Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 45732/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

.....
SIGNATURE **DATE** 15 November 2023

In the matter between:

LEANNE LYNNE LANGE	First Plaintiff
SANDRA LYNN KERR	Second Plaintiff

and

PATRICK LESTER HARVEY HENEGAN	First Defendant
DAVID JOHN HENEGAN	Second Defendant
DANIEL SCHUTTE	Third Defendant
MASTER OF THE HIGH COURT, JOHANNESBURG	Fourth Defendant

JUDGMENT

LOUW AJ:

[1] The late Mr Andrew James Henegan with identity number […] ("the testator") and his wife, the late Mrs Denice Henegan ("the testatrix") duly executed a joint will on 31 July 2014 ("the joint will").

[2] In terms of the joint will the beneficiaries were, in equal portions, the first plaintiff, Mrs Leanne Lynne Lange (25%), the second plaintiff, Mrs Sandra Lynn Kerr (25%), the first defendant, Mr Patrick Henegan (25%) and the second defendant, Mr David Henegan (25%).

[3] The first and second plaintiffs are sisters, the daughters of the testatrix. The first and second defendants are the brothers of the testator. The first defendant elected to represent himself. The second defendant filed a notice to abide. The action was not defended by the third and fourth defendants.

[4] The joint will includes a provision that the bequest, in four equal portions, shall apply if either the testator or testatrix passes away more than three months after the other without having executed a subsequent valid will. The testatrix passed away in April 2015 which left the testator as the surviving spouse. In terms of the joint will, the estate of the testatrix devolved upon the testator who subsequently passed away more than three months after the testatrix.

[5] Circumstances changed for the testator and the beneficiaries in terms of the joint will. In the present action, this court was called upon by the plaintiffs to find that a document, in want of compliance with the formalities applicable to the execution or amendment of a will, in terms of which the first and second

plaintiffs are the only beneficiaries of the estate to the exclusion of the first and second defendants, was in fact intended by the testator to be his will.

[6] Section 2(3) of the Wills Act 7 of 1953 provides that if a court is satisfied that a document or an amendment of a document drafted or executed by a person who has since died, was intended to be his or her will, it must order the Master to accept the will, although it does not comply with all the formalities applicable to the execution or amendment of a will.

[7] The requirements of the section are the following:

[7.1] There is a document or an amendment of a document, which implies that it must be in writing;

[7.2] The document, or the amendment thereto, was drafted or executed by or through a person who has since died; and

[7.3] The deceased intended the document or the amendment to be his will, which would require extrinsic evidence to persuade the court that the document or the amendment was intended by the deceased to be his will.

[8] The witnesses who testified for the plaintiffs all had discussions with the testator, some simultaneously, others individually. The evidence indicated, to my mind, a clear intention by the testator to change the joint will to make the plaintiffs the sole beneficiaries of his estate, to the exclusion of the first and second defendants.

[9] On 6 October 2017 the first plaintiff, in the presence of her husband, Mr Lange, was instructed by the testator that he had changed his will through Citadel Investments. The evidence was uncontroverted that he had changed his will wherein he bequeathed the whole of his estate to the first and second plaintiffs, in equal half shares. He instructed the first plaintiff that the second plaintiff's proceeds would be held in a testamentary trust by the first plaintiff, the only trustee and executor.

[10] The testator, so it was testified, explained to the first plaintiff and her husband, Mr Lange, that he had changed his will because of the distressing conduct of his brothers, the first and second defendants, in the winding-up of their late father's estate.

[11] The conduct referred to is well-documented and clearly contained in correspondence between the testator and the first and second defendants. The animosity between the brothers was obvious. I have no reservations in accepting the evidence reflecting the uncomfortable acrimony and disputes between the brothers to be a valid reason for excluding them from the amended will. At the very least it gives credence to what the testator told the first plaintiff and Mr. Lange

[12] Mr Lange confirmed the instructions given by the testator to the first plaintiff and his reasons for doing so. I found the evidence of the first plaintiff and Mr Lange to be sincere, coherent and corroborative of each other.

[13] On 31 October 2017, shortly before his passing, the testator again informed the first plaintiff that his affairs were all in order and that, in support and

confirmation of his previous instructions, all she needed was the minute of the meeting he had with Citadel Investments, which he had left in his desk at his home. The first plaintiff collected the minute. The minute, so it is argued by the plaintiffs, should be considered to be the testator`s last will and testament.

[14] Carien Preusse, a wealth manager at Citadel Investments, testified that the testator called her during September 2017 and requested an urgent meeting with her. She was initially not available on short notice, but he insisted on meeting with her as soon as she could. Preusse met with the testator on 2 October 2017 at his house in Parys, Free State. She had with her a pre-prepared document which she described as minutes with certain sections and headings populated by Michelle Reid, an employee of Preusse.

[15] During the meeting the testator was clear and adamant about the changes that he wished to effect to his will. These changes accord with the evidence of the first plaintiff and Mr Lange. She completed the section headed "*Will*" on his instructions in his presence. The recorded handwritten notes were:

> "*Executor: Lee Anne Lynn Lange (née Barnard)*
> *Equal portions: Sandra's into trust (Lee Anne the trustee).*"

[16] The document was signed by the testator in the presence of Preusse.

[17] It is common knowledge that the testator neither completed nor drafted the minute. He signed the last page thereof. The question is whether the testator drafted the will within the meaning of the term "drafted" as per the Act.

[18] Brand J, as he then was, in Ndebele N.O. and Others v Master of the Supreme Court and Another (10338/96)[1999] ZAWCHC (15 December 1999) held that:

"[21] The term "drafted" is not defined in the Act. It has received considerable judicial scrutiny, leading to different conclusions as reflected in the case law to date. On the one hand there is an approach advocating a strict interpretation to the effect that the document must be drafted ***personally by the deceased.***

[See e.g. ***Olivier v die Meester en andere*** *:* ***In Re Boedel Wyle Olivier 1997 (1) SA 836*** *(T) 844 B and* ***Webster v The Master and others 1996 (1) SA 34*** *(D) 41B - D.]*

[22] On the other end of the spectrum there is an approach which advocates a liberal or flexible interpretation. According to this approach the document does not need to be in the handwriting of the deceased, or to have been typed by him personally or even to have been dictated by the deceased in order for it to have been "drafted" by the deceased within the meaning of the section. The underlying reasoning to this approach appears for example from the following ***dictum*** *by* ***Van Zyl J*** *in* ***Back and others NNO v Master of the Supreme Court*** *(1996) 2 All SA 161 (C) 174 a - c:*

> *"The reality of the situation is that computers and word processors have become as pedestrian as pen and ink. Another reality is that many would-be testators give full instructions as to their final wishes to their attorneys or bankers and the attorneys of bankers have draft wills prepared in accordance with such instructions. If a draft will is subsequently perused and approved in every detail by a testator, he then, as argued by Mr* ***Hodes,*** *associates himself with and adopts it as his own. On a flexible interpretation of section 2(3), it may be regarded as having been drafted by him personally. As long as it is*

incontrovertible that the testator intended the draft will to be his will, it should be totally irrelevant whether he personally or physically drafted it with his own hand or his secretary typed it in accordance with his dictation, or his attorney's or banker's secretary typed it in accordance with his instructions."

*[See also **Ex Parte Laxton** 1998 (3) SA 238 (N) 244 E - F and **Ex Parte De Swardt and another NNO** 1998 (2) SA 204 (C) at 207 B-J.*

*[23] It is apparent that, on the facts of this matter, insistence upon personal drafting will result in a dismissal of the application. It is equally clear, however, that if I were to adopt the approach approved **inter alia** by **Van Zyl J** in the **Back**-case it can be said that annexure JN4 had been "drafted" by the deceased within the meaning of section 2(3) of the Act. As of the document under consideration in the **Back**-case, it can on the uncontroverted evidence be said of annexure JN4, that it had been "perused and approved in every detail" by the deceased and that the deceased had "associated and adopted" annexure JN4 "as his own."*

*[24] In the circumstances it is hardly surprising that Mr **Petersen**, on behalf of applicants, submitted that I should follow the decision in the **Back-**case whereas second respondent's attorney, Mr **Jacobs,** who appeared on her behalf, contended that I should not.*

*[25] Mr **Jacobs'** argument in support of his contention was in essence that the **Back-**case was wrongly decided in this respect. I do not agree. On the contrary, I respectfully consider the judgment in the **Back**-case to be well-reasoned and for the reasons set out therein and I therefore find myself in agreement with the conclusion. My only concern is whether I am in fact free to follow the judgment in the **Back**-case. This concern stems from a judgment of a full-bench in this division in **Anderson and Wagner NNO and another v The Master and others** **1996 (3) SA 779** (C), more particularly from the following **dictum** by **Thring J** (with **Friedman JP** concurring) at 784 G-H of the report:*

"To me the words of s 2(3) of the Act are clear. The provisions of the subsection apply only to certain documents. To come within the ambit of the subsection the document concerned, be it a will or an amendment of a will, must have been drafted or executed by the person concerned with a certain intention. That intention must have been that the document should itself constitute his will or an amendment of his will, as the case may be."

And further at 785 G-H:

"These considerations all lead me to conclude that s2(3) of the Act must be strictly, rather than liberally, interpreted. Whilst the pursuit of equity (sometimes erroneously confused by laymen with 'justice') and the elimination of hardships are consummations devoutly to be wished, their attainment can often not be justified if it entails the sacrifice of certainty and legal principle. I do not think that the Legislature had such a sacrifice in mind when it placed s2(3) on the statute book."

[26] In the ***Back-case*** *(at 171 d-e)* ***Van Zyl J*** *found these* ***dicta*** *to be* ***obiter*** *and therefore not binding on him with regard to the drafting-requirement. However, in the later full bench judgment of this division in* ***Henwick v The Master and Another*** ***1997 (2) SA 326*** *(C) 334 H,* ***Foxcroft J*** *expressed the view that* ***Van Zyl J*** *was wrong in regarding the remarks by* ***Thring J*** *in the* ***Anderson****-case as* ***obiter****. With all due respect to* ***Foxcroft J*** *and the two judges who agreed with him, I again find myself in respectful agreement with* ***Van Zyl J.*** *I am also of the view that the remarks by* ***Thring J*** *were indeed* ***obiter*** *in the present context. I say this for two reasons. First, it should be borne in mind that the document under consideration by the full bench in the* ***Anderson****-case was in fact drafted by the deceased by his own hand (see 782A). The question whether personal drafting is required was therefore never an issue in that case. Secondly, because the* ***ratio decidendi*** *in the* ***Anderson****-case is in my view succinctly summarised by* ***Thring J*** *in the following passage (at 783E):*

> *"I am not satisfied on the information which has been placed before us on the papers that the document was intended by the testator to be an amendment of his will. In my view it is at least as probable that it was not, and that it constituted no more than his instructions to the first applicant as to how he intended his will to be altered."*

[27] In short, the decision in the ***Anderson****-case turned on the consideration of the third requirement, namely whether the deceased intended the document* ***in casu*** *to be his will (or an amendment thereto) and not on a consideration of the first requirement, namely whether the document had been* ***drafted*** *by the deceased. The statement by* ***Foxcroft J*** *on the* ***Henwick****-case (at 334 H) that the strict approach adopted by* ***Thring J*** *in the* ***Anderson-case*** *is irreconcilable with the flexible approach advocated by* ***Van Zyl J*** *in the* ***Back****-case is, in my respectful view, a* ***non sequitur****.* ***Thring J*** *advocates a strict approach with reference to the third requirement - i.e. with regard to the testator's intention. In fact, as far as I am aware, no-one has thus far suggested that there should be a flexible approach to the issue of the testator's intention. I can see no reason, however, why an insistence upon strict compliance with the third requirement would necessarily exclude a more flexible interpretation of the term "drafted" in section 2(3).*

[28] I am fortified in my view that the decision of the full bench in the ***Anderson****-case was indeed* ***obiter*** *with regard to the drafting requirement by the judgment of* ***Combrinck J*** *in* ***Ex Parte Laxton*** ***1998 (3) SA 238*** *(N) 242H-243A. The view expressed by* ***Foxcroft J*** *in the* ***Henwick****-case to the effect.*

[29] In the circumstances I find myself free to adopt the approach advocated by ***Van Zyl J*** *in the* ***Back****-case. As I have already indicated; the consequence of that approach in the present matter is a finding that annexure JN4 had been "drafted" by the deceased within the meaning of section 2(3).*" I align myself fully with Brand J`s reasoning.

[19] Mr Henegan, the first defendant, acknowledged the apparent animosity between the brothers, but testified that it had been resolved. He gainfully attempted to show that the plaintiffs were driven by greed and that a conspiracy and fraud had been committed by the plaintiffs and the representatives from Citadel. No cogent and/or permissible evidence was presented to the court in this regard. Mr Henegan's evidence that the animosity was resolved is contradicted by the numerous exchanges of correspondence referred to in evidence by the plaintiffs.

[20] The facts, considered in light of the surrounding circumstances, support my findings and conclusion that the testator had the necessary intention/animus testandi to amend the joint will when he signed the minute.

[21] This court's approach to the matter is supported by the judgment of the Supreme Court of Appeal in *Van Wetten and Another v Bosch and Others* [2003] 4 All SA 442 (SCA). Paragraphs 16 and 26 of the judgment read as follows:

> "*16. In my view, however, the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. The enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.*"
>
> "*26. These are not the words of a person giving instructions for the drafting of his will. They are the words of a person who has made a decision to which immediate effect is to be given. They are his will. The very words used by the deceased are thus also decisive of the question before the Court: the deceased intended the document to be his will. The surrounding circumstances, and in particular, as I have*

> *said, the handing over of the documents in sealed envelopes to Van der Westhuizen, to be opened only should something happen to him, lead to the same conclusion." (emphasis added)*

[22] For these reasons I find that the plaintiffs have established on a balance of probabilities that the testator intended the minute, annexure POC3 to the particulars of claim, to be his final instruction with regard to the disposal of his estate. In other words, he intended it to be his will.

[23] Consequently it is not necessary for me to deal with the alternative relief in terms of section 2A of the Act sought by the plaintiffs.

[24] As far as costs are concerned, the following. The general rule is that costs should follow the event. However, *inter alia* because the mechanical application of any rule might lead to unfairness, the general rule is subject to the overriding principle that costs are in the discretion of the court. This discretion must be exercised judicially, not arbitrarily, upon a consideration of the facts of each case. The nature of the proceedings, the conduct of the parties, the relationship between them and the practical effect of the outcome of the proceedings are amongst many relevant factors to be taken into account in the exercise of this discretion. Factors that I have taken into account, amongst others, is that the first defendant as beneficiary in terms of the joint will was duty bound to defend the *status quo*. Also, as dictated by the authorities referred to above, my ultimate finding on the merits was to an extent dependant on policy considerations and my findings in respect of the evidence placed before me. Consequently, upon careful reflection, I find that justice would not be served by a mechanical application of the general rule that costs should follow the event. My finding in this regard will be reflected in my order on costs.

ORDER

1. Annexure POC3 to the particulars of claim in this action is declared to be the will of the late Andrew James Henegan with identity number […].
2. The fourth defendant is ordered to accept annexure POC3 to the particulars of claim in this action as the will of the late Andrew James Henegan with identity number […] for purposes of the Administration of Estates Act 66 of 1965.

3. Each party shall pay their own costs in the action.

_____

A LOUW

Acting Judge of the High Court

Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be __ November 2023.

APPEARANCES:

For the plaintiff: Adv K Turner

Instructed by:

The first defendant appeared unrepresented.

Date of hearing: 22 & 23 May 2023

Deemed date of judgment: 15 November 2023