

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D1703/2021

In the matter between

JEANETTE DELPORT

APPLICANT

and

MARIA ELIZABETH LE ROUX .

FIRST RESPONDENT

BELINDA RAATS (born Le Roux)

SECOND RESPONDENT

BERNICE SPIES (born Le Roux).

THIRD RESPONDENT

KEATON BEN LE ROUX (born Bates)

FOURTH RESPONDENT

**MASTER OF THE HIGH COURT
KWAZULU-NATAL PROVINCIAL DIVISION**

FIFTH RESPONDENT

**MASTER OF THE HIGH COURT .
GAUTENG PROVINCIAL DIVISION**

SIXTH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 24 November 2022 at 15:30

ORDER

The following order is granted:

The application is dismissed with costs.

JUDGMENT

Mlaba AJ

[1] Daniel Casparus Le Roux ("the deceased") died on 10 October 2015. He had been married to the first respondent, and their marriage was in community of property. At the time of his death they had separated and the deceased had moved from Gauteng, where he had been living with the first respondent in their matrimonial home, back to Durban where he was living with the applicant, his cousin. The deceased had two children, the second and third respondents, who were born out of his first marriage with Loretta Mavis Smit and prior to his marriage with the first respondent. The fourth respondent was adopted by the deceased and first respondent, he is the grandson of the first respondent and the son of the first respondent's daughter from the first respondent's previous relationship.

[2] At the institution of these proceedings the first respondent was still alive and she opposed the application. She has however since died. The second and third respondents oppose this application and they are not legally represented. The fourth respondent is not opposing the application. The fifth

and six respondents have indicated that they will abide by the decision of this court.

[3] The applicant, represented by Mr *Reddy* SC, seeks an order in the following terms:

·1. The fifth and sixth respondents are directed to accept as the last will of the late Daniel Casparus Le Roux (Identity Number: [...]) the document, a copy of which is annexed to the affidavit of Jeanette Delport (the applicant) as annexure "F", for the purposes of the Administration of Estates Act No. 66 of 1965.

2. The costs of this application shall be borne by the second and third respondents who oppose this application, the one paying the other to be absolved.'

[4] The applicant submitted that the deceased moved into her home in Malvern, Durban which he shared with his partner, Andries Du Plessis ("Andries"), in 2012 when he separated from the first respondent due to marital problems. In the three years until his death on 10 October 2015 he suffered from severe diabetes which caused the amputation of one of his legs. The applicant and Andries cared for the deceased and during this period he had no contact whatsoever with his wife and children (the first, second and third respondents). It appeared that they wanted him out of their lives.

[5] The applicant further submitted that while living in her home the deceased was introduced to Mr Simon Read by her neighbour Mr Neville Lionel Banks. Mr Read is an accountant and was instructed by the deceased to prepare his last will. Mr Read prepared the will for the deceased and presented it to him and he signed the will in the presence of Mr Read. Mr Read thereafter took the will to Mrs Deidre Trembling, who is the wife of Mr Read's business partner. She signed the will as a witness even though she had not witnessed the deceased signing the will.

[6] The will was thereafter signed by Mr Neville Banks as a witness even though he too had not witnessed the deceased signing his will as a testator.

[7] Mr *Reddy* accepts that the signing of the will as witnesses, by both Mr Banks and Mrs Trembling, was not in accordance with ss 2(1) (a) (ii) and (iii) of the Wills Act 7 of 1953 ("the Act").

[8] He submits however that in terms s 2(3) of the Act, if the court is satisfied it could declare valid the deceased's will even though it was not in compliance with s 2(1) of the Act. He relied on several decided cases including *Webster v The Master and others*.¹ In fact he submitted that s 2(3) is peremptory and that the court had no discretion in this regard. Mr *Reddy* submitted that the deceased had intended for the will to be his last will and non-compliance with s 2(1) ought not to invalidate his will.

[9] In terms of the will, the deceased left his entire estate to the following persons:

- (i) the applicant - 70%
- (ii) the second respondent - 10%
- (iii) the third respondent - 10%, and
- (iv) Andries H Du Plessis (the applicant's partner) - 10%.

[10] The applicant believed that the deceased left the majority portion of his estate to her because she had been looking after him in the final years of his life and this to her was reasonable. She further submitted that the deceased's estate had been wound up as if he had died interstate even though the first respondent had been informed that the deceased had left a will. The first respondent sold the matrimonial home which she shared with the deceased during their marriage and the applicant sought to have her share in the

deceased's share of the estate in terms of the will. The deceased had no other assets except his share in the matrimonial home which the first respondent sold for R1,4 million. An amount of R596 161.96, being the deceased's portion of the joint estate, is lying in the estate account pending the finalization of this matter. The applicant is seeking to have this amount divided in terms of the deceased's will.

[11] The will had been submitted to the sixth respondent but was rejected by the sixth respondent. The applicant however submits that she has satisfied the requirements of s 2(3) of the Act, and that the court should direct the fifth and sixth respondents to accept the will as the valid last will of the deceased.

[12] The second and third respondents oppose the application on the basis that the will is not in compliance with s 2(1) (a) of the Act. Further to that, they dispute that the deceased made this will and submit that if he did he would not leave such a large portion of his estate to a cousin, and allegedly a lover, and leave only a small share to his own children. They further submit that the submission by the applicant that they had left their father and wanted nothing to do with him is false. They had been supporting the deceased financially ever since he moved to Durban and had even purchased a wheelchair for him after his leg was amputated.

[13] They submitted that they loved their father and had been in constant contact with him. They, together with their children, had visited him in Durban on several occasions and the applicant is aware of such visits. The applicant would occasionally contact them to request necessities on behalf of the deceased and they would provide those necessities for their father. They had even supported the applicant financially during that period. The second and third respondents disputed that the applicant weaned the deceased off alcohol as he still was consuming alcohol. The deceased had contracted diabetes long before he moved to Durban and they had been purchasing his medication for him and continued to do so even after the deceased had moved to Durban.

¹ Webster v The Master and others 1996 (1) SA 34 (D).

[14] The second and third respondents submitted that the legal requirements of a valid will are there for a reason and that everyone had to comply therewith. The deceased had not even changed his beneficiaries in the policies that he held and upon his death the proceeds were divided accordingly. The applicant was not added as a beneficiary. She was also allegedly in a romantic relationship with the deceased even though they were cousins, and Andries lived in the back room.

[15] The second and third respondents submitted in closing that despite s 2(3) of the Act, the court should not validate the will as it is not in compliance with s 2(1) of the Act and that it was unlikely that the deceased would not have informed them of the existence of a will.

[16] In terms of s 2(1) of the Act the signature of the testator must be made in the presence of two or more competent witnesses. The witnesses must attest and sign the will in the presence of the testator and each other; where the testator signs the will with a mark, a commissioner of oaths must be present and specific certification formalities apply.

[17] Section 2(3) of the Act 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 (Act 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 *Logue and another v The Master and others*² the court held that failure to comply with formalities should not defeat the genuine intention of the testator. This requires that the applicant, who seeks to have the will validated

² Logue and another v The Master and others 1995 (1) SA 199 (N) at 203E-F.

in terms of s 2(3), must demonstrate and persuade the court that the deceased intended the document to be his will. The court also stated in Logue that it did not mean that it was unnecessary to comply with any of the prescribed formalities, but only that it was not necessary to comply fully with all the formalities.

[19] In *Webster*³ where the court held as follows, as cited from the headnote of the judgement:

'... s 2(3) of the Act was in most peremptory terms: when the Legislature provided that a document which was sought to be declared to be the will of the deceased in terms of s 2(3) of the Act had to be "drafted or executed by a person who had died since the drafting or execution thereof", it required that the document had to be drafted by such person personally.'

[20] The court held further that:⁴

'... the Legislature had not intended to endow an unsigned document drafted by someone other than the testator, not even an attorney, with the status of a will: if the section were given such an interpretation it would leave the door wide open to potential fraud, and it would certainly not have the effect of ensuring the authenticity of such a document. **What the Legislature had in mind was that the intention of the testator as demonstrated in writing in his own hand should not be frustrated because the writing does not comply in all respects with the requirements of s 2(1) of the Act.**' (My emphasis)

[21] The facts herein are that the deceased allegedly instructed Mr Read, an accountant, to draft his will. Mr Read drafted the will and took it to the

³ Webster above fn 1 at 36B-C.

⁴ Ibid at 36C-E.

deceased who signed it in his presence. Mr Read then took the will to witnesses, who were not present to witness the deceased signing the will. They each signed as witnesses to the will at different places and at different times. As they had not witnessed the deceased signing the wills 2(1) of the Act was not complied with.

[22] There is no certainty that the document was indeed signed by the deceased and accordingly that the contents of the will are what the deceased intended for his estate upon his death. Mr Read's contention, which appears in his affidavit,⁵ is that he drafted the will upon the instructions of the deceased and that the deceased signed the document. Mr Read however is not a witness to the will. It is the persons who are present when the testator signs the will who become witnesses to the will and who can attest to the above. In this case such persons were not present to witness the deceased signing the will.

[23] Section 2(3) is intended to cure the non-compliance only when the document sought to be validated as the deceased's will was drafted or executed by the deceased personally thereby demonstrating that the document was intended to be the deceased's will.

[24] In this case and in light of paragraph 20 above (especially the highlighted part), I am not persuaded that the provisions of s 2(3) are satisfied such that this court may declare the will to be valid. This is because the will was not drafted by the deceased personally. Section 2(3) is peremptory. As an accountant, Mr Read, ought to have ensured compliance with the formalities as s 2(3) does not mean that formalities have to be done away with. They stand, and only in circumstances that are covered by the section will a will be declared valid. I am not persuaded that those circumstances exist in this matter.

[25] In *Webster* the court held that there had been no compliance with any

⁵ Volume 1 pages 46-49.

of the formalities set forth in s 2(1) of the Act, and the court said it was of the view that the Legislature's intention was not to validate a document which does not comply with any of the formalities of s 2(1) of the Act.

[26] Similarly, except for a signed document, none of the other formalities as prescribed by s 2(1) of the Act have been complied with. The applicant failed to successfully substantiate why the formalities were not complied with. Section 2(3) cannot therefore be relied upon successfully to validate a document that was drafted by a professional person who ought to have complied with the formalities of a valid will but for no valid reason failed to do so.

[27] In conclusion, having considered the submissions by both parties, the court is not satisfied that the document alleged to be the deceased's will was what the deceased intended to be his will for the purposes of the Administration of Estates Act 66 of 1995. Further, the requirement in s 2(1) (a) (ii) of the Act is mandatory and the will, being the subject of this matter, is invalid for want of compliance with a statutorily required formality

Order

[28] I therefore make the following order:

1. The application is dismissed with costs.

Mlaba AJ

APPEARANCES

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