

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case no. 2083/2024

In the matter between:

ANDRE UNGERER

Applicant

and

ANDI UNGERER

First respondent

MORNE FOURIE N.O.

Second respondent

THE MASTER OF THE HIGH COURT

Third respondent

JUDGMENT

GOVINDJEE AND LAING JJ

[1] This is an unopposed application to have the unsigned and undated Last Will and Testament of the Deceased, Estelle Ungerer, drafted in 2022 ('the 2022 Will') declared to be valid in terms of s 2(3) of the Wills Act, 1953 ('the Act'), together with consequential relief.

Background

[2] The second respondent was appointed as Executor in terms of a 1999 Will, which has been accepted by the Master. The applicant and the deceased were married. The first respondent is the only child born of the marriage and is the sole

heir in terms of the 1999 Will. She has been estranged from the applicant and the deceased for some time.

[3] It is convenient to draw from counsel's heads of argument in order to place the application in its proper context.

[4] The applicant and the deceased utilised the services of Capital Legacy during January 2022 to assist them in drafting their wills. They seemingly intended to leave 100% of their respective estates to each other, and thereafter to their daughter in the event of their demise. Wills were drafted according to instructions received. The deceased had contracted cancer and was very ill at the time and on medication.

[5] The application provides details regarding the intention of the applicant and the deceased and their financial constraints, including the reason for leaving their estates to one another instead of their daughter. As to the reasons for the deceased not signing her own will at the appointed time, the applicant states only the following:

'On the day that we had to sign our Last Wills and Testaments, my sister Annalien Botha, was visiting us.

My sister, the deceased's aunt, referred to above, myself and the deceased were all together. We decided to sign our Wills. We did not know in what sequence we had to sign. We had by then received the Wills drafted by Capital Legacy. My sister signed both our Wills as witness, but before the Deceased could sign her Will and Living Will, she felt ill and decided to sign her Will at a later stage, which she never did. I continued to sign my will, but the Deceased left it later. She left and went to our room.

I can assure this Honourable Court, on oath, that the 2022 Will is indeed the final Will of the Deceased, although not signed by her.'

[6] The applicant's core argument was that the landscape had changed: the first respondent was a minor at the time the 1999 Will was drafted, during a time when the applicant and deceased were both employed. At that stage the main concern had

been their daughter's financial well-being. At the time the 2022 Will was drafted, however, the applicant and deceased were both unemployed, whereas the first respondent was employed. The applicant's dire financial situation was emphasized, together with various details pertaining to a so-called 'family feud'. The application is supported by the two family members who were to witness the signatures of the applicant and the deceased upon signature of the 2022 Will, as well as the representative of Capital Legacy who took instructions from them and arranged for the wills to be drafted in accordance with their instructions. The application is unopposed, also on the part of the Master.

The issue

[7] As indicated, the deceased passed away before ever signing the 2022 Will. The question is whether the court may accept that Will on the papers before it and in the light of the applicable legal framework.

The legal position

[8] S 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, as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).'

[9] A similar factual matrix, broadly speaking, was considered by the SCA in *Grobler v Master of the High Court*.¹ In that instance, there was a chain of email communications between the deceased and the person who drafted the disputed will on his behalf. The deceased also requested that individual to provide him with

¹ *Grobler v Master of the High Court* 2019 JDR 1772 (SCA) (*Grobler*) paras 2–4.

specimens of wills dealing with bequests of movable and immovable assets to surviving partners and children.² A draft will was eventually prepared. The drafter and the applicant described what occurred at the final meeting which took place with the deceased prior to his passing. The deceased suggested further amendments to the draft which were recorded by the drafter on a typed version of the draft will in manuscript. He understood this to constitute the deceased's final instructions that would later be effected electronically, after which a meeting would be arranged for signature. In fact, the meeting never took place, seemingly because of the deceased's busy schedule.

[10] The court *a quo* dismissed the application. On appeal, it was argued that the unsigned will ought to be accepted because the deceased 'played an active role in the drafting and completion' of the draft will and it could be inferred in the circumstances of the matter that he had received the final version.³ Maya P emphasized that the purpose of s 2(3) of the Act was to 'avoid thwarting the lawful wishes of the deceased would-be testator'. The learned judge added as follows:

'However, the document must have been drafted or executed by the deceased whose will it purports to be, i.e. created or prepared by the deceased personally. Furthermore, the court must be satisfied on a preponderance of probabilities that the deceased intended it to be his or her will. And once satisfied that the document meets the requirements of s 2(3), the court is obliged by these peremptory provisions to order the Master to accept it as the deceased's will.'⁴

[11] As in the present circumstances, the disputed will had clearly not been drafted by the deceased, but by someone else, and there was simply no indication on the record that the deceased accepted the final document presented and accepted it as their will.⁵ The position has been described as follows:⁶

² Ibid para 3.

³ Ibid para 10.

⁴ Ibid para 13, references omitted.

⁵ Ibid para 14.

⁶ *Anderson and Wagner NNO and another v The Master and others* 1996 (3) SA 779 (C) (*Anderson*) at 784H –785B.

‘The difference between a document which is intended by its maker to be his will ... on the one hand, and an instruction by him to another person to draw a will or an amendment to a will, is neither merely technical nor insubstantial: in my view it is fundamental. In the former case, the maker of the document intends it to constitute the final expression of his wishes as regards the disposal of his estate. It is not subject to change, save, perhaps by means of a subsequent and entirely fresh and separate amendment or codicil. In the latter case, the maker of the document does not vest it with the same intention of finality: he anticipates that another document will, in due course, be prepared and placed before him for his consideration and approval, *which he may or may not sign or alter, as he may wish, when it is presented to him.*’ (Own emphasis.)

[12] Similarly, in *Bekker v Naude en andere*,⁷ the appellant and the deceased had approached a bank and requested it to draft a joint will for them. They had explained to a bank employee what they wanted. The notes made by that employee were sent to the bank’s head office where other officials used the bank’s standard clauses to draft a draft will which was sent to the appellant and deceased for their signature. In fact, the draft will was never signed. As such, the SCA held that the key question was whether the draft will was ‘drafted’ by the appellant and the deceased. When compared to the notion of ‘caused to be drafted’, the court concluded that the legislature had preferred the stricter requirement of personal drafting, so that the instructions given to the bank could not be said to amount to the will being ‘drafted’ by the deceased. An appeal against a decision declaring the will to be invalid was refused.

[13] As Maier-Frawley J explained in *Sono and another v Master of the High Court, Johannesburg and others*,⁸ the upshot of *Bekker* is that it will not be possible for an unexecuted document, drafted by an attorney or other advisor, to be rescued

⁷ *Bekker v Naude en andere* 2003 (5) SA 173 (SCA) (*Bekker*).

⁸ *Sono and another v Master of the High Court, Johannesburg and others* 2023 JDR 2538 (GJ) (*Sono*).

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.⁹

Analysis

[14] The formalities prescribed by ss 2(1) and 2(2) in relation to the execution of a will and amendments thereto are to ensure authenticity and to guard against false or forged wills.¹⁰ 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'.¹¹ In *Van der Merwe v The Master*,¹² also a case involving a disputed, unsigned will, Navsa JA held that in circumstances where there was no opposition to an application, a court should guard against uncritical acceptance of the appellant's version. That decision also explains the two-pronged nature of the enquiry. 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 their will.¹³

[15] On the authority of *Grobler*, in the absence of evidence that establishes that the deceased *approved* all the contents of the draft will, a court will be unable to find that they intended it to be their will.¹⁴ It is, strictly speaking, unnecessary to make a firm decision regarding the deceased's intention in the present circumstances. The disputed will was neither drafted by the deceased, nor executed by her, so that the subsequent enquiry into intention does not arise.¹⁵

[16] Nothing more needs to be said in that regard other than to observe that the applicant provided no adequate explanation for the deceased's failure to have signed

⁹ Ibid para 15; *Mdlulu v Delaray and others* 1998 (1) All SA 434 (W) at 442f–h. Signature by a witness in the absence of the deceased does not constitute a will that was 'executed' within the meaning of that word in the section. The testator must be involved in the 'execution' process, even in marginal respects: Hofmeyr, G and Paleker, M *The Law of Succession in South Africa* (3rd Ed) (2023) (Juta) at 111, 114.

¹⁰ *Van der Merwe v The Master* 2010 (6) SA 544 (SCA) (*Van der Merwe*) para 13.

¹¹ Ibid para 14.

¹² Ibid para 7.

¹³ Ibid para 15.

¹⁴ The greater the non-compliance with the prescribed formalities, the more it would take to satisfy a court that the document in question was intended to be the deceased's will: *Van der Merwe* above n 10 para 16.

¹⁵ *Sono* above n 8 para 8.

the will during the intervening period of eight months between the date upon which the disputed will was presented to her for signing, 22 February 2022, and the date of her passing, 11 October 2022. The applicant merely averred, vaguely, to 'the pressing arrangements being made to relocate on 17 July 2022' and to 'her failing health'. If the deceased had truly intended the 2022 Will to have been her final will, then it would have been expected that she would have signed it, especially in view of her terminal decline and impending demise. On a preponderance of probabilities, however, the deceased changed her mind to avoid leaving her daughter, the first respondent, with nothing until the applicant's eventual passing. From the exchange of communication between the deceased and the first respondent it is apparent that the deceased was desperate for mother and daughter to set aside their differences and to achieve reconciliation before she departed. This would go some way towards explaining her failure- or refusal- to sign the disputed will. In the end, however, there was simply no evidence on the papers to demonstrate the intention as alleged by the applicant.

[17] Section 2(3) is cast in peremptory terms and does not permit the exercise of judicial discretion absent compliance with the stipulated requirements.¹⁶ This is because it represents an exception to the rigorous requirements for a valid will stipulated in s 2(1), so that it must be strictly interpreted.¹⁷ In the circumstances, broader considerations of justice, fairness, equity, distinguishable features of the applicant's position and the like are beyond the scope of the enquiry.¹⁸ This court is bound by the doctrine of *stare decisis* to implement the law as it has been expressed by the SCA. As Thring J held in *Anderson*:¹⁹

¹⁶ *Van der Merwe* above n 10 para 14.

¹⁷ See *Anderson* above n 6. The relevant parts of s 2(1)(a) provide:

'(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 ...'

¹⁸ *Sono* above n 8 para 17–18.

¹⁹ *Anderson* above n 6 at 785G–H.

‘Whilst the pursuit of equity (sometimes erroneously confused by laymen with “justice”) and the elimination of hardships are consummations devoutly to be wished, their attainment can often not be justified if it entails the sacrifice of certainty and legal principle. I do not think that the Legislature had such a sacrifice in mind when it placed s 2(3) on the statute book...’

Order

[18] The following order is issued.

1. The application is dismissed.
2. There is no order as to costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

JGA LAING
JUDGE OF THE HIGH COURT

Heard: 30 July 2024

Delivered: 02 August 2024

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