IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

24 March 2023

DATE SIGNATURE

CASE NUMBER: 36165/2021

In the matter between:

DALE ALISTAIR KINNEAR	1st APPLICANT
MELANIE MERLYN KINNEAR	2nd APPLICANT
and	
THE MASTER OF THE HIGH COURT	1st RESPONDENT
SHAAYNAZ RAMDHANI, NO	2nd RESPONDENT
DOMINIC AUSTIN KINNEAR	3rd RESPONDENT

SUMMARY: *Notice of Motion: Declaratory Order that an unsigned will is valid- Section 2(3) of the Wills Act, 1988 (Act 57 of 1988) – Jurisdictional requirements.*

ORDER

Held: Application is dismissed
Held: The costs to be paid out of the Estate of the deceased.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an opposed declaratory application in which the applicants are seeking the following relief-

'1. An order that the Master of the High Court, and all persons dealing with and that are affected receive, approve and accept the document described as "00540151X8, THE WILL OF FLORENCE DINAH ROSINA KINNEAR", for the purpose of the Administration of Estates Act 66 of 1965, as the Last Will and Testament of the late Florence Dinah Rosina Kinnear, even though it does not comply with all of the usual or normal formalities for the execution of a valid Will.

2. That the costs of this Application be paid by the party that unsuccessfully opposes the application, alternatively, the cost of the application be paid by the Estate of the Late FLORENCE DINAH ROSINA KINNER.

3. Further and or alternative relief.'

[2] The applicants, Mr Dale Alistair Kinnear and Ms Melanie Merlyn Kinnear who are siblings are represented by Adv. Mabilo. The application is only opposed by the third respondent, Mr Dominic Austin Kinnear who is the biological child of the first applicant and who is represented by Adv. Coetsee.

FACTUAL BACKGROUND:

[3] The applicants' biological parents were married in community of property on 4 April 1970 and had drafted a joint Will on 2 October 2013. The terms of the joint will among others bequeathed the immovable property to the third respondent who is their grandson. The applicants' father passed away on 31 August 2018 and the estate was wound up in 2019. After the death of the applicants' mother, a new Will which amends the terms of the joint Will was produced which was not signed. The executor of the estate of the deceased was duly informed about the existence of the new Will and of the intention to obtain a declaratory order from this court recognising the validity of the new Will. This then led to the current application for a declaratory order. Notice was served on the third respondent on 24 August 2021 who filed

notice of intention to oppose and filed his answering affidavit on 3 December 2021. The non-compliance with Rule 6 (5) (d) (i) and Rule 6 (5) (d) (ii) was condoned by order of this court.

ISSUES FOR DETERMINATION:

[4] The issues for determination are whether or not the document described as 00540151X8, THE WILL OF FLORENCE DINAH ROSINAH KINNEAR falls within the ambit of section 2(3) of the Wills Act, 1988 (Act 7 of 1988) and whether or not the applicants have made out a case for the relief claimed.

SUMMARY OF EVIDENCE:

(a) Applicants' case:

[5] The first applicant states in his founding affidavit that his parents had a joint Will and after the death of his father it was his mother's wish to finalize the winding up of his father's estate before she made a new Will. He avers that his mother started the process (of making a new Will) but due to ailing health she was not able to sign her new Will. According to the first applicant, his parents were astute business people. After his father's estate was wound up, his mother instructed her financial advisor to draw a new Will which was early 2020. He concedes that he was not privy to the discussion about the content of the new Will. The first applicant's averments are that on 9 May 2020 his mother was admitted in hospital in the ICU and while in hospital she suffered a stroke and broke a leg. He states that after her release from hospital, his mother requested to see Mr Burden in order to finalize her instructions to him for the new Will. Mr Burden came to his mother during June 2020. He avers that he was close to his mother who indicated that she wants to make a new Will because the joint Will bequeathed the immovable property to the third respondent and she was no longer happy with that clause.

[6] According to the first applicant, he states that his mother wanted to include his other children so that they may inherit. He avers that the unsigned Will marked annexure DK2 is consistent with the instructions received and the discussions held with his mother. The first applicant proceeds to list the number of unsuccessful attempts to have the new Will signed. He avers that it would be in the interest of justice if the unsigned Will is declared valid and effective.

[7] The second applicant in her supporting affidavit avers and confirms that Mr Jasper Burden is a trusted financial adviser of her late parents. She states that Mr Burden had visited

her late mother for the purpose of drawing a new Will. She further confirms that the contributing factors why the new Will was not signed was due to the fact that her late mother had been ill, was hospitalized and attended the funeral of her cousin. She confirms that she had numerous discussions with her late mother relating to her new Will and what her wish and desire were.

[8] Mr Jasper Burden positively attests in his supporting affidavit that he is a financial advisor at Blignaut and has read the affidavit by the first applicant and confirms that he was the financial advisor of the late Mr and Mrs Kinnear. He avers that he did consult with the deceased and drafted the Will marked annexure DK2 which was drawn in accordance with the specific instructions of the deceased before her passing. He avers further that the deceased was of lucid mind and the content of the Will her understanding and desire of what she wished for her estate. He states that he was appraised by her on her relationship with her children and the grandson.

(b) Third Respondent's case:

[9] The third respondent avers that the applicants are not entitled to the relief on the basis that the formalities of a Will have not been met. He states that there is no evidence that the document was intended to be the final Will and testament of his grandmother. He denies that his grandmother expressed any intention to amend or create a new will as a sense of urgency following the death of his grandfather. He states that he shared a close bond with his grandmother who raised him from when he was nine months old and had who expressed to him that the house will be bequeathed to him which was in accordance to the joint will. He denies that the purpose for the visit by Mr Jasper Burden was for his grandmother to change the Will. The third respondent concedes to drug addiction and avers that his grandparents were aware of and they supported his recovery from. He states that there was a period of nine months prior to his grandmother's passing that she could have attended to revocation of the Will if she intended it.

SUBMISSIONS MADE:

[10] Counsel for the applicants argues in the heads of arguments that the applicants have made out a case for the relief sought. The submission is that Courts approach this kind of application graciously and use a liberal approach rather than a rigid approach. The contention is that the Court in its discretion may grant the application in terms of section 2(3) of the Wills Act 7 as amended to have the will declared valid despite non-compliance with prescribed

formalities. Counsel concedes that the Will is not signed and not dated and argues that section 2(3) of the Wills Act gives the Court the discretion to overlook minor non-compliance with the prescribed formalities if it apparent or can be proved that the Will represents the Testatrix's true intentions. Counsel contends that the Testatrix's true intention is confirmed under oath by her financial adviser.

[11] Counsel for the applicants contends that it is trite that circumspection is required to prevent fraud if certain evidence would be allowed, however, where there is proof that the Will does not comply with the requirements of the Wills Act, the Court may rectify or declare it valid. Reliance is made to ***Cuming v Cuming and Others 1944 AD 201*** with special reference to the word 'effect' which is a notion which applies in this application. The submission is that the conduct of the third respondent in opposing the application is contrary to the principle that the will must be read at the time of death of the testator according to the author G. Steyn[1], Law of the Wills in South Africa, 2nd ed, (1948) pages 58 to 59.

[12] Counsel for the applicants submits that there are no dispute of facts as the third respondent conceded that he has a drug addiction who was an alleged nuisance to his grandmother who made her selection in the Will. He prays for the application to be granted and that the costs be paid by the third respondent on punitive scale and the estate should not be burdened by costs.

[13] Counsel for the third respondent in the heads of arguments contends that the evidence proffered by the applicants is vague and inconsistent. It is submitted that the document was not seen by the testatrix (the deceased) and does not fall within the ambit of section 2 (3) of the Wills Act. The submission is that the following questions must be answered- (a) whether the document falls within the ambit of section 2(3) of the Wills Act within the meaning of 'drafted' or 'executed' and whether the deceased is required to do so; (b) whether the applicants have made out a case for the relief sought. The contention is that the applicants have not sought relief of revocation of the joint Will.

[14] Counsel for the third respondent contends that the applicants failed to make out a case on the basis that the deceased was not even aware of the content of the document and did not have sight of it. Counsel refers to ***Anderson NO and Others v Master of the Supreme Court***

[1]Counsel referred to the author as Steyn J – which I was unable to locate. It is unclear if this was a typographical error or not. Needless to say, I was unable to find this author despite diligent search.

and Others 1996(1) ALL SA (637) (C) and to ***Bekker v Naude 2003 (5) SA 173 (SCA***. The submission is that the document was not dictated or completed in the presence of the deceased and cannot fall within the ambit of section 2(3) of the Wills Act and the application should fail. In the event that the finding be made that the document falls within the ambit of section 2(3) of the Wills Act, the application should fail based on the inconsistency in the evidence of Mr Burden and the applicants. The contention is that there is no allegation that the drafted will was discussed with the deceased. Counsel prays for dismissal of the application with punitive costs on the scale of attorney and client.

APPLICABLE LEGAL PRINCIPLES:

[15] Freedom of testation is a central principle of testation succession as it recognises the right of a person to make arrangements of his or her assets as he or she wishes which is constitutionally protected[2]. However this right of testation is not without limitations- where the testamentary instrument is contrary to public policy or illegal or to constitutional value, the court has discretion to intervene. See ***King NO and Others v De Jager and Others 2021 (4) SA 1 (CC).***

[16] Section 2(1) of the Wills Act prescribes the formalities applicable to Wills, in that each page of the Will must be signed by the testator and two witnesses who must be in each other's presence at the time.

[17] Section 2(3) of the Wills Act provides that –

'*If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since 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 the subsection (1).'*

[18] In terms of section 2(3) of the Wills Act, there are three jurisdictional requirements which a court must be satisfied on-

1) A document must serve before the court;

[2]See *Wilkinson and Another v Crawford NO and Others 2021 (4) SA 323 (CC*) paras [69] to [70]. See Harvey NO v Crawford NO 2019 (2) SA 153 (SCA) para [53].

2) Such document or amendment must have been drafted or executed by the person who died (deceased);
3) The deceased must have intended such document as a will or an amendment of a will.

[19] In ***Van Der Merwe v The Master 2010 (6) SA 544 (SCA)*** para [14], Navsa JA held 'It has rightly and repeated 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 envisaged therein. In other words, the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.'

[20] A testator has the right to revoke a will as well as to amend a will. The proper manner to interpret any document is one compounded in ***Natal Joint Municipal Pension Fund v Endumeni Municipal 2012 (4) SA 593 (SCA)*** para [18]. Where testamentary instruments are concerned, the Constitutional Court in ***Wilkinson and Another v Crawford NO and Others 2021 (4) SA 323 (CC)*** para [35] held 'The golden rule of interpretation of testamentary instruments is to "ascertain the wishes of the testator from the language "used". As a general rule, words and phrases must be given the meaning they had at the time the testamentary instrument was used.'

[21] Where a bequest has been made in an earlier testamentary disposition, it would require clear and unambiguous language in a later testamentary disposition to justify the Court making a finding that the testator had intended to revoke such bequest. See Ex Parte Adams 1046 CPD 267 at 268.

[22] The requirement that the document or amendment must have been drafted or executed by the deceased or testator was a subject of uncertainty until ***Bekker v Naude 2003 (5) SA 173 (SCA)*** para [20]. The facts were that the appellant and the deceased had requested the bank to draft them a joint will and had explained what they wanted. The official took notes and sent the notes to the bank's head office where other officials drafted a Will. The deceased died before signing the Will. The appellant instituted action for an order in terms of section 2(3) of the Wills Act seeking the Court to accept the document as draft will of the deceased and an order to the Master to accept it. The action was dismissed. On appeal the SCA held that drafted when compared with 'caused to be drafted' could only have the strict meaning of a personal act.

EVALUATION:

[23] It is common cause that the deceased passed away 20 September 2020. It is also common cause that the document purported to be the Will of the deceased is not signed. There are factual disputes pertaining to the deceased's intentions relating to the immovable property and the relationship between the deceased and the third respondent , however by agreement between the parties the matter is to be disposed on legal arguments without applying the **Plascon- Evans** rule.[3] In terms of section 2(3) of the Wills Act, I need to be satisfied that the document was made by the deceased and reflects her intention in compliance to the three jurisdictional requirements.

[24] The only issue I have to determine in respect of the jurisdictional requirements in section 2(3) of the Wills Act in reference to 'drafted' or 'executed'. The document was done by Mr Burden and there is no evidence that the deceased personally took part in the drafting of this document.

[25] The third respondent raises a pertinent point in that the deceased had at least nine months before she passed on which as the argument goes rectification of the Will could have taken place. In support of the argument, he refers me to ***Giles NO v Henriques [2007] All SA 1409 (C)*** which was later taken on appeal[4] where at para [16] the SCA explains rectification. In the list of authorities, I am referred ***to De Reszke v Czeslaw Maras and Others 2003 (6) SA 676(C)*** in which the issue was whether a document (annexure A) was intended to be a will of the deceased within the ambit of section 2(3) of the Wills Act. In both the Court a quo and Appeal the Court dismissed the action[5]

[26] The first applicant's evidence with regard to the instructions actually given to Mr Jasper Burden the financial adviser is hearsay as he was not present when those instructions were given. Mr Burden without fully substantiating the content of the instructions given to him by the deceased merely confirms the first applicant's founding affidavit. Even if one accepts for a

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[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A*) at 634E to 635C which principle provides that an applicant who seeks final relief using motion proceedings must ,in the event of a dispute, accept the version set out by the opponent unless the opponent's allegations in the opinion of the Court are not bona fide disputes of facts or are far-fetched or untenable to the extent that the Court is justified in rejecting the allegations on the papers. In motion proceedings, a real dispute of fact only exists where the Court is satisfied that the party who purports to raise it has in the affidavit seriously and unambiguously addressed the fact so disputed. See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)* para13. See *Malan v City of Cape Town 2014 (6) SA 315 (CC)* para 73.

[4] See *Henriques v Giles NO and Another; Henriques v Giles NO and Others 2010 (6) SA 51 (SCA*).

[5] See *De Reszke v Czeslaw v Maras and Others 2006(2) SA 277 (SCA*).

moment that the deceased gave instructions to revoke the joint will and make a new will, the evidence is that she died before seeing it. Applying ***Bekker*** to the facts, I am not satisfied that the deceased took a personal act in drafting the alleged new Will. This is born out from the fact that there is a lacuna in the process from giving instructions until they were carried out .Put differently, if the deceased died without seeing the terms of the alleged new Will, were the instructions she allegedly gave to Mr Burden correctly captured in the purported new Will?

[27] In the event that I am wrong in my findings that the applicants has failed to satisfy me on the one jurisdictional requirement in section 2(3) of the Wills Act, even on their version they have failed on the balance of probabilities to prove that it was the deceased's intention to revoke the terms of the joint Will and conclude a new Will for the following reasons-

a) In his founding affidavit, the first applicant avers 'my parents were astute business people' would wait to finalize the signing of the alleged new Will because her husband's estate had been wound up. The passage of time is contrary to the behaviour of someone alleged to be astute. In fact, the deteriorating health assessing the veracity of the facts) ought to have been the very factor causing her to urgently sign the new Will. The averments that the alleged new Will could not be signed due to ill-health is improbable on the basis that the deceased was strong enough to attend a funeral and be a source of comfort to the grieving family yet had no time to attend to an important document like a Will.
b) On the one hand the first applicant avers that he was not privy to the discussion about the content of the terms of the new Will, yet he was discussing the very content of the Will. Which bring the following questions- how long after these discussions did the deceased draft the alleged Will? Did the discussions not amount to 'attest' within a broad interpretation? I pose this question on the basis of the first applicant's averment that annexure DK2 was *'consistent with instructions received and the discussions held with my late mother'.* He is a witness to his mother's alleged intention and a beneficiary. In my view, the meaning of 'attest' ought to be extended to apply under these facts, then what is the impact of section 4A (2) of the Wills Act within the content of those discussions? After all, undue influence is a question which depends on the circumstances of each case. Even if this is incorrect (to extend the meaning of 'attest' within the ambit of section 4A and can be disregarded), it does not retract from the fact that the probabilities shift in favour of the third respondent version.

c) Apart from the questions raised above, it is common cause that the deceased suffered a stroke which brings into question her mental state especially in view of the first applicant's averments that '*and undertook to invite Jasper Burden back, after the pain had subsided and she felt strong enough to deal with these matters.'*

d) In addition, the first applicant's averments suggests that the instructions were not yet finalized, which then bring about the question, how then was the alleged new Will drafted?

[28] Similar sentiments are shared with regard to the second applicant. Mr Burden avers that the deceased was lucid which I find improbable on the basis of the founding affidavit which reflects that the deceased was not strong enough to give instruction on the Will. Mr Burden, does not positively attest that the deceased had insight to the alleged draft Will in order to for the deceased to confirm the correctness of the content. In any event, I find that the instructions were still not finalized as indicated supra.

CONCLUSION:

[29] On the issue whether the document purported to be the last Will and testament of the deceased falls within the ambit of section 2(3) of the Wills Act, I find that the document does not. The facts prove that this document was unexecuted therefore I am not satisfied on the evidence presented that the document was '.drafted ' or 'executed' by the deceased within the context and ambit of section 2(3) of the Wills Act. It follows as the last issue that the applicants failed to make out a case for the relief. I am satisfied that the balance of probabilities favours the third respondent's version. Consequently, the application must fail.

COSTS:

[30] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially[6]. A just court order is that the costs of this application including the costs of the interlocutory application for condonation are to be paid out of the estate of the deceased.

Order:

[31] In the circumstances the following order is made:

1. Application is dismissed.

[6]See *Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC).*

2. The costs to be paid out of the estate of the deceased.

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MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicants	: Adv. P.A. Mabilo
Instructed by	: Tyron I. Pather Incorporated 771 Park Street, Sunnyside Pretoria
On behalf of the Third Respondent	: Adv. A. Coetsee
Instructed by	: Kruger Attorneys and Conveyancers 32 Mouton Street, Horizon, Roodepoort
Date of Judgment	: 24 March 2023