



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)**

CASE NUMBER: 2172/2024
(1) **REPORTABLE: NO**
(2) **OF INTEREST TO OTHER JUDGES: NO**
(3) **REVISED YES/NO**
DATE 07/05/2026
SIGNATURE

In the application between:

HERMANUS JOHANNES DEMPERS KOTZEE

FIRST APPLICANT

NICHOLAAS CORNELIUS VAN HUYSSTEEN

SECOND APPLICANT

obo ARMAND KOTZEE

THIRD APPLICANT

obo SIMEON KOTZEE

FOURTH APPLICANT

obo SYBIL TOLMAY

FIFTH APPLICANT

obo EHRHARDT TOLMAY

SIXTH APPLICANT

obo ALWY TOLMAY

SEVENTH APPLICANT

and

J[...] D[...] B[...]

FIRST RESPONDENT

MARIA ELIZABETH CARBIS

SECOND RESPONDENT

MARGARETHA MARIA CARBIS

THIRD RESPONDENT

JUDGMENT

FOURIE AJ

INTRODUCTION:

- [1] The Applicants made an application to Court premised on Section 2(3) of the Wills Act, 7 of 1953, for a document which they believe to be the Last Will and Testament of the deceased to be declared as the valid and intended Last Will and Testament of the deceased after the said document was rejected by the Master of the High Court as being a compliant Last Will and Testament.

BACKGROUND FACTS:

- [2] The deceased, one Martha-Louise Basson, was a major female who, at the time of her passing, was 70 years old. The First Applicant, Mr Hermanus Kotzee, was, at the time of the deceased's passing, the life partner of the deceased, a fact that is not disputed, and it further seems undisputed that Mr Kotzee has been the deceased's life partner for a considerable period. The First Respondent, Mr J[...] D[...] B[...], was the erstwhile husband of the deceased, who was married to the deceased from 1973 until their divorce in 2001.

- [3] The deceased was the owner of several properties, among which were several farms, one of which was occupied by the First Respondent. The Respondent ordinarily resided in Secunda, some 30km from the farming activities, and it is common cause that the deceased commuted daily from Secunda to the farming activities. Mr Kotzee is also a farmer who conducts farming operations in Vrede. It is not seriously alleged that Mr Kotzee and the deceased were at all times residing together, although their relationship is similarly not seriously contested. The First Applicant, Kotzee, alleges that, after the passing of the deceased, he attended her residence in Secunda, where, with the help of a locksmith, he unlocked a safe, after which the document, which the Applicant's prayer is declared to be the Last Will and Testament of the deceased, was found. The document is dated 14 October 2023, seven days prior to the deceased's passing. It is necessary to state that the deceased died of natural causes after a long struggle with cancer.
- [4] For ease of reference, the 14 October 2023 document shall be referred to hereinafter as the "14 October Will", without pronouncing on the validity of such document.
- [5] The Applicant further states that, after the document was handed to the Master of the High Court, an endeavour he took upon himself as he was in the document nominated as the Executor of the estate of the deceased, the document was rejected by the Master of the High Court as being a valid Last Will and Testament.
- [6] Although the rejection notice from the Master of the High Court was not supplied by the parties, it is common cause that the document is non-compliant with the Wills Act, 7 of 1953, in that the document was not signed in the presence of any witnesses, nor was the document countersigned at all by any witnesses. It is further common cause that the document was not signed by the deceased with a pen on paper, but rather bears an electronic signature. The document was rightfully rejected by the Master of the High

Court because it is non-compliant with the requirements for a valid Last Will and Testament.

- [7] After being informed that the document was not compliant, the Applicant alleges that he returned to the deceased's premises, where he found two further documents in the bedside drawer of the deceased, which he believed to be necessary to advance the claim presented to the Court. Firstly, a handwritten document dated 9 March 2020, written under the hand of the deceased, purporting to be her Last Will and Testament at the time, was advanced. This document was purportedly signed by the deceased by writing her full name at the end of the document, although it was not signed by her with a signature and was signed only by one unknown witness.
- [8] I pause to mention that, initially, the Applicants had an alternative prayer that, should the Court not find the document of 14 October 2023 to be a valid Last Will and Testament under the auspices of Section 2(3) of the Wills Act, *supra*, then this document dated 9 March 2020, ought to be accepted as the Last Will and Testament of the deceased. At the hearing of the matter, however, this prayer in the Notice of Motion was not persisted with, and as such, I do not intend to pronounce on the validity of this document. The First Applicant also advanced a typed document resembling the logo of a Company named Shetland, an incomplete, unsigned two-page document similarly undated.
- [9] It is evident that this document was not drawn by the deceased, a fact confirmed by correspondence with the Fourth Respondent, who appears to be the broker and/or financial advisor of the deceased. The Fourth Respondent confirmed that he was not in possession of a signed Last Will and Testament of the deceased and expressly stated to the First Applicant's attorney that the parties never got round to finalising the Last Will and Testament of the deceased.

- [10] No facts were presented to indicate that the 14 October 2023 Will was drawn by the Fourth Respondent, or that the Applicant gave any instructions to any party to draw the Will on her behalf.
- [11] No evidence was presented on who the ultimate drafter of the 14 October 2023 Will was, and although the Applicants, in their Heads of Argument, seek the Court to find that the Will was drafted on behalf of the deceased, it seemed rather during argument that it was conceded that the Court needs to make an inference that the document was ultimately drafted by the deceased. This is largely because no evidence was presented that any instructions were given to draft the document on behalf of the deceased.
- [12] Although it was not contested that the signature on the 14 October 2023 Will resembled the deceased's signature, no evidence was presented as to how, where, or by which mechanism the electronic signature was generated and appended to the document.
- [13] No evidence was presented indicating that the deceased, a 70-year-old lady, had ever previously utilised electronic signatures, or in what way. The inference the Applicant wishes the Court to draw is that, because the document exists, and was found by the First Applicant at the deceased's premises, the document could only have been drafted by the deceased and signed by her.
- [14] The First Respondent, in opposing the application, alleges that the 14 October 2023 Last Will and Testament is not valid, and it is presented through some fraudulent actions by the First Applicant. No particularity to these averments has been made by the First Respondent in order for the Court to seriously consider the allegations of fraud.
- [15] It is noteworthy, however, to point out that the First Applicant provided no confirmatory affidavit by the locksmith who allegedly attended the deceased's premises with the First Applicant, who, at the very least, could

verify the attendance at the deceased's premises and the safe, and the fact that the document was under those circumstances, removed from the deceased's safe.

- [16] Both the founding and answering papers are silent on the issue of witnessing the 14 October 2023 Last Will and Testament. Much attention was paid to the fact that the document was electronically signed, but no real consideration was given to why it was not signed by witnesses.
- [17] At the very least, the handwritten Will of the deceased of 9 March 2020 was signed by one unidentified witness, and the unsigned Will drafted by the deceased's broker made provision for the signing thereof by several witnesses. Accordingly, it cannot be accepted that the deceased was unaware of the requirement that her Last Will and Testament be signed by a witness.
- [18] The only evidence pertaining to the movements of the deceased in the period preceding her death, having regard to the fact that the 14 October 2023 Will was signed seven days prior to her passing, is that, on 16 October 2023, and between the time that the 14 October 2023 Will was signed, allegedly, and the passing of the deceased, the deceased together with the First Applicant, collected a friend, Joan Austin, from the airport who visited the deceased.
- [19] At the very least, it is also not seriously contested that the wife of the First Respondent also frequently visited the deceased during the period in question. As stated, no evidence was presented to explain why it would have been impossible for the deceased to have any witness acknowledge that she had signed her Last Will and Testament on 14 October 2023.
- [20] Having regard to the three documents referenced as possible last wills and testaments of the deceased, it is specifically the unsigned Last Will and Testament received from the deceased's broker and the 14 October 2023

Last Will and Testament that is to be compared, as, at the very least, some sort of confirmation was received that the unsigned Will was drafted on the instructions of the deceased.

[21] The most glaring differences between the respective documents are summarised hereinafter:

[18.1] The undrafted will reflect the drafting company's logo, whereas the 14 October 2023 will does not.

[18.2] The unsigned will mentions several “erfgename” indicating plural, where the signed will, as a heading, indicates a singular “ergenaam.

[18.3] The unsigned document expressly provides a place on each page for the witnesses to sign, whereas the signed 14 October 2023 Will is the first document not to make any provision for witnesses to sign.

[18.4] The unsigned will incorporates a request for the deceased to be buried, whereas the signed 14 October 2023 Will incorporates a request for the deceased to be cremated.

[18.5] The unsigned document seeks to appoint the Fourth Respondent as the Executor in the deceased's estate, whereas the signed 14 October 2023 Will appoints the First Applicant as the Executor.

[18.6] The unsigned document nominates two independent persons to act as independent Trustees in a Trust to be established, whereas the signed 14 October 2023 Will reflects only one independent Trustee, specifically so nominated.

[18.7] The unsigned document bequeaths a property to a friend of the deceased and the remainder of her estate to a Trust established in favour of Afrikaans-speaking students and their studies, whereas the 14 October 2023 Will provides that the deceased's friend may purchase the property, and the Trust is nominated to have several beneficiaries, which beneficiaries are seemingly the remaining Applicants and Respondents in the application. The beneficiaries appear to be the children and grandchildren of the deceased, as well as the grandchildren of the First Applicant.

[22] The Applicants allege that the Second and Third Respondents support the application. This is not the case as the Second and Third Respondents merely filed notices to abide. A Notice to Abide cannot be equated to a supporting affidavit. If the Court were to believe that these Respondents support the application, affidavits or even letters to that effect would have been presented in the Court record. The Notices to Abide simply indicate that the Second and Third Respondents do not take issue with the ultimate decision by the Court. This is as true for the granting of the application as for its dismissal. By filing a Notice to Abide, a party clearly takes the position that they accept any outcome the Court ultimately reaches.

THE ISSUES TO BE DECIDED:

[23] It is common cause between the parties that the 14 October 2023 Last Will and Testament is non-compliant and, in the absence of the Court granting the application in respect of Section 2(3) of the Wills Act, *supra*, the document will not be accepted as such.

[24] The Court accordingly needs to evaluate whether the 14 October 2023 Last Will and Testament has been proven to be a document drafted or executed by the deceased and intended as her Last Will.

- [25] If the Court is satisfied on the aforesaid, an Order in line with Section 2(3) of the Wills Act, needs to be made.
- [26] The Court must be satisfied on a balance of probabilities that the deceased intended the document to be her Will.**[1]**
- [27] The purpose of Section 2(3) of the Wills Act is to validate a document that would otherwise not pass muster as a Will due to a technical flaw in its attestation..... to avoid thwarting the lawful wishes of the deceased would-be testator.**[2]**
- [28] The Courts have continually found, and I align myself therewith, that a Court in dealing with an application such as the current one ought to be satisfied that the document in question was intended by the Testator to be her Will. A document that is not yet complete, a working document or general instructions to a person to draft a Will on behalf of another party is generally not accepted as an intention by a party for such to be their Will.**[3]**
- [29] Although certain elements of the investigation into a Section 2(3) of the Wills Act application might draw some leniency from the Court evaluating the question, the crucial question of the true intention of the deceased or Testator has consistently attracted a strict approach to interpretation. A strict application of what the true intention of the Testator was and whether the document was intended to be a Last Will and Testament remains, in my view, necessary.
- [30] If it is not expressly and blatantly clear that the document was indeed the intended Last Will of the deceased, the Court would, in essence, be speculating on the true nature of the document. Section 2(3) of the Wills Act was clearly incorporated to cater for circumstances where an injustice would be done to the last wishes of a deceased, where it is abundantly clear that a document with some technical issues should be accepted, as, on a balance of probabilities, this document is indeed the Last Will and Testament of a

Testator. Orders validating invalid Last Wills and Testaments under the auspices of Section 2(3) of the Wills Act should be reserved for circumstances where the intentions of a Testator are clear, not for circumstances where the intentions are unclear, and the parties or the Court are left to speculate or wonder on the true nature of a document or a party's intentions.

[31] **Bekker v Naude [4]** is perhaps one of the most-quoted matters concerning Section 2(3) of the Wills Act applications. The principle in **Bekker** is simply that the Court needs to be satisfied that the deceased drafted or executed the relevant document.

[32] In order to establish whether a person drafted or executed a document, the same should be derived from the supporting facts presented, and from which it ought to be clear that the document was indeed drafted or executed by the deceased.

[33] It was argued by the First Respondent that, because the document was signed electronically, it would automatically and under all circumstances be excluded from being declared as a valid Last Will and Testament because the Electronic Communications and Transition Act[5] precludes it as such.

[34] Even if it could be stated that the ECDA finds application to the matter, I align myself with the views of Lever J, in the matter of Mokgoro[6], specifically insofar as it deals with the fact that Section 2(3) of the Wills Act expressly provides that a Will is to be signed by placing ink on paper. If a document is signed by means of an electronic signature, but a party is nonetheless able to convince the Court that the signature as appended by the deceased, and that the deceased intended that document to be their Last Will and Testament, I see no reason why an electronic signature would not be condoned by a Court if the facts of a matter justify the same. In saying that, I believe that the rationale for the signing of a Last Will and Testament in the presence of two witnesses is obvious as the signing of a

Last Will and Testament by a person under their own hand in the presence of two witnesses alleviates the need to prove that it was indeed the deceased who signed the document and it indicates that there were at least two individuals that could attest to that fact. The Court is mindful, however that we are living in an evolving world, specifically on a technological front, and I believe that, if a party is able to establish that the document was indeed intended to be the last will and testament of a deceased, which is to be evaluated on a rigid approach, then the remaining aspects such as strict compliance with the formal manner in which a document is signed or confirmed by witnesses, should be evaluated with a much more lenient view. The aforesaid aligns with the General Legal Principles of favouring substance over form.

- [35] The aforesaid is not stated in order for parties to take a relaxed approach to drawing and signing of Wills, as the document ultimately remains one of the most important documents a party will sign in their lives. The statement is made to cater for individuals who, due to deserving circumstances, were necessitated to draw less than perfect documents or to convey their last wishes in some or other fashion that is generally not accepted but which a Court can accept to be their last wishes. The facts of each individual matter will speak for themselves to indicate whether the Court could and should give effect to what is ultimately presented as their Last Will and Testament.

EVALUATION OF THE FACTS:

- [36] It is conceded that there are no facts before the Court indicating who the author of the 14 October 2023 Will and Testament was.
- [37] Similarly, no facts were presented to indicate and prove that it was indeed the deceased who appended the electronic signature to the 14 October 2023 Will and Testament. This Court would have had little difficulty in accepting the

14 October 2023 Will and Testament as the last will and testament of the deceased, if the deceased, in the presence of at least one person, if not two as required by the Act, appended an electronic signature to the document indicating it to be her Last Will and Testament.

[38] Unfortunately for the Applicants, this is not the case in the current matter. The Court is left to speculate as to how the document in question came into existence and how it was ultimately signed. The high-water mark for the Applicants is that, because the document was found by the First Applicant at the ordinary residence of the deceased, the Court needs to infer that it was drawn and executed by the deceased. No confirming or corroborating facts to support this notion other than the inference the Applicants wishes the Court to draw have been presented.

[39] The document, ultimately presented as the purported Last Will and Testament of the deceased, is markedly different from the one on which an engagement was made with the deceased's broker. At the very least, the Court is instructed that, insofar as it relates to the involvement of the broker, the deceased had not yet finalised her last will and testament, and no final and intentional Last Will and Testament existed.

[40] No explanation is given as to whether the deceased had previously utilised electronic signatures.

[41] No evidence was presented as to why the deceased, who seemingly knew of the requirements in respect of the signing of the will in the presence of witnesses, would not attend to the signing of the will in the presence of witnesses or, at the very least, inform anyone of the existence of a newly signed will.

[42] The terms of the 14 October 2023 Will and Testament were never previously discussed with any person who can corroborate the same to be the last

wishes of the deceased, and the Court would do nothing less than speculate on who the author was in respect of the document or who ultimately appended an electronic signature thereon.

[43] The Applicants in essence seek the Court to be convinced that a document that no other person knew existed was found by the person who is, for the first time in the new document, nominated as the executor in the estate of the deceased, and from which several of his family members derive benefits which have never featured in previous Last Will and Testaments, which document was not signed under the hand of the deceased and without any sort of confirmatory proof indicating that it was indeed the deceased who appended her signature electronically to the document.

[44] The Court is in no way pronouncing on any fraudulent actions of the First Applicant. No such fraudulent actions have been seriously alleged nor found by this Court. The aforesaid sentiment was made purely to indicate the dangers that a ruling in favour of the Applicants would pose to future matters, and the manner in which the proverbial floodgates would open for other parties to conduct themselves fraudulently to benefit from the estates of deceased persons. A ruling in favour of the Applicants would, in essence, mean the Court would allow any person, without any substantiating proof as to how a document came into existence, to present such a document with an electronic signature without needing to prove that it was the deceased who appended the electronic signature while alleging that document to be the last will and testament of a deceased. This would be an unthinkable proposition.

[45] Even if the Court were to accept the uncorroborated statement that the 14 October 2023 Will and Testament was found in the safe of the deceased at her residence; the location of a document cannot, on its own, prove its validity or the intention of the person at whose premises it was found.

[46] The Applicants have simply failed to adduce any sort of evidence to prove the 14 October 2023 Will and Testament to be the intended last will and

testament of the deceased. Absent the Applicants convincing the Court on this principle, the Applicants simply cannot succeed. The fact that the formal requirements for the execution of the will were, in nearly all circumstances, not complied with, and no explanation for such non-compliance has been forthcoming, similarly does not aid the Applicants in the relief they seek.

[47] When a Court is confronted with an application under Section 2(3) of the Wills Act, a Court is to be convinced on the facts that an injustice would otherwise unfold if the Court does not overlook the technical deficiencies in the document.

[48] Applications of this nature are not designed to embark upon endeavours of speculation and unsubstantiated inferences. The Applicants have simply not advanced facts to substantiate the relief they are seeking.

COSTS:

[49] Although costs remain a discretionary mechanism available to a Court in order to ensure that ultimate justice is done when a Judgment is delivered, it is generally accepted that the unsuccessful party to litigation should be ordered to pay the costs of the successful party to the litigation. Unfortunately, both the Applicants and the First Respondent, rather than presenting facts dealing with the express requirements of an application of this nature, embarked upon an historical set out of the deceased's life. The true questions pertaining to her last will and testament remain unanswered.

[50] Under circumstances where the Applicants ought to have known that they simply did not present to the Court sufficient facts to succeed with the application, cannot be overlooked by the Court, although the matter deals with parties that are at least to some degree, extended family, and dealing with an estate of a deceased, I find no reason why a Court Order deviating from the normal principles should not be made.

ORDER:

[51] For all the aforesaid reasons, the following Order is made:

[47.1] The Applicant's application is dismissed.

[47.2] The Applicants shall, jointly and severally, the one paying the other to be absolved, pay the costs of the First Respondent on a party and party scale.

H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MIDDELBURG

Counsel for the Applicants:
Instructed by:

Adv RA Britz
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Judgment reserved on:
Date of delivery:

5 May 2026
7 May 2026

- [1]** Grobler v Master of the High Court and Others [2019] ZASCA 119 (23 September 2019) at para 17
- [2]** Grobler *supra* at paragraph 30
- [3]** See Letsekga v The Master and Others 1995 (4) SA 731 (W) at 735 C-G
See also Anderson & Wagener NNO and Another v The Master and Others 1996 (3) SA 779 (C) [1996] 1 All SA 637 at 784G - 785H
- [4]** Bekker v Naude 2003 (5) SA 173 (SCA)
- [5]** Electronic Communications and Transition Act 25 of 2002
- [6]** Mokgoro and Others v Master of the High Court, Kimberly and Others (09-25) [2025] ZANCHC 60 (1 August 2005)