HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED: Yes

28 April 2021 Judge P.A. Meyer

Case NO: A5046/2019

In the matter between:

FATIMA OSMAN	First Appellant
AZIZA BABA	Second Appellant
AMINA PETKER	Third Appellant
AB ASIHA NOORDIN	Fourth Appellant
ZUBEDA ESSACK	Fifth Appellant
ABIDA BABA	Sixth Appellant
KHADIJA AMIN	Seventh Appellant

and

TASNEEM NANA N.O.	First Respondent
MASTER OF THE HIGH COURT, JOHANNESBURG	Second Respondent

***Case Summary*: Will – Acceptance of document as will in terms of s 2(3) of the Wills Act 7 of 1953 - Whether handwritten document intended to be the deceased's last will.**

JUDGMENT

MEYER J (WINDELL and TWALA JJ concurring)

[1] This appeal, with leave of the court *a quo*, is against the whole judgment and order of the Gauteng Division of the High Court, Johannesburg (Matojane J), delivered on 3 May 2019. The central issue in this appeal is whether a handwritten document was

intended by the late Dr Sheik Abdulla Nana (the deceased) to be his final will within the meaning of s 2(3) of the Wills Act 7 of 1953 (the Wills Act). The section 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 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred in subsection (1).

[2] The deceased died on 17 April 2018. The first appellant, Ms Fatima Osman, the second appellant, Ms Aziza Baba, the third appellant, Ms Amina Petker, the fourth appellant, Ms AB Asiha Noordin, the fifth appellant, Ms Zubeda Essack, and the sixth appellant, Ms Abida Baba, are sisters of the deceased. The seventh appellant, Mr Rafiq Amin, represents his deceased mother, Ms Khadija Amin, who was also a sister of the deceased. (I refer to the first to seventh appellants as the sisters of the deceased.) The eighth appellant, Mr Yusuf Noordin, is the son of the fourth appellant, who was appointed by the sisters of the deceased as their representative. The first respondent, Ms Tasneem Nana, is a daughter of the deceased. She is also the duly appointed executrix of the deceased's estate. The second respondent is the Master of the High Court, Johannesburg (the master).

[3] During his lifetime the deceased practiced as a medical doctor. He has three daughters; the first respondent, Ms Najmoonisha Noorgat and Ms Farida Baba. According to the first respondent, a thorough and diligent search for a will of the deceased was conducted after he had died by her and other members of his family, including at all his properties and where he used to practice as a medical doctor, but none could be found. If the deceased had died intestate, his three children will be his heirs and the beneficiaries of his estate. On 27 June 2018, the first respondent was duly appointed by the master as the executrix of her late father's estate.

[4] According to the eighth appellant, on 1 August 2018 he searched the former home of the deceased and discovered an unsigned handwritten document entitled 'NOTES on WILL' dated 14 August 1990. The document, according to him and the sisters of the

deceased, was drafted by the deceased and intended to be his will (the handwritten document). In terms of the handwritten document the sisters of the deceased would also benefit from his estate and be his heirs. The master declined to accept the handwritten document as a will.

[5] Hence the application to the court *a quo* in which the sisters of the deceased sought an order *inter alia* that the handwritten document found by the eighth respondent be declared to be the will of the deceased in terms of s 2(3) of the Wills Act, authorising and instructing the master to accept the handwritten document in terms of s 2(3) as the last valid will of the deceased and to appoint the first applicant (presently the first appellant) as the executrix of the deceased's estate in accordance with the terms of the handwritten document. The application was opposed by the first respondent in her official and personal capacities. The sisters of the deceased contended that the handwritten document, although not complying with the formalities for the execution of a valid will, is nevertheless the last will of the deceased and should be declared and accepted as such, since the requirements of s 2(3) have been met.

[6] On 3 May 2019, the court *a quo* dismissed the application and ordered that the costs of the application be paid out of the deceased's estate. In dismissing the application, the court *a quo* concluded thus:

'It must be kept in mind that the purpose of subsection 2(3) is to overcome non-compliance with the 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.'

[7] The eighth appellant's evidence is that '[s]hortly after the death of the deceased, the family members discussed the death of the deceased and the fact that no will could be located at the time'. In the next paragraph of the founding affidavit he states this:

'One of my aunts, Zubeida (Juby) advised me during a quick search of the personal documents of the deceased, she noticed a document which may resemble a Will.'

The eighth appellant does not say whether he was so told by his aunt at the meeting that was held shortly after the death of the deceased referred to in the previous paragraph of

the founding affidavit or at some other occasion, nor does he state whether the document referred to by his aunt happened to be one of the documents he had found on 1 August 2018 in the house where the deceased had resided prior to his death. The general paucity of facts proffered in the founding affidavit is evident.

[8] A day before the handwritten document was found, the eighth appellant addressed an email to the first respondent's attorney on 31 July 2018, stating:

'Do note that due to certain circumstances certain members of Dr. Nana's family have not been formally consulted with regards to the Estate. Do note that the attorneys representing these members will institute a claim within a short period of time.'

On 2 August 2018, the eighth appellant addressed another email to the first respondent's attorney, stating that the 'LAST WILL' of the deceased had been found. On the same day the first respondent's attorney addressed an email to the eighth appellant, seeking pertinent details pertaining to the circumstances in which the alleged 'LAST Will' was located. It does not appear from the record that the eighth appellant furnished the first respondent's attorney with any information pertaining to such circumstances. In the replying affidavit of the sisters of the deceased, the eighth appellant states this:

'The circumstances under which the Will was found is not relevant and have I (*sic*) already made the necessary submissions in the Founding papers, as to when, where and by whom the Will was found. I need not repeat myself in the circumstances.'

[9] According to the evidence of the eighth appellant, on 1 August 2018 he not only found the handwritten document in the house where the deceased resided prior to his death, but also another unsigned typed document entitled 'WILL' (the typed document). It is not dated, but the attestation clause, which makes provision for the insertion of a date, contains the year '1990'. Each page of the typed document is marked 'COPY ONLY'. According to the eighth appellant the typed document was drafted by the Estate Division of First National Bank. Upon enquiries made by the first respondent's attorney to the Estate Division of First National Bank, she was advised in writing that a will of the deceased could not be located on the bank's systems. The sisters of the deceased do not suggest that the typed document is the last will of the deceased. A comparison between the typed document and the written document reveal significant differences

between the two, which requires no elaboration. The case of the sisters of the deceased is that the handwritten document is his last will.

[10] It is common cause that the handwritten document does not comply with the formalities prescribed by s 2(1) and (2) of the Wills Act in relation to the execution of a will. In *Van der Merwe v Master of the High Court & another* 2010 (6) SA 544 (SCA), Navsa JA said this:

'[13] It is clear that the formalities prescribed by s 2(1) and s 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. [14] By enacting s 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities 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.'

[11] I accept, as did the court *a quo*, that it has been established that the handwritten document was drafted by the deceased and that it was done 29 years prior to his death. Two of the three jurisdictional requirements of s 2(3) have thus been met. The only issue is whether the handwritten document was intended by the deceased to be his will. In other words, whether the third jurisdictional requirement of s 2(3) has also been met.

[12] In *Letsekga v The Master & others* 1995 (4) SA 731 (W) at 735F-G, Navsa J (as he then was) said the following:

'The wording of s 2(3) of the Act is clear: the document, whether it purports to be a will or an amendment of a will, must have been intended to be the will or the amendment, as the case may be, ie the testator must have intended the particular document to constitute his final instruction with regard to the disposal of his estate.'

That intention must have existed concurrently with the execution or drafting of the document: *De Reszke v Maras and others* 2006 (2) SA 277 (SCA) para 11.

[13] In *Van Wetten and another v Bosch and others* 2004 (1) SA 348 (SCA) para 1, Lewis JA said this:

'The central issue in this appeal is whether Tertius Bosch, who died on 14 February 2000, intended a document that he had written in September 1997 to be his final will or merely instructions to an attorney to draft a will. If the former, then in terms of s 2(3) of the Wills Act 7 of 1953 the Master of the High Court must be ordered to accept the document as a will.'
(Footnote omitted.)

[14] By way of further elaboration I also refer to *Ex parte Maurice* 1995 (2) SA 713 (C) and to *Anderson and Wagener NNO and Another v The Master and Others* 1996 (3) SA 779 (CPD). In *Maurice* at 716E-F, Selikowitz J, in dealing with s 2(3), said the following:
'In my view, s 2(3) requires that the document in question must have been intended by the testator to be his/her will. A document which was intended to convey information about what a testator wishes to have included or has already included in his/her will does not suffice. Written instructions to an attorney or other adviser so as to enable the recipient to draft the testator's will are not intended by such testator to constitute his/her will albeit that they record the author's intended testamentary dispositions...'

[15] And in *Anderson* at 784-785H, Thring J said this:
'To me the words of s 2(3) of the Act are clear. The provisions of the subsection apply only to certain documents. To come within the ambit of the subsection the document concerned, be it a will or an amendment of a will, must have been drafted or executed by the person concerned with a certain intention. That intention must have been that the document should itself constitute his will or an amendment of his will, as the case may be. An instruction by a testator to his attorney or other adviser to draft or prepare a will or an amendment of a will along certain lines or in certain terms, no matter how precisely defined, is not written with the intention required by the subsection, and consequently cannot be brought within its terms. The difference between a document which is intended by its maker to be his will, or an amendment of 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.

Any other interpretation of the subsection would seem to me to be unjustified, and would open the door to fraud and abuse.'

[16] The sisters of the deceased contend, as they did in the court *a quo*, that the intention of the deceased - as reflected in the typed document, the written document and his insurance policies (they and the deceased's three daughters are the nominated beneficiaries of the proceeds thereof) - was to, apart from his three daughters, also benefit his seven sisters in sharing in equal portions in the net proceeds of his estate upon his death, except for three other specific beneficiaries, namely the Bosmont Mosque, the Al Aqsa Institute and the Transvaal Kokney Muslim Society. However, his intention 29 years prior to his death may well have been to benefit all his children and sisters, but it does not, however, impact on the principal issue – whether the deceased intended the written document to be his will at all. As was said by Lewis JA in *Van Wetten* para 16, it-

'. . . 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.'

[17] The handwritten document is entitled 'NOTES on WILL', an indicator that the deceased did not intend the handwritten document to be his will. The words 'NOTES on WILL' rather indicate that the handwritten document was intended to convey information about what the deceased wished to have included in his will; instructions by him to a bank or other adviser to draft or prepare a will in certain precisely defined terms. The words 'NOTES on WILL' indicate that the deceased anticipated that another document will, in due course, be prepared and placed before him for his consideration and approval. It does not appear that the written document had been written with the intention required by s 2(3), and consequently cannot be brought within its terms.

[18] An examination of the written document in the context of the surrounding circumstances does not detract from the conclusion that it has not been established that it was intended to be the deceased's will. The deceased was a learned and professional man. And according to the evidence of the eighth appellant, a meticulous man. The first respondent states in her answering affidavit that her late father had many dealings with attorneys and would have known that there are legal requirements for the execution of a

valid will. The deceased, also during 1990, instructed the Estate Division of First National Bank to draft a will for him. Furthermore, it is common cause that a fire had destroyed many of the deceased's documents, but it is not known whether one of those was a valid will.

[19] A conclusion that the deceased in the handwritten document commented on the draft will (the typed document), which he had received from the Estate Division of First National Bank, would be based on speculation and amount to mere dubious reasoning. There are no facts put forward to support such an inference. Nevertheless, such a conclusion will not advance the case of the sisters of the deceased one iota. In their founding affidavit, the eighth appellant states:

'It is blatantly clear that the deceased intended that the contested will [the handwritten document], be his last will and went so far as to instruct FNB to draft a will to give effect to his last wishes.'

[20] Furthermore, there is no evidence of the deceased discussing the typed document or the written document with anyone, that anyone other than the deceased had ever seen the written document after it had been created, that the deceased had ever told anyone that the written document was his will or that the deceased had ever re-visited the issue of his testamentary dispositions between 14 August 1990 and the date of his death almost 29 years later. The sisters of the deceased and their representative did not establish that the deceased never intended any other document, but the written document, to be his last will and testament.

[21] Finally, the matter of costs. Counsel for the sisters of the deceased and their representative requested us to follow the approach of the court *a quo* and direct that costs be payable from the estate. This approach may have been appropriate then. However, the court *a quo* has given a fully reasoned and correct judgment and the sisters of the deceased and their representative elected to appeal against the whole of that judgment and order. I have, in all the circumstances, not been persuaded that the costs of this appeal should not be borne by the estate. No valid reason is advanced for the deceased estate to be mulcted with the costs of this appeal. (*Cf. De Reszke v Maras and others* 2006 (2) SA 277 (SCA) para 19.) Furthermore, I consider the first respondent's

engagement of two counsel 'a wise and reasonable precaution'. (See *LAWSA* Vol 3 Part 2 Second Edition para 417.) In fact, both sides engaged the services of two counsel.

[22] In the result the following order is made:

The appeal is dismissed with costs, including those of two counsel whenever so employed.

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	28 April 2021
Heard:	18 January 2021
Counsel for the appellants:	Adv A Bishop (assisted by Adv O Maithufi)
Instructed by:	Richards Attorneys, Maraisburg, Roodepoort
Counsel for the 1st respondent:	Adv A Mundell SC (assisted by Adv E Sithole)
Instructed by:	Saleem Ebrahim Attorneys, Newtown, Johannesburg