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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 24039/2015

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

11 January 2021
DATE

.....
SIGNATURE

In the matter between:

COLLEEN SUSAN BILLINGS

Applicant

and

**THE MASTER OF THE HIGH COURT OF
JOHANNESBURG**

1ST Respondent

GAILEEN DENTON N.O.

2ND Respondent

(In her capacity as appointed executrix in the
Deceased Estate of ELLEN JOAN CAMPBELL,
ID number [...] (Estate No 9496/2012)

GAILLEEN DENTON

3RD Respondent

(ID No: [...])

(In her personal capacity)

JUDGMENT

MIA, J

- [1] The applicant sought the following relief in an amended application:
- “1. The document attached to the supplementary affidavit marked 'SA2' is declared to be the last will and testament of the late Ellen Joan Campbell, Identity Number [...] (Estate number 9496/2012).
 2. The first respondent is directed to accept the document to the supplementary affidavit marked "SA2" to be the last will and testament of the late Ellen Joan Campbell, Identity Number 301018 0297 083 (Estate number 949612012), for the purpose of the Administration of Estates Act 66 of 1965.
 3. The first respondent is directed to remove the second respondent as the Executrix of the late estate of Ellen Joan Campbell, Identity Number 301018 0297 083 (Estate number 9496/2012). The first respondent is to appoint Legatus Trust (EDMS) BEPERK as executor of the late estate of Ellen Joan Campbell, Identity Number 301018 0297 083 (Estate number 9496/2012).
 4. The third respondent to pay the costs of the application.”
- [2] Before the amendment, the applicant requested that a document marked as Annexure “A” be regarded as the last will and testament of her mother Ellen Joan Campbell, (“the deceased”) in terms of Section 2(3) of the Wills Act, 7 of 1953, as amended. The remainder of the relief mirrored the relief requested above except for the appointment of the executor. The difference between Annexure “A” and “SA2” is that Annexure “A” appears to be the deceased’s instructions for the drafting of a will and how she wishes her estate to be distributed and “SA2” is the document giving effect to those instructions. Furthermore, Annexure “A” was signed by the deceased and two witnesses whilst

“SA2”, a document titled “TESTAMENT”, the will drafted as a result of Annexure “A” was not yet signed by the deceased.

- [3] The applicant, Colleen Susan Billings, currently residing at 61 Campbell Street, Davidsonville Roodepoort, is the deceased's daughter. The first respondent is the Master of the High Court, Johannesburg, with offices situated at 66 Marshall Street, Marshalltown, Johannesburg. The Second Respondent is Gailleen Denton N.O., an adult female cited in her capacity as the executrix appointed in the deceased estate of Ellen Joan Campbell, Estate No 9496/2012. The third respondent Ms. Gailleen Denton was cited in her personal capacity and is the sister of the applicant.
- [4] Regarding the initial application, there was an order by Theron AJ dated 10 May 2019 that the matter is postponed *sine die* for oral evidence. The applicant was granted leave to file a supplementary affidavit within fifteen days of the court order. The second and third respondents were granted leave to file supplementary affidavits within fifteen days of receipt of the applicant's supplementary affidavit. Within twenty days of delivery of the latter supplementary affidavit, the parties were to meet to formulate the terms and narrow the issues regarding the referral to oral evidence.
- [5] The applicant filed a supplementary application and amended the relief she sought, per paragraph [1] above. The second and third respondents filed their supplementary affidavit. The parties met on the 17 June 2019 and identified witnesses to be called. The applicant intended calling four or five witnesses, whilst the respondent did not intend calling any witness but reserved their right, if needed, to call one witness.
- [6] When the matter was set down before me, it appeared that no witnesses would be called. This issue was addressed in the respondents' counsel's practice note and heads of argument, where

Adv. Scott placed on record that the applicant's attorney sent a letter dated 13 July 2019 informing the respondent's attorney of record that they did not intend to lead any witnesses and were of the view that the matter could be determined on the papers.

- [7] The applicant is one of seven siblings, whilst the third respondent is her youngest sister. It appears that in or about October 1992 the deceased concluded a will. A copy of this will was attached to the papers and is recorded as the first will. In terms of the first will, the deceased left her entire estate to her youngest daughter Ms. Gaileen Denton and in the event that she had died to her daughter Ms. Evelyn Wentzel. In May 1997 the deceased was about to retire and was prompted by the Human Resources Department at her place of employment, SA Greetings (Pty) Ltd to update her affairs and ensure they were in order. This resulted in the deceased applying to Legatus Trust (Pty) Ltd(Legatus) to draft a new will to update her affairs. During this period, the deceased informed all the surviving children that she would update her will and that they would each receive an inheritance from her estate upon her death. Legatus confirmed that they received an instruction to draft a will in correspondence dated 29 February 2012, wherein they stated that "Ons het in die faat negentigs vir bogemelde persoon 'n testament opgestel ten opsigte waarv'an ons nooit die getekende testament ontvang het nie."
- [8] Early in 2009, the applicant looked after the deceased whilst she was ill. She moved the deceased to her daughter as she required assistance with the care of the deceased. This was a temporary arrangement. In May 2010, the deceased accompanied by her daughter, Louise Marais, approached Ms. Gaileen Denton to collect the first will and the property's Title Deed. She informed Ms. Denton that she wished to change her will. Ms Denton informed her she could transfer the property into anyone's name as it was her property. It appears the applicant wished to provide for her son Mr. Walter Campbell who was not well.

- [9] She requested Ms Denton to take her to the attorney to effect changes to the will. Ms Denton however, refused apparently due to work commitments. She requested that her sister, Louis Marais assist their mother instead. It was the applicant's version that upon her return, the deceased was distressed that Ms Denton had been unwilling to take the deceased to the attorneys to change the will which is confirmed by Ms Marais and that Ms Denton had thrown the will and title deed at the deceased. The deceased passed away on 26 July 2010 in Krugersdorp. The applicant returned to reside at the property to care for her brother Mr Walter Campbell, who was hospitalised in October 2011 and passed away two weeks later.
- [10] Ms Denton arrived at the premises soon after that and announced she would be taking an inventory and pictures of everything on the property. She also informed them that "everything in the house belongs to me. I am rich, nobody must remove anything from the property". The siblings, Littez Yvonne Williams, Helen Christine Harris and Joan Lucia Baxter were present when Ms Denton laid claim to the deceased's immovable property and personal belongings. A few weeks later, Ms Denton sent a letter through her attorneys informing her siblings that she was the sole beneficiary of the deceased's estate. She demanded occupational rent from the applicant forthwith.
- [11] The siblings met and decided to contest the will as they believed that the first will did not reflect the deceased's intention nor her wishes. Whilst clearing their brother's personal belongings and personal effects, they discovered a document they believed was the deceased's final will. It accorded with what the deceased mentioned to them. She had told them that she had a will drafted to protect their brother Mr. Walter Campbell. It was the will drafted in May 1997 with Legatus Trust (Pty) Ltd. During their discussions, a family member informed them that he knew Ms. Hélène de Villers, who signed the Legatus application for a will. She was contacted and explained that the deceased's employer

had advised the employees who were about to retire to ensure they had updated wills. They deduced that this prompted the deceased to prepare the final will. A will was prepared according to the deceased's instructions. It was, however, not signed by the deceased. The instruction to prepare the will was, however, signed by the deceased and two witnesses.

[12] The applicant met with the family to disclose the final will to the family. Ms. Denton and two sisters, Louise Marais and Noreen Williams rejected the document. The applicant nor her siblings were aware that the deceased's estate had to be reported. They became aware of this in 2012 when the applicant consulted with her current attorneys regarding the estate and how it would be divided according to her mother's final will. She informed her three siblings, being Littez Yvonne Williams, Helen Christine Harris, Joan Lucia Baxter, and they agreed to report the estate as soon as possible. They instructed their attorney in April 2012, to attend to requirements to report the deceased estate and handed over a copy of the final will. The attorneys prepared the necessary documentation to report the estate. After the documentation was submitted, numerous requests were made to the first respondent about the Letter of Executorship. From the time of reporting the estate in April 2012 until September 2014, there were unsuccessful enquiries at the offices of the first respondent.

[13] In September 2014, a certain Grace from the first respondent's offices, who was the estate controller, informed the applicant's attorney that she had the matter since October 2012. She was unsure about how to resolve the matter as there were two wills. She furthermore indicated that as Ms. Denton attended at her office and presented an original will, whilst the applicant submitted a copy, she issued the Letter of Executorship in accordance with the first will. She appointed Ms. Denton as the executrix of the deceased's estate.

[14] The applicant's attorneys wrote to the first respondent's attorneys and requested that the estate's winding up be held over given the dispute regarding the wills. There was no response from the second and third respondent. The applicant then sought various counsel's opinions which resulted in the applicant launching an application in 2014 seeking an order declaring that the final will they believed they had, to be the will of the deceased in terms of Section 2(3) of the Wills Act, 7 of 1953, as amended ("the Wills Act"). The applicant was not happy with the application and accordingly sought further opinion to draft a new application. Thus new counsel was briefed in February 2015 to prepare the current application.

[15] The issue for determination is whether the document attached to the supplementary affidavit marked "SA2" read with the application to draft a will should be declared to be the last will of the late Ellen Joan Campbell?

[16] Section 2(1) of the Wills Act 7 of 1953(the Act) provides for the formalities required in the execution of a will as follows:

“(1) Subject to the provisions of section 3*bis*—

(a) no will executed on or after the first day of January 1954, shall be valid unless—

(i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and

(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

- (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and
- (iv) if the will consists of more than one page, each page other than the page on which it ends, is also signed by the testator or by such other person anywhere on the page; “

[17] Section 2(3) of the Act provides:

“(3) If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).”

[18] In *Van Der Merwe v Master of the High Court and Another* 2010 (6) SA 544 SCA at para [14]-[16] the Court stated:

“[14] By enacting s 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators.¹ It has rightly and repeatedly been said that once a court is satisfied that the document concerned meets the requirements of the subsection a

¹ See *Logue op cit* at 203F-G. In *Anderson op cit* at 785C the following is said about s 2(3) of the Act:

‘Section 2(3) is in the nature of a special exemption from the rigours of the requirements of s 2(1).’

court has no discretion whether or not to grant an order as envisaged therein. In other words the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.²

[15] Turning to the provisions of s 2(3) the first question to be considered is whether the document in question was drafted or executed by the deceased. Following on this is the question whether the deceased intended it to be his will. In *Letsekga v the Master & others* 1995 (4) SA 731 (W) the following was stated at 735F-G:

‘The wording of s 2(3) of the Act is clear: the document, whether it purports to be a will or an amendment of a will, must have been intended to be the will or the amendment, as the case may be, ie the testator must have intended the particular document to constitute his final instruction with regard to the disposal of his estate.’

[16] A lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of s 2(3). In *Letsekga*, decided in the division from which this appeal emanated, the lack of a signature was not held to be a bar to an order in terms of s 2(3) of the Act. *Ex parte Maurice* 1995 (2) SA 713 (C) decided in the same year as *Letsekga* was to the same effect. In *Thirion v Die Meester & andere* 2001 (4) SA 1078 (T) an unsigned document drafted by a person shortly before he committed suicide was held to be a valid will and declared as such in terms of s 2(3). In that case the deceased had executed a prior will that had complied with all the prescribed formalities. The very object of s 2(3), as pointed out above, is to ameliorate the situation where formalities have not been complied with but where the true intention of the drafter of a document is self-evident. *A basic trawl through the decided cases reveals that the absence of a signature has not been seen as a bar to relief in terms of s 2(3).*”(my emphasis)

[19] In the present matter, the deceased completed the first will. This will complied with all the formalities. However, it only benefitted the

² See *Anderson* at 785E-F and the cases there cited.

youngest daughter and in the event of her demise, the oldest daughter. This was done evidently to exclude her son Mr. Walter Campbell whose conduct she did not approve of. The deceased, however, later changed her mind. Mr Campbell resided in her house, he was her only son, and she was concerned about his wellbeing after she died. She wanted to be sure that he would be provided for in her will. It appeared that she was intent on providing for all her children. There is no explanation for why she wished to continue to benefit Ms. Denton to the exclusion of the remaining children. On Ms. Denton's version, the deceased approached her to change her will. According to Ms Denton, she could not take the deceased to the attorneys to change the will which benefitted her exclusively, due to work commitments, despite being aware of the deceased's ill health. It is an unavoidable fact that the will remaining unchanged ensured that she remained the beneficiary of the deceased's entire estate.

[20] The final will attached to the Legatus application for a will must be read having regard to section 2(3) of the Act. The question to be considered regarding the intention of the section is whether the document clearly purports to be a will or an amendment of a will. The deceased must have intended the will or the amendment, as the case may be to her final instruction. Regarding the deceased's visit to Ms Denton to retrieve the old will and the title deed and the request to visit the attorneys it is clear the first will lodged with the first respondent was not the deceased's final instruction.

[21] It is evident that the deceased did not understand what was required to change her will, and she believed that she needed Ms Denton to accompany her to the attorney. The deceased wished to provide for her son Mr. Campbell. It is evident from Ms Denton's conduct that she was not satisfied with an equal distribution of the assets after being led to believe that she would inherit everything. The application for a will to Legatus read with the will subsequently drafted indicates the

deceased's final intention when she reassessed her position at retirement. When she became ill, she sought to retrieve the old will and title deed from Ms Denton, and it was clear she no longer wished for her estate to devolve under the old will. She could not have obtained the old will as Ms. Denton had it in her possession. This is so as she filed the first will with the first respondent. Thus notwithstanding the formalities not being complied with section 2(3) of the Act as stated in *Andersen NO and Others v Master of the Supreme Court and Others* [1996] 1 All SA 637 (C) where the Court noted at p 642 that:

"Section 2(3) is in the nature of a special exemption from the rigours of the requirements of section 2(1). In *Stoltz v The Master and Another* 1994 (2) PH G2 (E) it was held that:

"It would appear, however, that with the enactment of section 2(3) the legislature, while seeking to retain the benefit just referred to," (that is, the securing of authenticity and the elimination of false or forged wills) "recognised on the other hand the virtue of not invariably insisting on a strict compliance with all the formalities prescribed in section 2(1)(a) in order to achieve the situation where a will, otherwise established to be the genuine will of the testator, would not be declared inoperative merely for want of compliance with the prescribed formalities. Hence its imposition on the Court of the peremptory duty, upon satisfaction as envisaged in the section, to order the Master to accept the document in question as a will."

Whilst the final will does not comply with the formalities, it does evidence the deceased's final wishes as per her instructions to Legatus and as she intended. This is also supported by the decision in *Pienaar and another v Master of the Free State High Court and Others* 2011(6) SA 338 SCA where at paragraph 11 the court found that '*where there is a conflict between the provisions of the two wills, the conflicting provisions of the earlier testament are deemed to have been revoked*'

COSTS

[22] I now proceed to the question of costs. The request is usually made that the costs be paid from the estate. This was not the case in this matter. There was a remand for oral evidence and a request that the applicant be liable for the costs on the one hand. The applicant

requested that the second and third respondent be held responsible for the costs initially as the respondents had resisted the leading of oral evidence. I believe that the costs should not come from the estate; instead, it is appropriate that costs should follow the cause. Counsel for the second and third respondent deemed it an appropriate order in the circumstances as did the applicants.

ORDER

[23] For the reasons above, I grant the following order:

1. The document attached to the supplementary affidavit marked 'SA2' is declared to be the last will and testament of the late Ellen Joan Campbell.
 2. In terms of section 2(3) of the Wills Act 7 of 1953, the first respondent is directed to accept the document attached to the supplementary affidavit marked "SA2" to be the last will and testament of the late Ellen Joan Campbell, for the purpose of the Administration of Estates Act 66 of 1965.
 3. The first respondent is directed to remove the second respondent as the Executrix of the late estate of Ellen Joan Campbell, (Estate number 9496/2012). The first respondent is to appoint Legatus Trust (PTY) LIMITED as executor of the late estate of Ellen Joan Campbell, (Estate number 9496/2012).
 4. The third respondent to pay the costs of the application."
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**S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances:

On behalf of the applicant	:	Adv M Karolia
Instructed by	:	Ayoob Kaka Attorneys
On behalf of the 2 nd and 3 rd respondent	:	Adv A Scott
Instructed by	:	Low & Heyl Attorneys
Date of hearing	:	04 August 2020
Date of judgment	:	11 January 2021