

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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

Date: 03/07/2023

A Maier-Frawley
A Maier-Frawley



CASE NO: 2021/46542

In the matter between:

ELISABETH BRIDGETTE GEGE SONO

First Applicant

IRENE DIKELEDI LOATE

Second Applicant

and

THE MASTER OF THE HIGH COURT, JOHANNESBURG

First Respondent

MARIA ASINDO

Second Respondent

MAVIS HELEN KGADITSOE

Third Respondent

J U D G M E N T

MAIER-FRAWLEY J:

1. The applicants and the second and third respondents are the biological sisters of the deceased, one Tiny Salome Julia Modisakeng, who died on 4 April 2021.
2. The applicants seek an order in the following terms in these proceedings:

- (i) That the unsigned document titled 'Last Will and Testament of Tiny Salome Julia Modisakeng'¹ be declared the valid Last Will and Testament of the deceased in terms of the Wills Act, 7 of 1953 (the Wills Act);
 - (ii) That the deceased's failure to comply with the formalities set out in section 2(1)(a)(i), (ii), (iii) and (iv) of the Act be condoned;
 - (iii) Alternatively to prayers (i) and (ii), should the deceased estate devolve in accordance with the rules of the Intestate Succession Act, 81 of 1987, the third respondent be excluded as intestate heir;
 - (iv) Costs of the application on the attorney and client scale against those respondents who oppose the application.
3. The alternative relief in (iii) above was expressly abandoned by the applicants at the hearing of the application and need not therefore be considered.
 4. Only the third respondent, a pensioner, acting in person, opposed the application. The second respondent filed a notice to abide the court's ruling.
 5. The applicants seek an order in terms of section 2(3) of the Wills Act that a document drafted by an attorney appointed by the deceased for such purpose, be recognized by the Master of the High Court, Johannesburg, as one intended to be the deceased's will. (I shall refer to the document as 'the contested will').
 6. It is common cause that the formalities prescribed by section 2(1)(a) of the Wills Act were not complied with in that the deceased did not sign the document, whether in the presence of two competent witnesses or at all,

¹ A copy of this document is attached to the founding affidavit as annexure 'EBGS5'.

nor was the will signed by two attesting witnesses, whether in the presence of the testator or at all.²

7. In terms of s 2(3) of the Wills Act, the Master of the High Court must be ordered to accept the document as a will if certain requirements are met. The section provides:
 '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 (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).' (emphasis added)
8. Section 2(3) of the Wills Act is clear: the court must direct the Master to accept the document in issue as a will once certain requirements are satisfied. First, the document must have been drafted or executed by a person who has subsequently died. Second, the document must have been intended by the deceased to have been his or her will.³

² The relevant parts of s 2(1)(a) of the Wills Act provides:

'(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 so signed by the testator or by such other person anywhere on the page; and...'

³ *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) at par 14.

9. That the applicant was aware of these requirements is apparent from what is stated in par 35 of the founding affidavit. There, the following was said:
 '35. ... in order for the court to declare the unsigned "*will*" valid, the following factors ought to be proven:
 35.1. [that] The document in question reflects the wishes *as drafted and ought to have been executed by the deceased*;
 35.2. [that] The deceased's relations with all siblings not being a surprise that she would have intended the document to be her Will and testament or final instruction with regards to the disposal of the deceased's estate.' (own emphasis)

10. As the applicants' heads of argument addressed only the subsection's *intention requirement*, leave was sought by the applicants' counsel to file supplementary heads in order to address the *drafting or execution requirement*, which I granted. Although both parties were afforded an opportunity to file supplementary heads, only the applicants elected to do so.

11. The facts peculiar to this case are these:
 - (i) The contested will is an unexecuted document that the deceased did not draft personally;
 - (ii) The contested will had not been forwarded by the attorney who drafted same to the deceased, who had thus not had sight thereof prior to her death;
 - (iii) On the evidence of the attorney, Ms Phaleng-Podile, the contested will was yet to be discussed with the deceased and finalised at a future consultation to be held in December 2016, which consultation the deceased never attended. Nor was any consultation for such purpose arranged thereafter;

- (iv) The written document was never approved by the deceased prior to her death, despite the lapse of a period of 5 years from the drafting of the will in October 2021 to the deceased's death in April 2021;
 - (v) Whether the writing indeed accorded with the deceased's final instructions and indeed represented an accurate expression of her intent was never confirmed by the deceased during the period of 5 years that elapsed until her death.
12. Section 2(3) of the Wills Act is cast in peremptory terms and does not permit the exercise of judicial discretion - if the requirements in the subsection have been met, a court must issue the condonation order to the Master and cannot in its discretion decide not to rescue the document at hand, Conversely, if such requirements have not been met, a court cannot issue a condonation order.⁴
13. In *Bekker v Naude en Andere* 2003 (5) SA 173 (SCA), condonation was sought in respect of an unexecuted document that the deceased had not drafted personally. *Bekker* concerned a joint will drafted by a bank official for the deceased and his wife (appellant). The deceased and the appellant consulted with an official of Absa Bank and requested that a joint will be drawn up for them. They explained what they required, the bank official took notes, whereafter a draft will was drawn up. The will was posted to the deceased and appellant with the request that they sign it in the presence of witnesses. The will had not been signed, despite the fact that it had been in the deceased's possession for some 5 years. The Supreme Court of Appeal held that the qualifier '*drafted...by a person who has died since the drafting...thereof*' to the word '*document*' must be interpreted literally to require personal drafting of the document by the person who subsequently

⁴ See: *Van der Merwe v The Master and Another* 2010 (6) SA 544 (SCA), par 14.

died.⁵ As it was not, the appellant's application was dismissed in the court *a quo*, whose decision was upheld on appeal.

14. The aforesaid *ratio* in *Bekker* has since been endorsed in subsequent Supreme Court of Appeal cases.⁶
15. The upshot of *Bekker* is that it will not be possible for an unexecuted document, drafted by an attorney or other advisor to be rescue from invalidity using s 2(3) of the Wills Act. Where the document is indeed executed (by the act of signing it), then it will be irrelevant who drafted it.⁷
16. The contested will in *casu* was not personally drafted by the deceased, nor was it executed by the deceased. In order to overcome this difficulty, counsel for the applicants submitted in supplementary written heads filed on their behalf that *Bekker's* case is distinguishable on its facts and therefore need not be followed. I disagree. On the contrary, the facts in *Bekker* are portentously similar to the facts in *casu*, the only slight difference being that in *Bekker*, the impugned document was in fact sent by the bank to the deceased for approval and signature, whereas in *casu*, not even that was done.
17. The applicants argue that *'It is the uniqueness of the facts of the present application that justifies a departure from the approach adopted by the*

⁵ *Bekker*, par 20. The personal drafting of a document by the deceased is not restricted to the production of a personally handwritten document but also incorporates other acts of personal creation such as typing or dictation by the deceased - *Bekker*, par 8.

⁶ See, for example, *Van Wetten v Bosch*, cited in fn 2 above, at par 14, where the following was said: "...The meaning attributable to the phrase 'drafted or executed' has recently been clarified in *Bekker v Naude en andere*:- the document must have been created by the deceased personally." (footnote excluded); and *Van der Merwe v The Master and Another* (cited in fn 3 above) at par 15; and *Crossman v The Master of the High Court, Johannesburg and Others* (2020/7625) [2021] ZAGPJHC 443 (26 August 2021) at par 61.

⁷ See too: *Mdlulu v Delaray and Others* 1998 1 ALL SA 434 (W) at 442f-h.

Supreme Court of Appeal in Bekker v Naude. That uniqueness justifies an adoption of a wider interpretation of the word “drafted” as opposed to a narrow interpretation thereof.’ The ‘uniqueness’ of the facts included certain circumstances that evidenced the disharmonious relationship between the deceased and the third respondent at the time of the drafting of the contested will, such that the contents of the contested will were said to be consistent with the deceased’s wish and desire to disinherit the third respondent.⁸

18. The facts on which the argument aforesaid is premised do not, however, assist the applicants apropos the failure of the applicants to meet the drafting requirement. If anything, they relate to the intention requirement, which I refer to below. The argument also loses sight of the doctrine of *stare* or doctrine of precedent. The essence of the doctrine, for present purposes, is that a High court is bound by previous decisions of a higher court, save that it is only the *ratio decidendi* or reason for the decision that is binding.⁹ Thus, decisions on questions of fact are not binding,¹⁰ but when a decision is such that legal consequences follow from certain facts, the decision will be binding when similar facts are raised.¹¹ The Constitutional Court has on several occasions professed its commitment to the doctrine, emphasising the merit of legal certainty and the like treatment of similarly situated litigants.¹²

⁸ These included that (i) the deceased had a year earlier sought the eviction of the third respondent from her residence and had deposed to an affidavit in those proceedings in which she outlined the disintegration of her relationship with the deceased, pursuant to which an order was granted evicting the deceased from her property; and (ii) certain domestic violence proceedings instituted by the deceased against the third respondent, which proceedings, however, did not culminate in an order against the third respondent.

⁹ *R v Nxumalo* 1039 AD 580 at 586; *Fellner v Minister of the Interior* 1954(4) SA 523 (A) at 537.

¹⁰ *R v Wells* 1949 (3) SA 83 (A) at 87-88; *Khupa v SA Transport Services* 1990 (2) SA 627 (W) at 636.

¹¹ *Harris v Minister of the Interior* 1952 (2) SA 428 (A) at 452.

¹²) *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC); *Van der Walt v Metcash Trading limited* 2002 (4) SA 317 (CC); *Daniels v Campbell NO & Others* 2004(5) SA 311 (CC).

I am accordingly bound by *Bekker* and cannot find that it is distinguishable on its facts. Nor can I find that a wider interpretation of the word 'drafted' is permissible either in law or in *casu*.

19. As regards the intention requirement, it is trite that the question is not what the document means, but whether the deceased intended it to be his/her will at all.¹³ Evidence as to subsequent conduct is relevant only in so far as it throws light on what was on the mind of the deceased at the time of making the contested will.¹⁴
20. The facts point to the conclusion that the relationship between the deceased and third respondent was tumultuous, unfriendly and frosty at the time of the drafting of the will. This conclusion was supported by the third respondent's own evidence at the hearing of the matter and in her papers. When regard is had to the contents of the contested will, the deceased ostensibly did not want the third respondent to benefit from her estate upon her death. Heirs and beneficiaries in terms of the document included only the applicants, second respondent, the first applicant's sons (deceased's nephews) and possibly the deceased's cousins.
21. The difficulty in this case, however, on the facts peculiar to this case, is whether the contested will was intended to function as the final expression of the deceased's wishes, given that same had never even been forwarded to the deceased for her approval during the 5 year period preceding her death. The evidence of the attorney was that a consultation was yet to be held with the deceased discuss and finalise the *draft* will she had prepared. As pointed out by Navsa JA in the *Van der Merwe* case, 'the greater the non-compliance with the prescribed formalities, the more it would take to satisfy a court that

¹³ *Van Wetten v Bosch supra*, at par 16.

¹⁴ *Id*, par 21.

the document in question was intended to be the deceased's will.¹⁵ The fact that the contested will was never finalised and hence never executed by the deceased for a period spanning 5 years prior to her death, may point to the fact that the deceased did not want it to serve as her last will. However, it is not necessary for me to make a definitive finding in this regard, given the non-compliance with the drafting requirement as outlined above.

22. In the result, the application falls to be dismissed. I am not persuaded that a costs order against the applicants is warranted in this case. The applicants took various steps in the course of these proceedings to procure compliance by the third respondent with the rules of court, however, to no avail. The third respondent seemingly refused to comply with the directives of this court which require the filing of written heads of argument by each party, notwithstanding the case management of this matter by the Deputy Judge President of this court. Moreover, she pursued an argument in open court on irrelevant issues, which argument, however, unequivocally exposed her unjustifiable disdain, disrespect, jealousy and bitterness not only towards the first applicant but also the deceased.

23. Accordingly the following order is granted:

ORDER:

26.1 The application is dismissed.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

¹⁵ *Van der Merwe*, above fn 3, at par 16.

