TOMLINSON v ZWIRCHMAYR

TRANSVAAL PROVINCIAL DIVISION

HARTZENBERG J

1997 September 11; December 3 — Case No 15381/95

*Will—Validity of—Foreign will—Section 3*bis*(1)*(a) *and* (b) *of the Wills Act 7 of 1953 as amended—Whether will executed in Austria, complying with the internal law of Austria but not with the formal requirements of South African law, valid in South Africa insofar as it purported to deal with immovable property situated in South Africa—Common law position requiring compliance with either* lex loci actus *or* lex situs*—Section 3*bis *codifying common law and therefore to be interpreted accordingly—Will valid even if it not complying with* lex situs *but only* lex loci actus*—Section 3*bis*(1)*(b) *to be interpreted as additional instance of validity of a will dealing with immovable property and not only instance.*

The plaintiff applied in a Provincial Division for an order declaring that the will of the deceased dated July 1984 and executed in South Africa was valid and enforceable in respect of the testator's immovable property situated in Johannesburg and that all subsequent wills were invalid. This followed the testator having executed four wills in Austria during the 24 days before his death while under heavy sedation, each will bequeathing a lesser portion to the plaintiff, and a greater portion to the first defendant, than the last. The legal question to be answered by the Court was whether a will executed in Austria, which complied with the internal law of Austria but not with the formal requirements of South African law, was valid in South Africa insofar as it purported to deal with immovable property situated in South Africa. (At 841G.)

The defendants had admitted at the pre-trial conference that Austrian Courts had no jurisdiction over the deceased's immovable property but that, according to Austrian law, the deceased's immovable property devolved according to the *lex rei sitae*, being South African law. The defendants therefore argued that whatever the Austrian law might be, the final will of the deceased dated August 1992 and validly executed in Austria was valid by virtue of the provisions of s 3*bis*(1)*(a)* of the Wills Act 7 of 1953 as amended ('the Act'). The heir in terms of Austrian law therefore acquired the foreign immovable property according to the *lex rei sitae*. The plaintiff accepted the will of August 1992 as a valid will but contended that, as it had not been validly executed in terms of South African law and as the defendants had admitted that the immovable property was to devolve according to the *lex rei sitae*, the disposition with regard to the immovable property in Johannesburg was invalid as it did not comply with the *lex rei sitae* as required by s 3*bis*(1)*(b)* of the Act.

Held, that insofar as a will disposed of an immovable property, it was formally valid at common law if it complied with the requirements of either the *lex loci actus* or the *lex situs*. (At 847I/J–J and 850E.)

Held, further, that as s 3*bis* codified the South African common law, and proceeding on the presumption that the Legislature did not want to change the existing law more than necessary, the section did not require the enquiry into the validity of the will to go further than to confirm that the will of August 1992 was valid according to Austrian law. (At 849B, 849B/C–C and F.)

Held, further, that the provisions of s 3*bis*(1)*(b)* were to be interpreted as meaning that the *lex situs* was an additional instance of validity of a will dealing with immovable property and not the only instance. A will was valid even if it did not comply with the *lex situs* but only with the *lex loci actus*. (At 850E/F–F and 850C/D.)

Held, accordingly, that the will of August 1992 was valid because it complied with the formalities required by Austrian law for a valid will in Austria. (At 850H.) Plaintiff's claim dismissed.

Annotations:

Reported cases

Ex parte Blenner-Hassett 1931 NPD 585: considered
Re Eliashof's Estate 1903 TS 833: considered
Re Estate Bhyat 1920 TPD 198: considered.
Ex parte H L and J Franck 1920 WLD 70: considered
Ex parte G and E Heymann NO 1935 WLD 100: considered
Lewin v Lewin 1949 (4) SA 241 (T): considered
Ochberg v Ochberg's Estate and Another 1941 CPD 15: referred to.

Statutes

The Wills Act 7 of 1953, s 3*bis*(1)*(a)* and *(b)*: see *Juta's Statutes of South Africa 1996* vol 2 at 3-58.

Civil trial in an action for an order declaring the will of a deceased invalid as it complied with the law of Austria but not with the law of South Africa while purporting to deal with immovable property situated in South Africa. The facts appear from the reasons for judgment.

R K R Zeiss SC for the plaintiff.
F du Toit for the defendants.

Cur adv vult.

Postea (December 3).

Hartzenberg J: The question to be answered is if a will executed in Austria which complies with the internal law of Austria but not with the formal requirements of South African law is valid in South Africa insofar as it purports to deal with an immovable property situated in this country.

The matter is complicated by an admission by the defendants about Austrian law made at the pre-trial conference. The plaintiff maintains that the effect of the admission is that South African law never becomes relevant whereas the defendants maintain that whatever the Austrian law may be the will is valid by virtue of the provisions of s 3*bis*(1)*(a)* of the Wills Act 7 of 1953 as amended ('the Wills Act').

The late Helmut Loitzenbauer ('the deceased') died on 18 August 1992 in Salzburg, Austria. He was then 41 years of age. He was an Austrian citizen. Prior to 1992 the deceased lived and worked in South Africa for a considerable period. He owned a scrap metal business and had quite a number of assets. One of the assets was a house in Morningside, Johannesburg.

For more than four years before his death he lived with the plaintiff as man and wife. In July 1984 the deceased made a will. He appointed the

plaintiff as the sole beneficiary in terms of that will. In the event of her death he stipulated that his estate was to be divided equally between the plaintiff's mother and sister on the one hand and his father and mother in Austria on the other hand. In 1987 the deceased gave a general power of attorney to the plaintiff to manage his affairs.

During February 1991 the deceased was diagnosed with an indifferentiated stomach carcinoma. He underwent a total gastrectomy, splenectomy and a distal abdominal oesophagectomy. His intestines were connected to his oesophagus. He made a good recovery although he lost about half of his original body weight of 80 kilograms. During February 1992 the plaintiff and the deceased had a major dispute about his excessive drinking habits. She left him for about a month but asked her sister to look after him. Thereafter she returned to him. In March 1992 there was a recurrence of the cancer. Further surgery followed by radio-therapy and chemotherapy was planned but the deceased declined the option.

The plaintiff bought him a return ticket to Austria. He stayed in Salzburg with the first defendant, his sister. She owns a brothel in Salzburg. When he went to visit his parents in Austria he became very ill with pneumonia and was admitted to a hospital in Salzburg on 2 July 1992. He was under the care of a Dr I Pretsch. The first defendant contacted the plaintiff and the latter visited the deceased in Salzburg for approximately a fortnight. She stayed with the first defendant. Both she and the first defendant visited the deceased regularly in hospital.

On 14 July 1992 the deceased signed a codicil to his will of 13 July 1984 in which he confirmed that will. It is significant that, although it was executed in Austria where three witnesses are necessary, it was signed by the deceased and two medical practitioners in the presence of one another. There can be little doubt that the plaintiff had that document prepared in South Africa. She was the deceased's sole heiress in terms of the two testamentary documents of 1984 and of 14 July 1992.

However that may be, on 17 July 1992 the deceased signed a testament prepared by Dr Spruzina, an Austrian lawyer. The first defendant acquired his services for the deceased. In terms thereof he bequeathed the house in Morningside to the plaintiff. One half of the balance of his estate was also bequeathed to the plaintiff. The other half thereof was bequeathed to the first defendant, his brother and two other sisters and his father and mother in six equal shares. He specifically stipulated that all the assets were to be sold by auction. He revoked all other wills.

Three days later the first defendant again had to arrange for Dr Spruzina to get instructions from the defendant as to the contents of a new will. On 20 July 1992 the previous will was revoked and in terms of the new will the first defendant was appointed as his universal heiress. One half of the assets of his business were bequeathed to the plaintiff and the other half in equal shares to his parents and siblings, including the first defendant. He again stipulated that the assets were to be auctioned.

Dr Spruzina had a further occasion to assist the deceased with the making of a will. The first defendant again had to summon him on behalf

of the deceased. On 7 August 1992 the deceased signed a further testament. A translation thereof reads as follows:

'Last Will and Testament

Know all men by these presents: That I, Helmut Loitzenbauer, born June 5, 1951, currently residing in Steingasse 24, 5020 Salzburg, being of sound and disposing mind and memory and precluding fraud, coercion and material error, make and declare this to be my last will and testament.

1. I give, devise and bequeath all my property, whether real, personal or mixed (also including my account and my safe at the First National Bank in Cape Town, my 43 Krueger *(sic)* rands, my shares in "Old Mitchell") to my sister, Friederike Zwirchmayr, Heuberg 35, 5020 Salzburg, and limit compulsory heirs to their due statutory portion, which is to include everything which can be taken into account according to law.

With respect to the life insurance policy which I took out, wherever it may be located and with whichever insurance company it was concluded, I herewith revoke the current entitlement to insurance benefit by Leslie Ann Tomlinson and appoint my sister, Friederike Zwirchmayr, as the new beneficiary. If the insurance proceeds are distributed before this change of beneficiary is received by the insurance company, Leslie Ann Tomlinson shall pay the insurance proceeds to my universal heir. The revocation of Leslie Ann Tomlinson's entitlement also applies to any and all other property holdings, shares, etc to which Leslie Ann Tomlinson is currently entitled. I also appoint my universal heir as the sole beneficiary for such property holdings.

2. I give, devise and bequeath all my business holdings to the following persons in the proportions so designated next to their names:
   (a) my girlfriend, Leslie Ann Tomlinson, of 26 Drakens Mont Park Drive, Montgomery Park, South Africa, 1/5 share
   (b) my sister, Friederike Zwirchmayr, of Heuberg 35, 5020 Salzburg, 2/15 shares
   (c) my sister, Inge Loitzenbauer, of Perwenderstrasse 25, 4614 Marchtrenk, 2/15 shares
   (d) my sister, Gertrude Huber, of Eulengasse 4, 4614 Marchtrenk, 2/15 shares
   (e) my brother, Hermann Loitzenbauer, of Perwenderstrasse 25, 4614 Marchtrenk, 2/15 shares
   (f) my mother, Maria Loitzenbauer, of Perwenderstrasse 25, 4614 Marchtrenk, 2/15 shares
   (g) my father, Friedrich Loitzenbauer, of Perwenderstrasse 25, 4614 Marchtrenk, 2/15 shares.

I direct that my entire company assets shall be sold at best or offered for voluntary legal sale or sold by public auction by an authorised auctioneer. The proceeds from such sale, legal sale or auction shall be distributed among the aforementioned legatees in the aforementioned proportions. The settlement of the sale or legal sale and the distribution of the proceeds shall be effected by my universal heir.

3. I hereby revoke any and all wills and codicils by me previously made.

In witness whereof, I sign, seal, declare, publish, make and constitute this as and for my last will and testament in the presence of the three personally designated witnesses, who all at one time, and at the same time, in my presence and in the presence of each other have subscribed their names as witnesses this 7th day of August 1992.'

It is clear that the plaintiff's legacy shrank dramatically from 14 July 1992 until 7 August 1992. The first defendant on the other hand was busy

doing better and better. On 18 August 1992 the deceased died. A cynic in the shoes of the plaintiff would have regarded foul play as a distinct possibility.

The first defendant applied to the district court of Salzburg to be accepted as the sole inheritrix of the deceased in terms of the will of 7 August 1992. On 28 August 1992 the aforesaid court granted her application. (The district court of Salzburg is a non-litigious court. It is akin to the office of the Master of the High Court in South Africa.)

Thereafter the plaintiff instituted proceedings in the aforesaid district court of Salzburg for the rescission of the order of 28 August 1992 on the ground that the deceased's will of 7 August 1992 was invalid. It was alleged that the deceased did not have the necessary mental capacity to make a valid will.

The district court ruled that it was not a matter for its decision but that the issue was to be decided by the procedural court. The plaintiff was granted three months within which to institute action for the necessary relief. The plaintiff instituted action for such relief in the provincial court of Salzburg on 25 January 1995.

Thereafter and on 17 August 1995 the present action was instituted in this Court. The defendants are the following: the first defendant is the sister and universal heiress in terms of the will of 7 August 1992. The second, third, fourth, fifth and sixth defendants are the other relatives who are beneficiaries in terms of that will. The seventh defendant is the executor of the estate of the deceased appointed by the Master of the High Court, Pretoria, in his official capacity. The Master accepted the will of 7 August 1992 as valid. The Master was joined as the eighth defendant. The plaintiff claimed declaratory orders to the effect that the wills of 17 July 1992, 20 July 1992 and 7 August 1992 are invalid and that the will of 13 July 1984 is valid and enforceable. She also prayed for an order that the letters of administration issued to the seventh defendant are to be cancelled. The plaintiff's claim was subsequently amended to claim in the alternative that the wills of 17 July, 20 July and 7 August 1992 are null and void as far as they purport to deal with the deceased's immovable property situate in the Republic of South Africa and that the will of 13 July 1984 is valid and enforceable in respect of the immovable property. The cancellation of the executor's letters of administration in respect of the immovable property is also claimed. The alternative claim is based on the contention that an Austrian cannot validly deal in a will executed in Austria with his immovable property situate outside of Austria.

The first six defendants entered a special plea of *lis pendens*. However, on 25 November 1996 the district court of Salzburg issued an order declaring the proceedings in the provincial court to be deemed to have been withdrawn. The situation was that the plaintiff had been required to furnish security but was unable to get Reserve Bank authority for the transfer of the necessary amount.

The defendants then entered a special plea of *res judicata* in this matter based on the order in the district court of Salzburg of 25 November

1996. Le Roux J heard the special plea. He found the matter not to have been decided by the provincial court, Salzburg, as it was deemed to have been withdrawn.

The first six defendants applied for the appointment of a commission *de bene esse* to hear the evidence of a number of witnesses in Austria, the most important of whom were the first defendant, Dr Pretsch and Dr Spruzina. The application succeeded and in August 1997 the two legal teams and Advocate Erasmus as commissioner proceeded to Salzburg where the three people just mentioned testified in chief and were cross-examined.

The plaintiff from a comparatively early stage was in possession of a medical opinion of three South African specialists based on the medical reports and Austrian hospital records in respect of the deceased for the period 2 July 1992 until his death. Their opinion was that, in view of the deceased's condition and the sedatives administered to him, he was not mentally capable of appreciating the nature of his acts.

The three witnesses who testified before the commissioner gave evidence about, *inter alia*, what was said and done by the deceased and about his ability to talk rationally. Dr Pretsch conceded in cross-examination that as the deceased was terminally ill all, from a medical point of view, that could be done for him was to make his condition as bearable as possible by the administration of pain-killing drugs. The doses appeared from the hospital records. She also conceded that while the deceased was still alive she did not apply her mind to the question if he was capable of making a considered decision about the disposition of his assets.

There were complications about having the record of the proceedings in Salzburg speedily ready. There was a preliminary record by 30 September 1997 and the final record was served upon the plaintiff by 4 October 1997. (The trial was scheduled to start and did commence on 27 October 1997.) Constant pressure was exerted on the plaintiff after the return from Austria to file its summaries of expert medical evidence. The plaintiff indicated that it needed the aforesaid record to be submitted to the medical experts for them to consider the situation. When the possibility of an application for a postponement due to time constraints was raised by the plaintiff the defendants' reaction was violent. They accused the plaintiff of deliberate delaying tactics. If it is borne in mind that the record comprises hundreds of pages of evidence, it is obvious that the defendants' attitude was more emotional than rational. (One can understand the disappointment caused by the long delay. After all the district court of Salzburg as long ago as 28 August 1992 accepted the will of 7 August 1992 as the deceased's last testament. More than five years have elapsed since then and still there is no finality.) But to regard it as *mala fide* to allow one's experts to read and consider the very evidence which forms the basis of their opinion is clearly untenable.

At a pre-trial conference held on 24 October 1997 the plaintiff at the outset stated that she abandoned her main claim (based on the deceased's mental capacity) but would proceed with the alternative claim. She intimated that she proposed to hold the defendants to the admission

A contained in para 5.1 of the pre-trial minute recording the pre-trial conference held on 4 April 1997 and which was signed on 14 April 1997. (That conference was held in order to clarify the issues in connection with the special plea of *res judicata*.) The plaintiff further gave notice that she objected to the proposed expert evidence of Dr Schulze (a senior B lecturer in comparative law at the University of South Africa) on two grounds, namely that it is irrelevant insofar as it deals with Austrian law as the Austrian law applicable to the case was resolved by the aforesaid admission in para 5.1 and that it was inadmissible in respect of South African law as it was the Court's prerogative to interpret the South African law. Paragraph 5.1 of the minutes of the pre-trial conference of C 4 April 1997 reads as follows:

'Defendants admit that Austrian courts have no jurisdiction over the deceased's immovable property and that, according to Austrian law, the deceased's immovable property devolves in accordance with the *lex rei sitae* being South African law.'

D It is the defendants' contention that what has been recorded there means no more than that an heir in terms of Austrian law acquires foreign immovable property according to the *lex rei sitae*. Insofar as the admission can possibly be construed to mean that it impedes the right of an Austrian citizen to deal with his foreign immovable property otherwise than in accordance with the *lex rei sitae*, it was wrongly made. Insofar as E it implies that a beneficiary cannot become entitled to inherit immovable property unless the testament complies with the *lex rei sitae*, it was also wrongly made. It was submitted that the defendants are not to be held thereto.

When the case commenced it was clear that the only possible evidence F necessary for the decision was that of Dr Schulze. The defendants contended that his evidence was irrelevant as s 3*bis* of the Wills Act is clear and unambiguous for the purposes of this case. They contended, however, that, if s 3*bis* is ambiguous, evidence regarding the reason for the enactment thereof would be admissible and that the evidence of Dr Schulze would be relevant and admissible. It was indicated to counsel G that there was the possibility of this Court finding the section to be clear and unambiguous and another tribunal at a later stage finding the opposite. It could then possibly lead to a situation where this Court's order be set aside but that the matter be remitted to it to hear such evidence. As the argument on the admissibility of the evidence would H take some time counsel at the insistence of the Court agreed to lead the evidence on the understanding that the admissibility thereof was still in issue.

The evidence in cross-examination of Dr Schulze took longer than was anticipated. It was only concluded on the Tuesday morning after the case had commenced on the Monday. Thereafter counsel argued. I Towards the afternoon I indicated to Mr *Du Toit*, on behalf of the defendants, that as far as costs are concerned I would appreciate it if he could give me his argument in condensed form and I undertook to make a study of the bundle of documents which he had handed up and which he maintained would persuade me to make a special order as to costs in J favour of his clients. He was not amenable to my suggestion and insisted

on addressing me on the question of costs in greater detail. As a result A thereof a further day of hearing could not be avoided.

Section 3*bis* of the Wills Act was inserted in the Act by s 2 of the Wills Amendment Act 41 of 1965 and amended by s 6 of the Law of Succession Amendment Act 43 of 1992. It now reads as follows:

'(1) A will, whether executed before or after the commencement of this B section, shall—

(*a*) not be invalid merely by reason of the form thereof, if such form complies with the internal law of the state or territory—
   (i) in which the will was executed;
   (ii) in which the testator was, at the time of the execution of the will or at the time of his death, domiciled or habitually resident; or C
   (iii) of which the testator was, at the time of the execution of the will or at the time of his death, a citizen;

(*b*) so far as immovable property is disposed of therein, not be invalid merely by reason of the form thereof, if such form complies with the internal law of the state or territory in which that property is situate;

(*c*) . . . D

(*d*) so far as it revokes a will or a portion of a will which by virtue of the provisions of para (*a*), (*b*) or (*c*) is not invalid, not be invalid merely by reason of the form thereof, if such form complies with the internal law referred to in the paragraph in terms of which the revoked will or portion is not invalid.'

(It is not necessary for the purposes of this judgment to quote ss (1)(*c*) E and (*e*) and ss (2), (3), (4) and (5).)

Before the enactment of the aforesaid s 3*bis* our Courts accepted wills as valid where it was proved that the will had been validly executed according to the law of the country in which it was executed (the *lex loci actus*). See *Ex parte G and E Heymann NO* 1935 WLD 100 where the F Master was authorised to accept as valid a will executed in Germany. See also *Ex parte H L and J Franck* 1920 WLD 70 in which the Court accepted as valid a will executed in France according to French law.

In *Ex parte Blenner-Hassett* 1931 NPD 585 it was stated without reference to authorities that a will executed in conformity with the law of G the domicile of the testator is valid in respect of movable property and that the will executed in conformity with the law of the country in which immovable property is situated is valid in respect of immovable property situated in that country. In *Re Eliashof's Estate* 1903 TS 833 the Transvaal Court held that a will which complies with the *lex rei sitae* (the Transvaal) was valid in respect of immovable property situated in H the Transvaal. In *Re Estate Bhyat* 1920 TPD 198 the Transvaal Court held that a testator who was domiciled in the Transvaal but who disposed of his Transvaal estate by a will executed in a foreign country but which complied with the formalities required by the Transvaal law was valid notwithstanding the fact that there was no proof that it I complied with the formalities of the place of execution. In Corbett, Hahlo Hofmeyr and Kahn *The Law of Succession in South Africa* (1980) it is stated that insofar as a will disposes of an immovable property it is formally valid at common law if it complies with the requirements of either the *lex loci actus* or the *lex situs*. It is stated that, although the Roman-Dutch writers concede that the *lex situs* should govern, the J

alternative is justified on the ground of practical convenience as an intolerable situation could arise if a testator who desired to will away immovables situated in several countries had to execute a separate testament for each of them so as to comply with local requirements of form (at 642 and 643).

It is stated by the authors that s 3*bis* of the Wills Act is based on the Draft Convention on the Formal Validity of Wills that flowed from the ninth session of the Hague Conference on Private International Law in 1960. At 644 and having quoted s 3*bis*(1)*(a)* the authors state as follows:

> 'These tests apply to every will that the statute covers, *whether it disposes of movables or immovables or both.* In addition, so far as it disposes of immovable property, it is in order if the "form complies with the law of the state or territory in which that property is situate" [s 3*bis*(1)*(b)*].
>
> Accordingly, it is sufficient for the proper execution of a will disposing of movables that it conform to any one of seven laws: (1) the *lex loci actus*; (2) the *lex domicilii* of the testator at the time of execution; (3) the law of the testator's habitual residence at the time of execution; (4) the *lex patriae* of the testator at the time of execution; (5) the *lex ultimi domicilii* of the testator; (6) the law of the testator's last habitual residence; (7) the *lex ultimae patriae* of the testator. At common law at most (1), (2) and (3) exist.
>
> With immovables, an eighth optional testing law is applicable, the *lex situs.* It exists at common law, with probably only (1) in addition.'

(My emphasis.)

As s 3*bis* is based upon the agreement reached at the Hague Conference ('the agreement'), I find it appropriate to quote art 1 of the agreement. It reads as follows:

> 'A testamentary disposition shall be valid as regards form if its form complies with the internal law:
>
> *(a)* of the place where the testator made it, *or*
>
> *(b)* of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, *or*
>
> *(c)* of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, *or*
>
> *(d)* of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, *or*
>
> *(e)* as far as immovables are concerned, of the place where they are situated.'

(In my view the Court is entitled to refer to the document without it being introduced by an expert witness.)

It is clear that the five subsections are linked to one another by the word 'or'. It follows therefore that wills will be valid both in connection with movables and immovables if they comply with *(a)*, *(b)*, *(c)* and *(d)* and that in addition and just in the case of immovables they will also be valid in the case of *(e)*.

It can of course now be argued that as s 3*bis* is based upon that article that s 3*bis* must be interpreted accordingly, i e that all wills irrespective of the question whether they deal with movables or immovables will be valid if they comply with s 3*bis*(1)*(a)* and that only in respect of wills dealing with immovable property is there the extra provision for validity that it may comply with the *lex situs*. A closer scrutiny of the subsection makes it clear that the instances mentioned in s 3*bis*(1)*(a)*(i), (ii) and (iii) are linked by the word 'or'. Section 3*bis*(1)*(b)* stands alone. In that

respect there is a marked difference between art 1 of the agreement and s 3*bis*(1) of the Wills Act. According to Dr *Zeiss*, on behalf of the plaintiff, it implies that the Legislature intended to distinguish between wills in respect of immovable property and wills dealing with property other than immovable property. In respect of immovable property the provisions are clear. The will must comply with the *lex situs*. It would then follow that, as s 3*bis* now codifies the South African common law, the exception that a will dealing with immovable property will also be valid if it complies with the *lex loci actus* no longer forms part of the law as codified in s 3*bis*.

I do not think that that is the correct approach. There is a presumption that the Legislature does not want to change the existing law more than is necessary. Steyn *Die Uitleg van Wette* at 97; Devenish *Interpretation of Statutes* at 159 and the cases cited in footnote 21. If the section is to be construed that where immovables are concerned a will cannot be valid unless it complies with the *lex situs*, it means that the common law recognition of validity of a will in respect of immovables which complies with the *lex loci actus* is abolished. It means also that the abovementioned intolerable situation, which caused the Roman-Dutch writers to accept compliance with the *lex loci actus* as sufficient for a valid will, has now been reintroduced into our law.

The introduction of s 3*bis*, after having become a party to the agreement, could only have been to bring our private international law on wills in line with that of the other parties thereto. It is significant that 'internal law' is defined in the Wills Act as 'the law of a State or territory, excluding the rules of the international private law of that State or territory'. It is therefore not necessary in order to ascertain whether a will complies with the law of a country to go any further than to enquire if it has been executed in accordance with the formalities prescribed by the law of that country. In this case for instance the enquiry need not go further than to confirm that for a will to be valid according to Austrian law the testator's signature at the end thereof is to be attested by three witnesses. The Legislature emphatically provides that it is not necessary to investigate the intricacies of the Austrian law of succession when there is a conflict of laws.

People who own immovable property more often than not have other assets over and above the immovable property. It is not uncommon to find such people with assets in various countries. If such a person makes a will in which he wishes to deal with his whole estate, in many cases the provisions in respect of the immovable property will be a very important, if not the most important aspect, of the will. If such a testator unwittingly fails to see to it that the will complies with the formalities of the law of the country or countries in which the immovable property is situated but the will is otherwise valid, for example in that it complies with the *lex domicilii* or the *lex patriae* or the *lex loci actus*, the whole intention of the testator may be thwarted if the movable assets are to devolve in terms of the will and the immovable assets are to devolve intestately. There may even be a serious conflict of laws between the rights of intestate heirs. In my view, that is exactly one of the problems which was addressed at the Hague Conference which preceeded the agreement. Article 1 makes it plain that such a will is also valid in respect of the immovable property.

The fact that a will is valid even if it does not comply with the *lex situs* is a very important aspect of the agreement. Clause 1*(e)* provides for the situation where a will is not valid because of want of compliance with *(a)*, *(b)*, *(c)* or *(d)* but it complies with the *lex situs*. The codicil signed by the testator in this matter on 14 July 1997 is an example of such a testament. The testator owns immovable property in a foreign country and executes a will which is not valid but which complies with the *lex rei sitae*. As the disposition in respect of fixed property is usually of great importance to the testator and the heirs the agreement gives validity to the provisions in the will dealing with the immovable property.

As s 3*bis* of the Wills Act is based on that agreement, it is preposterous to think that the Legislature decided not to go along with one of the most important features of the agreement, ie to give validity to an otherwise valid will in respect of immovables, even if it does not comply with the *lex situs*. There is no logical explanation for such a radical departure from the agreement. What makes it even more improbable is that the Legislature thereby abolished the recognised common-law acceptance of the *lex loci actus* as valid in respect of immovables. Most importantly, if the Legislature intended s 3*bis*(1)*(a)* to deal only with movable property, it was very easy just to say so. The fact that the words 'movable property' do not appear in s 3*bis*(1)*(a)* is, in my view, conclusive of the question. It pertains to all sorts of property, also immovable property. The summary by Corbett, Hahlo, Hofmeyr and Kahn *The Law of Succession in South Africa*, quoted above, sets out the effect of the introduction of s 3*bis* in the Wills Act correctly. See also Joubert (ed) *The Law of South Africa* 1st ed vol 31 para 170. Although s 3*bis*(1)*(b)* is separated from s 3*bis*(1)*(a)*, the effect thereof is not that the only instance of validity of a will dealing with immovable property is when it complies with the *lex situs*. It is an additional instance.

In the present matter the plaintiff accepts that the will of 7 August 1992 is a valid will. From what is stated above it follows that the provisions therein relating to the fixed property are also valid. The revocation of all former wills (including the 1984 will) is also valid. (Section 3*bis*(1)*(d)* of the Wills Act is not applicable in this case as the effect thereof is only that if a will is valid because it complies with s 3*bis*(1)*(a)*, *(b)* or *(c)* it can be revoked by a document which complies with the same requirements.)

Because of the conclusion to which I have come, ie that the will of 7 August 1992 is valid because it complies with the formalities required by Austrian law to be a valid will in Austria, it is unnecessary to consider the admission about Austrian law or the evidence given by Dr Schulze. In my view, the alternative claim also cannot succeed.

That brings me to the question of costs. A whole bundle of documents was handed in. There are indications that the plaintiff deliberately delayed the proceedings. The main complaint, however, relates to the way in which the plaintiff dealt with the assets of the deceased. That aspect does not fall to be considered in this matter at all. If the executor is of the view that there are things for which the plaintiff must account to him, it is for him to take the necessary action against her. This matter is about the validity of the will and not about the administration of the

estate. Insofar as the defendants accuse the plaintiff of delaying tactics, their insistence that security be furnished in Austria did not help to speed up the proceedings. The plaintiff is saddled with a substantial order as to costs in Austria as a result thereof. Furthermore, it would probably have been far less expensive if the three people who testified before the commission in Austria could have been persuaded to testify at the trial. Instead of them coming to South Africa both legal teams and the commissioner had to go to Austria. Arrangements had to be made for a record to be kept and to be prepared urgently. The costs of the application for the evidence to be taken on commission would not have been necessary if the witnesses came to South Africa. In my view, this is very much a case of the pot calling the kettle black.

In Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 492 and 493 the following is stated:

> 'It has been held that a successful party who, on reasonable grounds, has instituted proceedings to set aside a will on the ground of the testator's insanity at the time of the execution of the will, should not be ordered to pay costs. The Court has likewise ordered costs from the estate in an invalidity action where the testator was to blame for the doubt as to the validity of the will, but not where the applicant in a similar action had no sufficient and reasonable grounds for instituting the action.'

See also *Ochberg v Ochberg's Estate and Another* 1941 CPD 15 at 47, where Sutton J said:

> 'The testator is responsible for this litigation and, therefore, his estate should bear the costs of it.'

In the matter of *Lewin v Lewin* 1949 (4) SA 241 (T) the Court had occasion to consider the circumstances under which a will may be set aside for want of the necessary testamentary capacity. At 280 Roper J said the following:

> 'It is abundantly clear from the authorities that it is not sufficient that the testator understood and intended the dispositions which he was making in his will (see on this point in our own Courts *Estate Rehne and Others v Rehne* 1930 OPD 80 at 91; *Lange v Lange* 1945 AD 332 at 342); it is necessary further that he shall have been able to comprehend and appreciate the claims of his various relations upon his bounty, without any poisoning of his affections, or perversion of his sense of right, due to mental disorder; and generally, to use the language of the American case referred to by Cockburn CJ that he shall have had the ability
>
> > "clearly to discern and discreetly to judge of all these things, and all those circumstances, which enter into the nature of a rational, fair and just testament".'

If a testator makes four wills in 24 days at a time when he is under heavy sedation, such as was the case with the deceased, he must foresee that the beneficiaries who lose out heavily will question his ability to execute a just testament. In my view, and although the purely legal argument about the immovable property went against the plaintiff, this is a case where it was really the testator who caused the litigation. It is therefore a proper case for all the costs to come out of the deceased's estate. I may have ordered the plaintiff to pay the costs after 24 October 1977 but then the defendants prolonged the proceedings with the irrelevant argument on

costs, which costs I could have awarded to the plaintiff. I have given thought to such possible orders but I have decided that the fairest order would be to order that all the costs be paid by the estate on the attorney-and-client scale.

In the result I make the following order.

The plaintiff's claim is dismissed. All the costs of the plaintiff and the defendants are to be paid by the estate on the attorney and client scale.

Plaintiff's Attorneys: *Derek L Brugman*, Johannesburg; *Adams & Adams*, Pretoria. First to Seventh Defendants' Attorneys: *Gideon Erasmus Inc*, Pretoria. Eighth Defendant's Attorneys: *State Attorney*.

SOCIETY OF ADVOCATES OF SOUTH AFRICA (WITWATERSRAND DIVISION) v EDELING

WITWATERSRAND LOCAL DIVISION

VAN DER MERWE J and DU PLESSIS J

1997 May 12–16, 19–23; August 4–6; December 11 Case No 96/7541

*Advocate—Misconduct—Disciplinary proceedings—Application for removal of advocate's name from roll of advocates—Nature of proceedings—*Sui generis *statutory process of disciplinary nature—Society of Advocates moving application approaching Court as* custos morum *of profession—Proceedings those of Court, exercising inherent right to control and discipline practitioners practising within its jurisdiction—Society's role to bring evidence of practitioner's misconduct to attention of Court—Society acting under public duty in interests of Court, profession and public at large—Proceedings not subject to all strict rules of ordinary adversarial process.*

Advocate—Misconduct—Disciplinary proceedings—Application for removal of advocate's name from roll of advocates—Power of Society of Advocates to apply for striking-off—Admission of Advocates Act 74 of 1964, s 7(2)—Society's Bar Council finding member guilty of professional misconduct and resolving to expel member—General Council of Bar upholding member's appeal—Clause 23 of Society's constitution providing that General Council's decisions on appeal final and binding on Society—Such clause not purporting to limit exercise of Society's powers in terms of s 7(2) to apply for striking-off—In any event, any contractual provision limiting Society's rights and duties in terms of s 7(2) would fetter Society in exercise of statutory rights and duties conferred and imposed in public interest and would oust jurisdiction of Court—Member's objection to Society's application on grounds that, since misconduct issues determined in his favour by General Council, decision binding on Society, Society thus precluded by contract from pursuing application and that application improper, irresponsible, unlawful and/or unreasonable, dismissed.

*Estoppel—*Res judicata*—Issue estoppel—When applicable—Society of Advocate's Bar Council finding member guilty of professional misconduct and resolving to expel member—General Council of Bar upholding member's appeal—Society nevertheless applying in terms of s 7(2) of Admission of Advocates Act 74 of 1964 for striking of member's name from roll of advocates—In absence of prior litigation for same relief, or judicial determination whether or not member's name to be struck off, or any other judicial determination involving issues of fact and law relating to striking-off, pleas of* res judicata *and issue estoppel dismissed.*

An application in terms of s 7 of the Admission of Advocates Act 74 of 1964 to have someone's name struck off the roll of advocates is not in the nature of ordinary civil proceedings. It is a *sui generis* statutory process of a disciplinary nature in which the Society of Advocates moving the application approaches the Court as *custos morum* of the profession. Such proceedings are those of the Court, not those of the parties: the Court, having admitted a person as an advocate in the first instance, exercises its inherent right to control and discipline the practitioners who practise within its jurisdiction. The Society's role is merely to bring evidence of a practitioner's misconduct to the attention of the Court. In so doing, it acts under a public duty, in the interests of the Court, the profession and the public at large. Given that such proceedings differ in their nature and purpose from ordinary civil and criminal proceedings, they are not subject to all the strict rules of the ordinary adversarial process. (At 859I, 860B/C–C/D, 860F/G–G/H and 861F.)

Acting under the authority conferred upon it by s 7(2) of the Admission of Advocates Act, the plaintiff ('the Society') applied in terms of s 7(1)*(d)* of the Act for an order removing the defendant's name from the roll of advocates on the grounds that he was no longer a fit and proper person to practise as an advocate. The bases upon which the order was sought were *(a)* the defendant's participation in two property transactions which were, allegedly, part of a fraud upon the *fiscus* and part of a scheme described in s 73 of the Value-Added Tax Act 89 of 1991; *(b)* the defendant's allegedly giving untruthful evidence concerning the transactions in a Special Income Tax Court; and *(c)* arising out of the defendant's counterclaim, certain insulting statements allegedly made by the defendant concerning the Society, its Bar Council and certain of its members without any reasonable basis for the insults they conveyed.

The defendant had testified before the Special Court concerning the two property transactions during March 1994. In its judgment, handed down on 29 August 1994, the Court found that the defendant had been an active participant in fraudulent schemes about which he had given perjured evidence. This judgment was brought to the attention of the professional committee of the Society's Bar Council. On 14 November 1995 the full Bar Council considered, and confirmed, its disciplinary subcommittee's recommendation that the defendant had been guilty of professional misconduct and later resolved to expel the defendant from the Society. The Bar Council also resolved to apply for the striking-off of the defendant's name from the roll of advocates. The General Council of the Bar upheld the defendant's