Republic of South Africa

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

Case number: 17638/2020

Before: The Hon. Mr Justice Binns-Ward
Hearing: 15 April 2021
Judgment: 19 April 2021

In the matter between:

ESTATE LATE ELAINE ILSIA WILLIAMS	First Applicant
FRANCIS LEONE WILLIAMS	Second Applicant
THURSTON CLEMENT WILLIAMS	Third Applicant
EUGENE NATHAN WILLIAMS	Fourth Applicant
CARMEN LETITIA THERESA WILLIAMS	Fifth Applicant

and

WESLEY HENDRICKS	First Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Second Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 19 April 2021.)

BINNS-WARD J:

[1] Section 2(3) of the Wills Act 7 of 1953 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).'

[2] In the current matter, the close relations of the late Elaine Hendricks seek an order directing the Master to accept as a will for the purposes of the Administration of Estates Act a pro forma document signed by the deceased in which she gave instructions to a bank to draft her last will and testament.

[3] The first respondent is the surviving spouse of the deceased, with whom he had been married in community of property. He is also the executor of the deceased's estate. He was cited in these proceedings in his personal capacity. There is a minor child of the marriage between the deceased and the first respondent.

[4] The Master was cited as the second respondent, but she has taken no part in the proceedings.

[5] The nature of the bank document was consistent with its printed title, '*Will Application / Aansoek om testament*'. It is apparent from the terms of the document that the bank offers a service for the drafting of wills. The service is provided free of charge if the bank's trustee company is nominated as the executor, but a fee is levied if the will to be drafted provides for an 'alternative executor'. The form signed by the deceased did not nominate an executor, but it did purport to authorise the debiting of an account conducted in the first respondent's name at a branch of a different bank in the amount of R90, presumably for services rendered by the bank in respect of the will application.

[6] The deceased's instructions to the bank in respect of the content of the will were framed as follows: '*I would like to give my full estate to my son* [the child's full names and identity number were provided] *until he is of age as well as any other monetary payouts as a result of any claims. 50% of the family home, 50% of any investments, 50% of any policy payouts, 50% of any savings.*' It would appear that the deceased also wished her will to

provide that the bequest to her son should be administered in a trust until the child attained the age of 21.

[7] The form signed by the deceased recorded the following standard 'terms and conditions':

1. I/We acknowledge that Nedgroup Trust (Pty) Ltd will prepare a last will in terms of the details and instructions provided in this application form.
2. We confirm that the information is correct and that it remains my/our responsibility to advise Nedgroup Trust (Pty) Ltd if circumstances change.
3. These instructions should not be construed as a valid will as the requirements of the Wills Act, 1953, must still be met.
4. I/We confirm that the proper advice has been sought from Nedgroup Trust (Pty) Ltd as to best practice relating to the structure of my/our will. If my/our instruction(s) are contrary to Nedgroup Trust (Pty) Ltd's advice, my/our instruction(s) should prevail.

[8] The will application form was completed by the deceased with the assistance of a representative of the bank on the day before she died. She was terminally ill with cancer at the time. The deceased passed away before her instructions for the drafting of a will were carried out.

[9] As evident from the wording of s 2(3) of the Wills Act, it is required of an applicant seeking an order of the sort contemplated by the provision to establish, amongst other things, that the document in question was intended by the deceased person to be his or her will. It is in that regard that the application runs into difficulty on the merits of the claim.

[10] The applicants' counsel submitted that a liberal approach should be adopted in respect of the application of s 2(3). He relied on three judgments in support of his argument: *Van Wetten v Bosch* [2003] ZASCA 85 (19 September 2003); [2003] 4 All SA 442 (SCA); 2004 (1) SA 348 (SCA), *Mabika and Others v Mabika and Another* [2011] ZAGPJHC 109 (8 September 2011) and *Dikgale v Master of the High Court, Polokwane* [2013] ZAGPPHC 85 (26 March 2013).

[11] The document in issue in *Van Wetten* was in the form of a letter drafted by the deceased to his attorney setting forth instructions to the latter to draw up a will. In that respect it is therefore comparable on its facts to the current case. However, the evidence in *Van Wetten* was to the effect that the letter had never been sent to the attorney. The deceased in that case instead entrusted the letter to a friend for safekeeping as if it were in fact his will. In deciding that the letter qualified to be recognised as having been intended by the deceased

to be his will, the appeal court was persuaded by the surrounding circumstances. Notably, the document had been entrusted to a close friend in a sealed envelope endorsed with the words '*Maak net oop as daar iets met my gebeur of ek ander besluit!*' The entrustment of the letter occurred in circumstances in which the deceased was emotionally charged because he suspected infidelity by his wife. He took his own life every shortly after giving the letter to the friend for safekeeping. It seemed that he had probably been contemplating doing that when he entrusted the document to his friend. It could accordingly readily be inferred in the circumstances that the deceased in *Van Wetten*'s case intended the letter, which contained detailed instructions for the administration of his deceased estate, to be regarded as his will. The essence of the court's reasons for so concluding are reflected at para 19 of the judgment, where Lewis JA said:

> 'The inference that the deceased contemplated suicide leads inevitably to the conclusion that, when he gave the envelope to Van der Westhuizen, it was not intended that the latter should hand the enclosed document to attorney Mike Nolan so as to see to the drafting of his will. At the time when it was envisaged that the envelope would be opened, and the document read, the deceased would already be dead. A dead man cannot execute a will, and the deceased, even in a troubled frame of mind, would have appreciated that. This fact alone, in my view, shows that the contested will was intended by the deceased to be his will. The terms of the contested will bear that out.'

[12] By contrast, in the current case there is nothing to indicate that the deceased intended the document to be anything other than what it appears to be – an instruction to the bank to draft a will.

[13] The facts in *Mabika* were more closely analogous to those in the current matter. In that matter too, the document in issue was a written instruction to a bank by the deceased to draft a will for her. As in the current case, the deceased in *Mabika* was terminally ill and died before a will could be executed in accordance with her signed detailed instructions. The court's reasoning for holding that the instructions document should be accepted as the deceased's will were set out in para 15 of the judgment as follows:

> 'I have already sketched extensively the family background, and the circumstances leading to the present application. I have also examined closely the purported will, Annexure "SM2". It is plain that the deceased died on 24 January 2011 engulfed in miserable circumstances after she executed, in her own handwriting Annexure "SM2". She clearly intended the document to be her final will but did not survive to sign it. This is so despite the fact that the document is styled "*Application for the Drafting of a Will*". It contained full personal details which the

deceased intended to appear in her will. The surrounding circumstances are that the deceased and the first respondent, due to his cruelty towards her, were estranged. They were on the verge of a divorce, but for her illness and eventual death. They no longer lived together since 2006. The deceased clearly intended to disinherit the irresponsible and unemployed first respondent from her estate. She took him to the maintenance court in order to compel him to comply with his fatherly responsibilities, including that of his own son. She even obtained an interim protection order to put an end to the persistent assaults on her. She was also hugely scared of the first respondent. That is why she never ventured to mention to him the word '*divorce*'**.** Under these circumstances, it will be greatly unjust not to accept Annexure "SM2" as the deceased's final will, and the first respondent will unfairly benefit from her estate when it is clear that such was not her intention. In *Van der Merwe* [*Hendrik van der Merwe v Master of the High Court and Another* [2011] 1 All SA 298 (SCA)], *supra*, Navsa JA at para [14] said:

> "*By enacting section 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators …*"

Once this Court accepts that the deceased intended Annexure "SM2" to be her final will, the issue of discretion does not come into play at all. The decision to declare that the first respondent should forfeit his share of the immovable property, although drastic in nature, will be justified in the circumstances of this matter.'

[14] It seems to me, with respect, that the learned judge in *Mabika* was guided by the equities of the case rather than the prescripts of s 2(3). Whilst there was no doubting that the document in issue in that case reflected the deceased's testamentary wishes, there was no evidence that she had intended it to be her will. Proof that she had so intended was one of the essential requirements for relief in terms of s 2(3). This would appear to have been overlooked by the court in *Makiba*. In my opinion, the judgment in *Mabika* was justifiably criticised by Professor MJ de Waal in his contribution to the (2011) *Annual Survey of South African Law* (Juta) 1033 s.v. '*The law of succession (including administration of estates) and trusts*' at 1039-1041 as '*unfortunately, a hard case which made bad law*'.

[15] In *Dikgale*'s case, the court was satisfied that signed entries in the deceased's diary that appeared to set out instructions for the administration of her affairs and the care of her child after her death were intended by her to express her testamentary wishes. It is indeed unusual for anyone to make signed entries in a diary. The content of the entries coupled with the attachment of the deceased's signature to them justified the conclusion by the court in that case that her directions were intended by the deceased to be her will. I would consider the

judgment in *Dikgale* to manifest the sort of liberal application of s 2(3) that the applicants' counsel contended for. I say that because to have treated entries in a diary as 'a document' seems to me to stretch the contextual import of the word 'document' in s 2(3) too far. But that is not the issue in the current case. The distinguishing feature in the current case is that the content of the document in issue and the circumstances surrounding its execution indicate clearly that the deceased did not intend it to be anything other than a drafting instruction. There is nothing to support the contention that the deceased intended the document to be her will; everything points to the contrary.

[16] It follows that a case for the substantive relief sought in this application has not been made out.

[17] The first respondent contended that the applicants in any event did not have the legal standing to bring the application. The basis upon which the second to fifth applicants alleged that they had standing was their situation as contingent intestate heirs to the estate. It is quite evident, however, that the prospect of any of them inheriting on intestacy from the deceased's estate is illusory. On intestacy, the deceased's estate falls to be shared between the first respondent and the minor child. Indeed, if the value of the deceased's share of the estate in community of property is less than R250 000, the first respondent would inherit the entire share (s 1(1)(c) of the Intestate Succession Act 81 of 1987). It is evident, however, if regard is had to the supporting affidavit as a whole, that the second to fifth applicants brought these proceedings not in their own interests but concerned, rather, that the deceased's minor child should inherit her portion of the joint estate in accordance with the deceased's declared wishes. A court will not lightly turn away a litigant who approaches it in the interests of a minor child, even if, technically, the proper approach would have been for the applicants, or one of them, to apply for the appointment of a curator *ad litem* to prosecute the proceedings on the child's behalf, if so advised. It is for this reason that I have treated of the application on its merits rather than dismissing it on the point *in limine*, as could have been done.

[18] The first respondent sought his costs of suit. Although the general rule is that costs follow the result, the awarding of a costs order remains a matter within the discretion of the court. Being satisfied that the applicants were actuated not by their personal interests, but rather with a bona fide concern that the deceased's wishes for her deceased estate to devolve upon her child as conveyed in the instructions given on the day before her death for her last will and testament be implemented, I consider that the equities of the case make it one in which it would be appropriate to depart from the general rule and make no order as to costs.

It weighs with me in this regard that I would expect the first respondent, if it were practicable for him to do so, to honour his late wife's declared wishes regardless of the fact that due to a cruel twist of fate they did not end up being entrenched in a will as she had intended.

[19] The following order will issue:

1. The application is dismissed.
2. There will be no order as to costs.

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

APPEARANCES

Applicants' counsel:	**D.L. Petersen**
Applicants' attorneys:	**Boer Arries & Associates**
	Cape Town
First Respondent's counsel:	**B. Braun**
First Respondent's attorneys:	**Jaffer & Associates**
	Cape Town