EX PARTE BOEDEL STEENKAMP.

(ORANGE FREE STATE PROVINCIAL DIVISION)

1962 *June 21; July 5.* DE VILLIERS, R.

Will – Child in ventre matris. – When entitled to inherit in equal shares with other children born before the death of the testator.

The testator had bequeathed the residue of his estate in equal shares to his daughter and her children of the first generation "living at his death".

Held, that a child *in ventre matris* had to be presumed to be alive for the purpose of inheritance, and was entitled to inherit equally with his mother, the testator's daughter, and her other children already born at the death of the testator.

Application for the interpretation of the will. The facts appear from the judgement.

H.J.O. van Heerden, curator-ad-litem for the children Gerda and Daniel Johannes De Villiers: If para. 6 of the will stated that the remainder ["restant'] should be left "to my daughter… and her chlidren", without addition of the words "*who at date of death are alive*", there would have been no doubt that the son Paul Johannes De Villiers should also inherit .See in r*e estate van Velden*,18 S.C. 31*; Lewis' Estate v. Jackson Estate*, 22 S.C. 73*; Hopkins v. Estate Smith.* 1920 C.P.D. 558*; Estate Delponte v. de Fillippo and Others*, 1910 C.P.D. 334. In Such an event even children of the daughter born in the future, would probably have to be taken in account. *Ex parte van Zyl*, 1938 O.P.D. 144; *Ex parte Louwrens and Others*, 1941 O.P.D. 249. According to the cases referred to, the reason why children born after the death of the testators (irrespective of when they were conceived), would be involved in the postulated circumstance, is because there is a presumption that that was [in fact] the intention of the testator. This presumption must however yield where the wording of the will manifests some other intention. See *Voet* 28.5.12 and 13. It is true however that the common law sources state that in so far as it is to his advantage, a child is presumed to have been born at the moment of his conception, but when this propostion is applied to a testamentary proviso, it naturally cannot have greater force than as a mere presumption. It is surely unthinkable that a testator cannot expressly or by implication stipulate that only children that were actually born prior to his death, should inherit. See *Voet* 1.5.5; *de Groot*, 1.3.4. In the matter presently under consideration, the words "*who, at the date of [the testator's] death, are alive*", undoubtedly suggest that children conceived after the death of the testator, cannot inherit, and ……..

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therefore the presumption mentioned in the cases referred to above, falls away, there can be no reason why the presumption mentioned in the cases previously referred to, should remain intact. English law apparently accepts the principle that a testamentary provision similar to the one in the present case can also be applicable to a child conceived prior to the death of the testator, but born after his death, although it is acknowledged that such a construction is contrary to the normal meaning of the words "*is/ are alive" ["in die lewe is"]*. Apparentlty it is argued that the testator contemplated that such children should also be benefited. It is however difficult to understand why the testator who uses the words quoted, would intend to benefit a child conceived prior to, but born after the testator's death, but not benefit a child conceived and born after his death. See *Elliot v. Joicey*, 1935 A.C. 209; *Villor v. Gilbey*, 1907 A.C. 139. It is therefore submitted that the son Paul Johannes is not entitled to a portionof the remainder of the estate.

P.E. Linde, curator-ad-litem For the minor child Paul Johannes

de Villiers: a child *in ventre matris*, is, for the purposes of an inheritance, presumed to be alive on the grounds that it is to his advantage. See *Voet, 1.5.5; Elliot v. Joicey*, 1935 A.E.R. (reprint) on page 584; *Botha and Others v. Thompson, N.O.*, 1936 C.P.D. 1. The use of the words "*children…. That at the date of my death are alive…*" can make no difference, in other words, because a child *in ventre matris* is deemed to be alive if it is to his advantage, the use of the words "*are alive*" makes no difference. See *Elliot's* case, *ibid* on page 589. In any case no *indicia* can be found in the words of this will that suggests an intention to exclude a child *in ventre matris*. What the testator clearly intended [meant] with the words "*who are…. alive*, is "*who are…. **still** alive*", in other words, children who have already been born,and have not yet died. This is in accordance with the whole scheme of the rest of his provisions. The emphasis is not on "live [alive]", but actually on "not yet dead". If the emphasis is seen thus, then the use of the words "*alive / being alive*" is not indicative of the exclusion of a child *in ventre se mére.*

Cur.adv. vult.

Postea (July 5).

DE VILLIERS, R: Paul Johannes Steenkamp, hereinafter referred to as the testator, drew up a will on the 22nd of February 1960, in which he bequeathed, in the terms of proviso 6 of the will, *inter alia* the remainder of his estate as follows:

"I bequeath the remainder of my estate in equal shares to my daughter Magdalena Susanna de Villiers (born Steenkamp) and her children of the first generation who, at the date of [my] death, are alive, in other words, my daughter and her children of the first generation who are alive at my death."

In the event of my daughter predeceasing me, the whole of the remainder of my estate shall accrue in equal shares to her children of the first generation who are alive at my death."

The testator died on the 15th of December 1960. At that date Magdalena Susanna de Villiers (born Steenkamp) had two ……

children, namely a son Daniel Johannes and a daughter Gedra, born on the 18th of February 1960,and 16th March 1958, respectively. On 15th December 1960 was pregnant, and on the 13th June she gave birth to a son, Paul Johannes.

A The applicant, who is the executor testamentary in the estate of the testator, and after giving proper notice to all interested parties, is now applying to court in terms of section 19 (1) (C) of Act 59 of 1959 to determine whether Daniel Johannes and Gerda, the grandchildren who had already been born prior to the time of the death of the testator, should inherit the remainder of the estate between themselves only, or whether B Paul Johannes, who was born after the death of the testator, but who was *in ventre matris* prior to the testator's death, should also share in the inheritance.

W2

It is a common cause that a child *in ventre matris* is, for the purposes of the law of succession, presumed ["vermoed"] to be alive, provided the child was born later, and provided it is to his advantage. *Voet*,1.5.5, C is translated by *Gane* as follows:

"Still by a fiction of law they (children *in ventre matris)* are regarded as already born whenever it is a question of their advantage."

See also *South African Law Journal*, vol. 69, p. 77, for further Roman Dutch authorities, and *In re Estate van Velden*, 18 S.C. 31; *Estate Lewis v. Estate Jackson*, 22 S.C. 73; *Hopkins v. Estate Smith and Others*, 1920 D C.P.D. 558; *Estate Delponte v. de Fillippo and Others*, 1910 C.P.D. 334, and *Botha and Others v. Thompson, N.O.*, 1936 C.P.D. 1.

W3

W4

E If, in the case now under consideration [*in casu*], the testator had stipulated that the remainder of his estate was to be bequeathed to his above mentioned daughter and her children, there would have been no doubt that Paul Johannes must also share in the inheritance, for it is clearly in his interest [to his benefit] that he should be regarded as already having been born on the date of the death of the testator. As a matter of fact, on the authority of *Voet, 28.5.12 and 13*, as well as *Ex parte van Zyl*, NO, 1938 O.P.D 144, and *Ex parte Lourens and Others* 1941 O.P.D. 249 (but see *Botha and Others v. Thompson, N.O., supra)*, he [PJ de Villiers] F would in all probability have inherited even if he hand not been *in ventre matris* when the teastator died, for as VAN DEN HEEVER, J, puts it in *Ex parte van Zyl*, supra at page 152:

"but in the absence of *indices* of another intention on the part of the testator, it can safely be said that there is a general acceptance of the presumption that a testator who left a bequest to a class of descendants did not intend to confine the succession to descendants born *before* his death."

W5

G It is however clear from all the authorities that the presumptions created in *Voet*, 1.5.5 en 28.5.12 en 13, must fall away if it is apparent from the will as a whole that the testator had another intention.

W6

H Mr. *Van Heerden*, who acted as a *curator-ad-litem* for Gerda en Daniel Johannes, submitted that the words used by the testator, *viz.* "Who on the date of death are alive" rebuts the presumption created in *Voet*, 1.5.5, and indicate that the testator wanted to benefit onlythose children of his daughter that had been born and were [actually] alive at the date of the testator's death. Mr. *Linde* who acted as *curator-ad-litem* for Paul Johannes, on the other hand, submitted that the relevant words qouted from the will were, in the light of the provisionsof the will read in its entirety, not sufficient to rebut the presumption created in *Voet*, 1.5.5.

W7

W8

I am of the opinion that *Mr. Linde's* point of view seems to be the correct one.

W9

Even if it is accepted that mr *Van Heerden's* submission is correct, namely that the testator, by the use of the words "*who at date of death are alive*", intended that grandchildren who were conceived and born after his death shall not share in the inheritance, it still does not mean that he also intended that grandchildren who were already conceived prior to his death, but who were born after his death, shall not be able to inherit. W9 A

Similar problems have arisen in the English and Scottish courts, and the question again received attention in the House of Lords recently in the case of *Elliot v. Lord Joicey and Others*, 1935 A.C. 209. Regarding this question, both legal systems have similar presumption as that found in *Voet* 1.5.5, and its origin also lies in the Roman Law (see p. 238-9 of the judgement of LORD MACMILLAN). Actually, *Voet*, 1.5.5, is based on *Digesta*, 1.5.7 and 26. In aforementioned case the English en Scottish law is encapsulated by LORD RUSSELL on p. 233 as follows: B

"First, words referring to children or issue "born" before, or "living" at, or (as I think we must add) "surviving", a particular point of time or event, will not in their ordinary or natural meaning include a child *en ventre sa mére* at the relevant date. Secondly the ordinary or natural meaning of the words may be departed from, and a fictional construction applied to them so as to include therein a child *en ventre sa mére* at the relevant date and subsequently born alive if, but only if, that fictional construction will secure to the child a benefit to which it would have been entitled if it had been actually born at the relevant date. Thirdly, the only reason and the only justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time or event, a child *en ventre sa mere* must necessarily be within the reason and motive of the gift." C D

It would also be oppportune to quote LORD MACMILLAN on p. 239 of said case:

"Your Lordships were indeed referred to one recent Scottish decision where the Second Division of the Court of Session declined to apply the fiction, even although it was to the interest of the posthumous child to do so, because in the will there under consideration the testator had indicated with reiterated emphasis that only those children of his son who were born prior to the date of the testator's death were to participate in his bequest: *Burns's Trustees v. Burns*, 1917 S.C. 117. I confess that for myself I should not be disposed to approve this decision were it before your Lordships for review; I cannot see why the operation of the fiction should be excluded to the detriment of the posthumous child by the fact that the testator has several times and emphatically used the very language which brings the fiction into operation." W10 E F

Kyk ook Jarman on Wills. 8ste uitgawe, vol. 3, bl. 1698, en sake daar aangehaal: *Villar v Gilbey*, 1907 A.C. 139 en *Re Stern's Will Trusts.* 1961 (3) A.E.R. 1129.

It would appear to me, if I understand it correctly, that the *ratio decidendi* of the above mentioned authorities that, even if it be remembered that the reference to children "alive" or "born" at a specific point in time, in common parlance would exclude a child *in ventre matris*, the use of such words in the present instance, and *in the absence of any other indication that makes the testator's intention absolutely clear*, is not enough to rebut the very strong natural presumption that the testator intended that a child *in ventre matris* should be deemed as having already born or as being alive. G H

I am prepared to accept the *ratio decidendi* of the English and Scottish authorities, because, on close examination, it [i.e the *ratio decidendi]* follows the rules and interpretation as applied in our own law. It has bee stated many times …….. W11

That all rules of interpretation are simply means and aids to ascertain the true intention of the testator from the words he used in the will as a whole (kyk *Cuming v. Cuming and Others.* 1945 A.D. 201).

W11

A

In the present matter, it must, in the light of the very strong presumption contained in Voet 1.5.5 (and which he describes as a fiction), be assumed that the testator would have had the natural urge to benefit a grandchild *in ventre matris*, in a similar manner as granchildren who had already been born at his death.The use of the words "alive" ["in lewe"] must not be taken to literally, and should not be seen as a inevitable indication that the testator, through their use, intended to rebut the presumption, but rather, that he emphasises the presumption, as it is to the advantage of Paul Johannes.See for example the case *Ex parte Odendaal*, 1957 (2) S.A. 15(O), where the Court did not interpret the words "at the death" ["by die dood"]literally,as well as the case of *In re Estate van Velden, supra,* where the testator bequeathed the value of two thirds of his estate to the "children born of our marriage". In the latter case the court decided that a child of the testator's marriage *in ventre matris*, is entitled to inherit together wit hthe other children slready born at his death.The word "born" did not prevent the Court from giving effect to the presumption contained in *Voet*, 1.5.5.

B

W12

C

D

It is ordered that, as far as the remainder of the testator's estate is concerned, Pauuul Johannes must be regarded as having been alive at the death of the testator, and entitled to inherit in equal shares with his mother Magdalena Susanna de villiers, born Steenkamp, and his sister and brother Gerda en Daniel Johannes.

It is further ordered that the costs of his application, including the costs of the *curratores-ad-litem* shall be paid by the estate of the testator on an attorney and client scale.

X

E

Applicant's Attorneys: *McIntyre & van der Post.*

Y

M

E **PINCHIN AND ANOTHER, N.O. v. SANTAM INSURANCE CO. LTD.** N

(ORANGE FREE STATE PROVINCIAL DIVISION) O

F **1962 November 30; December 3-7. 1963 January 18. HIEMSTRA, J.** P

Minor – Injuries sustained pre-natally – Right to claim – Negligence – Damages – Child suffering pre-natal injuries – Claim for. Q

G A child has an action to recover damages for pre-natal injuries. R

Action for damages. The facts appear from the reasons for judgment. S

H *H.J. Hanson, P.C. (with him G. Israel), for the plaintiff*

G.P.C. Kotzé, S.A. (with him J. Coetzee), for the defendant. T

V *Cur.adv. vult.*

Postea (July 5).

W_1 HIEMSTRA, J.: This case presents a problem which is res nova, not only in our case law, but also, as I understood the evidence, in the field

dence about other possible causes of cerebral palsy. Added to this is the fact that at an estimate one in a 1,000 births (in America the figure was stated to be one in 200) is a child suffering from this affliction, and that not one case could be found where this was directly linked with pre-natal loss of amniotic fluid, in circumstances where labour did not ensue. **A**

In the result the likelihood that the loss of fluid led to the cerebral palsy is not stronger than the opposite contention. That means that plaintiff's case has not been proved on a balance of probabilities.

An alternative theory was advanced for the plaintiff, namely that the foetus suffered direct trauma in the accident. This theory was, if not expressly, at least impliedly abandoned on behalf of the plaintiff. I regard this as a very unlikely one. **B**

Plaintiff loses the case on the facts, but it was necessary to decide the law point because it is relevant to costs. IF the defendant company had won the law point, it would have been entitled to costs only as if on exception. In regard to costs I shall take into account that plaintiff was successful on the law point. That took up nearly a day's argument. **C**

The order is: Absolution from the instance with costs, except that defendant pays to costs of the last day of the hearing. **D**

Plaintiff's Attorneys: *Israel, During & Kossuth.* Defendant's Attorneys: *Hofmeyr, Stegmann & Able.*