

VONNISSE

THE SUPREME COURT OF APPEAL DECIDES ON THE REVIVAL OF A REVOKED WILL

Wessels NO v Die Meester [2007] SCA 17 (RSA)

Introduction

The only previous occasion on which the Appellate Division has had to decide on the revival of a revoked will was in *Moses v Abinader* 1951 4 SA 537 (A) (*Moses*), in 1951. Following that decision the law on the revival of revoked wills remained uncertain, because in *Moses* the judges were not in agreement on whether a revoked will had to be re-executed in order to be revived (see Corbett, Hofmeyr and Kahn *The law of succession in South Africa* (2001) 110). This particular issue was clarified by the Supreme Court of Appeal in *Wessels NO v Die Meester* [2007] SCA 17 (RSA) (*Wessels*).

Facts of the case

The testator, Mr Bezuidenhout, and his wife had made a joint will in 2002. From various provisions in the will it was apparent that the testators had anticipated that Mrs Bezuidenhout would survive Mr Bezuidenhout. (Eg, in clause 2 it was stated that, should the testator die first, the return on their investments should devolve in a certain way; in clause 3(a) it was stated that, should the testator die first, the parties' immovable property should go to a grandchild, Freddie.) There was only one clause making provision for the event of the testatrix dying first – namely, clause 8, which stated that in such an event the testator would be the sole heir. Contrary to the expectations of the parties, however, the testatrix died first. In terms of clause 8 of the joint will, the testator therefore inherited the whole estate.

Probably not realising that the provisions in the will no longer had any effect because they provided for the situation where the testatrix was the survivor only, the testator executed a codicil to the joint will in May 2003. In the codicil it was stated that the bequest to the grandchild, Freddie, in clause 3(a) of the will was subject to the provision that Freddie should pay a certain Johanna Nel the amount of R1 000 per month for the rest of her life. It was also stated that the rest of his will (ie, the joint will) remained unaltered. In June 2003 the testator executed a further codicil to the will, bequeathing a motor vehicle and a colour television set to Johanna, once more stating that the rest of his will remained unaltered. Immediately afterwards the testator executed a third codicil, which could not be found after his death. The master consequently refused to accept the third codicil. The wording of the third codicil appeared to be known, as the court *a quo* referred to it. In the codicil the testator referred to himself as the sole heir

in terms of the joint will. It was also stated that all the bequests and conditions of that will were to become valid immediately and should be applicable at the death of the testator, except for certain amendments, which were described in detail.

Upon the death of the testator, the executor of his deceased estate was of the opinion that the joint will, read together with the two codicils, should be considered as the will of the testator. The master did not agree. The master was of the opinion that, apart from a few irrelevant exceptions, the testator had died intestate. The executor applied to the High Court in Bloemfontein for an order confirming his viewpoint. The court refused the order and granted the respondents an order to the effect that the testator had died intestate. The executor appealed this order in the Supreme Court of Appeal. The court rejected the appeal.

Reasoning of the Supreme Court of Appeal

The court, per Brand JA (Van Heerden and Combrinck JJA concurring) started off by pointing to the well-established principle that, unless massing has taken place, a joint will has to be considered as the two separate wills of the testators contained in one document, in which each testator divides up his or her own estate (*Wessels* para 9; see also *Rhode v Stubbs* 2005 5 SA 104 (SCA); *Corbett et al* 436–437). Upon the death of the first-dying, the survivor is free to make a new will and to decide anew on the devolution of his or her property. The fact that the survivor had accepted benefits from the estate of the first-dying does not impinge on this freedom. (In the event of massing for joint disposition after the survivor's death, the situation is of course different; if the survivor accepts a benefit under the joint will he or she is bound by the provisions of the joint will – see *Corbett et al* 440.)

According to the court, a more pertinent issue *in casu* was the situation where a testator, being entitled to make a new will after the death of the testatrix, had failed to do so. The answer to that question depended on whether the testator had made his bequests in the joint will subject to the event that he should die first. If he had not done so, his part of the will remained unaffected by the death of the testatrix. However, if he had made his bequests subject to him dying first, his bequests would lapse in the event of this not happening. If thereafter he had failed to make a new will, he would die intestate (see *Wessels* para 10; see also *Corbett et al* 440).

The court pointed out that *in casu* the material bequests had been expressly made subject to the testator dying first and that in the only provision dealing with the situation where the testator was the survivor, namely clause 8, it was clearly stated that the testator would then be the sole heir. The will therefore contained no provisions on what should happen at the death of the testator if he were to be the survivor. The assumption clearly was that he would make a new will after the death of the testatrix. The court therefore agreed with the court *a quo* that the joint will had lapsed at the death of the testatrix (see *Wessels* para 11).

The appellant's argument was that the testator clearly had the intention that the joint will, as amended by the codicils, should be his will. With reference to *Re Estate Marks* 1921 TPD 180, the court pointed out that in the context of the law of succession the clear intention of the testation could be relevant only if that intention was evident from the will. Since the will in question had lapsed at the death of the testatrix, its position was similar to that of a revoked will. Unless the testator revived the will in some way, it could no longer have any effect. Any

intention apparent from the will was therefore no longer relevant (see *Wessels* para 13).

The appellant argued that the will had been revived by the testator. Two possible ways in which this could have been done were advanced. First, it was argued that the will had been reinstated (or revived) by means of the two codicils (“herinstelling daarvan in die latere twee kodusille”). Second, it was argued that the will had been revived by means of “incorporation by reference” – in other words, by referring to the will in the two validly executed codicils the will had become valid (“herlewing by wyse van die inlywing deur verwysing daarna in die twee kodusille”).

The court pointed out that the questions before it were similar to those in *Moses* (*Wessels* para 15). In *Moses*, the testator had made a will in which he left his estate to his two brothers. Shortly after that he made a second will revoking the first and leaving half of his estate to his two brothers and the other half to the appellant. Some months later he made a codicil in which he had amended a provision in the first will, without referring to the second will. One of the brothers argued that the first will, as amended by the codicil, should be accepted as the will of the testator.

The court in *Wessels* referred to the separate judgments in *Moses* by Schreiner JA (paras 16–17), Van den Heever JA (para 18), Greenberg JA (Fagan JA concurring – (para 19) and Hoexter JA (para 19).

Schreiner JA had distinguished between reviving a revoked will and incorporating the revoked will in a later will by referring to it in the later will. He had held that incorporation by reference was not possible in terms of the formality requirements for wills imposed by the relevant provincial legislation (*Moses* 546–547). However, revival of a revoked will by means of a later will was in principle possible, because the provincial legislation left the principles of revival untouched (*Moses* 543–544). Schreiner JA had set the following two requirements for revival: the later instrument reviving the will must be duly executed, and the intention to revive the revoked will must be clear from the reviving document (*Moses* 544).

Schreiner JA said that the onus of proof was on the person alleging revival. In *Moses*, in order to prove that the first will had been revived by the codicil it had to be shown on a balance of probabilities that the testator had executed the codicils with the knowledge that the first will had been revoked and was of no effect. Since it seemed probable that the testator had lost sight of this fact, the onus, according to Schreiner JA, had not been discharged (*Moses* 546).

Van den Heever JA was of the opinion that incorporation by reference was not possible in our law, because of the formality requirements for wills. He had furthermore been of the opinion that the doctrine of revival was also inconsistent with our common law as amended by statute. According to Van den Heever JA, a revoked will could be revived only by re-execution (*Moses* 552). Hoexter JA agreed with Van den Heever JA (*Moses* 533–534).

Greenberg JA (Fagan JA concurring) was of the opinion that the case could be decided on the facts. He agreed with Schreiner JA that the testator’s mistaken impression that the first will was valid precluded a finding that the testator intended to revive the will (*Moses* 542).

The court in *Wessels* pointed out that the issue of the revival of a revoked or lapsed will had not been dealt with by the Supreme Court of Appeal since *Moses*, and neither had a higher court given a pertinent answer to that issue (*Wessels* para 20). In two decisions by the Supreme Court it had been accepted *obiter* that revival (“herlewing deur herinstelling”) was possible, but in both cases the intention to revive was found not to be present (see *Estate Gonsalves v Pataca* 1957 4 SA 585 (T) 590–591 and *Raabe v The Master* 1971 1 SA 780 (T) 781). In *Loureiro v The Master* 1981 4 SA 248 (N) (*Loureiro*), an application for revival had been granted, but since the application had not been contested and the court had given its decision without furnishing reasons that case had not taken the matter much further.

Referring to Van der Merwe and Rowland *Die Suid-Afrikaanse erfreg* (1990) 199–204; Corbett *et al* 111; Sonnekus “Herlewing van herroepe testament – vereistes” 1981 *TSAR* 284 and Wiechers “Herlewing van herroepe testament” 1982 *THRHR* 80, the court pointed out that academic writers all agreed with the view held by Schreiner JA in *Moses*, namely, that revival of a revoked will was possible in our law.

The court went on to say that the time had come for the Supreme Court of Appeal to take a stand on that issue. The court, agreeing with the academic writers, decided to accept the viewpoint of Schreiner JA in *Moses*. The court reasoned that in our law the general point of departure was that effect must be given to the intention of the testator as expressed in a validly-executed will. The view of Schreiner JA gave recognition to both elements, namely, a validly executed will and a clear intention. If both elements were not complied with, revival could not take place. Both the revoked will and the reviving document should be validly executed. The court was of the opinion that it would not serve any purpose to require that the revoked will be re-executed, since the initial execution of the will in accordance with the formalities remained a historical fact (referring to Van der Merwe and Rowland 204 – see *Wessels* para 22).

Returning to the facts of the present case, the court indicated that the will had not been revoked – it had lapsed. Nevertheless, the court was of the opinion that in principle that did not matter and that the same principles and requirements applied to the revival of a will after it had lapsed as where it had been revoked. The court therefore concluded that it had been possible for the testator to revive the lapsed joint will by means of the two later codicils. The question remained, however, whether that had in fact been done. The requirement of valid execution had been complied with, because both the joint will and the two codicils had been validly executed (*Wessels* para 23).

The question in the present case was whether the testator intended to revive the will. The court *a quo* was of the opinion that the appellant had not discharged the onus of proving such an intention on the part of the testator. The court *a quo* referred to the third codicil in support of its view, arguing that the third codicil evinced an intention to revive the will, but that a similar intention was absent in the first and second codicils (*Wessels* para 24).

The Supreme Court of Appeal rejected this approach by the court *a quo*. The third codicil had not been accepted as a valid testamentary writing and could therefore be used neither to determine the intention of the testator, nor to interpret validly-executed testamentary documents. The court was nevertheless of the opinion that the ultimate decision that the court *a quo* had arrived at was correct.

The Supreme Court of Appeal found nothing in the wording of the two codicils indicative of an intention to revive the will. On the contrary, the wording of the two codicils indicated that the testator had thought that the will had remained in effect and was therefore still valid. The inelegant formulation of the provisions of the will as a whole also pointed to a real possibility that the testator had received the wrong legal advice regarding the continued validity of the joint will (*Wessels* para 25).

The facts of *Wessels* could therefore not be distinguished from those of *Moses* and the decision of Schreiner JA on that point in *Moses*, namely, that an incorrect impression on the part of the testator that his will remained valid excluded an intention to revive, was also applicable to the present case. The court did not agree with the appellant that this was a “highly technical view”. The court argued that had the testator known that he was no longer bound by the joint will he could, for all they knew, have acted in a completely different manner. Appellant therefore had not discharged the onus of proving an intention to revive on the part of the testator (*Wessels* para 26).

The court then dealt with the alternative argument made by the appellant, namely, that the will had been revived by incorporating it in the later codicils. However, the court pointed out that the one issue on which the judges in *Moses* had been in agreement was the fact that the doctrine of incorporation by reference was precluded by the statutory formality requirements for wills that were in place at the time. Referring to Corbett *et al* 66–67, Van der Merwe and Rowland 302 and De Waal, Erasmus, Gauntlett and Wiechers (revised by Jamneck and Williams) “Wills and succession, administration of deceased estates and trusts” 31 *LAWSA* (1st reissue 2001) para 240) the court said that the generally accepted view was that the Wills Act 7 of 1953 (“the Act”) had not altered that position (*Wessels* para 27).

According to the court, the obstacle in the way of recognising incorporation by reference was the fact that even where both the revoked will and the reviving will were each on their own validly executed, they were usually not executed in the presence of the same witnesses and were not signed by the testator on the same occasion (see also *Estate Orpen v Estate Atkinson* 1966 2 SA 639 (C) 645). After the enactment of section 2(3) it had been argued by some (Corbett *et al* 68; Du Toit “Enkele gedagtes rondom artikel 2(3) van die Wet op Testamente van 1953, inlywing deur verwysing en die herlewing van herroepe testamente” 1997 *THRHR* 101) that a court could be asked to condone the problem with the formalities in terms of section 2(3). The court pointed out that because a section 2(3) application had not been brought in the present case, that possibility was not relevant (*Wessels* para 28).

The appellant argued that the present case differed from the “normal” incorporation cases, because the same two witnesses were present when the joint will and the two codicils were signed by the testator. The court argued that it was not necessary for it to decide whether that fact really made a difference, because there was another insurmountable obstacle in the way of the appellant’s argument based on incorporation by reference, namely the fact that, looking at the wording of the codicils, the testator had never intended to incorporate the joint will in the codicils. It had been the testator’s declared intention to amend the joint will which, so he thought, was still valid. The court therefore also agreed with the court *a quo* on that point (*Wessels* para 29). The appeal was dismissed with costs, which were to be paid from the testator’s estate.

Discussion and evaluation of the case

The position regarding the revival of wills prior to the Wills Act 7 of 1953

Prior to *Moses*, revival of a revoked will by means of a subsequent duly-executed testamentary writing had been allowed in the Transvaal and the Cape (see *Re Estate Marks* 1921 TPD 180; *Wood v Estate Fawcus* 1935 CPD 350; *Ex parte Estate Gillespie* 1943 CPD 58). In *Van Reenen v Board of Executors* 1876 Buch 44, re-execution of a revoked will had been required, but in that case the revoked will had in any event been invalid *ab initio*. In Natal, Law 2 of 1868 provided that a revoked will could be revived by re-executing it, or by means of a subsequent will that revealed an intention to revive the revoked will (see Cronjé and Roos *Casebook on the law of succession/Erfregvonnissbundel* (2002) 131). All the above-mentioned cases, including *Moses*, were decided before the Wills Act 7 of 1953 came into operation. This Act repealed the legislation governing testamentary formalities in the various provinces, but did not deal with revival; consequently it was argued by various writers that the principles explained in those cases remained applicable under the new Act (Sonnekus 1981 *TSAR* 286; Corbett *et al* 111; Van der Merwe and Rowland 203–204; Cronjé and Roos 131).

The position regarding the revival of wills after the Wills Act 7 of 1953

Wessels was the first case to be decided by the Supreme Court of Appeal on the revival of a revoked will after the enactment of the Wills Act 7 of 1953. As pointed out, the court agreed with the view generally held by academic writers on this topic, namely, that Schreiner JA's view in *Moses* that in principle it was possible to revive a revoked will by means of a later will should be accepted.

The decision in *Wessels* is also in line with decisions of the higher courts delivered after *Moses*, albeit that those remarks were mostly *obiter* (see *Estate Gonsalves v Patata* and *Raabe v The Master*). *Loureiro*, however, did not merely contain *obiter* remarks, but unfortunately the learned judge did not give reasons for his decision. Sonnekus 1981 *TSAR* 287 discussed *Loureiro* with reference to the pleadings and concluded that the court's decision confirmed the decision of Schreiner JA in *Moses*. Schreiner JA's view was also accepted in an unreported case heard by the full bench of the Cape Provincial Division (*K van Onselen v NM Wells*, case no 8539/1985, heard on 2 Dec 1985 – see Drutman 1986 *De Rebus* 448).

The revival of revoked wills and section 2(3) of the Wills Act 7 of 1953

In *Wessels*, the court did not give an opinion on whether section 2(3) of the Act could be used in an application for the revival of a revoked will. The court referred to the views of Du Toit 1997 *THRHR* 101 and Corbett *et al* 68 that a court could be asked to condone problems with formalities in terms of section 2(3) in an application for revival. The court pointed out that, because a section 2(3) application had not been brought in the present case, that possibility was not relevant (*Wessels* para 28).

Du Toit 1997 *THRHR* 101 104 submitted that section 2(3) of the Act could in an appropriate case be used to revive a revoked will. He argued that if the testator's intention to revive a revoked will was evident from a subsequent validly-executed testamentary document but it became apparent that the revoked will complied with the necessary testamentary formalities, section 2(3) could be

invoked to declare the revoked will valid. Corbett *et al* 68 argued that it seemed possible that section 2(3) could be invoked to have recognised an apparently informal document drafted by the testator and annexed to the will, thereby bypassing the “no-incorporation-by-reference” rule. The situation Corbett *et al* referred to was not the same as the situation referred to by Du Toit. In Du Toit’s example the revoked will was invalid, but in Corbett’s example it was the reviving document that was invalid. It is submitted that a section 2(3) application could be successful in a case similar to the example given by Du Toit, but that the example given by Corbett is more problematic in nature.

In order to succeed with an application in terms of section 2(3) of the Act (ie, to have the court order the master to accept a particular document as a valid will) the applicant has to prove that the particular document was drafted or executed by a person who since died (the deceased), and that the deceased intended that document to be his or her will (see *Van Wetten v Bosch* 2004 1 SA 348 (SCA) para 14, and also Roos “Die Hoogste Hof van Appel beslis oor artikel 2(3) van die Wet op Testamente” 2005 *THRHR* 132 142). For a document to have been “drafted” by the deceased, he or she must have written, typed or dictated it to someone who then typed or wrote it for him or her (see *Bekker v Naude* 2003 5 SA 173 (SCA)), whereas for a will to have been “executed” by a testator or testatrix, he or she must have signed it (see Roos 2005 *THRHR* 132 137–138 for the importance of the distinction between the words “drafted” and “executed” in the context of s 2(3)).

The problem in applying section 2(3) of the Act to Corbett *et al*’s example is that it is uncertain whether a court will find that the deceased intended the informal note attached to the revoked will to be his or her will. According to Du Toit 1997 *THRHR* 101 103, the reviving document cannot necessarily be considered as a will. It is suggested, however, that one should be able to argue that the document could be considered as a will, because it contains an indication of the way in which the testator wishes the estate to devolve – namely in terms of the revoked will.

If it is accepted that the reviving document can be considered to be a will and the court orders the master to accept the handwritten note as a valid will in terms of section 2(3) of the Act, the requirements set by *Wessels*, namely the existence of a previously validly-executed (and subsequently revoked) will and a validly-executed reviving will, are met.

Summary: Importance of this case for the law on the revival of revoked wills

The Supreme Court of Appeal’s decision in *Wessels* confirmed the following aspects regarding the revival of revoked wills:

- (a) For revival there needs to be a validly-executed initial will and a clear intention to revive expressed in a validly-executed revival document (will). If these elements are not complied with, revival cannot take place (para 22).
- (b) Both the revoked will and the reviving document should be validly executed and the first revoked will must still exist (para 22).
- (c) Re-execution of the revoked will is not required; the initial execution of the will in accordance with the testamentary formalities remains a historical fact (para 22).
- (d) The same principles apply to a will that was not revoked, but which has lapsed. A lapsed will can also be revived by means of a later validly-executed document expressing such an intention.

- (e) The English doctrine of incorporation by reference does not form part of our law (para 27, confirming the decision in *Moses* in this regard).

Aspect (e) above means that effect cannot be given to a testamentary writing referred to in a validly-executed will if the writing does not comply with testamentary formalities (Cronjé and Roos 132). However, if in a will reference is made to a document that is not a testamentary writing, such a document may, when interpreting the will, be used as part of the surrounding circumstances (*Ex parte Sieberhagen* 1946 CPD 83 97–98; Corbett *et al* 68 115 fn 18). It therefore seems as though a document other than a testamentary writing may be incorporated in a will by referring to it in that will (*Kohlberg v Burnett NO* 1986 3 SA 12 (A) 25; South African Law Commission “Formalities of a will” *Review of the law of succession* Working Paper 14, Project 22 (1986) para 11.7; Britz “Incorporation by reference” 1987 *THRHR* 210). (A testamentary writing is a document containing an essential part of a testamentary bequest or disposition in that it identifies either (a) the property bequeathed; (b) the extent of the interest bequeathed; or (c) the beneficiary – *Ex parte Estate Davies* 1957 3 SA 471 (N); *Oosthuizen v Die Weesheer* 1974 2 SA 434 (O).)

Conclusion

The decision of the Supreme Court of Appeal is to be welcomed. After more than 50 years it is now certain that a validly-executed will can be revived in our law without the need for re-execution. The court had the opportunity to decide the case on the facts only, since in the end it decided that the intention to revive was not present. If the court had followed the easy way out, the law regarding revival of wills would have remained uncertain. The decision of the court to express its opinion on the matter is therefore a laudable one.

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RAILROAD OPERATOR'S FAILURE TO PROTECT PASSENGER AGAINST ATTACK ON TRAIN NOT NEGLIGENT

Shabalala v Metrorail 2008 3 SA 142 (SCA)

1 Introduction

This judgment concerns the appeal against a judgment of the Johannesburg High Court (*Shabalala v Metrorail* 2007 3 SA 167 (W)) in which the plaintiff failed in his claim for damages against the defendant. In a case note dealing with the latter judgment (“Failure by passenger to hold railroad operator liable for damage occasioned by robbery on train – *Shabalala v Metrorail* 2007 3 SA 167 (W)” 2008 *THRHR* 323 330), I commented favourably on the judgment of Horn J, noting in particular that he had applied the “elementological” method of establishing delictual liability correctly in coming to the conclusion that the defendant should not be held liable. It is thus with some measure of satisfaction that the