpretation clauses 4.2.1 to 4.2.3 would be given effect to, unless the surviving spouse elected to make a further will before or after the expiry of the thirty day period.

The defendants' interpretation

[10] The defendants however contend for a different interpretation according to which the whole estate would devolve in terms of the law of intestate succession if the surviving spouse failed to make a new will within thirty days. They pleaded and argued that the word to be read into the text, if one is to be read into the text at all, is the Afrikaans word 'en' [and]. The clause would then read as follows:

> *"Slegs indien ons gelyktydig of binne 30(dertig) dae na mekaar te sterwe kom, en in sodanige omstandighede waarin die langslewende nie 'n verdere testament maak nie dan in daardie geval bemaak ons die geheel van ons boedel soos volg…."*

[11] In other words, on this interpretation clause 4.2 is not applicable at all as more than

---

[7] Words may be added to or deleted from a will to give effect to its true meaning. See *Henriques v Giles NO: In re Henriques v Giles NO* 2010 (6) SA 51 (SCA) [2009] 4 All SA 116 (SCA),

thirty days elapsed between the passing of the two testators. The same fate would befall clause 4.1.

[12] The result of the defendants' interpretation is as follows: if the surviving spouse survived the other by more than thirty days and failed to make a new will:

12.1 there would not be a nominated executor or executrix, and

12.2 the surviving spouse died intestate.

The "massing" argument

[13] In heads of argument filed on their behalf the defendants argue that clauses 4 to 5.3 of the will could be construed as a massing.[8] This argument is at odds with the plea where it is alleged that the testatrix died intestate, and at odds with the submission also made in the heads that the will was silent about and was never meant to deal with what was to happen to the surviving spouse's estate upon her death. A will that provides for massing governs what has to happen when the survivor dies – the beneficiaries are to inherit.

[14] Massing occurs when the property or part of the property of two or more testators is consolidated or massed for the purpose of a joint disposition after the death of the survivor.[9]

[15] Massing[10] is most often provided for in a mutual will by spouses. The survivor is given a limited interest[11] in the massed property. The survivor is put to an irreversible election upon the death of the first-dying: The survivor may repudiate, or may adiate[12] by accepting the benefit under the will and is then irrevocably bound by its terms. The jointly disposed-of

---

8 Kellaway *Principles of Legal Interpretation of Contracts, Statutes and Wills* 1995, 586.

9 *Kruger v Terblanche* 1978 (2) SA 198 (T) 205A to 206A.

10 See De Waal et al 'Wills and Succession, Administration of Deceased Estates and Trusts' *Law of South Africa* vol 31, 1st reissue 2001, paras 364 to 366.

11 Such as a *usufructus* or *fideicommissum*.

12 One would expect a pleading to allege either adiation or repudiation.

property then devolves in terms of the will upon the beneficiaries and the survivor loses the freedom to vary or revoke his or her own disposition in the mutual will.

[16] The rights of the beneficiaries are dealt with in the Administration of Estates Act:[13]

> *"**7 Massed estates***
>
> *If any two or more persons have by their mutual will massed the whole or any specific portion of their joint estate and disposed of the massed estate or of any portion thereof after the death of the survivor or survivors or the happening of any other event after the death of the first-dying, conferring upon the survivor or survivors any limited interest in respect of any property in the massed estate, then upon the death after the commencement of this Act of the first-dying, adiation by the survivor or survivors shall have the effect of conferring upon the persons in whose favour such disposition was made, such rights in respect of any property forming part of the share of the survivor or survivors of the massed estate as they would by law have possessed under the will if that property had belonged to the first-dying; and the executor shall frame his distribution account accordingly."*

[17] If one accepted for the sake of evaluating the argument that the will did provide for massing but that the will gave the surviving spouse a 30-day opportunity to change his or her mind and make a different will, then the question arises as to who the beneficiaries of the massing are. In the heads it is argued that the will is silent as to what was to happen with the survivor's estate (notably, not the massed estate) upon the surviving spouse's death, and did not provide for a distribution of the survivor's assets on her death. These submissions defeat the "massing argument."

[18] Conversely, if one tried to shoehorn a massing into the will, again to test the argument, then the only beneficiaries of the massed estate are those listed in paragraphs 4.2 and 5 and in those proportions.

---

[13] Administration of Estates Act, 66 of 1965, section 37.

Amendment of plea and counterclaim

[19] The defendants initially pleaded that clause 4 of the will does not find application as their parents did not die within the same thirty-day period and the surviving spouse did not make a further will. Therefore the bequests in paragraph 4.2 of the will fell within the residue of the estate and that the whole of the estate falls to be dealt with in terms of clause 5, which meant that the defendants were the two heirs in equal proportions of 50% each.

[20] The defendant gave notice of their intention to amend the plea and counterclaim early in April 2023. They now sought a declaratory order to the effect that the estate of the late Mrs. Strauss *"shall devolve and be divided equally between the plaintiff"* and the defendants *"per stirpes"* in accordance with section 1(1)(b) of the Intestate Succession Act, 81 of 1987.

[21] The amendment was granted by agreement between the parties.

The correct approach to interpreting the will

[22] The proper approach to interpretation of legislation, contracts, wills and other documents has engaged the minds of lawyers for many years.[14] The traditional approach to the interpretation of a will has been that a court is required to place itself in the testator's

[14] See *Beadica 231 AA and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *Cassiem v Standard Bank of South Africa Ltd* 1930 AD 366 368; *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA); *Glenn Brothers v Commercial General Agency Co Ltd* 1905 TS 737 740–741; *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 (1) SA 365 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA); *Ma-Afrika Hotels (Pty) Ltd and Another v Santam Ltd (a division of which is Hospitality and Leisure Insurance)* [2021] 1 All SA 195 (WCC); *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA); *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] 4 All SA 417 (SCA); 2016 (1) SA 518 (SCA); *Schoeman and Others v Lombard Insurance Co Ltd* [2019] JOL 44846 (SCA), 2019 (5) SA 557 (SCA); *South African Football Association v Fli-Afrika Travel (Pty) Ltd* [2020] 2 All SA 403 (SCA); *Stiglingh v Theron* 1907 TS 998 1002, 1007; *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA).

proverbial armchair, armed with the information then at the disposal of the testator in order to determine the intention of the testator. In the *Allen* case, Corbett J (as he was then) said: [15]

> *"There was some debate at the Bar regarding the extent to which the Court could look to the evidence of background facts and surrounding circumstances[16] in the interpretation of the bequest in issue. In this connection the correct approach has been definitively stated in two decisions of this Court (see Ex parte Froy: In re Estate Brodie, 1954 (2) SA 366 (C); Ex parte Eksekuteure Boedel Malherbe, 1957 (4) SA 704 (C)). Briefly, the position is as follows: Basically the duty of the Court is to ascertain not what the testator meant to do when he made his will but what his intention is, as expressed in his will. Consequently, where his intention appears clearly from the words of the will, it is not permissible to use evidence of surrounding circumstances or other external facts to show that the testator must have had some different intention. At the same time no will can be analysed in vacuo. In interpreting a will the Court is entitled to have regard to the material facts and circumstances known to the testator when he made it: it puts itself in the testator's armchair."* [emphasis added]

[23] It is accepted that text, context,[17] and purpose from a triad of interpretative aids in determining meaning. Words must after all usually be understood in the context of other words. Even the simplest of words are capable of different meanings and convey different nuances of meaning depending on context, and even a word with a very clear and definite meaning in isolation can take on a different meaning in context.[18] An important caveat must be added: It is not for the court to design the document that the draftsman ought, in the opinion of the court, to have created.

[24] In judgments in the Supreme Court of Appeal reported in 2012 to 2014, Wallis JA

---

[15] *Allen and Another, NNO v Estate Bloch and Others* 1970 (2) SA 376 (C) 380A-C. See also *Dison NO and Others v Hoffmann and Others NNO* 1979 (4) SA 1004 (A) 1035G.

[16] The distinction between background facts and surrounding circumstances is no longer a valid distinction. See *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) par. [12].

[17] See *Richter v Bloemfontein Town Council* 1922 AD 57 at 67 and *Swart v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) 202.

[18] The word 'dozen' is a good example. Its meaning of 'twelve' is often very clear, but it may mean 'thirteen' in a particular context. This is what is known as a 'baker's dozen.'

clarified the principles and placed the emphasis on a contextual[19] approach to interpretation in preference to a textual approach. Interpretation is now a unitary[20] exercise and the -

> *"former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.*[21]

[25] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[22] Wallis JA said:

> *[18] ……. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document … having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence….The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used…."* [emphasis added]

---

19 Wallis JA makes the important point that people going about their daily business have to understand words and sentences in their context all the time, and generally manage to do so successfully without much conscious thought. See Wallis "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) 2019 *PER / PELJ* (22).

20 In contrast to the so-called 'two-stage approach.' The two-stage approach requires the court to first determine the literal meaning of the words, and to embark on an investigation of the context and background circumstances only when encountering ambiguity. See the *dictum* by Innes CJ in *Glenn Brothers v Commercial General Agency Co Ltd* 1905 TS 737 740–741. The 'two-stage' approach has the potential to lead to questionable results by insisting on an strictly literal interpretation but it many of the judgements where it was followed, it appears from reading the judgments that the Judges did look at context and considered ambiguity in context. *Richter v Bloemfontein Town Council* 1922 AD 57 at 67 is a prime example.

21 Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) par. [12]. The footnote reads as follows: *"Per Lord Clarke SCJ in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 ([2012] Lloyd's Rep 34 (SC)) para 21. He relied also on the following passage in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) 545, 551:'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'"*

22 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par. [18].

[26] Wallis JA was critical of the *"conventional description"* as an exercise to determine the *intention* of the legislature or the draftsman of a contract, and described the use of the term as a misnomer, because the enquiry is not to determine the *intention* but the *meaning* of the language of the legislation or contract.[23]

[27] The learned Justice of Appeal did not refer to wills and the matter before the Court did not involve a will. The question now is whether when interpreting a will, the intention of the testator is still a relevant consideration.

[28] Writing in the Potchefstroom Electronic Law Journal,[24] Wallis JA argued that the principles as stated in the *Endumeni* case applied to wills, subject to adaptation.

[29] In *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* and in *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*[25] the Supreme Court of Appeal held that the interpretation of documents will not vary depending on the characteristics of the document in question. The *Endumeni* principles are of universal application and were applied for instance to the interpretation of a trust deed in *Harvey NO and Others v Crawford NO and Others.*[26] There are however *"differences in context with different documents, including the nature of the document itself."*[27]

[30] The unitary approach in *Endumeni* applies to the interpretation of a will just as it applies to the interpretation of a contract or legislation or any other document. The context is just different – a will differs fundamentally from legislation, or a contract, or a trust deed, or a memorandum of incorporation of a company, or a resolution, and the unitary approach in Endumeni take the differences in context into account to a greater extent than the two-stage

---

23 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par. [20]

24 Wallis "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) 2019 *PER / PELJ* 22. See also Le Roux W "EDITORIAL: SPECIAL EDITION - Legal Interpretation after *Endumeni*: Clarification, Contestation, Application" *PER / PELJ* 2019 (22) and Moosa "Interpretation of Wills – Does the Endumeni Case Apply?" *PER/PELJ* 2021 (24)

25 *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* 2020 (4) SA 480 (SCA) paras [10] to [17] and *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) paras [16] to [17].

26 *Harvey NO and Others v Crawford NO and Others* 2019 (2) SA 153 (SCA).

27 *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) par. [16].

approach. If by the intention of the testator[28] one means the objectively-analysed intention as expressed[29] in the will, rather than his or her unexpressed intention sitting in an armchair thinking about the law of succession, then there is to my mind no real difference between determining what the *intention* of the testator was in the words of Corbett J,[30] and ascertaining the *meaning* of the language of the will in the terminology used by Wallis JA.[31] The older authorities therefore still have great value provided one keeps in mind the unitary approach in *Endumeni*.

[31] This conclusion is borne out by the judgment by Leach JA in *Raubenheimer v Raubenheimer and Others*[32] where Leach JA in a unanimous decision, Wallis JA concurring, used the older terminology referring to the intention of the testator. Leach JA said:

> *"[23] In interpreting a will, a court must if at all possible give effect to the wishes of the testator. The cardinal rule is that 'no matter how clumsily worded a will might be, a will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes can be carried out.' …"* [emphasis added]

The context

[32] In the present matter, the will was made in the following context:

32.1 The testators were married in community of property;

---

[28] It is perhaps easier, linguistically, to attribute an 'intention' to a lone testator sitting in an armchair, than to a large body of decision-makers who adopt a resolution, perhaps with 51 votes to 49, while all the individuals who vote for the adoption of the resolution do so with a different intention. In this context the language in *Endumeni* par. [20] is purer and more accurate.

[29] Cf Ogilvie Thompson J In *Ex parte Froy: In re Estate Brodie* 1954 (2) SA 366 (C) 370B : "*What a man intends, and the expression of his intention, are two different things. He is bound, and those who take after him are bound, by his expressed intentions.*" See also *Bester NO v Nel* 2008 JDR 1572 (T) 6.

[30] *Allen and Another, NNO v Estate Bloch and Others* 1970 (2) SA 376 (C) 380A-C. See also *Dison NO and Others v Hoffmann and Others NNO* 1979 (4) SA 1004 (A) 1035G.

[31] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par. [20]

[32] *Raubenheimer v Raubenheimer and Others* 2012 (5) SA 290 (SCA) par [23].

32.2 Four children were born of the marriage and one child died young;

32.3 When the will was made in 2014 the three remaining children were respectively 51, 49, and 44 years old;

32.4 The plaintiff was born in 1965 and matriculated in 1984;

32.5 Mr. Strauss Snr was a successful businessman and in the course of his career he managed businesses and was the owner of a number of properties in addition to the family home in Klerksdorp;

32.5.1 He worked for a financial institution until about 1978 when he started to devote his time on a full-time basis to his estate agency business established some time previously;

32.5.2 He became a sectional title expert and would often convert a property that he had acquired to sectional title ownership, and sell off the sections while keeping some for himself;

32.5.3 He was also often appointed as managing agent of such sectional title complexes;

32.5.4 In doing so he built up considerable wealth and business acumen;

32.6 Shortly after leaving school the plaintiff went to work in the family business and he has worked in the business for most of his life;

32.7 In about 1986, two years after leaving school and having completed his military service, he identified a property near the dam that he believed had potential for development and his parents financed the acquisition of the property as well as improvements to develop it as a resort;

32.8 The resort property was acquired using Encash CC as a business vehicle;

32.9 Around that time, the mid-1980's, his father had heart attack and intended to scale down his activities as an estate agent, developer, and owner and seller of property;

32.10 The plaintiff played a leading role in developing the resort property, to the extent that his parents took out keyman insurance over his life to enable them to employ someone to take over from the plaintiff in the event of something happening to him;

32.11 His parents also sold some of their other properties, including a block of flats, to finance the development of the resort at the property identified by the plaintiff;

32.12 Initially the three children each held 2% of the members' interest in Encasn CC and their parents held 94%; The defendants resigned in about 2000 and thereafter the plaintiff held 50% of the members' interest, and his parents held 25% each;

32.13 In the year 2000 an adjacent property was purchased and Tien Jaar Beplan CC was incorporated as the business vehicle, and the members' interest was held on the same 50/25/25 basis;

32.14 The intention at the time was to keep cattle and game on the Tien Jaar Beplan property, with a bridge to connect the two properties;

32.15 The property owned by Tien Jaar Beplan CC was sold in 2006 and the farm Goedgevonden was purchased with the proceeds;

32.16 The plaintiff administered and ran the family business but Mr. Strauss Snr was the guiding force in the business, and he had the "last say" when business decisions were made;

32.17 The business ran into financial difficulties and the plaintiff and his wife sold their house in Klerksdorp to put money into the business, and by doing so the

debt owed to the principal creditor was paid in full;

32.18 The plaintiff and his family then moved into his parents' house in Klerksdorp and eventually a flatlet was built where his parents lived while the plaintiff's family occupied the main house;

32.19 The three children had a good relationship and with their parents ae the time;[33]

32.20 The plaintiff had a good relationship with his parents and looked up to them, and he regarded his father as the chief decision maker in the family business;

32.21 The defendants were not involved in the family business;

32.22 Mr. and Mrs. Strauss loved the three children equally.

Analysis

[33] There are a number of problems with the defendants' interpretation of the will, namely that clause 4 fell away after the passage of thirty days.

[34] Firstly, it would leave clause 5, a free standing clause not subject to the heading of 'Gelyktydige afsterwe' that one sees in clause 4, still extant. This clause 5 leaves the residue ('restant') of the estate to the defendants in equal shares. The use of the word 'restant' implies that there are assets not included in the residue[34], but without reference to clause 4.2 it is not possible to determine what the residue is, unless one classifies the whole of the estate[35] as 'residue' which of course does an injustice to the word 'residue' or 'restant.'

---

33 The relationship between the siblings deteriorated after Mrs. Strauss passed away in 2018.

34 In other words, the 'residue' of an estate would always be less than 100% of the whole estate.

35 This is in fact what the defendants did in their first plea and counterclaim. As set out above a new plea was substituted shortly trial and the amendment was granted by agreement.

34.1 Mr Strobl on behalf of the defendants argued that one has to read clause 5 as a renumbered sub-clause of clause 4, in other words as clause 4.3.

34.2 Therefore, on the defendant's interpretation of the will it is nevertheless necessary to read the text differently from how it appears on paper in order to arrive at the meaning.

[35] There is nothing in the will to merit the inference that the testators intended the surviving spouse to die intestate unless he or she made a new will. There is a presumption against intestacy:

> *"When a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce … that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."*[36]

[36] The presumption against intestacy applies even when the intestacy would be only partial.[37]

---

[36] *In re Harrison* (1885) 30 Ch 390 at 393-394;

[37] *Havemann's Assignee v Havemann's Executor* 1927 AD 473 at 475; *Jarvis, NO v Hawken and Others* 1959 (2) SA 594 (FC) 598.

Conclusion

[37] It was the intention of the testators to deal with the whole of their estate in the will and to nominate their daughter, the first defendant, as the executrix. It was not their intention to die intestate and without a nominated executor – first the surviving spouse and then their daughter. It was also the intention that the surviving spouse's freedom to make a new will was unlimited. No restrictions are placed on the surviving spouse and the will does not entail the massing of assets.

[38] For the reasons set out above I grant the order in paragraph 1 above.

_____

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **24 APRIL 2023**.

COUNSEL FOR THE PLAINTIFF:	R STOCKWELL SC
INSTRUCTED BY:	ROXO LAW ATTORNEYS
COUNSEL FOR THE FIRST AND SECOND DEFENDANTS:	W STROBL
INSTRUCTED BY:	CLIFFE DEKKER HOFMEYR INC
DATE OF THE HEARING:	17 & 18 APRIL 2023

DATE OF JUDGMENT: 24 APRIL 2023