REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10338/96

In the matter between:

SIBONGILE PRECIOUS NDEBELE N O	**First Applicant**
MPHO KIBE N O	**Second Applicant**
NOMATHEMBA ALBERTINA MALI N O	**Third Applicant**
JOHAN NESER	**Fourth Applicant**

and

THE MASTER OF THE SUPREME COURT	**First Respondent**
VIRGINIA NOMONDE TSHABALALA	**Second Respondent**

JUDGMENT DELIVERED ON 16 DECEMBER 1999

BRAND J:

[1] This is an application in terms of section 2(3) of the Wills Act, 7 of 1953 ("the Act"), alternatively in terms of section 2A of the Act. The relief sought by the four applicants in the main is for an order directing the first respondent ("the Master") to accept a document, annexure JN4 to the founding affidavit of fourth applicant, ("annexure JN4") as the will of the late Bhekizulu Herman Tshabalala ("the deceased"). Alternatively, applicants seek an order declaring that the deceased's previous will had been duly revoked.

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[2] The Master has indicated that he abides the decision of this Court. The application is however opposed by second respondent, Mrs Virginia Nomonde Tshabalala. Although substantial affidavits have been filed, it is apparent from these affidavits that there is very little dispute between the parties which is material to the relief sought by the applicants.

[3] The question is therefore whether this Court, on the facts which are common cause or not seriously disputed, is obliged to make an order in terms of either section 2(3) or section 2A of the Act.

THE FACTS

[4] The document under consideration, annexure JN4 , describes itself as the last will and testament of the deceased. It is not signed by the deceased. Nor is it signed by anyone else. Consequently it does not comply with any of the formalities for the execution of wills referred to in section 2(1) of the Act.

[5] At the time of his death, the deceased was married to second respondent. There is some dispute on the papers as to whether they were in fact married in or out of community of property. That, however, is not a matter which needs to be determined for the purposes of this application.

[6] Each of the first, second and third applicants is cited in her capacity as the mother and natural guardian of a minor child. It is alleged in the founding affidavits - and not opposed with conviction by second respondent

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- that the deceased was the natural father of each of the three children.

[7] Fourth applicant, Johan Neser, is an attorney of this Court. He acted professionally for the deceased in various business, property and personal matters from the late 1980's up to the time of the deceased's death.

[8] During June 1991 fourth applicant prepared two documents on the instructions of the deceased. The first was a notarial trust deed which constituted the B V Tshabalala Trust. This was a family trust in respect of which the deceased and the second respondent were the income beneficiaries and the children were to be the ultimate capital beneficiaries. The trustees were the deceased, the second respondent and fourth applicant.

[9] The second document was the joint will of the deceased and the second respondent. In terms of the will, the deceased made three appointments. He appointed second respondent as his sole heir and his children born or to be born as ultimate heirs in the event that the second respondent should survive him but fail to make a further will. Secondly, he appointed the second respondent as his executrix, and failing her the fourth applicant's firm of attorneys. Thirdly he appointed the second respondent as the trustee of a testamentary trust created in terms of the will. Both the trust deed and the joint will were duly executed on 7 June 1991.

[10] During April 1996 the deceased made an appointment to see the

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fourth applicant and on 18 April consulted with fourth applicant. One of the latter's co-directors, Ingrid Broodryk ("Broodryk") who specialises in family law matters was also present. At the consultation the deceased expressed three wishes and gave the fourth applicant and Broodryk instructions in respect thereof. First, he insisted to proceed with a divorce from the second respondent. Secondly he wished to have the second respondent removed as a trustee of the B V Tshabalala trust and instructed the fourth applicant to draw the necessary resolution. Thirdly he wished to redraft his will. More particularly, he instructed the fourth applicant to remove the second respondent as beneficiary, executrix and trustee thereunder and to appoint the three minor children on whose behalf the first, second and third applicants act as his residuary heirs and fourth applicant as the executor. In the course of the consultation the deceased informed fourth applicant and Broodryk that the two children referred to in the joint will of 7 June 1991 as "our children" were in fact not children of his marriage to second respondent at all but were the minor children represented in this application by first and second applicant. The correctness of the latter allegation is not disputed by second respondent.

[11] Subsequently, the deceased and the fourth applicant discussed the proposed new will in further detail. The deceased confirmed his earlier instructions in that regard. They also discussed the creation of a trust ***mortis causa*** in the deceased's will which would operate for the benefit of his minor heirs.

[12] The fourth applicant then drew up the new will in accordance with the

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deceased's instructions. He also drew the resolution for adoption by the trustees of the B V Tshabalala Trust. He sent both documents to deceased on 16 May 1996 under cover of a letter. The letter, which is annexure JN3 to fourth applicant's affidavit, records the enclosure ***inter alia*** of

> "a draft of your will in terms of which I have removed Virginia as a beneficiary, executor and have made your children your heirs. The will is a draft only and you should please read it carefully and let me know whether it is in order. If so, please let me know and we can then arrange for you to come and sign your final will."

[13] The salient terms of the draft will are the following:

a. the deceased revokes, cancels and annuls all previous wills, codicils and other testamentory dispositions previously made by him.

b. the deceased records that he has three children (who are the three minors represented in this application by the first, second and third applicants) and that he has instituted divorce proceedings against the second respondent.

c. the fourth applicant is nominated as executor of the estate and trustee of the trusts created by the will.

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d. the three children are appointed as the sole and universal heirs to the whole of the deceased's estate and effects, movable and immovable of whatsoever nature and wheresoever situate.

e. in the event of any beneficiary succeeding to the estate in terms of the will and not having attained the age of thirty years, any inheretance devolving upon such beneficiary shall be held in trust upon certain specified terms as to payment of the income and the bequest to the beneficiary.

[14] On 20 May 1996 the deceased met with his insurance broker, Diane Loria ("Loria"). At the meeting he told her that he was going to be divorced and that he had made a new will. He also informed Loria that he had set up a trust for his children and that the second respondent had been cut out of his will entirely. He wished to change the nomination of his beneficiaries in respect of all his insurance policies so as to nominate his children as equal beneficiaries to the express exclusion of the second respondent. The deceased duly signed requisite change of beneficiary forms in respect of all his insurance policies, save for certain policies which were held by his bank as security.

[15] On 22 or 23 May 1996 the deceased telephonically informed the fourth applicant that the draft will - annexure JN4 - correctly reflected his instructions and was what he wanted. The deceased was unable to come to fourth applicant's office to sign the will since he had to go to Johannesburg during the following weeks. Consequently, an arrangement

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was made for the deceased to contact fourth applicant upon his return from Johannesburg, which was anticipated to be on Monday 3 June 1996, in order to arrange a time when he could call upon fourth applicant to execute the new will.

[16] Prior to his being able to sign the new will, the deceased was murdered. He was murdered on or about 2 June 1996. The second respondent's lover, Xolani Hobongwana, has since been convicted of the murder. The police superintendent investigating the murder discovered at the murder scene a briefcase which belonged to the deceased and which contained ***inter alia*** fourth ~~respondent~~ applicant's letter of 14 May 1996 - annexure JN3 - and the two documents which it enclosed, including annexure JN4.

SECTION 2(3) OF THE ACT

[17] The relevant part of section 2(3) of the Act reads as follows:

> "If a court is satisfied that a document ..... drafted or executed by a person who had died since the drafting or execution thereof, was intended to be his will ..... the court shall order the Master to accept that document ..... for the purposes of the Administration of Estates Act, 1965 (Act No 66 of 1965) as a will although it does not comply with all the formalities for the execution ..... of wills referred to in sub-section (1)."

[18] In order to be successful with their application under this section, the

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applicants must, on a balance of probabilities, establish:

a. that the document, annexure JN4, was drafted or executed by the deceased;

b. that the deceased had died since the drafting of the document; and

c. that the document was intended by the deceased to be his will.

[See e.g. **Ex Parte Maurice** 1995 (2) SA 713(C) 715 G-H.]

If this court is satisfied on a balance of probabilities that the above three requirements have been established, it has no discretion, but is obliged to order the Master to accept the document as a will.

[See e.g. **Anderson and Wagner N N O and another v The Master and others** 1996 (3) SA 779 (C) 785E-F.]

[19] Compliance with the second of the aforementioned three requirements is not in dispute in the present matter. I therefore turn to a consideration of the remaining two requirements.

WAS THE DOCUMENT, ANNEXURE JN4, DRAFTED BY THE DECEASED

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[20] It is apparent that annexure JN4 was not in any way executed by the deceased. He did not sign it nor does any mark of his appear on the will. The question is whether the deceased **drafted** the will within the meaning of the term "drafted" as used in section 2(3).

[21] The term "drafted" is not defined in the Act. It has received considerable judicial scrutiny, leading to different conclusions as reflected in the case law to date. On the one hand there is an approach advocating a strict interpretation to the effect that the document must be drafted **personally by the deceased.**

[See e.g. **Olivier v die Meester en andere : In Re Boedel Wyle Olivier** 1997 (1) SA 836 (T) 844 B and **Webster v The Master and others** 1996 (1) SA 34 (D) 41B - D.]

[22] On the other end of the spectrum there is an approach which advocates a liberal or flexible interpretation. According to this approach the document does not need to be in the handwriting of the deceased, or to have been typed by him personally or even to have been dictated by the deceased in order for it to have been "drafted" by the deceased within the meaning of the section. The underlying reasoning to this approach appears for example from the following ***dictum*** by **Van Zyl J** in **Back and others NNO v Master of the Supreme Court** (1996) 2 All SA 161 (C) 174 a - c:

"The reality of the situation is that computers and word processors

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have become as pedestrian as pen and ink. Another reality is that many would-be testators give full instructions as to their final wishes to their attorneys or bankers and the attorneys of bankers have draft wills prepared in accordance with such instructions. If a draft will is subsequently perused and approved in every detail by a testator, he then, as argued by Mr **Hodes**, associates himself with and adopts it as his own. On a flexible interpretation of section 2(3), it may be regarded as having been drafted by him personally. As long as it is incontrovertible that the testator intended the draft will to be his will, it should be totally irrelevant whether he personally or physically drafted it with his own hand or his secretary typed it in accordance with his dictation, or his attorney's or banker's secretary typed it in accordance with his instructions."

[See also **Ex Parte Laxton** 1998 (3) SA 238 (N) 244 E - F and **Ex Parte De Swardt and another NNO** 1998 (2) SA 204 (C) at 207 B-J.]

[23] It is apparent that, on the facts of this matter, insistence upon personal drafting will result in a dismissal of the application. It is equally clear, however, that if I were to adopt the approach approved ***inter alia*** by **Van Zyl J** in the **Back**-case it can be said that annexure JN4 had been "drafted" by the deceased within the meaning of section 2(3) of the Act. . As of the document under consideration in the **Back**-case, it can on the uncontraverted evidence be said of annexure JN4, that it had been "perused and approved in every detail" by the deceased and that the deceased had "associated and adopted" annexure JN4 "as his own."

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[24] In the circumstances it is hardly surprising that Mr **Petersen**, on behalf of applicants, submitted that I should follow the decision in the **Back**-case whereas second respondent's attorney, Mr **Jacobs**, who appeared on her behalf, contended that I should not.

[25] Mr **Jacobs**' argument in support of his contention was in essence that the **Back**-case was wrongly decided in this respect. I do not agree. On the contrary, I respectfully consider the judgment in the **Back**-case to be well-reasoned and for the reasons set out therein and I therefore find myself in agreement with the conclusion. My only concern is whether I am in fact free to follow the judgment in the **Back**-case. This concern stems from a judgment of a full-bench in this division in **Anderson and Wagner NNO and another v The Master and others** 1996 (3) SA 779 (C), more particularly from the following ***dicta*** by **Thring J** (with **Friedman JP** concurring) at 784 G-H of the report:

> "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."

And further at 785 G-H:

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"These considerations all lead me to conclude that s 2(3) of the Act must be strictly, rather than liberally, interpreted. 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."

[26] In the **Back**-case (at 171 d-e) **Van Zyl J** found these ***dicta*** to be ***obiter*** and therefore not binding on him with regard to the drafting-requirement. However, in the later full bench judgment of this division in **Henwick v The Master and another** 1997 (2) SA 326 (C) 334 H **Foxcroft J** expressed the view that **Van Zyl J** was wrong in regarding the remarks by **Thring J** in the **Anderson**-case as ***obiter***. With all due respect to **Foxcroft J** and the two Judges who agreed with him, I again find myself in respectful agreement with **Van Zyl J.** I am also of the view that the remarks by **Thring J** were indeed ***obiter*** in the present context. I say this for two reasons. First, it should be borne in mind that the document under consideration by the full bench in the **Anderson**-case was in fact drafted by the deceased in his own hand (see 782A). The question whether personal drafting is required was therefore never an issue in that case. Secondly, because the ***ratio decidendi*** in the **Anderson**-case is in my view succinctly summarised by **Thring J** in the following passage (at 783E):

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"I am not satisfied on the information which has been placed before us on the papers that the document was intended by the testator to be an amendment of his will. In my view it is at least as probable that it was not, and that it constituted no more than his instructions to the first applicant as to how he intended his will to be altered."

[27] In short, the decision in the **Anderson**-case turned on the consideration of the third requirement, namely whether the deceased intended the document ***in casu*** to be his will (or an amendment thereto) and not on a consideration of the first requirement, namely whether the document had been **drafted** by the deceased. The statement by **Foxcroft J** on the **Henwick**-case (at 334 H) that the strict approach adopted by **Thring J** in the **Anderson**-case is irreconcilable with the flexible approach advocated by **Van Zyl J** in the **Back**-case is, in my respectful view, a ***non sequitur***. **Thring J** advocates a strict approach with reference to the third requirement - i.e. with regard to the testator's intention. In fact, as far as I am aware, no-one has thus far suggested that there should be a flexible approach to the issue of the testator's intention. I can see no reason, however, why an insistence upon strict compliance with the third requirement would necessarily exclude a more flexible interpretation of the term "drafted" in section 2(3).

[28] I am fortified in my view that the decision of the full bench in the **Anderson**-case was indeed ***obiter*** with regard to the drafting requirement by the judgment of **Combrinck J** in **Ex Parte Laxton** 1998 (3) SA 238 (N) 242H-243A. The view expressed by **Foxcroft J** in the **Henwick**-case to

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the effect that the **Anderson**-judgment was not ***obiter*** in this regard was clearly ***obiter*** itself. Consequently I am not bound by the ***obiter*** judgment of the full bench in the **Henwick**-case to find that the full bench judgment in the **Anderson**-case was not ***obiter***!

[29] In the circumstances I find myself free to adopt the approach advocated by **Van Zyl J** in the **Back**-case. As I have already indicated, the consequence of that approach in the present matter is a finding that annexure JN4 had been "drafted" by the deceased within the meaning of section 2(3).

WAS ANNEXURE JN4 INTENDED BY THE DECEASED TO BE HIS WILL

[30] It was conceded by Mr **Petersen** on behalf of the applicants that a strict interpretation of section 2(3) as far as the requirement of establishing the deceased's intention is concerned, is prescribed by all the authorities (see e.g. **Anderson and Wagner NNO and another v The Master** (***supra***) 784G; **Henwick v The Master and another** (***supra***) 334 H-J; **Ex Parte Laxton** (***supra***) 241 B-C.) The expressed reason for this insistance is that it remains of the utmost importance that there is no scope for the fraudulent introduction of a document in a situation where its supposed author is in the nature of things unable to verify it.

[31] Such concerns do not however arise in the present matter. Fourth applicant is an experienced attorney and officer of this court. There is no

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reason to doubt his version of events. Nor, in any event, has the second respondent sought to impugn the fourth applicant's integrity or to suggest that there is any fraud involved in the present application. The question is therefore solely whether the evidence of particularly fourth respondent establishes on a balance of probabilities that the deceased intended annexure JN 4 to be his will.

[32] In view of decisions such as **Ex Parte Maurice (*supra*)** 716 E - 717 A and **Anderson and Wagner (*supra*)** 782 G - 783 G it is to be accepted that a document purporting to constitute an instruction to an attorney as to the amendment or drawing up of a will does not evidence the requisite intention. In such cases, the deceased would have expected another document to be produced in due course for perusal and execution. The document containing the instructions to the attorney is not the deceased's draft will.

[33] That of course is not the case here. The deceased gave oral instructions to the fourth applicant as to the contents of his will. The fourth applicant, in accordance with these instructions and following detailed discussion, promised a written document which would undoubtedly - had it been duly executed - have constituted the last will and testament of the deceased. It is a complete document. The deceased read the document and informed the fourth applicant that it accorded with his instructions and that it was what he wanted. He also informed Loria that he had made a new will. It is plain in my view that he adopted the document as his draft will. All that was left to do was for the will to be properly executed.

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[34] Mr **Jacobs'** contention was however that all this is not enough. In order to satisfy the requirements of section 2(3), Mr Jacobs submitted, the deceased must have intended **that document** to be his will. Since the deceased knew that annexure JN4 would still have to be executed at some future occasion, Mr **Jacobs** argued, it cannot be said that the deceased intended **that document** to be his will. Otherwise stated, Mr **Jacobs'** argument was that what section 2(3) requires is that the deceased must have believed that he had succeeded in making a legally valid will.

[35] For this restricted construction of section 2(3), Mr **Jacobs** found support in the **Maurice**-case and the **Anderson and Wagner**-case. I do not agree. As already indicated, these two decisions only constitute authority for the proposition that an instruction to an attorney as to the drawing up of a will does not satisfy the requirement of section 2(3). In the **Anderson**-case (at 783 E - F) for example, **Thring J** refers with approval to a statement by **Navsa J** in **Letsekga v The Master** 1995 (4) SA 731 (W) that the requirements of section 2(3) is that "the testator must have intended the particular document to constitute his final instruction with regard to the disposal of his estate."

[36] Mr **Jacobs** conceded that the construction of section 2(3) for which he contends, is in direct conflict with the decisions in **Back and others NNO v Master of the Supreme Court** (***supra***) and **Ex Parte Laxton** (***supra***). His submission was that these two cases were wrongly decided. Again, I do not agree. The limited construction of section 2(3) contended for by Mr **Jacobs** will in a case such as the present have the very result

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that the legislature endeavoured to avoid, namely that the genuine intention of the deceased, as borne out by what he considered to be his final instruction with regard to the disposal of his estate, would be frustrated or defeated.

[37] In all the circumstances I find that the applicants have established on a balance of probabilities that the deceased intended annexure JN4 to be his "final instruction with regard to the disposal of his estate" and that they have thus satisfied the third requirement in section 2(3) as well.

[38] As a consequence, it is not necessary for me to deal with applicants' alternative application in terms of section 2A of the Act.

COSTS

[39] It was submitted on behalf of both parties that, whatever the outcome of the application, it would be appropriate that the costs of the application - including the costs of applicants and second respondent - be borne by the deceased's estate. I agree with this submission. Confusion, and consequent litigation, have been caused not by any fault on the part of the deceased, but nevertheless by the fact that he died leaving two documents which contained conflicting final instructions with regard to the disposal of his estate.

[See e.g. **Benischowitz v The Master** 1921 AD 589 at 598 and 600.]

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ORDER

[40] For these reasons it is ordered that:

a. The document annexed to the founding affidavit of fourth applicant as annexure "JN4" is declared to be the last Will and Testament of the late Bhekizulu Herman Tshabalala.

b. First respondent is directed to accept annexure JN4 as the Will of the late Bhekizulu Herman Tshabalala for purposes of the Administration of Estates Act, No 66 of 1965.

c. The costs of applicants - including the costs of two counsel where employed -- as well as the costs of second respondent be borne by the estate of the late Bhekizulu Herman Tshabalala.

BRAND J