Republic of South Africa

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

Case No. 17909/2022

Before: The Hon. Ms Acting Justice Hofmeyr

Date of hearing: 18 July 2023
Date of judgment: 20 July 2023

In the matter between:

JEAN-PAUL SOLOMON — Applicant

and

SHANE GRAIG SOLOMON — First Respondent

THE MASTER OF THE HIGH COURT — Second Respondent

JUDGMENT

HOFMEYR AJ:

1 This is a case about two brothers and an inheritance. The applicant was disinherited from their father's will. He seeks to have the will declared inexecutable so that he can inherit from the estate in terms of the rules of intestate succession.

2 The first respondent is the brother who stands to inherit under the will. The first respondent brought a counter application to have the will accepted by the Master of the High Court even though it does not comply with all the formalities of section 2(1) of the Wills Act 7 of 1953. The first respondent also seeks an order that he be declared competent to receive a benefit from the will under section 4A(2)(a) of the Wills Act.

The facts

3 Prior to May 2020, the deceased had a joint will that he and his late wife had executed in 1996. Under the old joint will, their sons (namely, the applicant and the first respondent) were both beneficiaries in equal proportions.

4 The deceased's wife died in 2004. 16 years later, in May 2020, the deceased executed a new will. In terms of the new will, he provided that the first respondent would be the sole beneficiary and would be appointed as executor of the estate.

5 By the time that he executed the new will, it is common cause that the deceased had a very strained relationship with the applicant. The relationship was so damaged that when the deceased tried to contact the applicant to wish him well on his 40th birthday, the applicant did not take his call and instead sent him a message telling him to "piss off". The applicant then messaged his brother – the first respondent – saying: "Just let me know when he's dead. I'm done with him."

6 This deterioration in the relationship between the deceased and the applicant is not denied by the applicant. In fact, after the deceased's death, the applicant posted messages on Facebook referring to his father as a "bitter, manipulative, vindictive, angry person". It was also common cause that the deterioration in the relationship between the applicant and the deceased occurred after the mother had passed away.

7 While the applicant and the deceased's relationship was deteriorating, the first respondent and his family played a significant role in caring for the deceased. They moved into the deceased's home shortly after their mother had died. In 2013, when the deceased was diagnosed with cancer, the first respondent assumed the primary caregiver role to his father. He saw him through almost a year of chemotherapy and radiation therapy. When the deceased had a fall towards the end of 2014 and the first respondent contacted the applicant to tell him about the fall, the applicant's response was: "Why are you letting me know, call me when he's dead".

8 The deceased died on 15 June 2020 while on a morning walk at a park near to the family home.

9 As I set out above, almost a month before this day, on 20 May 2020, the deceased executed a new will. The circumstances of its execution are important to the legal issues in the case so I must set them out in some detail. I rely on the version of the first respondent in doing so because he was there at the time. The applicant was not there and has not set up any facts that meaningfully dispute this version of events. The first respondent's averments are also confirmed under oath by every other person who was involved in the events of that day. There are confirmatory affidavits from the first respondent's wife, his daughter, his son, and Mr Shane Pillay – an electrician who was

working at the house on the day. Their own accounts of the day are also consistent with each other.

10 In May 2020, the deceased was not in a good state of health. It was two months after the emergence of the Covid19 pandemic and the deceased was suffering from numerous comorbidities including high blood pressure, kidney problems, arthritis and gout.

11 The first respondent explained that on the morning of 20 May 2020, he made his father breakfast and took it to his room. Shortly thereafter, his father called him back and told him that he had written out a new will which he kept in a folder. His father showed him the folder but the first respondent said he did not read the will. His father then said to him that he needed witnesses to sign the will and explained that the first respondent could not do so because he was a beneficiary under the will. His father then asked the first respondent to call his wife and daughter (who lived with them in the family home) to come to his room.

12 They did so and then signed the will together in the presence of the deceased. The first respondent was not in the room at the time. When his wife and daughter left the room, his father called him back into the room and asked him to call Mr Pillay to come into his bedroom. Mr Pillay went into the room and the deceased asked him to “do him a favour” and sign the will as a witness. Mr Pillay did so. His signature is therefore the third witness signature that appears on the will. He did not, however, sign the will in the presence of the other two witnesses. He did so after they had already left the room. The deceased did not show the first respondent the will on that day or thereafter. It was, in fact, only found two weeks after the deceased’s death, when the first respondent’s son was cleaning the deceased’s bedroom and found the will in a folder on the bed shelf.

13 The first respondent describes the deceased as a private person who did not speak openly about his private business and who handled his own affairs.

14 The first respondent also had no knowledge that the deceased was intending to change his will until the day he was called into his bedroom after breakfast and told that the deceased had changed his will to make him the sole beneficiary.

15 Despite not knowing about his father's intentions to change the joint will, the first respondent says in his affidavit that he has some understanding of why the deceased decided to leave his whole estate to him. He says that the applicant treated their father in an appalling manner and that his father was deeply hurt by the applicant's conduct. He points out that it was the applicant's choice to remove himself from the deceased's life in 2014.

16 The applicant offers no meaningful response to these averments. In fact, the mainstay of his replying affidavit is the refrain "no comment". On critical issues, such as the facts that transpired on the day that the new will was executed, the applicant does not set up any contradictory facts. Instead, he opines that the version of the first respondent is "not reasonably true" but then does not explain why and rather says that the matter will be addressed in legal argument. I raised with counsel for the applicant whether this type of approach from the applicant could reasonably give rise to a genuine dispute of fact.[1] Ms Cowlin, who appeared for the applicant, fairly conceded that it could not. Disputed facts are matters for evidence, not for counsel to advance in legal submissions.

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[1] As the Supreme Court of Appeal held in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13: "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

17 Against this backdrop, the uncontested facts on which this application must be decided are the following:

17.1 The first respondent had no knowledge that the deceased intended to change his will until he was told about the new will on the morning of 20 May 2020.

17.2 At that stage, the will had already been drafted by the deceased and kept in a folder.

17.3 The first respondent's only role on the day that the will was executed was to arrange for the people, whom the deceased wanted to have sign the will as witnesses, to come to his bedroom.

17.4 Although the first respondent is frank about the fact that he has no direct knowledge of what informed the deceased's decision to change his will, he sets out a long history of a deteriorating relationship between the deceased and the applicant. The relationship was so bad in recent years that the applicant, at least twice, indicated that his only interest in his father was to be told when he had died.

The questions

18 There are two questions that arise for determination in this matter.

18.1 The first is whether the document purporting to be the deceased's will was drafted or executed by the deceased and intended to be his will.

18.2 The second is whether the first respondent should be disqualified from receiving a benefit under the will, including being appointed as executor.

19 I shall deal with each question in turn.

The answers

Section 2(3) of the Wills Act

20 Section 2(1) of the Wills Act says that no will shall be valid unless certain formal requirements are met. One of those requirements – set out in section 2(1)(iii) – is that the witnesses who attest and sign the will do so in the presence of each other. It is common cause that that did not happen in this case. The three witnesses were not in each other's presence at the time that they signed the will. The first respondent's wife and daughter were together but Mr Pillay only signed after they had left the deceased's bedroom.

21 This non-compliance with the formalities under section 2(1) is not, however, the death knell for the will. This is because section 2(3) of the Wills Act creates a power for the courts to order that the Master accept a document as a valid will even when the requirements of section 2(1) have not been satisfied.

22 Section 2(3) 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 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)."

23 There are two relevant requirements under this section. The first is that the document, which purports to be a will, must have been drafted or executed by the deceased and the second is that the document must have been intended to be his will.

24 In *van der Merwe v The Master* 2010 (6) SA 544 (SCA), the Supreme Court of Appeal held that section 2(3) was introduced into the Act to ensure that a failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators.[2] Its purpose is to empower the courts to find that a document, which does not meet the formal requirements for validity, can nonetheless be treated as a valid will and to direct that the Master accept the will as such.

25 In this case, there is no dispute that the document in question was drafted by the deceased. The only question is therefore whether it was intended by the deceased to be his will. In *van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA), the Supreme Court of Appeal explained that the latter question must be answered by examining the document itself, as well as the context of the surrounding circumstances.[3]

26 The document itself begins with the words: "this is the last will and testament of Percival Fairhurst Solomon". The remainder of the document sets out that the deceased revokes all previous wills and codicils and that he has written out the will in his own hand and was of "sound health and mind" when he did so.

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2 *van der Merwe v The Master* 2010 (6) SA 544 (SCA) para 14

3 *van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA) para 16

27 When the deceased called the first respondent to his bedroom on the morning of 20 May 2020, he was unequivocal about his conduct and his intentions. He said that he had drafted a new will and wanted the first respondent's assistance in arranging for it to be witnessed. He said that he had the will in a folder. The applicant does not dispute these facts.

28 I am therefore satisfied that the document purporting to be the deceased's will was drafted by the deceased and intended by him to be his will. I am therefore required to order that the Master accept the document as the deceased's will.[4]

29 The question that remains is whether the first respondent is entitled to inherit under the will.

Section 4A of the Wills Act

30 Section 4A(1) of the Wills Act provides that a person who attests and signs a will as a witness, and the spouse of that person at the time of execution of the will, shall be disqualified from receiving any benefit from the will. Section 4A(3) says that the appointment of a person as the executor of a will shall be regarded as a benefit received by that person under the will.

31 The first respondent's wife witnessed the will on the morning of 20 May 2020. In terms of sections 4A(1) and (3) of the Wills Act, he is therefore disqualified from inheriting from the estate of the deceased under the will and from being appointed as executor.

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4 *Van Der Merwe v The Master* 2010 (6) SA 544 (SCA) para 14

32 However, that is not the end of the matter because section 4A(2) of the Wills Act creates three exceptions to this disqualification. The relevant one for the purposes of this case is section 4A(2)(a). The section says that a court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will.

33 The first respondent seeks a declarator to this effect in his counter application. As the Supreme Court of Appeal recognised in *Blom v Brown*, the purpose of the section is to permit a beneficiary, who would otherwise be disqualified from inheriting, to satisfy the court that he or she (or his or her spouse) did not defraud or unduly influence the testator in the execution of the will.[5] The Pietermaritzburg High Court has held that the beneficiary, who seeks the declarator under section 4A(2)(a), bears the onus of establishing that there was no fraud or undue influence over the testator.[6] The approach is sound because it is the would-be beneficiary who seeks an exception to the default disqualification under the statute. It is therefore appropriate that the beneficiary should bear the burden of proving that there was no such fraud or undue influence.

34 In this case, the first respondent has set out the facts surrounding the deceased's preparation of the will and his own involvement in it in clear and precise terms. These averments include the fact that neither he nor his wife had any knowledge of the will before the morning of 20 May 2020.

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5 *Blom v Brown* [2011] 3 All SA 223 (SCA) para 22

6 *Van Heerden v Picton and Others* 2021 JDR 3183 (KZP) para 13

35 The applicant's response to this averment is a combination of avoidance and deflection. First, he says that he has "no comment" in response to the averment and then he takes issue with whether the electrician, Mr Pillay, in fact signed the will on the 20th of May 2020. This latter point consumes most of the applicant's factual case on the papers. The applicant advances numerous theories about how unlikely it is that Mr Pillay signed the will on the same day as the first respondent's wife and daughter. However, this issue, even if the applicant were correct, misses the point. It is not evidence that the first respondent or his wife were involved in defrauding the deceased or unduly influencing him. At most, it may be evidence that the first respondent does not fall within the exception under section 4A(2)(c) of the Wills Act. That section provides that a person whose spouse attested and signed a will shall not be disqualified from inheriting if there were at least two other competent witnesses who signed and attested the will. The applicant's factual case appears to be aimed at showing that Mr Pillay cannot be counted as one of the two other witnesses because he did not, in fact, sign the will when he said that he did. However, the first respondent does not rely on section 4A(2)(c). He claims to be entitled to benefit under the will in terms of section 4A(2)(a), not 4A(2)(c) of the Wills Act.

36 The first respondent did not file a replying affidavit in his counter application. The papers reveal that his attorneys of record withdrew in March this year so he has been without legal representation since then. The first respondent therefore represented himself at the hearing and informed me that he has been unsuccessful in seeking pro bono legal assistance in the interim.

37 The absence of a replying affidavit is, however, of no moment because, for the reasons I have already set out above, the applicant has singularly failed to put up any facts that undermine the first respondent's clear account of the events on the 20th of May 2020.

38 I am therefore satisfied that neither the first respondent nor his wife defrauded or unduly influenced the deceased in the execution of his will. On the contrary, the papers reveal that the first respondent and his family cared for the deceased at the times in his life when he most needed his family's support. They were there for him during his struggle with cancer, during the challenges that the Covid19 pandemic presented to the world, and they respected his privacy throughout. There is not an iota of evidence that they defrauded or unduly influenced the deceased.

39 This is precisely the type of case for which the legislature provided exceptions in section 2(3) and section 4A(2)(a) of the Wills Act.

40 The only remaining issue is one of costs. Costs ordinarily follow the result.[7] I see no reason why they should not do so in this case. The first respondent has been successful both in resisting the applicant's application to have the will declared inexecutable and in advancing the case for his own relief in the counter application.

Order

41 I therefore make the following order:

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7 *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC) para 17

(a) The Master of the High Court is ordered to accept the document dated and signed on 20 May 2020 and executed by the late Percival Fairhurst Solomon, who passed away on 15 June 2020, a copy of which is annexed to the founding affidavit as "SS1" ("the will"), as his last will and testament for purposes of the Administration of Estates Act 66 of 1965 although it does not comply with all the formalities for the execution of a will under section 2(1) of the Wills Act 7 of 1953.

(b) The first respondent, Mr Shane Graig Solomon, is declared to be competent to receive any benefit under the will, including being appointed as the executor of the will.

(c) The applicant, Mr Jean-Paul Solomon, is ordered to pay the costs of the application and counter application.

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K HOFMEYR

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicants' counsel: **AH COWLIN**

Applicants' attorneys: Klynveld-Gibbens Inc c/o Johan Victor Attorneys / Litigants

Respondent's counsel: **IN PERSON**

Respondent's attorneys: