In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE NUMBER: 3656 /2022

in the matter between:

M[…] L[…] C[…] B[…]	**APPLICANT**
AND	
THE MASTER OF THE HIGH COURT	**FIRST RESPONDENT**
N[…] I[…]	**SECOND RESPONDENT**
K[…] C[…]	**THIRD RESPONDENT**
J[…] C[…]	**FOURTH RESPONDENT**

JUDGMENT DELIVERED ELECTRONICALLY ON 26 JANUARY 2023

RALARALA, AJ

INTRODUCTION

[1] The applicant is the foster sister and cousin of the late Ms [E…y D…y C…n], *("the deceased")* who passed away on 18 August 2021, from natural causes. The applicant seeks an order declaring the contested Will and Testament of the deceased to be valid. This is despite the contested Will not being compliant with the formalities as set out in section 2(1) (a) (ii) of the Wills Act. The application is in terms of section 2(3) of the Wills Act 7 of 1953 *("the Wills Act")* read with sections 8(1) and 8(4) of the Administration of Estates Act 66 of 1965("the Estates Act").

[2] The Master of the High Court, who is the first respondent, is not contesting the application. The second respondent is [N…e I…s], the biological father of the deceased, and a beneficiary to the deceased's estate should the deceased be deemed to have died intestate. Second respondent is opposing the application. The third respondent is [K…e C…n], a nephew and a beneficiary to the deceased estate, he is not opposing the application. The Fourth respondent, [J…e C…n] is the deceased's niece and a beneficiary to the deceased's estate. She is not opposing the application.

[3] In the notice of motion, the applicant seeks and order in the following terms:

[3.1] Directing the first respondent to accept the Will of the deceased, as valid in terms of section 2(3) of the Wills Act.

[3.2] Directing the first respondent to remove the second respondent as executor of the deceased estate.

[3.3] Directing the first respondent to appoint applicant as the executrix of the deceased estate and that she be exempted from providing security to the Master of the High Court for the due and proper fulfillment of her duties.

[3.4] Directing that the costs of the application be paid from the deceased's estate.

PRELIMINARY ISSUES: FILING OF A SUPPLIMENTARY AFFIDAVIT BY THE SECOND RESPONDENT.

[4] The second respondent filed a supplementary affidavit without requesting leave of the court, as envisaged in rule 6(5)(e) of the rules of court. For completeness, Rule 6(5)(e) provides:

" Within 10 days of the service upon him of the affidavit and documents referred to in subparagraph (ii) of paragraph (d) of sub rule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits." (my emphasis)

[5] The second respondent, filed an answering affidavit and pursuant to the applicant filing the replying affidavit, the second respondent filed a supplementary affidavit. At the hearing of this application, counsel for the applicant extensively addressed the issue of the filing of the supplementary affidavit. Counsel for the applicant argued and correctly so in my view, that where further affidavits are filed without leave of the court, the court can regard such affidavits as *pro non scripto*. No argument was proffered by the respondent's counsel in response to this argument, and instead, the argument of the second respondent's counsel were confined to the contents of the very impermissible affidavit, notwithstanding the dereliction by the second respondent in his obligation to seek leave of the court, prior to filing a supplementary affidavit, as contemplated in rule 6(5)(e).

[6] It should be emphasised that, it is imperative that the well-established general rules, regarding the number of sets and sequence of affidavits, should ordinarily be observed as this is in the interests of the administration of justice. See *James Brown*

& *Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons NO,* 1963 (4) SA 656 E –F.

[7] Nonetheless, some flexibility is necessarily permitted upon solicitation from the litigant desirous of such indulgence. Even so, such flexibility is thus exercised and controlled by the court in its discretion, having regard to the merits of the case. It is well acknowledged that in motion proceedings, the norm is that three sets of affidavits are filed. Only in exceptional circumstances, and upon proper explanation by the litigant, as to why a fourth set of affidavits would be needed would a court permit such affidavits to be submitted. In my mind, this would be a case, where something unexpected or new emerged from the applicant's replying affidavit. See Erasmus: *Superior Courts Practice* Vol 2 pages D1-67, James *Brown supra and Hano Trading CC v JR 209 Investments(Pty) Ltd and Another* 2013 (1) SA 161 (SCA).

[8] Self-evidently, the sole discretion, whether or not to allow further affidavits rests and remains only with the Court. In *Standard Bank of SA LTD v Sewerpersadh and Another* 2005(4) SA 148 (C) this was reiterated when the court stated:

"[13] The applicant is simply not allowed in law to take it upon himself and [to] file an additional affidavit …. Clearly a litigant who wished to file a further affidavit must make a formal application for leave to do so. It cannot simply slip the affidavit into the court file (as it appears to be the case in the instant matter). I am of a firm view that this affidavit is to be regarded as pro non scripto."

[9] I thus, align myself with the view expressed by the courts, that without a request before the court, for filing of a further affidavit, in such circumstances the court regard the second respondent's supplementary affidavit as pro *non scripto*, and it is regarded as such.

[10] I now turn my attention to two points *in limine* raised by the second respondent. In addition to the above, the second respondent raised two additional points *in limine,* First, that the applicant's founding affidavit lacks compliance with the requirements of an affidavit; Second, that the Commissioner of Oaths who commissioned the founding and confirmatory affidavits had direct interest in the matter and thus not impartial, unbiased and independent as required in the Regulations Governing the Administering of an Oath or Affirmation.

[11] Regarding the first point *in limine,* the applicant denies this allegation setting out that the relief sought is clear from her founding affidavit, which states that the first respondent accepts the deceased's Will as valid in terms of section 3(2) of the Wills Act. The applicant further presented evidence which the second respondent is not able to dispute, that the purported Will was drawn by the deceased. It was argued in the applicant's heads of argument that:

"*18 The first putative point in limine is that Applicant has not made out a case on her founding papers. This is not a point in limine but an argument on the merits which is to be dealt with in argument."*

[12] It is trite that Affidavits must satisfy the requirements set out in the Regulations Governing the Administering of an Oath or Affirmation, as promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

The second respondent does not substantiate as to which of the regulations of Act 16 of 1963 are not adhered to by the applicant's affidavit. The court is thus placed in a position where it is required to speculate as to the substance of the point *in limine*. It is settled law that the court retains a discretion to refuse an affidavit which does not comply with the regulations. It remains a question of fact in each case, as to whether there has been substantial compliance with the Regulations. The court in this instance has nothing to rely on in considering the point raised. Similarly, the applicant is bound to be confused in any endeavor to deal with this point *in limine*. The second respondent's counsel in the heads of argument does not pursue this point *in limine.* I am thus of the view that there is no merit in the first point *in limine* raised by the second respondent and same must fail.

[13] Regarding the second point *in limine,* it is clearly set forth and substantiated, in that the second respondent claims that the commissioner who administered the oaths in respect of the founding and confirmatory affidavits, had direct interest in the matter and thus was biased and not entirely independent of the applicant's attorney's office. Regulation 7(1) of the Regulations published in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 governs the administration of an oath, and it is therein plain that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he or she has an interest. This was emphasised in *Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers* 1998 (3) SA 677 (E), per Pickering J:

> "C*ommissioner of oaths who attests an affidavit is required to be impartial, unbiased and entirely independent of the office where the affidavit is drawn."*

[14] The rational for the rule was expounded in numerous court decisions over the years. In *Whyte's Stores v Bridle NO, and Waterberg Farmer's Co-op Society and Others* 1936 TPD 72, De Waal JP expressed that:

> *"The object of the rule in practice is, I think to prevent an attorney from drawing up a petition and putting, as it were, the words of the petition in the mouth of a client, and then himself taking the oath of the petitioner to that petition."*

[15] The second respondent avers in their answering affidavit, that the Commissioner of Oaths to the founding and confirmatory affidavits thereto, [C…l v…n d…r W…n] is the assistant to the applicant's attorney and has been for a period of more than a decade. A Commissioner of Oaths is required to be unbiased, impartial and entirely independent of the office where the affidavits were deposed to. The applicant in reply, argues that although [C…l V…n d…r W…n] has been an assistant to the applicant's attorney for a number of years, however, she has been practicing as an attorney and conveyancer in Grassy Park, Western Cape since 2021. C…l V…n d…r W…n], in the confirmatory affidavit to the replying affidavit, substantiates the applicant's argument expressing that she has been self-employed since July 2021. In consequence, she has no interest in the practice of the applicant's attorney. According to the applicant, [C…l V…n d…r W…n] has no knowledge of, nor any interest in the current matter.

[16] In my view, the view expressed in *Tambay and Others v Hawa and Others 1946 CPD 866 at 868* is apposite in the present case*:*

> *"There is nothing to indicate that he is interested financially in the results of this notice of motion, nor is there any suggestion that the amount of his salary is dependent in any way upon the fees to be earned in this matter…Now the word 'interest' can be used in many senses, but I am of the opinion that in this regulation it must be given a*

limited meaning. I do not think those words can mean a mere social or ethical interest. While perhaps it may be limiting the words too much to say that they cover only a direct financial interest, I am satisfied that they cannot be extended to cover the remote and indirect interest which an employee of an attorney had in the matter dealt with in that office."

[17] The second respondent relied on *Radue supra* in which Pickering J, on the facts of the matter held:

"It seems clear to me that by entering into an association the attorneys have established some sort of formal relationship with each other in consequence whereof their respective offices are to some extent connected. In my view the fact that the ambit of such relationship might differ widely from case to case is not of importance in the context of this case. What is of importance is that the attorneys, by entering into such association have obviously agreed that some mutual benefit in relation to the conduct of their practices be derived by each from their association. Were this not so no purpose would be served thereby. By reason of that association it can therefore ordinarily be expected that each is concerned to some extent with the interests of the other. That being so it cannot be said, in my view that the office of the one attorney is entirely independent of the office of the other or that the one attorney is completely impartial and unbiased in relation to the affairs of the other. Prima facie therefore, the requirement of complete independence is lacking. In these circumstances an attorney practicing in association with another attorney has an interest such as would preclude him or her from functioning as a commissioner of oaths in respect of an affidavit drafted by the other attorney."

[18] A distinctive feature between the afore-mentioned matters and the matter at hand, is the evidence of the actuality, that the Commissioner of Oaths, when the affidavits were attested to, before her, was no longer in the employ of, nor was she in association with the applicant's attorney. She has been in private practice for her own account as an attorney and conveyancer since July 2021. The affidavits in

question it must be noted, were deposed to in April 2022. It can further be gleaned from the replying affidavit of the applicant, that the applicant's attorney and Ms [V…n d…r W…n] are operating their respective practices from different offices and locations. This fact is not disputed, as it is averred in second respondent's answering affidavit in paragraph 11.2 where he states:

> *"Furthermore a Commissioner of Oaths is appointed for a particular area and can only serve in that position within the area for which he or she is appointed. [C…I V…n d…r W…n] is appointed to act as a Commissioner of Oaths in the area of Grassy Park…."*

[19] This is incongruent to the initial contention that [C…I V…n d…r W…n], while acting as Commissioner of Oaths in April 2022, was in the employ of the applicant's attorney, C [G…e] Attorneys whose offices the second respondent knew were situated in Mitchell's Plain. In the absence of any substantial averment, that the two firms are not functioning independent of each other, or are in association with each other, it cannot be concluded that Ms [V…n d…r W…n] has interests in the matter dealt with by her previous employer. In my view, there is absolutely no evidence to suggest that the two attorneys have since Ms [V…n d…r W…n] left applicant's attorney's employ, forged a professional relationship with each other's firms, culminating in a connection in their respective offices. Nothing before this Court would elucidate a finding that the applicant's attorney and the commissioner of oaths' offices are not independent of each other. In my mind, there is no basis for the notion that Ms [V…n d…r W…n] has an interest in the present litigation or is impartial or biased.

[20] Importantly, courts should ensure that disputes are dealt with on their merits and that technical defences that merely cause delays, should therefore not be

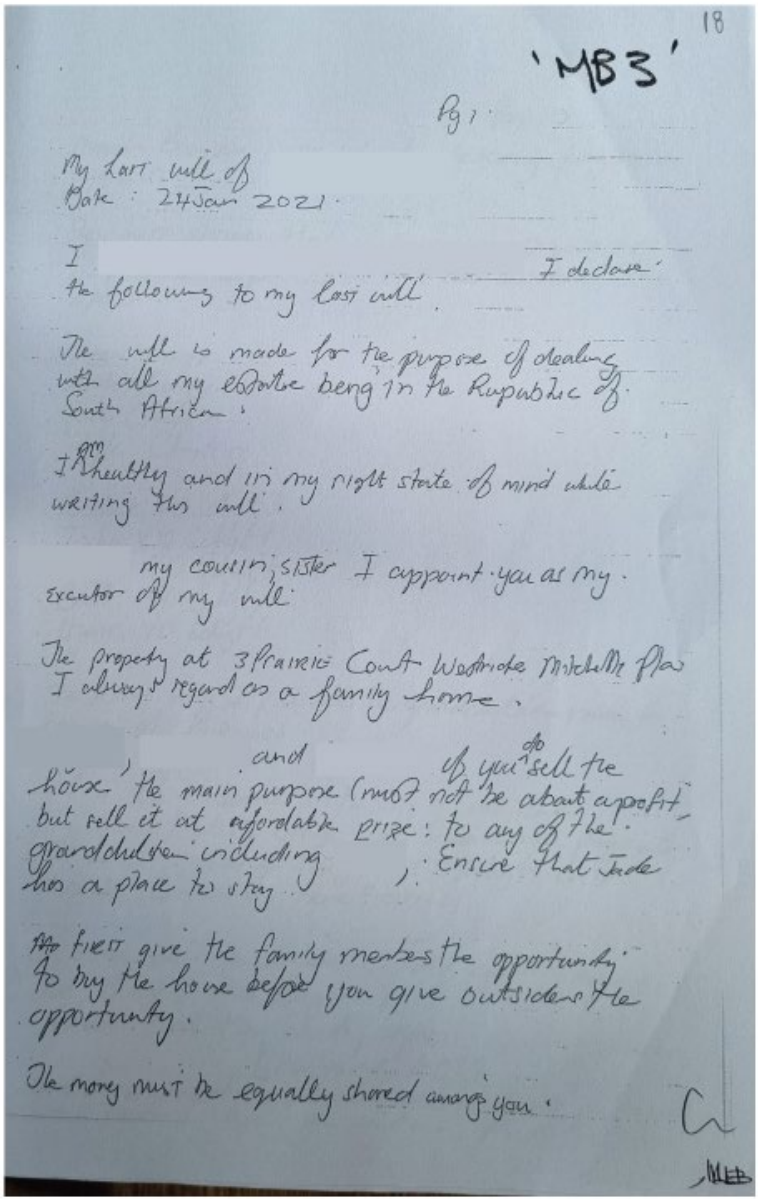
accepted by the courts and ought to be dismissed. See *Nedbank Ltd v Hatting & Others* (unreported FSB) (case no 4136/2020) delivered on 07/03/2022.

FACTUAL BACKGROUND

[21] The deceased resided with the applicant and the applicant's family in their erstwhile homestead since the age of 14 until she was an adult. At the time of her death in August 2021, she was still living in the same home with her niece, the fourth respondent. The applicant's parents became the deceased's foster parents, pursuant to a Children's court proceedings on 19 October 1984, where a determination was reached by the court, that the deceased at the time was a child in need of care and protection. It is common cause that the deceased had no relationship with the second respondent in her childhood and adulthood until the deceased reached out to the second respondent. The second respondent was also not considered as part of the family by the deceased. The deceased only made sporadic contact with the second respondent when she was already an adult. Subsequent to the death of the deceased, on 12 September 2021 the second respondent was invited to a family meeting, after the deceased's employer declared that it would only pay out the pension it held on behalf of the deceased, upon being satisfied that she had no dependents at the time of her death. This led to the second respondent deposing to an affidavit, stating that he was not financially dependent on the deceased. On 21 September 2021, the applicant lodged the contested Will, a four paged document, titled "My Last Will of [E…y C…n]," with the first respondent. The first respondent adhering to section 8(1) and (4) of the Administration of Estates Act, rejected the Will on the basis that the Will does not comply with section 2(1) (a) of the Wills Act. This was a consequence of the Will being signed by the deceased and two witnesses,

only on the last page of the Will. This meant that the second, third and fourth respondents would be eligible to inherit intestate from the deceased's estate.

[22] This caused the applicant to contact the second respondent in an effort to give effect to the deceased's last Will and Testament. The contents of the Will are replicated hereinafter: [The will has been retracted for purposes of publication.]


18

'MB3'

Pg 1

My Last will of
Date: 24 Jan 2021.

I I declare
the following to my last will.

The will is made for the purpose of dealing with all my effects being in the Republic of South African.

I am healthy and in my right state of mind while writing this will.

my cousin sister I appoint you as my
Executor of my will

The property at 3 Prairie Court Westlake Mitchells Plain I always regard as a family home.

and do
house the main purpose (must not be about a profit but sell it at affordable prize: to any of the grandchildren including , Ensure that Jade has a place to stay.

first give the family members the opportunity to buy the house before you give outsiders the opportunity.

The money must be equally shared among you.

MEB

Page 2

If my sole beneficiary of my pension pay out:

She must ensure that each person must get a share of my pension fund. She must use wisdom in this aspect.

The reason why I put all the grandchilden name on because of fairness.

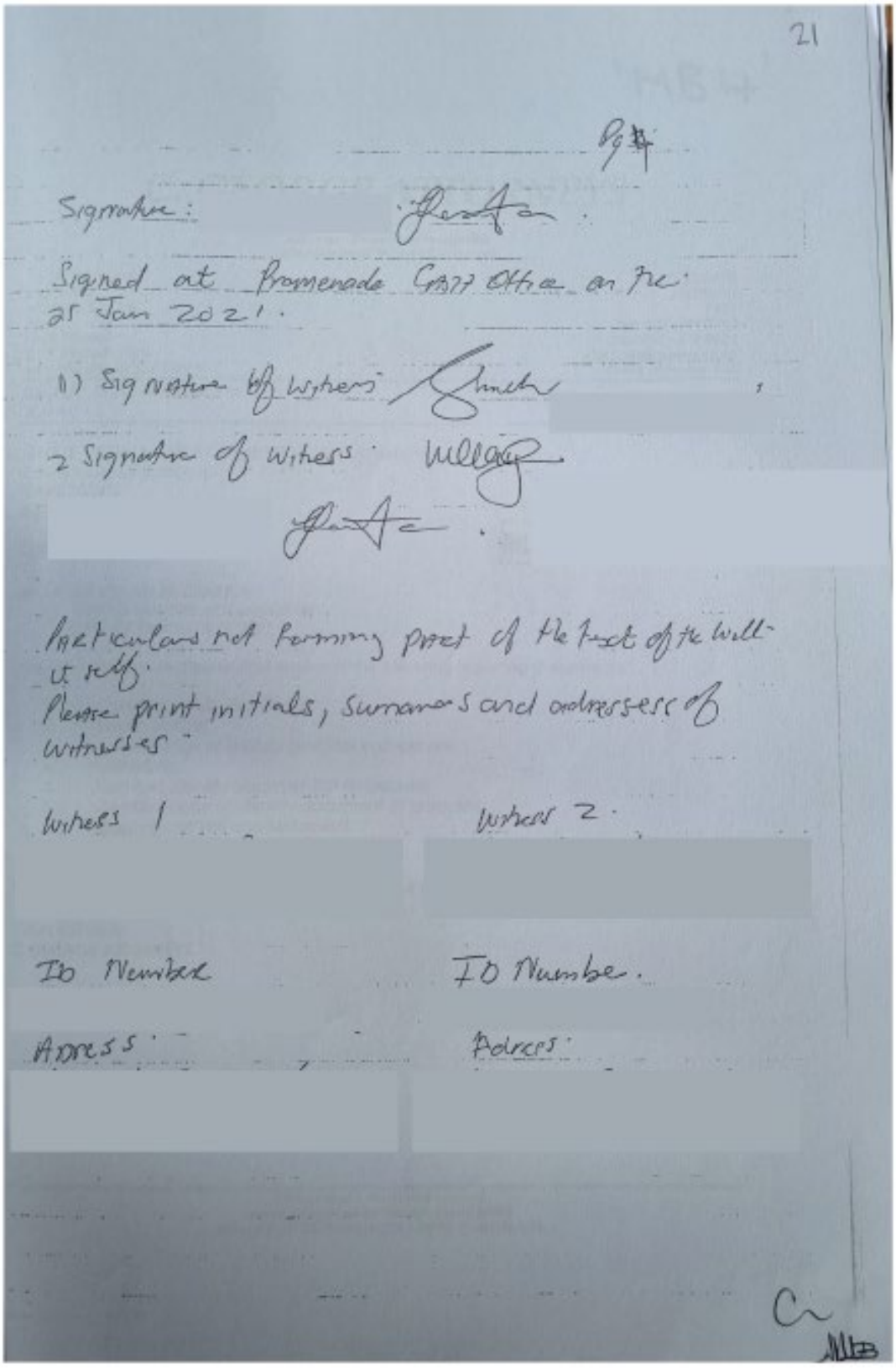
If I die in service in the City of Cape Town:
The money that the Group Life Scheme will pay out I have appointed and as beneficiries.

The Money must be devided equally among
1a) you and.
Ensure that the church, orphori, widow, elderly
a of or organisation will also get a donation from
[illegible]

Rpt. Pg 3

My car I will leave to
ensure that and
from the one as well.(

you are my beneficiary of my life
insurance at liberty.



21

Signature:

Signed at Promenade Gaol Office on the 25 Jan 2021.

1) Signature of Witness

2 Signature of Witness

Particulars not forming part of the text of the Will itself.
Please print initials, surnames and addresses of witnesses.

Witness 1

Witness 2.

ID Number

ID Numbe.

Address:

Address:

after the death of deceased. Subsequent thereto, the applicant caused certain documents to be prepared by her attorneys, which resulted in the appointment of the second respondent as executor of the deceased's estate. On 18 March 2022, the first respondent issued a letter in accordance with section 13 and 14 of the Administration of Estates Act, approving second respondent as executor of the deceased estate. Subsequently, second respondent sought legal advice and correspondence terminating any mandate given to the applicant and any attorneys to act as administrators of his daughter's deceased estate was sent to the applicant. This step prompted the application before this court.

[24] It is evident from the applicant's founding affidavit that the deceased worked for the City of Cape Town as an administrative officer in a supervisory capacity. At the time of her death, she was unmarried with no children. Pursuant to the deceased's last Will and testament, the applicant, her siblings, the third and fourth respondents, and other members of the family as well as charity groups comprised of orphans, widows and the elderly in the church that the deceased had attended stand to benefit from the deceased's estate. The main justification for the second respondent's opposition to the application is based on a purported suspicion, that the applicant is complicit and involved in wrongdoing in connection with the Will of the deceased. In amplification of this argument, the second respondent avers that the applicant does not in the founding affidavit, specify who discovered the will. Other than the issue raised as to who discovered the Will, there is therefore no factual clarity as to what the real issue is, as the applicant in the founding affidavit clearly states that two days prior to the deceased 's death, [B…m V…n d…r S…f] enquired from the deceased whether she had executed a Will, and the deceased confirmed same, indicating that it was placed in her car, which is where the Will was

subsequently located. In her replying affidavit, the applicant provides a response to the effect that it was in fact [B…m V…n d…r S…f] who found the Will, where the deceased had indicated it to be. [B…m V…n d…r S…f] in his confirmatory affidavit validates the same.

[25] Concerning the second respondent's further contention that the applicant failed to furnish examples of the deceased's handwriting to assist this court in determining whether the Will was executed in the deceased's handwriting, the second respondent admits not knowing what the handwriting of the deceased looks like, and further concedes that the applicant is better placed to pronounce upon such an issue. Meaning that, the second respondent's contention that the deceased did not execute the Will is baseless and unfounded.

[26] The second respondent is also unable to contest that the handwriting on the documents included as Annexure "MB 11" of the answering affidavit, which includes diary pages, and a deed of sale amongst others. The second respondent is not in a position to dispute that they are samples of the deceased's handwriting. It was argued by counsel for the second respondent that the signature on the Will differed from the signature on the deed of sale. In view of the second respondent's confirmation of the lack of knowledge of the deceased's handwriting, it was incumbent upon the second respondent to submit the Will and the signatures of the deceased to a handwriting expert if indeed he wanted to impugn the signature of the testatrix.

[27] Most significantly, the second respondent does not contend that the contents of the Will were not the wishes of the deceased. He expressed doubt as to the credibility of the witnesses whose signatures are attested to the Will. It appears from the second respondent's answering papers that the doubt as to the credibility of the witnesses [G…s M…e] and [V... a M…n] is due to applicant not filing examples of the deceased's handwriting. This reasoning in my view, is disjointed firstly, because the second respondent presented no compelling facts disputing that the two witnesses and the deceased enjoyed a long-term friendship, since their teenage years. It is thus apparent from their confirmatory affidavits that they personally knew the deceased over 30 years. Secondly, it is an unavoidable fact that unlike him, they are also knowledgeable about the deceased 's handwriting, as asserted in their confirmatory affidavits. Having made the confession that he himself bears no independent knowledge as to the handwriting of deceased, he is therefore, in no position to cast doubt on the credibility of Ms [M…e]'s and Ms [M…n]'s knowledge in this respect. I must point out that these witnesses also confirmed that the deceased signed the Will in their presence.

[28] According to the second respondent, if the Will had been that of the deceased, he would have been included therein as a beneficiary, as he enjoyed a good father-and-daughter relationship.

ISSUES FOR DETERMINATION

[29] This court is called upon to determine *firstly,* whether the contested Will constitutes the Last Will and Testament of the deceased. *Secondly*, whether this Court can condone the non-compliance with the provisions of section 2(1) (a) (iv), of

the Wills Act in that the document was signed by the deceased and two witnesses on the last page only.

[30] According to the applicant, when she made her own Will in 2020, she informed the deceased of the process and steps that she had taken whilst having been assisted by Standard Bank and advised the deceased to consider same. The two of them did not revisit the conversation. It is undisputed that the deceased was healthy when the Will was drawn. Her sudden death was as a result of complications resulting from contracting Covid 19. It was two days before her death that the applicant's brother, [B…m V…n d…r S…f] ascertained from the deceased whether she had a Will, and the deceased indicated that she did, and it was in her car. The Will was subsequently located and found in her car after her passing.

[31] The Will is a handwritten document, signed by the deceased and her two friends as witnesses. The applicant and the two witnesses to the Will, in their affidavits, confirm that the Will is in the deceased's own handwriting. Of particular importance, is that in paragraph 6.3.4 of the opposing affidavit, the respondent despite disputing the handwriting to be that of the deceased, concedes the fact that the applicant knows what the deceased 's handwriting looks like and he does not. Moreover, it is clear from the evidence of the two witnesses that the Will was that of the deceased. [G…s M…e] and [V…a M…n] state in their affidavits, that the deceased expressly indicated that, she pondered the issue of a Will, and that the document they were all signing was the deceased's Will which the latter drafted. On my assessment of the evidence, the deceased herself had, of her own initiative started the process of making a Will, and on 25 January 2021, she asked the two

witnesses to attest to it and she signed it in their presence. The concession by the second respondent, that he has no knowledge of what the deceased ‘s handwriting looks like, is a clear indication that his contention, that the handwriting is not that of the deceased is largely speculative, baseless and unsubstantiated. Moreover, it should disqualify him from making such assertions. I am of the view that this does not present as a material and genuine dispute, necessitating the leading of oral evidence as argued by the second respondent.

[32] Furthermore, the second respondent’s claim that he has “a reasonable suspicion” that the applicant is participating in a foul play regarding the deceased’s Will is simply not supported by any evidence. The applicant’s action of approaching the second respondent and informing him of their predicament upon coming to the realization that the deceased’s Will was not compliant with the formalities required in section 2(1) (a) of the Wills Act, is a clear demonstration of honesty and integrity. In fact, the applicant disregarded the fact that the second respondent had no meaningful relationship with the deceased in her childhood and most of her adult life, and acted with transparency, in respect of the second respondent. It is a mere suspicion that applicant has dishonorable intentions, no substantive facts were presented in support of this contention.

[33] The second respondent’s vehement allegations and suspicions, that most of the friends and family members including applicant’s attorney, were misled or induced by the applicant knowingly or unknowingly, are refuted by the applicant, as baseless and irrational. These suspicions are not substantiated with facts. Applicant dispelled the contention that by having the second respondent appointed as an

executor of the estate of the deceased, she was attempting to cheat the second respondent. The applicant in her replying affidavit asserts that Mr C [G…e], her attorney of record, advised the second respondent of the consequences of the respondent's suggestion, that he renounce his benefits if the deceased's Will is declared invalid.

[34] The applicant in her affidavit made averments, setting out the chronology of events that led to the applicant approaching the second respondent, and how the second respondent ended up being appointed as executor to the deceased's estate. This is evidence that remains uncontroverted. The second respondent also alleged that the applicant had offered to pay him R40 000 in exchange for him to honour the wishes of his deceased's daughter. The applicant disputed this allegation. It is the applicant's evidence that the main reason she approached the second respondent was to avoid burdening the estate of the deceased with legal costs. The applicant also asserted that it would not be a sound decision, to offer the second respondent money in order to facilitate carrying out the deceased's final wishes. My view is that, it is inconceivable that the applicant would take such a step while she was in the position to seek legal advice from her current attorney, whom I might add, she was already in consultation with at that stage. Clearly, the respondent's approach is abundantly founded in submissions, which are mostly speculative, unsupported and based on conjectures.

[35] As already demonstrated, the second respondent in his answering affidavit raised a plethora of peripheral issues which did not traverse the allegations in the founding affidavit, as it provided no factual details, specifically dealing with the applicant's averments. Considerably, the second respondent did not traverse the

most crucial and core issue to be determined being, whether the Will was executed and signed by the deceased and if she did, whether she intended it to be her final will and testament. There is absolutely no evidence presented by the second respondent to suggest that the Will is not executed and signed by the deceased and that she did not intend it to be her final Will and testament. Perhaps a telling argument crystalizing the second respondent's acknowledgement, that the Will is that of the deceased with her final wishes, is demonstrated in paragraph 7.1 of his answering affidavit where the following is stated:

"…Furthermore as attorney he should not have allowed that I renounced my inheritance in order to give effect to an invalid last will and testament in order that my daughter's wishes can be honored. It was in fact the Applicant's wishes as Applicant and family will benefit from the annexure' MB3'."

[36] In the face of fictitious disputes raised and concessions made by the second respondent, it cannot be said that the second respondent sufficiently presented any evidence to be classified as material disputes of fact in this instance. See *National Director of Public Prosecutions v Zuma* 2009(2) SA 277(SCA).

[37] I am therefore satisfied that the applicant successfully established that the handwriting and the signature in the Will is that of the deceased.

[38] I now turn to consider whether the contested Will was intended to be the Final Will and Testament of the deceased. It would be proper to start with detailing the specific provision with the required formalities in the execution of a will. Section 2(1)(a):

"(1) Subject to the provisions of section 3bis –

(a) no will executed on or after the first day of January 1954, shall be valid unless –

(i) the will signed at the end thereof by the testator or by such other person in his presence and by his direction; and

(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

(iii) such witnesses attest and sign the will in the presence of the testator and of each other and if the will is signed by such other person, in the presence also of such other person; and

(iv) if the will consists of more than one page, each page other than the page on which it ends is also signed by the testator or by such other person anywhere on the page …."

The contested Will is not in compliance with section 2(1)(a)(iv), hence the applicant is seeking condonation in terms of section 2(3) of the Wills Act for not complying with the above formalities.

[39] Section 2(3) of the Act provides 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 no 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)."

[40] The purpose of the formalities in section 2 (1) is mainly to introduce a tough curb on wills that are untrue or counterfeit. Navsa JA, in *Van der Merwe v Master of the High Court* 2010 (6) SA 544 (SCA), on consideration of section 2(3) expressed the following explanation:

> "*By enacting s 2(3) of the Act the Legislature was intent on ensuring that the failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators. It has rightly and repeatedly been said that once a court is satisfied that the document concerned meets the requirements of the subsection a court has no discretion whether or not to grant an order as envisaged therein. In other words, the provisions of section 2(3) are peremptory once the jurisdictional requirements have been satisfied."*

[41] Apparent from Navsa JA's reasoning, is that the section confers no discretion to the court once the jurisdictional requirements have been satisfied, conversely, it prescribes that the court directs the Master of the High Court, to unquestionably receive the Will, having satisfied itself that the contents thereof are in truth so intended by the deceased. See also *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA).

[42] I now turn to the consideration and, the examination of the contested Will with the view of determining the intention of the deceased. The process of such determination will include the context of the surrounding circumstances. Ostensibly, the deceased 's Will is titled "My Last Will of [E…y C…n]" Date 24 Jan 2021. It was argued on behalf of the applicant that, it is this ordinary language of the title, the deceased used that makes it plain that her intent was that the Will was to be

recognized as her ‘last Will’. The ID no [6. . .1], is the same as reflected in the deceased’s ID document and death certificate. Evidently, the title communicates that the Will is intended to be the last will of the deceased. The deceased clearly sets out in the Will, that she appoints the applicant as the executor of the estate. She further gives clear and specific instructions in respect of how her assets should devolve upon her death.

[43] The purpose of the Will is clearly specifically stated, that it is to deal with all her estate in the Republic of South Africa. In paragraph 6, she stipulates how the immovable property, her motor vehicle, pension monies are to be dealt with. She did not only list the names of the specific beneficiaries, she included the church, the elderly, widows and orphans. Significantly, the second respondent does not dispute the contents of the Will. From the Will, it is clear that the deceased did not only bequeath her estate to the applicant, but to her family, expressing that the aim is to ensure a fair distribution of the assets amongst everyone. The essence of the Will, represents and depicts the applicant’s description of the deceased life, and meaningful relationships. It is clear that the relationship between the second respondent and the deceased was not of such significance, as to render him worthy of a status of an heir. From her Will, her intentions are undeniably clear, that this was her last Will and Testament. This is also confirmed by the witnesses to the Will, Ms [M…e] and Ms [M…n] in their confirmatory affidavits, that the deceased expressed that the document was her last Will. The only censurable issue is its unsigned first three pages. The court is satisfied that the Will as presented by the applicant was signed by the deceased, and although it was only signed on the last page, it represented her true intention as to how her estate should devolve upon her death. In the circumstances, the Court condones the non-compliance with the formalities in

section 2 (1) (a)(iv) of the Wills Act, and declares the Will of the deceased as presented before this Court, as her last Will and Testament. Thus, the Court finds that there is no prejudice that would be suffered by the second respondent as a consequence thereof. Needless to say that the second respondent's opposition proved to be without any basis.

[44] Regarding the issue of costs, it is well established that in consideration of a cost order, the court will exercise its discretion. *Ferreira v Levin NO and Others: Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC). The Court's discretion must be exercised judicially. It is well established that the general rule is that costs follow the result. However, the applicant's counsel in their heads of argument, although recognizing that the costs should follow the result, highlighted that punitive costs were appropriate in that the opposition to the application is frivolous and or ill considered, with a lengthy answering affidavit, which does not set out a defence to the relief sought by applicant. The applicant however, reckons that this would not be what the deceased would have wanted to have happened. Ultimately, the applicant seeks an order that the costs be paid from the deceased's estate.

ORDER

[45] In the result, I make the following order:

[45.1] The points *in limine* are dismissed

[45.2] The Will signed on 25 January 2021, by the late [E…y] [C…n] (identity number [6…1]) which was lodged with the first respondent on 21 September 2021, is

declared the Last Will and Testament of the deceased, despite not being duly signed on the first three pages thereof; and

[45.3] That the first respondent is directed to accept the Will as the Last Will and Testament of the deceased;

[45.4] That failure of the deceased to comply with the formalities set out in section 2(1)(a)(iv) of the Wills Act is condoned;

[45.5] That the Master of the High Court is authorized and ordered to accept the document as a Will of the deceased for the purpose of the Administration of Estates Act 66 of 1965;

[45.6] That the first respondent is directed to remove the second respondent, as the executor to the deceased's estate; and

[45.7] That the first respondent is directed to appoint the applicant as executor to the deceased's estate as specified in the Will.

[45.8] The costs of this application are to be borne by the second respondent including the costs of counsel.

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RALARALA N
ACTING JUDGE OF THE HIGH COURT

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