IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 13591/2008

In the matter between:

JOHN LONGFELLOW	**Applicant**
and	
BOE TRUST LIMITED N.O.	**First Respondent**
ALAN THEUNS CHRISTIAN DE KLERK	**Second Respondent**
MICHAELA BROCKMAN	**Third Respondent**
MICHELLE DE KLERK	**Fourth Respondent**
THE MASTER OF THE HIGH COURT (CAPE PROVINCIAL DIVISION)	**Fifth Respondent**

JUDGMENT DELIVERED ON 28/04/2010

BAARTMAN, J:

[1] In June 2003, the applicant drafted a will (**the draft document**) on behalf of the late Jacqueline Susan Longfellow (**the deceased**). The applicant and the deceased were married at the time. The draft document did not comply with the provisions contained in the Wills Act 7 of 1953 (**the Act**) as amended. In this application, the applicant

sought condonation for the non-compliance with the provisions of the Act.

[2] The applicant also sought further ancillary relief that I deal with below to the extent necessary for purposes of this judgment. It is convenient to first deal with the facts that led the applicant to draft the draft document and thereafter to determine whether the document satisfies the requirements for condonation. It is in issue whether the deceased intended the draft document to be her last will and testament. Because that dispute will determine the outcome of this application, I deal with it upfront and in detail.

BACKGROUND

[3] Prior to her marriage to the applicant, the deceased and the second respondent were married. The deceased was the mother of third and fourth respondents. The second respondent is the father of the fourth respondent. In 1989, the deceased attested to a will (**the Will**) in which she left her entire estate to the second respondent. The first respondent was the executor of the deceased's estate in terms of the Will and was cited in its official capacity in these proceedings.

[4] At the institution of these proceedings, the Master of the High Court, cited as the fifth respondent, had already issued a letter of executorship to the first respondent.

[5] The deceased and the applicant got married on 13 September 1995, which marriage subsisted at the time of the deceased's death. No children were born out of that union. The couple owned the immoveable property situated at 17 Meerust Road (**the immoveable property**).

[6] In 2000, the deceased was diagnosed with cancer. Doctors treated that condition, initially successfully. However, in April 2007 the deceased was diagnosed with cancer of the brain. On 24 April 2007, she underwent surgery during which surgeons removed most of the tumour.

[7] On 29 August 2007, the deceased suffered a stroke and was again diagnosed with cancer of the brain. The applicant brought a precedent of a will, which he completed on 7 September. It is the applicant's version that he completed that document in the presence of the deceased and that he discussed the content with her. His version is further that he read the document to the deceased who was satisfied with the content thereof. In terms of the draft document, the applicant stands to inherit the bulk of the deceased's estate. Her two daughters, the third and fourth respondents, would share the proceeds of an Old Mutual policy.

[8] The applicant had arranged for employees of Standard Bank to witness the draft document. On 7 September 2007, two employees of Standard Bank arrived at the couple's home in order to witness the draft document as arranged with the applicant. These employees informed the applicant that he would not be able to inherit in terms of a will that he had drafted and left without formalising the draft document. The deceased died on 21 September 2007 without signing the draft document.

[9] The applicant discovered the Will, referred to above, amongst the deceased's belongings. The second respondent is the sole heir in terms of the Will.

Circumstances that led to the drafting of the draft document

[10] According to the applicant, the deceased and he had a number of conversations in which the deceased indicated to him that upon her

death her estate should devolve upon the applicant, the third respondent and the fourth respondent. On 7 September 2007, the applicant completed the draft document in the presence of the deceased and discussed what he was writing with her. He described the events as follows:

"50. *The Testator was discharged from hospital on 31 August 2007 and returned home. The Testator was apparently stable but I believe that she was sent home as there was nothing that could be done for her. The Testator was taken care of by Desiré who was a nurse whom I hired to take care of her.*

51 *I then realised that the Testator was dying. I started to enquire what I would have to do in order to have a will drawn up. I went to Standard Bank in Table View and spoke to the Public Relations Manageress, Rita Toto. She informed me that Standard Bank could assist me. I was informed, that someone would call me but they never did.*

52. *As a result I went back to the branch the next week. I asked for Rita but was informed that she was not there. I then decided to buy a will from CNA. That same day I bought one. I said to the Testator that I had a will. At the time, it was blank. I said that I was going to fill it in to reflect that I would inherit the estate, that I would be the executor, that the Old Mutual policy would be shared equally by the Third and Fourth Respondents and that she would revoke all previous wills. The Testator agreed to this.*

53. *I completed it on the morning of 7 September 2007. I was in the bedroom in the presence of the Testator. I sat next to the Testator facing her. She could not see what I wrote but I discussed what I was writing with her. I inserted the provisions which we had discussed previously.*

54. *The Testator could not write as she suffered from osteoporosis as a result of the stroke. The Testator could not lift her right arm or move her hand without suffering severe pain. That is why I completed the will and not the Testator herself.*

55. *I asked the Testator whether she wanted to read the will. She stated that I should read it to her. I did so and she confirmed that it was fine.*

56. *I expected people from Standard Bank to arrive as I had subsequently managed to arrange for them to assist the Testator and I. I asked the Testator if she remembered what we discussed regarding the will. The Testator stated that she wanted to leave her estate to me and that the Old Mutual policy would be shared by the Third and Fourth Respondents. I prompted the Testator regarding revoking previous wills and she agreed to this.*

57. *The Testator did not mention that I was to be appointed as the executor as this was understood when I read the will to her."*

The Wilks and Nel versions

[11] The applicant alleged that Desiré Wilks (**Wilks**), the deceased's nurse, and Jolene Nel (**Nel**), the deceased's colleague, were present when he drafted the draft document. I deal below with their, Wilks and Nel, versions of the circumstances surrounding the drafting of the draft document.

The Wilks account of the events

[12] Wilks said that she started nursing the deceased on 18 June 2007. During August 2007, she was present when the deceased told the applicant that each of her daughters should inherit R100 000 from her estate and that the applicant should inherit the balance thereof.

[13] Wilks was present on 7 September 2007 when the applicant "read a will to the Testator and showed her the will". Wilks further indicated that the document read to the deceased was in line with the intention that she had heard the deceased express previously. I have difficulty reconciling the latter statement of Wilks with the intention expressed during August 2007, as appears from paragraph 12 above. The draft document does not state that each of the deceased's daughters would inherit R100 000 as the deceased apparently indicated in the August conversation.

Nel's account of the events

[14] Nel met the deceased in June 2003 when she began working for her. Nel recalled the following conversation with the deceased before she was re-admitted to hospital on 29 August 2007:

> *"12. Some time during August 2007, I cannot recall precisely when, the Testator and I had a conversation with the Applicant regarding her will. The Testator stated that everything she had was the Applicant's as he had put so much into their house. I understood that the Testator was referring to money and that the Applicant has contributed to the house which they owned. The testator said that her daughters would share in one of her policies."*

[15] Nel's version differs from that of Wilks in that she made no mention of the R100 000 the deceased intended each of her daughters to inherit. It is not clear whether Nel referred to same conversation as did Wilks.

[16] On 7 September 2007, Nel witnessed conflict between the applicant and the third respondent. It is not clear from Nel's version whether the third respondent was present when the applicant read the draft document to the deceased. Nel merely stated that:

"15 ...There was a lot of conflict between the Applicant and the Third Respondent. ...The Third Respondent was present in the morning and left later..."

[17] Once the third respondent had left, the applicant told Nel and the deceased to expect the Standard Bank employees at 14h00. It appears from Nel's affidavit that after receipt of this information, the deceased said the following:

"The Testator said in my presence that she wanted the policy to be split so that each of her daughters would receive R100 000 and that the rest would go to the Applicant."

[18] This latter expression of the deceased's will differs from the earlier where the deceased is alleged to have merely said that she wanted her daughters to share in one of her policies. Nel further stated that the applicant read the will that he had written to the deceased and that it reflected the deceased's intentions earlier expressed. Nel further stated that the Standard Bank employees left when it became clear that the deceased was not able to sign the will contrary to her indications to them that she could. She does not mention that the Standard Bank employees expressed reservations about the applicant's ability to inherit in terms of the will because he had drafted it.

The applicant's version in reply

[19] The applicant had in para 45 of his founding papers said that:

"The Testator said that I should give the Third and fourth Respondents a 25% share each of the profit of the sale of the new house in the event of my death so that they each could own a house of their own one day."

[20] The respondents pointed out that this intention of the deceased was not contained in the draft document. The applicant in reply explained as follows:

"...The testator said to me that I should leave the Third and Fourth Respondents 25% (each) of the house in the event of my death. The testator and I subsequently discussed the will...The testator stated that she wanted the Third and Fourth Respondents to share equally in the Old Mutual policy...."

[21] It appears that the deceased had intended her daughters to share in the proceeds of the immoveable property in addition to sharing the Old Mutual policy. It is unclear how she could simultaneously leave her share in the immoveable property to the applicant because he "...had put so much into their house." That was the deceased's intention on Nel's version.

Did the deceased intend the draft document to be her will?

[22] Section 2(3) of the Wills Act provides that:

"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 the 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 (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).

[23] In the matter of **Anderson and Wagner NNO and Another v the Master and Others** 1996 (3) SA (c) 779 Thring J said the following about the section at 783 a–d

"The provisions of section (2)(3) of the Wills Act are intended to save a will that would otherwise be invalid due to a formal defect in its attestation. The formal provisions for the attestation of wills remain part of our law. It is the hardship which results from technical shortcoming in the attestation of a will which the introduction of s (2)(3) seeks to alleviate. This is, in my judgment, clear from the requirement in the section that the document must have been intended to be the testator's will. This is also apparent from the wording of the subsection, which provides that the court may order that the document in question be accepted by the Master 'as a will although it does not comply with all the formalities for the execution or amendment of wills refer to in s(1).'

...Had the legislature intended to empower the court to give a document which simply expresses the testator's wishes for the distribution of his estates to be treated as his will the legislature would have said so and would have focused upon the document having to reflect the testator's distribution intention rather than his/her intention in regard to the status of the document as his/ her will."

[24] I have dealt with the circumstances that led the applicant to draft the draft document. I can only order the Master to accept the draft document as the deceased's will if satisfied that the applicant had on a balance of probabilities shown that the deceased had intended it to be her last will and testament. I am not satisfied, on a balance of probabilities, that the deceased had intended the draft document to be her last will and testament. This is so in light of the circumstances that led the applicant to start his enquiries to ascertain how he could have the deceased's will drawn up. This appears from paragraph 10(51) above. He never stated that the deceased requested him to make any enquiry.

[25] On the contrary, the applicant in his founding papers said that when the deceased requested him to look after her two daughters, the third and fourth respondents, he refused to lend any assistance to the third respondent. The applicant was of the view that the third respondent had acted in an appalling manner towards the deceased and he informed the deceased of his view. Similarly, when the deceased had asked the applicant to look after her grandson, the third respondent's son, he refused. However, he qualified his refusal saying he would only assist the grandson if he was not in the custody of his mother. It is not clear what the deceased meant when she requested, on the applicant's version, him to look after her three relatives. The applicant also did not indicate in what manner the third respondent, in his view, had acted in an appalling manner towards the deceased.

[26] The applicant also, in his founding papers, said that the deceased had made these requests to him during late August 2007. At the time, according to the applicant, the deceased had been reluctant to discuss the detail of a will as she had expected to make a complete recovery.

[27] I cannot in those circumstances, accept that the deceased would expect the applicant, after he had inherited her half share of the immoveable property to leave a 25% share thereof to the third respondent. I can also not accept the applicant's version that he agreed to leave 25% of his own property to the third respondent. On the applicant's own version, he would not have agreed to that and the deceased had no reason to think that he would leave any of his own property to the third respondent.

[28] The draft document reflects, in my view, the applicant's will and not the deceased's. He says as much in his founding papers.

"I then realised that the Testator was dying,...I started to enquire....I ...decided to buy a will from CNA....I said I was going to fill it in to reflect that I would inherit the estate,..."

[29] Even if I am wrong, in the circumstances of this matter, the applicant unduly influenced the deceased. This is so because Wilks had administered morphine to the deceased on 6 September 2007 and twice on 7 September because she was in such pain. The applicant described the deceased's condition as "The Testator could not lift her right arm or move her hand without severe pain". It appears that the deceased knew that she was terminally ill. The applicant had already refused the deceased's request to render assistance to the third respondent and only conditionally agreed to lend assistance to the deceased's grandson. The applicant thereafter indicated to the deceased that he "...was going to fill it in to reflect that I would inherit the estate".

[30] Her agreement in those circumstances is suspect. This is so particularly when one bears in mind that, on the applicant's version, during late August 2007, the deceased was reluctant to discuss the detail of a will with him and that he refused her requests in respect of the third respondent and only conditionally agreed to her requests in respect of her grandson.

Other relief sought

[31] Mr Benade who appeared for the respondents in this matter argued that the matter should be referred to oral evidence. The applicant opposed this application. Since the applicant, in my view, failed to show on a balance of probabilities that the draft document reflected the deceased's will, referring the matter to oral evidence would serve no purpose.

[32] The applicant sought an order in terms of section 4A(1) of the Wills Act that he be declared competent to receive benefits under the last will despite the fact that he drafted the draft document. Relief in terms of that prayer obviously depends on the draft document being accepted as the deceased's last will and testament. The relief in terms of this prayer must therefore fail.

COSTS

[33] The costs occasioned by the postponement of the matter on 27 November 2009 stood over for determination by the trial court. The applicant sought a punitive costs order in respect of the postponement. It is so that the respondents' late filing of their answering papers occasioned the postponement. However, I am not persuaded that a punitive costs order is appropriate in the circumstances.

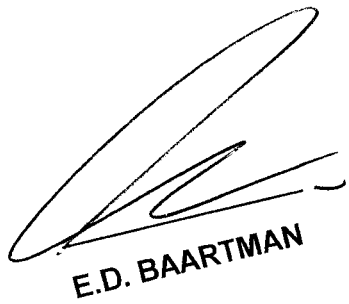
ORDER

[34] For the reasons stated above, I make the following order:

(a) The application is refused with costs, such costs to be paid from the estate of the late Jacqueline Susan Longfellow. In the event of the estate having insufficient funds to satisfy the costs order:

(i) The second and fourth respondents are ordered to pay the wasted costs occasioned by the postponement of the matter on 27 November 2009.

(ii) The applicant is directed to pay the costs of the application excluding the costs referred to in 34(a)(i) above.



E.D. BAARTMAN