REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 37220/2018

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

3 MAY 2019
DATE SIGNATURE

In the matter between:

FATIMA OSMAN	1st Applicant
AZIZA BABA	2nd Applicant
AMINA PETKAR	3rd Applicant
A B AISHA NOORDIN	4th Applicant
ZUBEDA ESSACK	5th Applicant
ABIDA BABA	6th Applicant
KHADIJA AMIN	7th Applicant
YUSUF NOORDIN	8th Applicant

and

TASNEEM NANA N.O. 1st Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG 2nd Respondent

JUDGMENT

MATOJANE J

Introduction

[1] Dr Sheik Abdulla Nana passed away on 17 April 2018. Following his death, no signed will could be found. The first respondent, who is one of the children of the deceased, was appointed as the executrix of his estate on 27 June 2018. The first to sixth applicants are the sisters of the deceased, and the eighth applicant is the son of the fourth applicant and nephew of the deceased.

[2] On 1 August 2018, the eighth applicant searched the former home of the deceased and discovered an unsigned handwritten document entitled 'NOTES on WILL' dated 14 August 1990. The applicants contend that this document, despite not conforming to the requirements of section 2(1) of the Wills Act 7 of 1953 (the 'Wills Act'), is the last will of the deceased.

[3] The eighth applicant also discovered another unsigned typed document headed 'WILL'. The typed document is not dated. However, the attestation clause, which makes provision for the insertion of a date, contains the year, being 1990. This was the year in which the document was drafted. The document appears to have been drafted by the Estate Division of the First National Bank. The Bank indicated that it was unable to ascertain whether the typed 'WILL' was executed, and it requested the first respondent to provide it with a copy of the will to ascertain whether the will was drafted by FNB. The original typed document is nowhere to be found.

[4] By this application, the applicants seek an order in terms of s 2(3) of the Wills Act, in terms of which this Court orders the Master to accept the 'NOTES on WILL' document as being the last will of the deceased.

Points *in limine*

[5] The first respondent has raised two points *in limine*, which she argues should result in the dismissal of the matter. Firstly, she contends that there has been a non-joinder of her siblings, the children of the deceased (Najmoonisha Noorgat and Farida Baba). Secondly, she contends that there is a dispute of fact, foreseeable to the applicants at the time of launching the application.

[6] About the alleged non-joinder of the siblings of the first respondent, their interest in the matter is not substantial. They only have an indirect interest in the outcome of this application and their joinder is not required. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.[1] In any event, the siblings were invited by the applicant in a letter dated 7 November 2018 to join the proceedings. These letters, together with a copy of the court application, was served on them by the Sheriff on 28 and 29 November 2018. Neither of the siblings elected to take up the invitation. The point *in limine* falls to be dismissed.

[7] On the alleged dispute of fact, this application involves the determination of the question of law whether the disputed document complies with the formalities in terms of the Wills Act. The fact that the first respondent disputes that the document was written by the deceased is not a material dispute of fact that cannot be decided based on the papers before the Court. This point *in limine* also falls to be dismissed.

The Merits

Legislative Provisions

[8] The formalities required for the execution of a will are set out in s 2(1) of the Wills Act which reads 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—

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[1] See *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA).

(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; ...'

[9] Section 2(3) of the same Act is a dispensing provision that allows the court to validate wills that do not comply with the formal requirements. The subsection reads as follows:

'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).'

[10] In *Van der Merwe v Master of the High Court & another*[2] Navsa JA discusses the provisions of s 2(3) and provided the following explanation for the legislation:

'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. It has rightly and repeatedly been said that once a court is satisfied that the document concerned meets the requirements of the subsection a court has no discretion whether or not to grant an order as envisaged therein. In other words, the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.'[3]

[11] The basic question before the Court is therefore whether the document 'NOTES on WILL' complies with the requirements contained in section 2(3): namely, (a) there

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[2] 2010 (6) SA 544 (SCA).
[3] Ibid para 14.

must be a document; (b) 'drafted' or 'executed' by the deceased; (c) with the intention that it be the will or an amendment of the will of the deceased.

[12] The controversial issue as to whether an unsigned document drafted by someone other than the deceased, such as bank official or an attorney, could be accepted as a will in terms of section 2(3) was finally decided by the Supreme Court of Appeal in *Bekker v Naude en Andere*.[4] In that case, the appellant and the deceased had requested a bank to draft a joint will for them. They had explained to the bank official what they wanted, and the official made notes thereof.

[13] The official sent the notes to the bank's head office where other officials used the bank's standard clauses to draft a draft will. The deceased died before signing the draft will. The appellant instituted an action for an order in terms of s 2(3) of the Wills Act, asking the court to accept that the draft will contained the last will of the deceased and to order the Master to accept it as his last will. The action was dismissed.

[14] The SCA held that the question was whether the draft will was 'drafted' by the appellant and the deceased. The court stated that '[d]rafted' when compared with 'caused to be drafted' could only have the strict meaning of a personal act. The court found that while using the deceased instructions, the bank had also used their wording and standard clauses. It could therefore not be said that the draft will was 'drafted' by the deceased, in contrast with 'caused to be drafted'.

[15] In the present matter, the typed will appears to have been drawn in accordance with the handwritten disputed will titled 'NOTES on WILL', right down to the numbering employed in both documents. Certain clauses relating to the creation of a trust have been added by the Bank, which has used its standard clauses and wording. Following the SCA's decision in *Bekker v Naude*, the typed will is not drafted by the deceased. The applicants are wisely not relying on the typed will, but rather on the contested will drafted in the handwriting of the deceased.

[16] In the answering affidavit, the first respondent denies that the contested will is the deceased's will, and that the deceased wrote it in his handwriting as his last will. Annexed to the applicants' supplementary affidavit is an affidavit by the deceased's

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[4] 2003 (5) SA 173 (SCA).

grandson, Ismail Mohamed. This grandson states that he performed various management and accounting duties for the deceased, and during that time he saw a lot of his handwritten notes the deceased made to him to write up accounts. He confirms that the handwriting on the document 'NOTES on WILL' appears to be the handwriting of the deceased, based on the notes the deceased used to write to him in the past.

[17] The evidence shows that the document was drafted by Dr Nana before his death. Therefore, the requirements (a) and (b) of section 2(3) of the Wills Act have been satisfied. The decisive and more difficult question is whether, at the moment when Dr Nana drafted the document, 29 years before his death, he had the intention that the document itself should constitute his last will.

[18] It was submitted on behalf of the applicants that the intention of the deceased was that his estate should be divided equally amongst his seven sisters and three daughters, because the documents headed 'NOTES on WILL', 'WILL' and the insurance policy documents reflect the same division of his estate.

[19] It was further submitted that the intention of the deceased (in all three of these documents) was to bequeath the net proceeds of his estate, in equal portions to each of his ten family and relatives, save for specific bequests to the Bosmont Mosque, the Al Aqsa Institute, and the Transvaal Kokney Muslim Society. The applicants contends that it was not the deceased's intention for the net proceeds of his estate to devolve only upon his daughters – as will be the case if his estate was administered in accordance with the provisions of s 1(1)(b) read with s 1(4)(f) of the Intestate Succession Act, 81 of 1987.[5] Nor was it his intention to exclude the said specific bequests.

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[5] The relevant provisions of the Intestate Succession Act read as follows:
'1. Intestate succession.—
(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and—
(a) ...;
(b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
...
(4) In the application of this section—
...
(f) a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived him or have died before him but are survived by their descendants, plus one. ...'

Analysis

[20] To answer the question of whether the deceased had the intention that the document should itself constitute his final will, the Court must consider the document itself, and the surrounding circumstances under which the document was written. Regarding the document itself, it was written 29 years before the deceased's death. No specific mention of the original will or any other document is made. The heading 'NOTES on WILL', indicates that the document does not reflect the deceased's fixed and final testamentary intentions. It merely records instructions or directions for the future drafting of his will; this document was accordingly not intended to be his last will.

[21] There is no evidence that the deceased would not have made any additional changes to the document. It was a draft with work still to be done on it. It is possible that the deceased may have lost interest in the document as 29 years passed since he wrote it. Had the deceased attended a meeting to execute the will and failed, that would have given a basis for a different conclusion. The evidence of his grandson suggested that the deceased was a meticulous person who used to write notes to him to write up accounts. Being a medical doctor, the deceased would have attached significance to officially signing his will.

[22] Even if I accept that the document reflected the deceased's intentions and that he intended to sign the will to be prepared on that basis, the requirement (c) is not satisfied as it cannot be said that, due to a mistake or inadvertence, the deceased omitted to sign the document. Requirement (c) requires that the person's intention when drafting the document, must have been that the document would be his will. It is apparent from the document that the deceased's intention was to give effect to a document to be prepared as his will not to the notes on the will.

[23] The crucial question to be answered is whether the document expresses the *animus testanti* of the deceased. There must be a fixed and final expression of the intention as to the disposal of the testator's property on death. In *Ex parte Maurice*,[6] the deceased, who had retired, prepared a draft joint will for himself and his wife. He

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[6] 1995 (2) SA 713 (C).

sent the draft will to a friend, who was his successor as a secretary of a building society, with a cover letter which stated:

"Dear Basil

Some while ago, you may recall, I spoke to you about the attached matter, I am sure that you are still willing to do me the favour.
Read it through and get my drift and my feeling. If there are any comments do feel free.
Knock it into shape, if necessary, then ask Mr G L Swanepoel (still at A & G?) to do me the special favour of finalising it in legal jargon, for my approval etc...."

[24] The court refused to order the Master to accept the document as a will in terms of s 2(3) of the Wills Act. It was clear to the court that the deceased had not intended the document to be his will. The document was only intended to convey information about what the testator wished to have included in his will. The court found that from the terms of the letter, the deceased did not intend the hand-written document to be his will.

[25] In *Van der Merwe v Master of the High Court,* the court ordered the Master to accept the document as a will in terms of s 2(3). The appellant and the deceased were very close friends.[7] The friendship was such that in 2007 they decided that each of them would execute a will in terms of which the other would be his sole beneficiary. The deceased sent the appellant an email setting out in detail the terms of such a will, with the deceased being indicated as a testator and the appellant as a sole beneficiary. The appellant in return formally executed a will in similar terms with the deceased as a sole beneficiary.

[26] The court found the following objective factors as being consonant with the intention that the appellant should be the sole beneficiary in respect of the remainder of his estate. The document was boldly entitled 'TESTAMENT' in large type print which indicated that the deceased intended the document to be his will. The deceased nominated the appellant as the sole beneficiary of his pension fund. The deceased had no immediate family and the appellant was a long-time friend and confidante. The

[7] *Van der Merwe* (note 2 above).

fact that his previous will nominated the second respondent as his sole heir indicated that he had no intention of benefiting remote family members.

[27] The appellant's version of the mutual agreement to benefit each other exclusively by way of testamentary disposition was uncontested by the second respondent, the sole beneficiary of the prior will, and was supported by the fact that after the deceased had sent the document to the appellant, the latter executed a will nominating the deceased as his sole beneficiary. All of these factors lead the court to conclude that the document was intended by the deceased to be his will.

[28] It must be kept in mind that the purpose of subsection 2(3) is to overcome non-compliance with formal requirements. It does not empower the court to make a will out of a document which was never intended by the deceased to be his last will. In the instant case, the document does not manifest a final testamentary intention of the deceased and therefore does not meet the threshold requirement of the section.

Conclusion

[29] I am not satisfied on the evidence before me that the unsigned documents with the heading 'NOTES on WILL' embodies the testamentary intentions of the late Dr Nana.

[30] In the result to following order is made:

1. The application is dismissed.
2. The costs of this application to be paid out the estate of the deceased.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	24 April 2019
Date of judgment:	3 May 2019

Appearances:

Counsel for the Applicant:	Anthony Bishop
Instructing Attorneys:	Richards Attorneys
Counsel for the First Respondent:	Emmanuel Sithole
Instructing Attorneys:	Saleem Ebrahim Attorneys Inc.