IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 14970/2010

In the *ex parte* application of

JANE HANDSLEY PORTER — **1st Applicant**
GEOFFREY LEIGHTON ASHMEAD — **2nd Applicant**

JUDGMENT	:	**JUDGE A.G. Binns-Ward**
FOR THE PLAINTIFFS	:	**ADV A.D. Brown**
INSTRUCTED BY	:	**Chris Fick & Associates** **4th Floor** **Waalburg Building** **28 Wale Street** **Cape Town**
DATE OF HEARING	:	**6 August 2010**
JUDGMENT	:	**13 August 2010**

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

Case No: 14970/2010

In the *ex parte* application of

JANE HANDSLEY PORTER **First Applicant**
GEOFFREY LEIGHTON ASHMEAD **Second Applicant**

Summary:

- *Section 2(3) of the Wills Act 7 of 1953 does not afford a basis for relief in circumstances in which a testamentary instrument has been duly executed in accordance with the prescribed formalities, but the executed document has subsequently been lost.*
- *Narrow construction of the word 'drafted' in s 2(3) of the Wills Act applied, in conformity with the interpretation of the provision in Bekker v Naude & andere 2003 (5) SA 173 (SCA).*
- *Alternative relief granted in terms of the common law*

JUDGMENT

Delivered on 13 August 2010

BINNS-WARD J:

[1] The facts in this matter are not in contention. The question in issue is whether on those facts the relief sought by the applicants in terms of s 2(3) of the Wills Act No. 7 of 1953 ('the Act') can be granted.[1]

[2] Just over a month before his demise, the testator executed a codicil to his last will and testament. The codicil was executed in a manner fully compliant with the formalities prescribed in terms of s 2(1)(a) of the Act. The duly executed codicil was thereafter delivered to the offices of the testator's attorney for safekeeping. It was taken there by a messenger in the testator's employ. It was enclosed in a large (B4) envelope. The receptionist at the attorney's office was able to recall the messenger in question delivering an envelope to the attorney's office, but she had no knowledge of what it contained. Unfortunately, no-one can say what became of the envelope or its contents after their delivery to the attorney's offices. When the codicil was called for after the testator's death it could not be found despite diligent search.

[3] The provisions of the codicil can be precisely established because the document executed by the testator had been drafted by his attorney in accordance with the instructions conveyed to him on the testator's behalf by the latter's wife. The resultant draft had thereafter been emailed to the testator's residence. There is therefore an electronic record of the text of the

[1] Section 2(3) was inserted into the Wills Act by s 3(g) of Act 43 of 1992.

document in existence. A print-out of the emailed draft codicil was duly executed by the testator at his home in the presence of his wife and one of his close friends, who is a co-executor testamentary of his estate. Also present when the document was executed were two entirely disinterested persons, who signed the codicil as witnesses. Affidavits confirming the aforementioned facts have been made by all the persons who were present when the codicil was executed.

[4] The intended effect of the codicil was to substantially increase the value of the bequests made in the testator's last will and testament to each of his daughters. It left unaffected the bequest of the residue of his estate to his wife. It also left unaffected two comparatively minor bequests to the only other beneficiaries in terms of the will. The only person whose proprietary interest might in a sense be adversely affected by the changes wrought by the codicil would appear to be the first applicant.

[5] The first applicant is the testator's widow, who is a co-executor testamentary of the deceased estate. The second applicant is the family friend and co-executor testamentary, mentioned earlier, who had been present when the codicil was executed. They seek an order in the following terms:

> That the Master of the High Court, Cape Town, be ordered to accept the First Codicil to the will of the late Stanley Allan Porter ('the deceased'), a copy of which is annexed to the Founding Affidavit of the First Applicant, marked as Annexure 'B', as his valid First Codicil to his last will and testament for the purposes of the Administration of Estates Act, 66 of 1965, in terms of section 2(3) of the Wills Act, 7 of 1953.

Annexure B to the founding affidavit is a print out of the email attachment that had been sent by the drafting attorney to the testator's wife; in other words, it is a replica of the document that was duly executed by the testator, but it does not bear his signature, or those of the witnesses.

[6] The third co-executor of the estate has filed an affidavit recording that he has no direct knowledge of the relevant facts, but has no objection to the court granting the relief sought by his co-executors. The Master has filed a report abiding the judgment of the court.

[7] Section 2(3) of the Act 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).'

The noun '*will*' is defined in s 1 of the Act as including '*a codicil and any other testamentary writing*' and the word '*amendment*' is defined in that section as meaning '*a deletion, addition, alteration or interlineation*'. There is no special definition in the Act in respect of the noun '*document*' or of the verbs '*draft*' and '*execute*' or any of the derivatives of those verbs and, consequently, they must be given their ordinary meaning, determined with proper regard to their contextual employment.

[8] In *De Reszke v Czeslaw Maras and Others* [2006] 2 All SA 115 (SCA); 2008 (2) SA 277, at para. [11], it was stated that '*Section 2(3) lays down the requirements which a document which does not comply with the formalities for the execution of a will has to meet before a court will order the Master to accept it as a will. The effect of an order under s 2(3) is that a document which is not a will for want of compliance with certain prescribed formalities but purports to be a will is given effect to if the requirements of the section have been met. For the grant of relief under s 2(3) a court must be satisfied that the deceased person who drafted or executed the document intended it to be his will.*' A consideration of this statement makes it immediately apparent that the facts of the current case are impossible to reconcile with requirements for relief in terms of s 2(3). The document which the testator executed complied in all respects with the prescribed formalities. That was the document which the testator intended to be a codicil to his will. The document which the applicants seek to have the Master directed to accept is not that document, but only a template of the one that was executed. In my view these characteristics, which are distinguishable from those that would be apparent in the kind of document contemplated in s 2(3) of the Wills Act, make it clear that the provision is not intended to address the predicament that arises when the testamentary instrument in issue has been executed in compliance with the formalities but has subsequently been lost.

[9] For completeness, however, I shall deal briefly with the basis upon the applicants' counsel sought, nevertheless, to persuade me that the matter should be accepted as falling within the ambit of s 2(3) of the Act.

[10] Counsel accepted that there was 'a difficulty' in the way of any attempt to persuade the court that the document the applicants seek to have the Master directed to accept had been executed by the testator. In a written note submitted at my invitation after the conclusion of the hearing, counsel implied that 'there may be some debate...as to the ambit of the word "execute" in the section', but he did not advance any argument in furtherance of the postulated debate. The argument that was advanced focussed instead on the word 'drafted'. Relying on a series of reported cases which adopted a generous construction of the ambit of s 2(3) of the Act,[2] counsel submitted that by causing his attorney to have drafted the codicil the testator must, in the context of the evidence that he had adopted the resultant text, be taken to have himself 'drafted' the document, in the sense of that word as employed in s 2(3) of the Act.

[11] If the argument were to prevail in the circumstances of the current case it would, of course, also require the words 'the document' to be construed widely enough to include any document which exactly replicated the text of the intended testamentary instrument, rather than being confined to the narrower concept of the actual piece of paper in issue, which, in my view, is what the statutory provision has in contemplation. But that difficulty aside, counsel's argument cannot be sustained because it has now been definitively determined that the verb 'drafted', interpreted in the context of s 2(3), denotes a direct act by the testator and not a representative act by some other person

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[2] The cases referred to by counsel, as well as a number of judgments to the opposite effect, are conveniently collected in the judgment of this court in *Ndebele and Others v The Master and Another* 2001 (2) SA 102 (C).

acting on behalf of the testator. Put differently, the act of drafting a document within the meaning of the provision does not include causing a document to be drafted. The line of authority supporting the construction of the provision contended for by the applicants' counsel has been considered and disapproved by the Supreme Court of Appeal: see *Bekker v Naude & andere* 2003 (5) SA 173 (SCA) at para.s [9]-[20]. See also *Van Wetten & another v Bosch & others* 2004 (1) SA 348 (SCA) at para. [14].

[12] Thus the formulation of relief in this application, predicated as it was on the provisions of s 2(3) of the Wills Act, was misconceived. The relief should rather have been sought under the common law, in terms of which the court may in a proper case authorise that a 'reconstructed copy' of a will be accepted by the Master. A proper case for relief under the common law would be made out in a matter in which the executed will has been lost and the court is satisfied on the evidence that the reconstruction is both accurate and complete. See Corbett et al, *The Law of Succession in South Africa*, 2nd edition, (Juta, 2001) at pp. 116-117; *Ex parte Gowree* 1915 CPD 108; *Ex parte Ntuli* 1970 (2) SA 278 (W) and *Nell v Talbot* 1972 (1) SA 207 (D). In my judgment a case for such relief has been made out on the papers and I propose to grant it pursuant to the prayer for alternative relief in the notice of motion. It is customary in matters of this nature to issue a rule *nisi* calling upon all persons who might have an interest to show cause why an order should not be made.

[13] The following order is made

1. A rule *nisi* shall and hereby does issue calling upon any person interested to show cause on Friday, 10 September 2010, at 10h00 or as soon thereafter as the matter may be called, why an order in the following terms should not be made:

   The Master of the High Court, Cape Town, is authorised to accept a copy of the unsigned draft annexed, marked 'B,' to the founding affidavit of the first applicant as the first codicil to the last will and testament of the late Stanley Allan Porter for the purposes of the administration of the deceased's estate in terms of the Administration of Estates Act, 66 of 1965

2. The rule *nisi* shall be served by means of publication in one edition of the *Cape Times* and *Die Burger* newspapers and by service of a copy thereof on the Master of the High Court, Cape Town.

A.G. BINNS-WARD
Judge of the High Court