



**THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case No: 2026-058889**

In the matter between:

**RAY CHARLES ESBACH**

Applicant

And

**MASTER OF THE HIGH COURT, CAPE TOWN**

First Respondent

**CHARKLENE BARRON**

Second Respondent

**KAREN ESBACH**

Third Respondent

**JOHN BRENT ESBACH**

Fourth Respondent

**JOHN BERNT ESBACH N.O.**

Fifth Respondent

**FIRST NATIONAL BANK**

Sixth Respondent

**Coram: YAKE AJ**

**Argument: 28 April 2026**

**Delivered: Electronically on 12 May 2026**

**Summary:** Wills Act section 2(3) – Will is noncompliant with section 2(1)(a)(ii) in that it was not signed in the presence of two witnesses present at the same time. No dispute that deceased signed the August 2013 Will. Factual dispute over the signature in the Will resolved under Plascon Evans Rule.

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## WRITTEN REASONS

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**YAKE AJ**

### **INTRODUCTION**

[1] This is an application to declare the last Will and Testament of the late Bertha Magdalene Esbach (“the testatrix”) dated 28 November 2022 (“the November 2022 Will”) invalid and/or null and void. And that the first respondent, the Master of the High Court, Cape Town, accepts the last Will and Testament dated 22 August 2013 (“the August 2013 Will”) as the valid last Will and Testament of late Bertha Magdalene Esbach for purposes of the Administration of Estate Act 66 of 1965.

[2] On 15 July 2025 an order was granted by Nziweni J on the following terms:

- (a) The matter is postponed for hearing on the semi-urgent roll to 28 April 2026.
- (b) The second respondent shall file her answering papers on or before 17 October 2025.
- (c) The applicant to file his replying affidavit, if any, within 15 days from service of the second respondent’s answering affidavit.
- (d) Should the second respondent fail to file her answering papers in terms paragraph B above, leave is granted to the applicant to re-enrol the matter on the unopposed motion court roll.
- (e) Costs to stand over.

[3] Only the second respondent opposes the application. The other respondents filed notices to abide by the Court’s decision. It is not clear what relief the second

respondent seeks in her opposition, save for disputing each and every averment in the applicant's founding affidavit. Absence of clear grounds of opposition, it is presumed that the second respondent opposes the order declaring the November 2022 Will invalid. No heads of arguments were filed by either party. The Court is therefore constrained to determine the matter on the affidavits and documentary evidence placed before it. The absence of heads of argument does not, however, absolve the Court from its duty to consider the issues raised and to apply the relevant statutory provisions and principles of law.

[4] On 28 April 2026, the matter became unopposed as the second respondent failed to appear in court. Counsel for the applicant accordingly requested that the Court grant the order in terms of the notice of motion. After having regard to the founding affidavit of the applicant and the answering affidavit filed by the second respondent, the Court granted an order dated 28 April 2026, together with a costs order against the second respondent. At the time, no reasons were furnished for the decision. I intimated that reasons would follow. I now proceed to set out the basis upon which the order was granted.

### **BACKGROUND**

[5] The applicant and the second to the fourth respondent are siblings. On the 22 August 2013, the testatrix and her late husband executed the joint Will ("the August 2013 Will"), which was subsequently kept in custody by the sixth respondent. The copy of the original Will is found on page 47 of the record. At paragraph 2 of the August 2013 Will, the following is recorded:

*"We bequeath the estate of the first dying of us to the survivor of us provided the survivor of us is alive on the seventh day after the death of the first- dying of us. This bequeath fail or should the survivor of us not leave a later valid will, then in either such event, we bequeath our respective estate to our son Ray Charles Esbach. (My emphasis)"*

[6] During August 2022, the testatrix became gravely ill and required frequent hospitalisation. A few days before her death, a new Will was drawn up, purportedly signed by her on 28 November 2022 (“the November 2022 Will”). It is that Will that the applicant seeks to have declared invalid and void. The applicant contends that the document does not comply with the formal requirements of section 2(1) (ii) of the Wills Act 7 of 1953 and further disputes the authenticity of the signature appearing thereon.

[7] The applicant contends that second respondent, together with other siblings conspired and attempted to manipulate the testatrix to execute the November 2022 Will. In support of his contention, the applicant relies on the report of SD Snyman (“Snyman”), the forensic document examiner. Snyman examined and compared the signature of the testatrix as it appears on the August 2013 Will with the signature purported to be that of the testatrix on the November 2022 Will. His expert conclusion was unequivocal: the testatrix is eliminated as the author of the November 2022 Will. This expert evidence stands unchallenged. No contrary evidence has been tendered by the second respondent to dispute Snyman’s findings.

[8] The applicant further contends that a certain Crystal Plaatjies (“Plaatjies”) who signed as a witness in the November 2022 Will, deposed to an affidavit in which she stated that at the time she apprehended her signature as the witness, the testatrix had not yet signed the document. Plaatjies avers that she never witnessed the testatrix signing the Will. She merely observed the testatrix from a distance holding a pen in her hand, while the second and fourth respondent were standing with her. The applicant submits, this evidence demonstrates non-compliance with the requirements for a valid Will.

[9] In opposing the application, the second respondent does not dispute the existence of the August 2013 Will. Her contention is rather that she did not

witness anyone signing the August 2013 Will. She further asserts that the testatrix subsequently signed the November 2022 Will out of her own free will. She alleges that she had no prior knowledge that the testatrix intended to execute a new Will, as this was not discussed with her beforehand.

[10] In support of her contention regarding the validity of the November 2022 Will, the second respondent relies on an affidavit of Tyler Ralph Stemmet (“Stemmet”). In that affidavit, Stemmet records that he and Plaatjies were asked by the fourth respondent to witness the signing of the Will by the testatrix. Stemmet states that upon arrival at the house of Mr. Duckitt, the Commissioner of Oaths, Mr. Duckitt interviewed the testatrix inside a vehicle. Thereafter, Stemmet was called to sign the document. According to him, the first person to sign was Plaatjies, and thereafter he appended his signature. He further records that he observed the testatrix’s signature already appearing on the Will at the time he signed but did not witness when the testatrix signed the Will.

[11] The second respondent further relies on an affidavit of Vincent George Duckitt, who confirms that the Will of the testatrix was duly signed in his presence together with two witnesses on 28 November 2022.

### **ISSUES FOR DETERMINATION**

[12] Against the backdrop of the affidavit evidence, the Court must determine whether the requirements of section 2 (1) of the Wills Act 7 of 1953 have been satisfied. Specifically, the questions arises whether the signature appended to the November 2022 Will is indeed that of the testatrix.

### **THE APPLICABLE LAW**

[13] Section 2 (1) of the Wills Act 7 of 1953 (the Act) stipulates formalities required for a valid Will, and provides as follows:

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

(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 so signed by the testator or by such other person and by such witness; and.....’

[14] Non-compliance with these provisions renders the Will invalid unless the court exercises its discretion under section 2(3) to condone the document as a valid Will.

[15] Section 2(3) of the Wills 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 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).”

[16] The purpose of section 2(3) is to empower courts to validate a document which owing to a technical flaw in its attestation, would otherwise not be accepted

by the Master as a Will. This is intended to avoid thwarting the lawful wishes of a deceased would-be testator merely because of non-compliance with formalities.<sup>1</sup>

[17] In *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA) Lewis JA in para 16 at page 354 expressed the view that;

‘..., the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.’

[18] A full court of this division in *Westerhuis and Another v Westerhuis and Others*<sup>2</sup> referring to *Van Wetten supra*<sup>3</sup>, described the test as follows:

‘[50] The Supreme Court of Appeal has stated repeatedly that, when applying s2(3), the real question is whether the deceased intended the document (or any amendment) thereto to be her will. And so, the court is required primarily to ascertain whether at the time of drafting or executing the document, or any amendment thereto, as the case may be, the necessary intention on the part of the testator has been established. Such an enquiry entails an examination of the document in the context of the surrounding facts and circumstances and the party so alleging must show unequivocally that the intention existed concurrently with the execution or drafting of the document....’

## **DISCUSSION**

[19] For the applicant to succeed, this court must be satisfied that the November 2022 Will was not executed in accordance with the formalities under section 2 (1) of the Will’s Act. As such the applicant bears the onus of demonstrating such non-compliance. The evidence presented must show, on a

<sup>1</sup> *Grobler v Master of the High Court and Others* (645/2018) [2019] ZASCA 119 (23 September 2019) at para [13].

<sup>2</sup> (A276/2017) [2018] ZAWCHC 84 (27 June 2018) at para [50].

<sup>3</sup> *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA) at para [16]; *De Reszke v Marais and Others* 2006 (2) SA 227 (SCA) at para [12].

balance of probabilities, that one or more of the requirements in section 2(1)(i)–(iv) were not met.

[20] It is trite that the August 2013 Will, found at page 47 of the record bears the signature of the testator, the testatrix and two witnesses. It has not been placed in dispute that the Will was signed by all four parties in the presence of each other. Save for the respondent's assertion that she did not witness the signing of the Will; no evidence has been presented indicating non-compliance with section 2(1) (i) to (iv). On the face of it, the August 2013 Will meets the requirements for validity. What remains for determination is whether the August 2013 Will was replaced by the November 2022 Will. This requires an inquiry into whether the latter document was validly executed in terms of section 2(1), or alternatively, whether it can be validated under section 2(3) as reflecting the deceased's testamentary intention notwithstanding any defects in form.

[21] It is noteworthy that the second respondent avers she was not made aware of the new Will. This assertion stands in contrast to the affidavit of Plaatjies, who indicated that the second respondent was present with the testatrix and the fourth respondent when she signed the Will. Yet, Plaatjies herself concedes that she never witnessed the testatrix signing the Will. Similarly, the second respondent seeks to rely on Stemmet's affidavit to establish that the testatrix signed the November 2022 Will. This evidence, while relied upon by the second respondent, does not unequivocally establish compliance with section 2 (1) (a) (ii). Stemmet does not state that he witnessed the testatrix signing the Will in his presence, but merely that her signature was already on the document when he signed. This omission is material, as the formal requirement is that the testator must sign in the presence of two witnesses present at the same time, and that those witnesses must attest and sign in the presence of the testator and of each other. The affidavit of Stemmet, therefore, does not cure the defects identified in the execution of the November 2022 Will. On the contrary, it reinforces the applicant's contention

that the Will was not executed in accordance with the formalities prescribed by the Act.

[22] The Court take cognisance that while Mr. Duckitt's affidavit purports to establish compliance with the formalities of section 2 (1) (a) (ii), it must be weighed against the contradictory evidence of Plaatjies and Stemmet, as well as the expert report of Snyman. The inconsistencies between these affidavits, coupled with the expert conclusion that the signature on the November 2022 Will cannot be attributed to the testatrix, cast serious doubt on the reliability of Mr. Duckitt's account. Mere assertion of compliance by a Commissioner of Oaths does not, in itself, cure defects in execution where the evidence demonstrates otherwise.

[23] Had the testatrix signed the Will in the presence of both witnesses, one would expect their affidavits to reflect this unambiguously. Instead, the affidavits are marked by inconsistency and silence on the crucial point of whether the testatrix signed in their presence. This ambiguity undermines the respondent's contention that the formalities of section 2 (1) (a) (ii) were satisfied. On the evidence before this court, it does not appear that all three parties; the testatrix and the two witnesses, signed the November 2022 Will in the presence of each other. The affidavits fail to establish compliance with section 2 (1) (i)–(iv). The validity of the November 2022 Will is therefore placed in serious doubt, and accordingly section 2(3) may not be invoked to cure these defects. On the totality of the evidence presented, this requirement has not been satisfied.

[24] There is a further dispute as to whether the signature appearing on the November 2022 Will is indeed that of the testatrix. The respondent contends that it is, while the applicant disputes its authenticity. This issue goes to the very heart of the validity of the document, for without proof that the testatrix signed the Will, the requirements of section 2(1)(i) cannot be said to have been met. This

factual dispute must be resolved in accordance with the well-established Plascon-Evans Rule, which requires that where disputes of fact arise on affidavit, the version of the second respondent must be accepted unless it is so far-fetched or untenable that it can be rejected on the papers.

[25] On the papers before court, the applicant has placed the authenticity of the signature in issue. The second respondent, however, maintains that the signature is valid. Expert evidence has been presented to assist this court to conclusively resolve the matter. Snyman who is a handwriting expert, ruled out any possibility that the signature on the November 2022 Will belonged to the testatrix. No evidence has been tendered by the second respondent to the contrary. In these circumstances, and applying the Plascon-Evans Rule, the second respondent's version cannot be accepted as it shows to be untenable.

[26] Considering that the November 2022 Will does not fully comply with the formalities for a valid Will, in that parties did not signed in the presence of each other, coupled with the forensic the evidence of Snyman excluding the signature to be that of the testatrix, in applying the Plascon-Evans rule, the Court finds that applicant has discharged the onus which he bears, therefore this court granted the relief. The Court was therefore satisfied that the applicant has discharged the burden of proof on a balance of probabilities.

### **ORDER**

[26] Order was granted as per Order "X" dated 28 April 2026.

  
YAKE S.  
ACTING JUDGE OF THE HIGH COURT

**APPEARANCES**

For the Applicant: Advocate Du Preez

Instructed by: Louw & Coetzee Attorneys

For the Respondent: In Person