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

CASE NO:13779A/2012

In the matter between:

ALAN THOMAS THOMPSON Applicant

And

THE MASTER, WESTERN CAPE HIGH COURT 1st Respondent

CONSTANTINE GODFREY VARLEY 2nd Respondent

ANDREW GEORGE BEAK 3rd Respondent

DAVID THOMAS BEAK 4th Respondent

STEPHEN JOHN BEAK 5th Respondent

Coram: Yekiso, J
Dates of Hearing: 13 October 2014, 14, 15 & 16 April 2015
Date of Judgment: 25 May 2015

JUDGMENT

YEKISO, J

[1.1.] In its amended notice of motion issued out of this court, the applicant seeks the following forms of relief as against the respondents, these being, that the document entitled “Last Will & Testament of Valerie Yvonne Thompson”, dated 31 August 2007

("the disputed Will") be declared invalid and revoked; that the appointment of the second respondent, as executor under the disputed will, be set aside and that the second respondent be removed as executor in the estate of the late Valerie Yvonne Thompson("the deceased"); that the second respondent be directed to return to first respondent the letters of executorship issued to him by the first respondent; that the second respondent be declared not entitled to receive any fees for his services for the period he acted as executor; that it be declared that the document entitled "Codicil to Will" dated 28 September 2008, was intended to be the deceased's last will and that the first respondent be ordered to accept the codicil for the purposes of the Administration of the Estates Act, 66 of 1965; and, finally, that the second, third, fourth and the fifth respondents be ordered to pay the costs of this application, including the costs of counsel, jointly and severally, the one paying the other to be absolved in the event the said respondents oppose the relief sought.

[2] The parties are as set out in paragraphs 4 to 9 of the applicant's founding affidavit. Initially, the second respondent opposed the relief sought and had filed a counterclaim for an order that the disputed will be accepted as the deceased's Last Will and Testament. The third, fourth and the fifth respondents did not oppose the relief that the disputed will be declared invalid but opposed the relief relating to the acceptance of the Codicil as the deceased's will. They thus adopt the position that the deceased died intestate.

[3] Once the pleadings were closed, the matter was enrolled for hearing. The matter was argued before me on 13 October 2014 and, in the cause of hearing argument, I directed that the proceedings be adjourned as I was of the view, at the time, that some of the issues in dispute would only be capable of being resolved by hearing oral evidence. On Friday, 17 October 2014 I directed that the matter be postponed to Tuesday, 14 April 2015 for the hearing of oral evidence on the following issues, these being:

[3.1.] The circumstances surrounding the signature and/or execution of the dispute Will;

[3.2.] The circumstances surrounding the will signed or executed by way of a mark. In the same directions, I directed that the following persons be called to testify, namely, Cecilia Buthelezi; Cecilia Brenda Machelm; Alan Thomas Thompson; and, Constantine Godfrey Varley. In the light of the settlement agreement subsequently concluded between the parties the need for Constantine Godfrey Varley to give evidence fell away and the evidence of the remaining witness became material solely on the circumstances surrounding the Will executed by way of a mark.

[4] Following upon the postponement of the matter and, before the resumption of the hearing on Tuesday, 14 April 2015, the matter was settled as between the second respondent, the applicant and the rest of the respondents, save the first respondent who does not oppose the relief sought, but abides the decision of this court. On the basis of that settlement agreement the second respondent withdrew its opposition to the application, as well as his counter-application that the disputed will be accepted by the

first respondent; the second respondent conceded that the document entitled "Last & Will & Testament of Valerie Yvonne Thompson", dated 31 August 2007, ("the disputed Will") is invalid; that the second respondent be removed as executor in the estate of the late Valerie Yvonne Thompson; and that the second respondent undertakes to return to the first respondent the letters of executorship issued to him by the first respondent.

[5] In the light of the settlement agreement, the only issue I am required to determine is whether or not the document entitled "Codicil to Will" dated 28 September 2008 was drafted by the deceased; whether the deceased had intended the document to be her will as contemplated in section 2(3) of the Wills Act, 7 of 1953; and whether it is competent for this court to condone non-compliance with the formalities set out in section 2(1)(a)(v) of the Wills Act in respect of the "Codicil to the Will", as well as the question of costs. Once the settlement agreement was made an order of court, the applicant, Cecilia Buthelezi and Cecilia Brenda Machelm were called to testify.

THE EVIDENCE OF THE APPLICANT

[6] The applicant testified that he is the only surviving sibling of the deceased. He recalled discussing the deceased's estate with her on many occasions and, in particular, that the deceased had said she did not mind dying without a will. At that stage the applicant and the deceased were under the impression that if the deceased died intestate, her entire estate would devolve to the applicant. It was only when she had to be admitted at Mountview Care Facility ("Mountview") did it become necessary for her to make a will. The deceased also wished to leave money for her carer, Cecilia

Buthelezi. In the disputed will, which has already been conceded to be invalid, the deceased made provision for Cecilia Buthelezi for a monthly income in an amount of R1,000-00 for a period of two years after her death.

[7] The deceased had to move to Mountview as she had had a series of unreliable night nurses and her carer, Cecelia Buthelezi, was unable to spend every night with her when required to step in. The deceased stayed at Mountview for a period of about two months. At the time the deceased moved to Mountview, her condition deteriorated significantly to an extent that in March 2008 she had had to move into the SenCit Home ("Sencit") in Strand where Mrs Machelm was the matron. It was only when deceased was admitted to SenCit Home in March 2008 that the applicant became aware that she wanted to change her Will. He describes in his evidence efforts made to get the second respondent, who was the deceased's financial advisor at the time, to come to SenCit for this purpose. Several efforts were made by way of telephone messages to get the second respondent to see the deceased at SenCit to no avail.

[8] The second respondent did not respond to several messages left for him to come to SenCit. On 28 September 2008 the applicant was telephoned by Mrs Machelm who told him that the deceased's condition had deteriorated considerably. Mrs Machelm was concerned that she would pass away without her wish having been realised.

[9] The applicant described how the deceased communicated in general. This was by nodding her head, opening or closing an eye or grunting when spoken to. As at the time of the execution of the Codicil, the deceased's health had deteriorated to an extent that she could not sign her signature, could not speak properly and only communicated by opening or closing her eyes or grunting when spoken to. The applicant re-iterates in his evidence that the deceased had indicated to him on several occasions that she intended to bequeath her entire estate to him. The applicant was advised by a retired attorney, who was also resident at SenCit, how the desired change in her will could be made and even suggested words that could be used to effect the desired change.

[10] On the date of the execution of the Codicil the applicant had asked of the deceased "Do you want to leave all your worldly possessions to your brother Alana Thomas Thompson?" The deceased responded by grunting. After such confirmation the applicant proceeded to type the document described as "Codicil to Will" on the computer at SenCit. Once the document was typed, he handed the typed page to Mrs Machelm. As he was the beneficiary in terms of the Codicil, he thought it advisable that he should not be present when the document was signed. It transpired later in the evidence that the deceased had to be assisted to place her fingerprint on the Codicil. The wording of the Codicil was as advised by the resident retired attorney. The will was read to the deceased whereafter the deceased was assisted to affix her fingerprint thereon. The applicant kept the document so signed. He gave it to the second respondent after the death of the deceased.

THE EVIDENCE OF THE OTHER WITNESSES

[11] The salient features of the evidence of the other witnesses merely confirms that the document entitled “Codicil to Will” was indeed typed by the applicant; that once the applicant had typed the document, he handed it to Mrs Machelm; Mrs Machelm and Mrs Buthelezi assisted the deceased in placing her thumbprint on the document; and that both Mrs Machelm and Mrs Buthelezi signed as witnesses

[12] The witnesses further corroborate the evidence of the applicant on the efforts made to get the second respondent to visit the deceased at SenCit to change her Will. All three witnesses who testified made it clear in their evidence that the Codicil was the only way they could try to ensure that the deceased’s wishes were carried out, given that the second respondent would not come as had been requested by the deceased. They claim in their respective evidence that they acted in the deceased’s interest, that their actions were reasonable and what they did was what the situation required, given the deceased’s particular circumstances.

[13] Section 2(1)(a)(v) of the Wills Act requires that a will signed by the testator by the making of a mark should be signed before a commissioner of oaths; that the commissioner of oaths should satisfy himself as to the identity of the deceased; and that the will so signed is the will of the deceased. It is common cause that the Codicil was not executed before a Commissioner of Oaths and, as such, does not comply with the statutory formality set out in section 2(1)(a)(v) of the Wills Act, in that, at the time the document was executed, the identity of the deceased was not confirmed by a

Commissioner of Oaths nor did a Commissioner of Oaths satisfy himself that the document so signed is the will of the deceased.

SECTION 2(3) OF THE WILLS ACT

[14] The document described as "Codicil to the Will" and signed by the deceased by way of a thumbprint is clearly defective as it does not comply with the provisions of section 2(1)(a)(v) of the Wills Act. In terms of section 2(3) of the Wills Act the court has the power to condone the failure to comply with any one of the formalities set out in section 2(1) of the Wills Act. Section 2(3) of the Wills Act provides:

> "(3) 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, 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 sub-section (1)."

[15] What is thus clear on a proper analysis of this provision, is that it embodies three requirements, these being, in the first instance, the existence of a document in question; the drafting or execution of such a document by the deceased; and the intention by the deceased that such document should be his or her will. The latter two requirements have commonly been referred to by academics and commentators as the drafting requirement and the intention requirement, respectively. (See *Annual Survey of South African Law* 2003 p528).

[16] There has been a divergence in the approach adopted by the courts in the interpretation and the application of the provisions of section 2(3) of the Wills Act leading to conflicting decisions, some courts favouring a strict and literal interpretation and application of that provisions, whilst some favoured a broad and flexible approach. Authorities such as *Webster v The Master & others* 1996(1) SA 34 (D); *Anderson & Wagener NNO & another v The Master & others* 1996 (3) SA 779 (C); *Henwick v The Master & another* 1997 (2) SA 326 (C) are but some of the authorities where a strict and literal approach was preferred. On the other hand, *Back & others NNO v The Master of the Supreme Court* [1996] 2 All SA 161 (C); *Ex Parte Laxton* 1998 (3) SA 238 (N); *Ndebele & others NNO v The Master & another* 2001 (2) SA 102 (C) are but some of the authorities where a broad and flexible approach is followed.

[17] It has been suggested in academic circles that the hallmark of the strict approach is to apply the power of condonation cautiously, as opposed to the flexible approach, which has been characterised by a more robust interpretation and the application of the section. Commentators go further to suggest that in instances where a more flexible approach is adopted, the overriding consideration has been whether the intention requirement has been met, whilst in instances where a strict approach has been adopted, the tendency has been to give more focus to the drafting requirement. (*Annual Survey of South African Law,* supra at p.529)

[18] Mr *De Bruyn,* for the third, fourth and the fifth respondent makes a point in his submissions that it is not competent for this court to grant the order contemplated in

section 2(3) of the Wills Act in as much as the document which the applicant seeks the Master to be ordered to accept as the deceased's will was not drafted or executed by the deceased and that the deceased could not have intended the document to be her will. Mr *De Bruyn* makes a point in this regard that nowhere in the document is it indicated that the deceased, in causing the document in dispute to be drafted, had intended to revoke the earlier will.

[19] In support of this submission Mr *De Bruyn* relies heavily on the judgment of the Supreme Court of Appeal in the matter of *Bekker v Naudé & another* 2003 (5) SA 173 (SCA). In that matter the facts were briefly as follows cited from the headnote of the judgment of the court *a quo* in *Bekker v Naudé & others* 2002 (1) SA 264 (WLD):

> "The plaintiff and her husband (the deceased) had during 1993 gone to the local branch of their bank, where they requested an official to prepare a will according to a set of instructions given by them. The official completed a form containing the instructions and sent it to Pretoria, where the will was drawn up, returned to the original branch, thence posted to the plaintiff and the deceased for their signature in the presence of two witnesses. The will so prepared complied with the instructions given by the plaintiff and the deceased, but five years later, when the deceased died, the will had not yet been signed. The deceased had previously been married to the first defendant, with whom he had during 1983 executed an earlier joint will, and the issue that the court had to decide was whether the 1993 will was valid and thus superceded the earlier one. Arising from this fact, the first question that the court had to determine was whether the unsigned document containing the 1993 will had been "drafted of executed" by the deceased as contemplated in section 2(3) of the Wills Act."

[20] In concluding that the draft will did not satisfy the requirements of section 2(3) of the Wills Act, the court *a quo* followed the strict approach adopted by the courts in authorities such as *Webster v the Master & others,* supra, and expressly rejected the flexible approach followed in authorities such as *Beck & other NO v the Master,* supra.

[21] The Supreme Court of Appeal confirmed the decision of the court *a quo* in *Bekker v Naudé & others,* supra. In doing so, it followed the strict and the literal approach in interpreting the provisions of section 2(3) holding that for the deceased to have drafted the document which the applicant seeks to have accepted as the deceased's will, the deceased personally ought to have drafted the document in question. It held that such an interpretation does not result in an absurdity as section 2(3) of the Wills Act contemplates that the deceased should personally have drafted the document.

[22] In support of the strict literal approach the court relied on a comparison of the provision of section 2A of the Wills Act. Section 2A of the Wills Act, under the heading "Power of court to declare a will to be revoked" provides:

> "If a court is satisfied that a testator has-
>
> (a) made a written indication on his will or before his death caused such indication to be made;
>
> (b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or
>
> (c) drafted another document or before his death caused such document to be drafted,

by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked."

[23] Section 2(3) and 2A of the Wills Act were inserted into the Wills Act by the same amending piece of legislation in the form of the Law of Succession Amendment, Act 43 of 1992. In view thereof, the Supreme Court of Appeal held, the use by the legislature of the phrase "drafted or caused to be drafted" in section 2A, as opposed to the use of the term "drafted" is evidence of a clear intention by the legislature to ascribe a narrow meaning to the term "drafted" in section 2(3) of the Wills Act. Based on this approach the Supreme Court of Appeal held that adopting the literal approach in interpreting section 2(3) is the correct approach as it, amongst other things, has the desired effect of preventing potential fraud. In the light of that approach the court did not find it necessary to deal with the intention requirement in section 2(3) thus confirming the decision of the court *a quo* in adopting the narrow and literal approach in the interpretation of that provision. This court, in *De Reszke v Maras & others* 2003 (6) SA 676 (C) at para 8 p 683 followed that approach.

[24] Ms *Fitz-Patrick*, for the applicant, in argument before me, sought to persuade me that in the light of the deceased's condition at the time the "Codicil to the Will" was drafted, (the deceased could hardly speak and could not even append her signature to the Codicil) that the legislature could not have intended to exclude persons in the condition of the deceased at the time the Codicil was drafted from the ambit of the provision of section 2(3). In view of the circumstances prevailing at the time the Codicil was drafted, so I understood the argument, section 2(3) cannot be interpreted in a

manner that excludes a person in the position of the deceased at the time the Codicil was drafted from the relief contemplated in section 2(3). Thus, her submission boils down thereto that in view of what could be described as exceptional circumstances at the time the codicil was drafted, a broad and flexible approach in interpreting section 2(3) should be preferred. This is especially so because the deceased could hardly speak or write at the time the Codicil was drafted. In the circumstances of this matter, so I understood the argument, it cannot be said that the drafting requirement was not met.

[25] If the submission by Ms *Fitz-Patrick* could be followed it would mean that "exceptional circumstances" referred to in her submission should be read into the provisions of section 2(3) of the Wills Act. *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) is authority for the proposition that reading in words in conformity with its stated objectives into an instrument is permissible in our law. Even if "exceptional circumstances" could be read into the instrument, such an approach would not breathe life into the document especially when it is not stated in the document in dispute that the deceased had intended thereby to revoke the earlier will. Thus, even if exceptional circumstances were to be read into the instrument, the intention requirement in section 2(3) of the Wills Act would still not be met. That said, it follows that the application falls to be dismissed.

[26] In as far as the question of costs is concerned Mr *De Bruyn* makes a point in his submissions that in view of the fact that the applicant's legal representatives were made

aware of the *Bekker v Naudé* decision as far back as during October 2014 when the respondent's heads of argument were handed to them, the applicant nonetheless chose to proceed with oral evidence. In these circumstances, so the submission goes, it would not be fair if the estate would be ordered to bear the costs of either of the parties. I do not agree. Despite the fact that the applicant's legal representatives would have been made aware of the *Bekker v Naudé* decision as far back as October 2014, it cannot be said that the applicant's decision to pursue this matter further was vexatious or frivolous. I do accept that the circumstances surrounding the "drafting" of the Codicil to the Will are exceptional so that it cannot be said that the applicant's decision to proceed with oral evidence had no merit. Having said that, I am of the view that it would be fair, in the circumstances of this matter, if the estate were to be ordered to bear the costs of the respective parties.

[27] In the result, the following order is made:

(1) The application is dismissed;

(2) The estate of the deceased shall devolve in accordance with the rules of Intestate succession.

(3) The costs of each one of the parties in these proceedings shall be borne by the estate.

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N J Yekiso
Judge of the High Court