REPORTABLE

CASE NO.: SA 37/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RUBY EUGEN KALOMO	**APPELLANT**

And

MASTER OF THE HIGH COURT	**FIRST RESPONDENT**
CARMEN CAROLA GÄBERT	**SECOND RESPONDENT**
ANDREAS VAATZ NO	**THIRD RESPONDENT**

Coram: Maritz, JA, Strydom, AJA *et* Damaseb, AJA

Heard on: 19/06/2008

Delivered on: 15/08/2008

APPEAL JUDGMENT

STRYDOM, AJA: [1] By Notice of Motion the appellant claimed, as against the respondents, the following relief:

"1. Reviewing and correcting or setting aside a decision taken by the first respondent on or about 14 March 2002 in terms of which she registered and accepted a purported will of the late E G Bergmann (and purportedly in terms of the provisions of section 8 or other relevant provisions of the Administration of Estates Act, Act No 66 of 1966), which will was dated 5 March 1990 ("the decision").

2. Declaring the decision unconstitutional and/or null and void.

3. Granting leave to applicant to join first and third respondents as defendants to the action instituted by applicant against second respondent (as defendant) in the above Honourable Court in terms of a summons issued on 4 April 2002 (and under case number (T) I.676/2002).

4. Granting leave to applicant to amend his particulars of claim in the abovementioned action to reflect the aforesaid joinder and in the terms as set out in the notice of amendment which is annexed to the founding affidavit of applicant to this application.

5. That the abovementioned action instituted under case number (T) I.676/2002 and the proceedings thereunder, be stayed pending the finalization of this application.

6. That the costs of this application be paid by first respondent, alternatively first, second and third respondents jointly and severally, the one paying the other to be absolved, alternatively jointly, further alternatively be costs in the cause of the action instituted under case number (T) I.676/2002."

[2] The above application was later followed by an application by the third respondent in which he claimed:

"1. That the court grants a declaratory order stating that the handwritten testament of the late Eugen Bergmann is a valid and enforceable testament

> in Namibia and that the estate be distributed in accordance with that testament."

[3] The background to the above applications, and other litigation between the appellant and the second respondent, had its origin in the fact that the late Bergmann (the Testator) had two children, a daughter, the second respondent, born during the marriage of the Testator, and a son, the applicant, born out of wedlock.

[4] The Testator died on 6th November 1998 and the third respondent was appointed as executor in the then intestate estate of the Testator. A final liquidation and distribution account was drawn up by the third respondent and advertised on 25 September 1999. As the appellant was born out of wedlock, and because of the common law rule that a child born out of wedlock cannot inherit, intestate, from the father, the whole estate devolved upon the second respondent.

[5] The appellant was not satisfied with this outcome and he issued a summons in the High Court in which he attacked the common law rule as unconstitutional and asked that it be set aside. As the second respondent is a *peregrinus* of the High Court of Namibia the appellant also applied for the attachment of the assets of the second respondent in Namibia, ad *confirmandam*, alternatively *fundandam jurisdictionem.* This application, which was successful, was necessary in order to allow the appellant to issue summons in the High Court of Namibia to claim also, as an intestate heir of the Testator, payment of his share of the inheritance.

[6] Most of the litigation, set out above, took place whilst the parties, on both sides, were aware of a handwritten will executed by the Testator during March 1990 and signed by him in Namibia. It seems that at the time all the parties were under the impression that this will, executed and signed by the Testator in Namibia, was invalid as it did not comply with sec. 2 of the Wills Act, Act 7 of 1953 (the Act). *Inter alia* the will was not signed by witnesses, either in the presence of each other and in the presence of the Testator, or at all. (See sec. 2(a) of the Act) The parties were unaware of the existence of sec. 3*bis* of the Act.

[7] However, already on 29 December 1998, the will was accepted by the German authorities, namely by the *Amtsgericht Schoneberg,* as a valid will according to the law of Germany.

[8] During or about April 2001 the third respondent became aware of the provisions of sec 3*bis* of the Act as a result of which the will was lodged with the first respondent on 20 June 2001. Subsequently, and on or about March 2002, the will was accepted and registered by the first respondent in terms of sec. 8(4) of the Administration of Estates Act, Act 66 of 1965. Instructions were given by the first respondent to re-open the final liquidation and distribution account and to distribute the assets of the Testator in accordance with the provisions of the will.

[9] By summons dated 4 April 2002, the appellant claimed the following relief:

> "1. An order declaring the common law rule that an illegitimate child does not succeed to his or her father's estate unconstitutional and invalid;

2. Payment in the amount of N$2,755,886.92, alternatively transfer of property received by defendant to the value of N$2,755, 889.92;

3. Interest on the amount in prayer 2 above, at the rate of 20% per annum *a tempore morae*;

4. Costs of suit."

[10] As a result of the acceptance of the will by the first respondent, the second respondent, when she filed her plea in the above action, on 12 July 2002, pleaded that the will was a valid will in accordance with the provisions of sec 3*bis* of the Act, and was enforceable in Namibia. As a further result the plea, if upheld, would render the constitutional issue, raised by the appellant, for all practical purposes irrelevant.

[11] Appellant alleged that until the second respondent's plea was filed, he was unaware of the second respondent's change of heart which, up till then, was not to rely on the provisions of the will. This then sparked off the present application which is on appeal before us. Part of the relief asked in the Court *a quo* was to join the first and third respondents as parties to the action instituted by the appellant and an application for amendment of his summons in order to reflect the changes envisaged by the joinder.

[12] Shortly before the hearing of the present application in the High Court, the parties concluded an agreement in which the issues were spelled out, in regard to which they wanted the Court to adjudicate upon. This agreement reads as follows:

"1. The parties herein agree that the matter shall be dealt with as follows:

the court is requested to interpret the provisions of section 3*bi*s(1)(a) of the Wills Act, 1953, which provides that:

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

(a) not be invalid merely by reason of the form thereof, if such form complies with the law of the state or territory–

(i) in which the will is 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

(iii) of which the testator was, at the time of the execution of the will or at the time of his death, a citizen;'

for purposes of the agreement the parties accept that:

the deceased, Bergmann, who died at Windhoek on 6 November 1998:

signed annexure 'B1', translated in annexure 'B2', to the applicant's founding affidavit (hereinafter 'the will') in Namibia;

was a German citizen at the time the will was executed and at the time of his death; and

the will complies with the German law as far as the formalities of the execution of a will in Germany are concerned;

the applicant contends that section 3*bis*(1)(a) is not applicable to the will in the aforementioned circumstances;

the second and third respondents contend that section 3*bis*(1)(a) is applicable to the will in the aforementioned circumstances.

2. If the court finds in favour of the applicant, the court is requested to:

2.1 declare that the provisions of section 3*bis*(1/(a) of the Wills Act are not applicable to the will and that the will is invalid, and unenforceable in Namibia; and

2.2 order the second and third respondents to pay the applicant's costs of the application as well as the third respondent's counter-application, jointly and severally, the one paying the other to be absolved.

3. If the court finds in favour of the respondents, the court is requested to:

3.1 declare that the provisions of section 3*bis*(1)(a) of the Wills Act are applicable to the will, and that the will is valid and enforceable in Namibia; and

3.2 order the applicant to pay the second and third respondents' costs of the application as well as the second defendant's counter-application.

THE JOINDER APPLICATION AND THE AMENDMENT APPLICATION:

4. The parties also agree, that the applicant's joinder and amendment applications and the costs thereof should be adjudicated upon (i.e. the application that the third respondent be joined as a third defendant (in his personal capacity) in case number (T) I.676/2002 (hereinafter 'the action'), and the application for the amendments (annexure 'D' to the application).

5. The Master agrees that she should be joined as a defendant in the action (in her official capacity).

6. The parties agree that all proceedings in the action shall be stayed pending finalization of this matter by the High Court of Namibia and/or on appeal by the Supreme Court of Namibia .

7. The parties also agree, that in respect of this application, no order as to costs will be sought against the first respondent, and the first respondent will seek no order as to costs against any of the other parties."

[13] On the issues agreed to, namely the interpretation of sec. 3*bis*(1)(a) and the joinder of the third respondent in his personal capacity, the Court *a quo* found against appellant. In regard to the interpretation of sec. 3*bis*(1)(a) the Court found that sub-sections (i), (ii) and (iii) of the Act should be read and interpreted disjunctively and not conjunctively. This interpretation is to the effect that each of the subsections must operate as alternatives. Consequently, the subsections each forms independent grounds for the validity of a will executed in terms thereof. It was therefore found that the Testator's will executed in Namibia according to the laws of Germany was a valid will and enforceable in Namibia because the Testator was at the time a citizen of Germany.

[14] In regard to the applications for joinder of the first and third respondents, and the consequential amendments of the appellant's particulars of claim, the Court *a quo,* in terms of the agreement of the parties, joined the first respondent, in her official capacity, in the action between the appellant and the second respondent. The Court, however, refused the application to join the third respondent to the action in his personal capacity, but allowed the joinder of the third respondent in his official capacity, i.e. as executor of the estate of the Testator. The Court further ordered the particulars of claim to be amended in order to reflect the above changes. The application was otherwise dismissed with costs.

[15] A sworn translation of the will, written out and signed by the Testator reads as follows:

> "I, EUGEN GEORG BERGMANN, born on 05 May 1933, being in full command of my mental faculties, hereby direct as follows:
>
> 1. My brother, WILLI BERGMANN, born l5 November 1930, inherits the sum of R100,000.00 (One hundred Thousand S.A. Rand).
>
> 2. My sole biological child, being my daughter, CARMEN CAROLA GÄBERT, born BERGMANN on 02 AUGUST 1965, inherits the residue of my assets.
>
> (Signed)
> EUGEN GEORG BERGMANN
> 05 March 1990"

[16] The issues agreed to by the parties, and which are relevant to the question of the validity or otherwise of the will, are threefold, namely:

1. It was agreed that at the time when the will was executed the Testator was a German citizen.

2. That the will complied with the formalities required in terms of German law and was therefore valid in terms of the requirements of that law.

3. That the Testator executed the will in Namibia.

[17] The Wills Act, Act No. 7 of 1953, (the Act), is an Act of the South African Parliament which applied to the then territory of South West Africa, and with

amendments, became, on Independence, part of the law of Namibia by virtue of the provisions of Article 140 of the Constitution of Namibia (Act No. 1 of 1990). On the Independence of Namibia amendments of the said Act by the South African state no longer applied to Namibia. It was common cause that sec. 3*bis* is part of our law that we share with South Africa, excluding amendments thereof by the South African Parliament, which were brought about after our Independence. The Act was applied to the then South West Africa by virtue of sec. 8 thereof.

[18] The only reported case, which could be found on the interpretation of sec. 3*bis,* is a South African case, namely *Tomlinson v Zwirchmayr,* 1998 (2) SA 840 (TPD). From this authority it is clear that sec 3*bis* was inserted in the Act by sec. 2 of the Wills Amendment Act No. 41 of 1965 (p. 847A of the above report). It became operative on 4 December 1970. It was furthermore stated that sec. 3*bis* was based on the Draft Convention on the Formal Validity of Wills that resulted from the ninth session of the Hague Conference on Private International Law in 1960. (p. 848B of the mentioned report. See also: Corbett, Hahlo, Hofmeyr and Kahn: *The Law of Succession in South Africa (1980)).*

[19] Mr. Tötemeyer, on behalf of the appellant, submitted that for a proper interpretation of sec. 3*bis*(1)(a) it was not enough that the Testator, at the time of the execution thereof, was a German citizen. Counsel submitted that for the section to apply it was also necessary that the will was executed in Germany. Mr. Tötemeyer argued that the requirements of section 3*bis*(1)(a)(i) and (ii) must be read and interpreted conjunctively and not disjunctively. Likewise the requirements set out in sec. 3*bis*(1)(a)(i) and (iii) should also be read and

interpreted conjunctively. According to counsel sec. 3*bis* (1)(a)(i), read together with 3*bis*(1)(a)(ii), constitutes one alternative premise which would render a will valid, whereas sec. 3*bis*(1)(a)(i), read together with sec. 3*bis*(1)(a)(iii), constitutes another alternative premise which would render a will valid. The will *in casu* is therefore invalid because, although it was executed by a German citizen, it was not also executed in Germany.

[20] On behalf of the second and third respondents Mr. Heathcote submitted that subsections 3*bis*(1)(a)(i), (ii) and (iii) should be read and interpreted disjunctively so that compliance with any one of the requirements set out in sec. 3*bis*(1)(a)(i), (ii) and (iii) would render the will valid. In the present instance the will executed by the Testator was valid because he was, at the time, a German citizen and the will complied with the laws of that country.

[21] Mr. Tötemeyer explained that the fact that sec 3*bis*(1)(a)(i) and 3*bis*(1)(a)(ii) are only separated by a semicolon means that the two subsections are to be read conjunctively. Counsel stated that there are numerous examples in statutes where legal requirements are set out, or acts to be done in terms of a statute etc., which are merely separated by a semicolon and where the grammatical meaning of the statute dictates a conjunctive reading of the provisions. That occurs without any other indicator to reinforce such interpretation such as the word “and” between the subsections. Furthermore, counsel submitted that sec. 3*bis*(1)(a)(i) and (iii) should likewise be read together. As I understood counsel, because one must read subsecs. (a)(i) and (ii) conjunctively, as if there is an "and" between those

subsections, the disjunctive "or" between subsecs. (a)(ii) and (iii) means a conjunctive interpretation between (a)(i) and (iii).

[22] Mr. Tötemeyer is undoubtedly correct that there are many examples in statutes where requirements or acts are only linked by a semicolon and are then read and interpreted conjunctively. This depends on the context in which such subsections are set out in an Act. However, in the present instance there are in my opinion various *indiciae* which militate against the interpretation submitted by counsel.

[23] As was pointed out by the presiding Judge, if sec. 3*bis*(1)(a)(i) was not meant to be an independent substantive requirement for the validity of a will but was meant as a prerequisite before secs. 3*bis*(1)(a)(ii) and (iii) could apply then it would not have been enacted as a subsection of section 3*bis*(1)(a) but would most certainly have been part of that section. Sec. 3*bis*(1)(a) would then read as follows:

> "…shall-
>
> (1)(a) not be invalid merely by reason of the form thereof, if such form complies with the law of the state or territory **in which the will was executed,** and - "

(the part emphasized by me is subsec. (i) added to subsec. 3*bis*(1)(a)).

[24] There is no conceivable reason why that was not done if, as was submitted by Mr. Tötemeyer, the intention was to connect sec. 3*bis*(1)(a)(i) with secs. 3*bis*(1)(a)(ii) and (iii) to create alternative premises which would render a will valid

only where execution thereof took place in the country of domicile or citizenship of a testator.

[25] The whole context in which subsections (i), (ii) and (iii) follow each other in sec. 3*bis*(1)(a) shows, in my opinion, that they were intended by the Legislator to form independent requirements and that compliance with any one of them would render a will, covered by the provisions of sec. 3*bis*(1)(a), valid. The interpretation submitted by Mr. Tötemeyer would put a completely different meaning to what was intended by the Legislator in a way which is contextually not supported by the provisions of the section.

[26] Sec. 3*bis*(1) also contain various other subsections which provide for certain special circumstances such as wills which deal with the inheritance of immovable property or the validity of wills executed on a vessel or aircraft. (See sec. 3*bis*(1)(b), (c), (d) and (e).)

[27] Subsec. (1)(e) makes provision for the validity of a will executed on board a vessel or an aircraft and provides that a will so executed would be valid if it complies with the law of the state or territory in which such vessel or aircraft was registered at the time of such execution or with which it was otherwise most closely connected at that time.

[28] Mr. Tötemeyer found support for his contention in subsec. (1)(e) seemingly because in order for the subsection to apply the testator executing the will had to be present on the vessel or aircraft. In my opinion subsec. 3*bis*(1)(e) does not

support counsel's argument, but rather supports Mr. Heathcote's argument that subsecs. 3*bis* (1)(a)(i), (ii) and (iii) should be read and interpreted disjunctively.

[29] Subsec. (1)(e) does no more than to apply the *lex loci actus* and nothing more, and the will executed on a vessel or aircraft would, despite its form, be valid if it complies with the laws of the country or territory where the vessel or aircraft was registered.

[30] For sec. 3*bis*(1)(e) to apply the person executing the will must be present on board the aircraft or vessel at the time of its execution. That is the link which is necessary before the section can apply. It goes without saying that there must be some or other link between a testator and the law which must apply otherwise the whole purpose of the Act will be defeated. In regard to sec 3*bis*(1)(a)(i), (ii) and (iii) the links created by the Legislator are the law of the country where the will was executed, the law of the testator's domicile or habitual residence or the law of the country of which the testator is a citizen.

[31] According to Mr. Tötemeyer's interpretation a will, falling within the ambit of sec. 3*bis*, executed otherwise than on a vessel or aircraft, would, in order to be valid, need to be executed in terms of the law of the state or territory where it was executed (therefore the *lex loci actus*). In addition thereto the testator must also have been domiciled or habitually resident in such state or territory, at such time, or have been a citizen of the state or territory at such time, before such will would be accepted as valid. In the present instance it would mean that, in order to

comply with the laws of Namibia, it was not enough that the Testator was a citizen of Germany but in addition thereto, the will also had to be executed in Germany.

In my opinion the interpretation contended for by Mr. Heathcote is straightforward and contextual and does not need performance of the callisthenic exercise submitted by Mr. Tötemeyer in order to fit in with his interpretation. Sec. 3*bis*(1)(e) makes it clear that, in order for such a will to be valid, it only requires compliance with the *lex loci actus*, i.e. that such will must be executed according to the law of the state or territory where the vessel or aircraft is registered or closely connected to. Again there is no logical explanation why, in the instance of sec. 3*bis*(1)(e), compliance with the *lex loci actus* would suffice but in the instance of sec. 3*bis*(1)(a) the requirement for validity is now more stringent and requires not only that the will be executed in a particular country, and according to the laws of that country, but must also have been so executed by a testator who was, at he time, either domiciled or habitually resident in that country or who was a citizen of that particular country.

[32] To the above *indiciae,* already mentioned by me, can be added the Convention itself. Mr. Tötemeyer referred the Court to the Convention and the fact that the various instances covered by art. 1 are all joined by an “or” and are therefore disjunctive. On the strength thereof counsel argued that the absence of an “or” between sec. 3*bis*(1)(a)(i) and (ii) and the appearance of an “or” between sec. 3*bis*1(a)(ii) and (iii) signifies a change of intention by the Legislator. Consequently counsel submitted that the conjunctive interpretation contended for by him is the correct approach and should apply.

[33] I do not agree with this interpretation by Mr. Tötemeyer. It seems to me that Hartzenberg, J. was correct when he stated in the *Tomlinson*-case, *supra*, 849 D, that the introduction of sec. 3*bis*, after South Africa had become a party to the Convention, was to bring the private international law of South Africa on wills, and therefore also that of the then South West Africa, in line with that of the other parties who signed the Convention. That, as the learned Judge also found, requires a disjunctive interpretation of sec. 3*bis*(1)(a)(i), (ii) and (iii). It furthermore also indicates that the intention was that the sections, reflected in our sec 3*bis*(1)(a)(i), (ii) and (iii), should constitute three separate and independent grounds for the validity of a will covered by the provisions of the section.

[34] Thus it was stated in Corbett et al: *op. cit.* at p. 644, and after they had quoted sec. 3bis:

> "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."

See also *Lawsa***:** (ed) by Joubert, 1st ed. Vol 31 pa. 170.

[35] Not daunted by all the authority against him Mr. Tötemeyer further argued that sec 3*bis*(1)(a) is ambiguous and should therefore be interpreted in a way which would depart as little as possible from existing law and more particularly the common law. (See Steyn, *Die Uitleg van Wette*, 5th ed., pp 97 – 100).

[36] The interpretation of a statutory enactment in a way which would change the existing law as little as possible is only available where such enactment is ambiguous. This canon of construction further enjoys no preference over other canons of construction which may apply. (See *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in Liquidation),* 1981 (1) SA 171 (AD) at 181H – 182C and *Gordon NO v Standard Merchant Bank Ltd,* 1983 (3) SA 68 (AD).)

[37] In the *Glen Anil*–case, *supra*, the Court, with approval, referred to the case of *Seluka v Suskin and Salkow,* 1912 TPD 258 at 265 where Wessels J said the following with reference to the above stated principle:

> "It is true that it is a canon of construction that an Act must not be presumed to alter the common law, but directly it is clear from the language of the statute that the very object of the Act is to alter or modify the common law, then full effect must be given to this object."

[38] I am satisfied that sec 3*bis,* based as it is on the Draft Convention on the Formal Validity of Wills, was enacted with the clear purpose to codify universal principles which would, as far as possible, uphold testamentary executions and, for that purpose, it was necessary to change the common law so to give effect to

the provisions of the Draft Convention. In my opinion reference to the Draft Convention itself makes it clear that sec. 3*bis*(1)(a)(i), (ii) and (iii) should be read and interpreted disjunctively in order to give effect to the purpose of the Convention, and bearing in mind also the other *indiciae* to which I have referred, I agree with what was stated by Silungwe, AJ, in the Court *a quo*, that sec. 3*bis* was enacted "not to thwart, but to give effect to the intention of the testator".

[39] The interpretation, contended for by Mr. Tötemeyer of sec. 3*bis*(1)(a), would greatly limit the scope of the section.

[40] Mr. Tötemeyer also criticised the *Tomlinson*-case and submitted that the finding of the Court in regard to sec. 3*bis*(1)(a) was in any event *obiter* as the Court dealt only with the issue of immovable property and it was therefore not necessary to interpret subsec. 1(a). I doubt the correctness of this argument because the Court found that sec. 3*bis*(1)(a) also applied to immovable property, which was the subject of the Court's deliberation. However, I will accept, for purposes of this judgment, that Mr. Tötemeyer is correct. I fail, however, to see the relevance of the argument. This Court is not bound by the decision of the South African Court and if it decides to follow that decision, it is because this Court is of the opinion that the findings of the Court in the *Tomlinson*-case was correct and therefore persuasive. It is therefore of little moment whether the finding of that Court was *obiter* or not.

[41] For the above reasons I have come to the conclusion that the judgment of the Court *a quo* is correct. In my opinion the will executed by the Testator on the

5th March 1990 is valid as it complies with the laws of Germany of which country the Testator was, at the time, a citizen. It is therefore covered by the provisions of sec. 3*bis*(1)(a) of the Act.

[42] The appellant also appealed against the refusal by the Court *a quo* to join the third respondent in his personal capacity to the proceedings issued by him against the second respondent. The appellant applied for the joinder of both the first respondent and the third respondent in their personal capacities. The Court allowed the joinder of both the first and second respondents in their official capacities. In regard to the first respondent, she agreed to be so joined. (See paragraph 4 of the agreement between the parties.)

[43] Mr. Tötemeyer first submitted that the claim against the third respondent is based on delict. He later however, conceded that there were some problems and obstacles in the way of such a claim and he then based his claim on the payment of costs by the third respondent *de bonis propriis.* Although counsel further conceded that in order to obtain such an order it was not strictly necessary to sue the third respondent in his personal capacity, as such an order could be given against him, also where he was sued in his official capacity. Counsel nevertheless persisted in the appeal.

[44] Under the circumstances I can see no reason why the Court should grant the amendment to cite the third respondent in his personal capacity where he is joined in his official capacity and the same order can be obtained in such an instance if the appellant is successful in this regard.

[45] In the result the following order is made:

> The appeal is dismissed with costs, such costs to include the costs of one instructing counsel and one instructed counsel.

_____
STRYDOM, AJA

I agree.

_____
MARITZ, JA

I agree.

_____
DAMASEB, AJA

COUNSEL ON BEHALF OF THE APPELLANT:	Mr. R. Tötemeyer
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