



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

CASE NO.: 8502/2015

In the matter between:

CATHERINE LOUISE YOUNG

Applicant

and

**THE MASTER
OF THE HIGH COURT, DURBAN**

First Respondent

T R DE MONSE

Second Respondent

R W YOUNG

Third Respondent

YESHAAN NAIDOO

Fourth Respondent

S T CAMBIER

Fifth Respondent

K NEAL

Sixth Respondent

Coram: Jeffrey AJ

Heard: 25 August 2015

Delivered: 28 August 2015

Summary: Will - Validity - Acceptance of document only existing in electronic format during deceased's lifetime as a will - Requirements – Financial advisor drafting document sent as an e-mail attachment - Deceased not signing the same in hard-copy format – Evidence not establishing that the document was either drafted by the deceased or intended by him to be his last will - Wills Act 7 of 1953, s 2(3)

JUDGMENT

JEFFREY AJ:

[1] This is an urgent application under s 2(3) of the Wills Act No 7 of 1953 (the Act) to have an unsigned document in electronic format attached to an e-mail declared to be the will of the late Arthur Ronald Halliday (the deceased) and for further ancillary relief. The applicant is the deceased's widow.

[2] The application is unopposed and the Master abides the decision of the Court.

[3] The applicant and the deceased were married to each other out of community of property on 4 February 2013.

[4] During early December 2013 the deceased was diagnosed with cancer. He was hospitalized and treated for

approximately 3 months at the Umhlanga Hospital. In early March 2015, however, medical opinion changed - it was considered that his earlier diagnosis had been incorrect and that he was actually suffering from acute myeloid leukaemia. The deceased died a few weeks later on 4 April 2015.

[5] Some 4½ years before his death the deceased met Mr Nazar, a financial planner, and instructed him to attend to his insurance and financial matters, which he did.

[6] During early 2014 the deceased instructed Mr Nazar to prepare an agreement between the deceased and his partner of their business called Samsung Business Solutions, Umhlanga. The partner is the fourth respondent. This proposed agreement was intended to provide for the succession of the business if either the deceased or the fourth respondent died.

[7] At the same time the deceased and the fourth respondent requested Mr Nazar to draft their updated wills.

[8] With regard to the deceased's proposed will, Mr Nazar has alleged that at his request the deceased compiled an

instruction sheet setting out what his instructions were concerning the content of the proposed will.

[9] According to Mr Nazar, upon receipt by him of this instruction sheet, he drafted a proposed will for the deceased and e-mailed it to him as an attachment to an e-mail. He added that "on numerous occasions" thereafter, he requested the deceased to execute the electronic will by "signing it in the presence of two witnesses" and that the deceased "continually reassured" him that "he would attend to the same in due course". The deceased did not do so, according to the applicant, because he "fell ill and rapidly deteriorated after the acute myeloid leukaemia infiltrated his central nervous system ... (and he) reached a point where he was unable to see, eat or walk properly and accordingly could not properly execute the electronic will."

[10] The instruction sheet, or a copy thereof, allegedly completed by the deceased has not been placed before the Court. Also absent before the Court is a copy of Mr Nazar's covering e-mail to the deceased attaching the proposed will that would establish the date when the document was sent to the deceased.

[11] There is also no evidence that the deceased converted the proposed will attached to the e-mail from Mr Nazar into a hard copy format. It is, therefore, accepted for the purpose of this judgment that the document existed only in electronic form as an e-mail attachment during the deceased's lifetime.

[12] The Act was amended in 1992 by the addition, *inter alia*, of sub-section 2(3) in terms of which the formerly strict compliance with the formalities regarding the execution of wills were somewhat relaxed. The sub-section reads as follows:

"(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 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)."

[13] The relevant formalities required for the valid execution of a will are set out in sub-section 2(1)(a) as follows:

"(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 ...”

[14] It is unnecessary for the purposes of this judgment to traverse the many difficulties faced by the Courts in the past in the application of the controversial provisions of sub-section 2(3). This is particularly so in this instance where this application has been brought on an urgent basis on the grounds, so the applicant alleges, that an executor must be appointed by the Master urgently in order to finalize an agreement of sale of certain immovable property owned jointly

by the deceased and the applicant so as to relieve the deceased's estate financially which, the applicant says, is burdened with "a mountain of debt which presently stands in excess of R6 million."

[15] In *van der Merwe v The Master and Another* 2010 (6) SA 544 (SCA) 548c at para [14] Navsa JA stressed that the provisions of sub-section 2(3) are peremptory; so, once a Court is satisfied that the document concerned meets the requirements of the sub-section, it has no discretion whether or not to grant an order as envisaged therein.

[16] The requirements of the sub-section are: first, whether the document concerned was drafted or executed by the deceased; and second, whether it was intended by him to be his will.

[17] Turning to the first requirement, since the decision in *Bekker v Naude en Andere* 2003 (5) SA 173 (SCA) the issue was settled of whether on the one hand, the sub-section required the deceased to personally draft the document - as was held in for instance *Ramlal v Ramdhani's Estate* 2002 (2) SA 643 (N); or, on the other, whether a document was

properly drafted if it was prepared by a third party on the instructions of the deceased and was subsequently approved by him – as was held in for instance *Back and Others NNO v Master of the Supreme Court* [1996] 2 All SA 161 (C). The Court in *Bekker* found that the word “drafted” in the subsection required the personal drafting of the document by the deceased. In that case the deceased had instructed a bank to draft a will, which it did using the deceased's instructions, but also added its own wording and standard clauses to the draft. In these circumstances the Court found that it could not be said that the draft will was 'drafted' by the deceased.

[18] In this application, as I have said, the deceased's instruction sheet to Mr Nazar has not been placed before the Court. Apart from the deceased not being the actual draftsman of the document concerned, it has not been established and consequently cannot be said with any confidence, that the document concerned accurately reflects the deceased's instructions to Mr Nazar.

[19] In the premises I am not satisfied that the deceased drafted the document concerned within the meaning of subsection 2(3). I find accordingly.

[20] In addition, in regard to the second jurisdictional requirement of sub-section 2(3), in the absence of the deceased's instruction sheet given by him to Mr Nazar, I am not satisfied that the document concerned was intended by the deceased to be his will. It is insufficient for Mr Nazar to allege that after he had sent him the e-mail attaching the will, "on numerous occasions" thereafter, he requested the deceased to execute the document concerned by "signing it in the presence of two witnesses" and that the deceased "continually reassured" him that "he would attend to the same in due course". If the deceased gave him the alleged assurances then the deceased could not have been too ill at that stage to have executed the will had he intended to do so.

There is, in any event, no indication on the papers when these assurances were given and, indeed, no copy of the covering e-mail was placed before the Court from which the time of these assurances could possibly be inferred. The meaning of the assurance given by the deceased that he would "attend to the same in due course" is equivocal. It does not only mean that he would execute the document concerned. It could equally mean that he would consider the

document concerned to see whether it in fact met his instructions to Mr Nazar.

[21] I may add that I find it astonishing that the deceased's financial advisor can misplace not only the deceased's instruction sheet concerning his proposed will especially when the deceased was terminally ill, but also be unable to produce a copy of the e-mail sent to the deceased attaching the proposed will that he drafted.

[22] For the above reasons the application must fail.

[23] I make the following order:

The application is dismissed.



JEFFREY AJ

Appearances:

Counsel for the applicant	:	Mr C B Edy
Applicant's attorney	:	Eduard de Lange Attorneys
Date of hearing	:	25 August 2015
Date of judgment	:	28 August 2015