THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 5890 / 2009

In the matter between:

TERSIA ABRAHAMS	Applicant
and	
CHANTAL SHARON FRANCIS N.O. (in her capacity of executor of the estate of the late *Warden Francois Pietersen*)	1st Respondent
GWENDOLINE PIETERSEN	2nd Respondent
SAMUEL PIETERSEN	3rd Respondent
MASTER OF THE HIGH COURT, WESTERN HIGH COURT, CAPE TOWN	4th Respondent

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JUDGMENT : 10 NOVEMBER 2010

BOZALEK J:

[1] The applicant in this matter seeks an order declaring that a certain document ("the contested will") to be the will of the late Warden Francois Pietersen in accordance with section 2(3) of

the Wills Act and condoning its non-compliance with the various provisions of the Act relating to the drawing up of a valid will.

[2] A further order is sought authorising and instructing the fourth respondent, the Master of the High Court, to accept the contested will, in terms of the aforesaid section 2(3), as the will of the deceased.

[3] The applicant is the sister of the deceased who was unmarried, had no children and died on 15 July 2007. First respondent is an attorney and the executor in the deceased estate. Both the first and fourth respondents abide the decision of the Court. The second and third respondents are the deceased's remaining sister and brother, respectively, and both oppose the relief sought. Apart from the contested will, no other testamentary document was left by the deceased. Thus far the deceased's estate has been wound up as if he died intestate with the result that the applicant, second and third respondent will each inherit 1/3rd of his estate. In the event that the document is declared the deceased's will, applicant will inherit 90% of the estate, with the remaining 10% revolving upon one Carol-Ane Matsela ("*Matsela*").

BACKGROUND

[4] The deceased was employed by Transnet as a manager and at the time of his death appeared to be living alone in a property which he owned. He had a stormy on-off relationship with a Ms. Leanne Oliphant ("*Oliphant*"). It would appear that, during 2007 at least, the deceased was unstable and suffered from depression. He also appeared to be abusing alcohol, a factor which rendered his relationship with Oliphant abusive and caused her to break it off from time to time. This in turn appeared to exacerbate the anxiety and mental instability which the deceased was suffering.

[5] Beyond the fact that it was a result of natural causes, the circumstances of the deceased's death are somewhat obscure. It occurred while his was riding his bicycle on his way to visit members of his family. On the one hand it is described as an accident whilst other documentation indicates that he died of a heart attack. Be that as it may for the purposes of this application it must be accepted that he died of natural causes.

[6] Members of the deceased' s family attended the day after his death at the offices of the first respondent who had wound up their father's estate. He advised them to search for a will. A search was conducted of the deceased's house and Ms.

Oliphant emerged from his spare room with an original unsigned and undated document written in the deceased's handwriting on 3 sheets of a Unisa assignment writing pad and which reads as follows (including misspellings):

"TO ALL MY FAMILY AND FRIENDS:
Please know that I never wish or planned this tragedy to happen. I was never an angel or perfect, but strived to give only my best.
Many or all of you would be disapointed, but this decision was mine.
My estate
After debt deductions
My House and Car, policy contributions, jewellery, clothing
Including all contents eg. furniture, electrical appliance utensils etc. must go to Mrs Tersia Abrahams (sister) (021) 988 9992 (Sole beneficiary).
Other; 10% of my entire estate must go to:
Mrs Carol-Anne Matsela, colleage, mother and friend.
My remains must be cremated as I would have died a dishonourable death.
I would like to pay tribute to the following persons that impacted positively on my life in being.
Lecturer Mr Charles Rogers (Senior Lecturer, UNISA (0844677777)
Employer and colleages at Spoornet
Mrs Dijino Nasoro
Mr Chris Sono
Mr Neil Naidu
All Senior Management, Committee Members: Western Region
My colleages and dedicated members of staff
Loved ones
Pietersen family and other and in particular my sister Tersia Abrahams whom supported me ever since. Also the Frans Lotriet Family.
There is many others, Thanks to them also.
Furthermore,
I herewith declare that this writing replace all previous in respect of estate devide or last wishes expressed.
Appointment as Executor of my Estate
Mrs Carol-Ane Matsela (021 940 3414/083 459 3278)
- **Immovable and Movable property (Home/Car)**

Must be immediately be taken in possession by Mrs Tersia Abrahams upon notice of death.
Bank Accounts
Mrs Tersia Abrahams have full right to withdrawals from my bank accounts
Standard Bank
Savings : PIN – 20182
Cheque : PIN – 34580
This will pay for the funeral ceremony."

[7] The first respondent forwarded the contested will to the fourth respondent who endorsed it as being invalid by reason of not having been signed or witnessed. Various members of the deceased's family, including the applicant and the second and third respondent, appear at times to have held differing views as to the basis upon which the deceased's estate should be wound up and differing instructions were furnished to first respondent. Applicant then engaged separate legal representation and, ultimately, this application ensued. I do not consider it material, for the purposes of this application, to detail the twists and turns of the various positions adopted by family members; suffice it to say that the papers reveal that this issue has unfortunately caused considerable dissension amongst them.

THE LAW

[8] Section 2(3) of the Wills Act, which was amended by the Law of Succession Act 43 of 1992, provides as follows:

> **"If a court is satisfied that a document or the amendment of a document drafted or executed by a person who had 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 Estates 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 ss (1)"**

[9] In Ex Parte Maurice 1995 (2) SA 713 Selikowitz J held that before a court can make an order pursuant to s 2(3) a Court must be satisfied that it has before it a document:

(a) which was drafted or executed by a person;
(b) who had since died; and
(c) who intended that document to be his/her will.

He held further that the relevant provisions "*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 a technical shortcoming in the attestation of a will which the introduction of s 2(3) seeks to alleviate.*"

[10] In **Van Wetten and Another v Bosch and Others** 2004 (1) SA 348 (SCA), the Court dealt with a document apparently written by the deceased in contemplation of his suicide. It held that the question which confronted it was whether the deceased had intended the document to be his will and that such enquiry of necessity entailed an examination of the document itself and also of the document in the context of the surrounding circumstances.

[11] In that matter it was contended on behalf of an opposing party that after concluding the document in question the deceased had appeared to change his mind concerning the disposition of his property. The Court held that those factors were not relevant in the determination of what the deceased's intention was at the time of writing the contested will. "*Evidence as to subsequent conduct is relevant only insofar as it throws light on what was on the mind of the deceased at the time of making the contested will...*" The approach adopted by the Supreme Court of Appeal in Van Wetten's case was recently endorsed by that Court in the matter of **Smith v Parsons N.O. and Others** 2010 (4) SA 378 (SCA).

[12] In the present matter there is no dispute that the contested will was drafted by the deceased who died thereafter. The dispute between the parties is whether the deceased intended the document to be his will. The respondents contend that, having regard to the surrounding circumstances and, most notably, various alleged statements made by the deceased in the period before his death, he did not intend the document to be his will.

DISCUSSION

[13] I turn in the first place to the contents of the document. Although the document is neither dated, signed nor witnessed it is common cause that it was written by the deceased. There are,

furthermore, very clear indications that the deceased intended it to be his will. In it he lists the main assets in his estate and then clearly directs that, save for 10% thereof, the applicant is to be the sole beneficiary of his estate. The contested will, expressly stipulates that Matsela was to be his executor. The following sentence makes the deceased's intentions in drafting the document quite clear. "*I herewith declare that this writing replace all previous in respect of my estate devide (sic) or last wishes expressed.*"

[14] Notwithstanding the denials of the second and third respondents, it is clear from its wording that when the deceased drafted the contested will he was contemplating suicide. This appears from his reference to the "*tragedy*" which he never wished to happen, the disappointment that his family and friends would suffer and, conclusively, his reference to dying "*a dishonourable death*". This prompts two observations; firstly the fact that the deceased was contemplating suicide does not of itself render the document something less than his will, if that is indeed what it is. Secondly, the fact that the deceased changed his mind about committing suicide also does not exclude the document being declared his will. The contested will must be judged on its own terms (which are unconditional), and the surrounding circumstances. Any later change of mind on the

part of the deceased, unless given effect thereto by an act of revocation in the form of a subsequent will or codicil or by destruction of the original will, is irrelevant. See in this regard the Law of Succession in South Africa, Juta 2nd ed Corbett et al at page 94 et sequor.

[15] This brings me to an examination of the various grounds advanced by the second and third respondents, singly or cumulatively, why the contested will, although admittedly drafted by the deceased, should not be declared to be his will. They both deny that the document was intended to be the deceased's will, first respondent pointing to the fact that it was found at his house amongst surplus notepaper and not in a place where one would expect to find any of the deceased's important documents. First respondent also relies on what she considers to be contradictory remarks made by the deceased prior to his death in which he indicated that her children would be cared for in the event that he died. Reliance is also placed by her on what she terms the "*form*" of the letter and its incomplete nature and the fact that shortly before his death the deceased was, according to her, under emotional stress and concerned about his health.

[16] The third respondent similarly relies upon an alleged intimation by the deceased, a month prior to his death, that Ms. Oliphant as well as all his brothers and sisters would be looked after in the event of his death. He refers to the contested will as an "*emotional letter*" which the deceased appears to have written during a period of depression and contemplation of suicide.

[17] Ms. Oliphant furnished an affidavit on behalf of the respondents in which she describes the stormy and abusive nature of their relationship. She states that the deceased told her in 2007 that, whilst considering suicide, he had written a letter to his family arising out of a dispute which he had with second respondent and in which letter he favoured certain family members. She stated that the deceased had then changed his mind and had torn up the letter in question in front of her.

[18] Ms. Oliphant also refers to assurances from the deceased shortly before his death in 2007 that he would look after her and all members of her family in the event of his death. She described how she found the contested will, stating that she looked in all the places where the deceased normally kept his documents but eventually found it amongst his study notes. Ms. Oliphant adds that she got the impression that it was a draft document which the deceased had written with the view to expressing his

thoughts before writing the letter to his family which he had torn up in front of her. She does not, however, state her reasons for forming this impression or whether she had even read the letter which the deceased tore up in front her. Ms. Oliphant states further that the deceased did not draw up the contested will after he tore up the letter to his family but once again furnishes no reasons for making this claim. She also expresses the opinion that the deceased would not have left what he regarded as his will unsigned and unwitnessed amongst his study notes. According to her he would have put it amongst his important documents or in his safe. Her reasoning in this regard is that she knew the deceased as a well-organised and educated person who knew well what the requirements were for a valid will. Again, however, this broad assertion is not substantiated in any way.

[19] In considering the various grounds advanced by or on behalf of the respondents as to why the deceased could not have intended that the contested will would be his will, I bear in mind the applicability of the Plascon Evans rule, namely, that any factual disputes must be resolved on the basis of the facts averred by the respondents together with those of the applicant which cannot be disputed by the respondents. However, even on the facts, as opposed to the assertions or conclusions put forward by or on behalf of the respondents, as set out above,

they carry little weight, either singly or cumulatively, and do not, in my view, cast any substantial doubt on the deceased's apparent intention that the contested will would constitute his will.

[20] Even accepting that the deceased told various members of his family in the weeks and months before his death that they would be looked after upon his death, in contradiction of the terms of his contested will, this does not in itself cast any real doubt on his apparent intention as expressed by him in writing. There is, for example, no evidence that he was aware how his estate would devolve in the event of his dying intestate. Furthermore, these assurances were in most instances vague or generalized, never witnessed by more than one person, and with no clear indication that they were sincerely meant.

[21] The evidence given by Oliphant regarding the tearing up of the letter is, in my view, significant. It underlined the deceased's realisation that anything which he committed to writing was important and, by implication, that if he changed his mind in regard thereto the destruction of that document was desirable, if not necessary. Significantly, however, the deceased did not destroy the contested will but retained it amongst his private papers. First respondent referred to the contested will being

found amongst the deceased's surplus notepaper but it is clear that she did not personally witness Oliphant finding the document. The latter's description is less dismissive, namely, that she found it amongst the deceased's study notes. The evidence regarding what important documents the deceased kept and where he kept them is scanty, if not non-existent, and I do not consider that an adverse inference can be drawn from the spot in which the contested will was found. It is also of some significance that, as is clear from the papers, for at least some period of time most, if not all, members of the family, including second and third respondents, regarded the contested will as expressing the deceased's last wishes. This can be inferred from the terms of a letter written by first respondent, at the time when he enjoyed the confidence of all of the parties, to the fourth respondent on the 20 July 2006. In it he asked whether the Master would support a planned application to court declaring the contested will valid.

[22] There is also the evidence of Ms. Carol-Ane Matsela who deposed to an affidavit on behalf of the applicant. She too has an interest in the matter, having been appointed executor and being a beneficiary to the extent of 10% of the deceased estate in terms of the contested will. It was common cause that Matsela worked with the deceased and had become close to him.

According to her shortly before his death the deceased had told her that she was "*in his will*", that she would bury him, that she would be his executor and that he had left 10% of his estate to her. If accepted, this evidence unquestionably strengthens applicant's case since these intimations reflect the provisions of the contested will. Not having been present, first and second respondents can do little more than deny that any such conversation took place and point to conflicting assurances allegedly made by the deceased to themselves or their children.

[23] Taking a broad view of the surrounding circumstances, I do not consider that any of the various assurances made by the deceased plays a decisive role in the determination of whether he intended the document to be his will. What must carry much greater weight are the terms of the contested will which unequivocally point towards the deceased's intention that it would constitute his will. A further weighty factor is that although the deceased destroyed another document relating to his view of his family members shortly before his death, he did not destroy the contested will but kept it in a place of sufficient prominence for it to be found without any difficulty after his death.

[24] Taking all these factors into account and the undisputed evidence, I am satisfied that annexure "TA1" to the applicant's

founding affidavit should be declared to be the deceased's will, nothwithstanding its lack of compliance with the formalities prescribed by the Wills Act. It follows that fourth respondent must be directed to accept annexure "TA1" as the deceased's will.

[25] There remains the question of costs. There is of course no question of any costs order against the first and fourth respondents who abided the Court's decision. The remaining parties were in agreement that whomsoever failed in the application should not have to bear the costs of the successful party, but that such costs should rather be costs in the estate. The second and third respondents have been unsuccessful in their opposition. However, I do not consider that it was unreasonable of them to oppose the relief sought by the applicant and in the circumstances I considered that the proposed costs order would be appropriate. The relief sought by applicant relating to condonation of the non-compliance with the formalities prescribed by the Wills Act is superfluous and subsumed by an order directing fourth respondent to accept the contested will.

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

1. The Master of the High Court, Western Cape Provincial Division, is ordered to accept the document marked "TA1" annexed to the founding affidavit of the applicant, as the

last will and testament of Warden Francois Pietersen for the purposes of the Administration of Estates Act 66 of 1969.

2. The costs of the application, including the costs of second and third respondents, shall be costs in the winding up of the deceased's estate.

L. J. BOZALEK, J
JUDGE OF THE HIGH COURT