Republic of South Africa

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

Case No. 2508/2022

Before: The Hon. Ms Acting Justice Hofmeyr

Date of hearing: 24 July 2023
Date of judgment: 28 July 2023

In the matter between:

MAUREEN SYLVIA SAMUELS	First Applicant
ANDRE NEIL SAMUELS	Second Applicant
BRENT SAMUELS	Third Applicant
COLLEEN BROWN (born SAMUELS)	Fourth Applicant

and

JOLENE JURIES (born SAMUELS)	First Respondent
MICHELLE DIANE BENSON (born SAMUELS)	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent

HOFMEYR AJ:

1 This is an application under section 2(3) of the Wills Act 7 of 1953 for an order directing the Master to accept a document as a will despite non-compliance with the formalities in section 2(1) of the Wills Act.

2 The document in question purports to be the joint will of the first applicant and her late husband, the deceased. They were married in community of property.

3 The document was signed by the first applicant and bears the thumbprint of the deceased. When the deceased's thumbprint was placed on the document, there was no commissioner of oaths present. The document was signed by two witnesses but not at the same time. It therefore did not comply with the requirements for a valid will under section 2(1) of the Wills Act.

4 The deceased passed away on 7 December 2010. In June 2021, the Master of the High Court refused to accept the will because it did not comply with the provisions of section 2(1) of the Wills Act. As a result, the first applicant, supported by three of her five children (the second to fourth applicants) brought an application under section 2(3) of the Wills Act for the court to direct the Master to accept the document as the deceased's will. I shall refer to the document as "the candidate will".

5 The order is opposed by one of the first applicant's daughters – Ms Jolene Juries – the first respondent. The first respondent contends that the candidate will was neither

executed by the deceased nor reflects his intentions. The first respondent also questions whether the deceased had the necessary testamentary capacity to execute the will.

6 In practical terms, the difference between the parties lies in the fact that if the applicants succeed and the Master is directed to accept the candidate will as the will, then the first applicant, as the surviving spouse of the deceased, will alone inherit the deceased's share of the estate. If applicants are unsuccessful, there will be no valid will, and the estate will devolve in terms of the rules of intestate succession.

7 Section 2(3) of the Wills Act 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)*."

8 The section empowers the courts to direct the Master to accept a document that would otherwise not pass muster as a will due to a technical flaw in its attestation. The Supreme Court of Appeal has described the power given to the courts under the section as a power to condone non-compliance with the formalities set out in section 2(1).[1]

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[1] *Grobler v Master of the High Court* 2019 JDR 1772 (SCA) para 13

9 In order to succeed in an application under section 2(3), the applicants must establish two things: first, that the candidate will was either drafted or executed by the deceased and, secondly, that the deceased intended it to be his will.

10 It is common cause in this matter that the candidate will was not drafted by the deceased. So in order to succeed, the applicants must show that the candidate will was executed by the deceased and that he intended it to be his will.

The facts

11 In late 2006, a few months before the candidate will was prepared, the deceased suffered a stroke. There is some debate on the papers about the full impact of the stroke on the deceased but it is common cause between the parties that it left him, at a minimum, without the ability to read, write or speak. The applicants nonetheless say that he was capable of understanding when spoken to and of communicating in a rudimentary manner.

12 The preparation of the candidate will arose as follows.

13 After the deceased suffered his stroke in late 2006, the second applicant, who is the deceased's and the first applicant's son, returned to South Africa from abroad. During his stay, he found a copy of a handwritten draft will that had been prepared by the deceased and the first applicant in May 2003. This 2003 document is described by the applicants themselves as only a "draft will". They did not sign or execute the draft will in 2003 nor at any time prior to February 2007. When the second applicant found the handwritten draft will, he realised that it had not been signed and therefore had a typed version of the draft

will prepared so that it could be properly signed and executed. That typed version of the draft will is the candidate will in these proceedings.

14 The first applicant and the deceased signed the candidate will on 14 February 2007. What, precisely, happened on that day is of cardinal importance in the case so I set out exactly how the first applicant describes those events, in her own words, in the founding affidavit:

> *"[The candidate will] is substantially similar to the earlier handwritten draft save that some headings were omitted and there were small changes to the bequests of certain movables. The handwritten amendments made to the bequests in paragraphs 4.4, 4.6 and 4.9 were made at the request of the testator and me. The handwriting is that of the second applicant.*
>
> *This will, with the handwritten amendments, was executed on 14 February 2007 by signature by myself and by the testator by his right hand thumb print being affixed to both pages.*
>
> *…*
>
> *I emphasise that I was present and personally witnesses the affixing of the [deceased's] thumbprint to the first and second pages of the will and the signature by my brother as a witness on the second page of the will. Second applicant was also present and witnessed the execution of the will*".

15 This is the sum total of the description of the events on the day that the candidate will was executed. Strikingly missing from this statement of the events of 14 February 2007 is how the contents of the typed document were communicated to the deceased and how it was that he confirmed his agreement with its contents. This type of explanation is important not only because, by that stage, the deceased was unable to read, write or speak but also because the typed version of the will differed in some material respects from the handwritten draft will that had been prepared in 2003.

16 These differences are particularly important because the first applicant, herself, appears not to have fully appreciated the differences. When the first applicant referred to the differences in her founding affidavit, she described them as “small” and relating to headings and movable property. However, as the first respondent later pointed out, there was at least one material difference between the old 2003 handwritten draft will and the candidate will. The handwritten draft will of 2003 made no reference to a second immovable property at 38 Lyndon Crescent. But under the candidate will, that immovable property was to be left to the second applicant. This change was a material addition to the candidate will. The first applicant seems either to have been unaware of the change or not to have appreciated its significance because she described the changes as “small” and relating only to “movables”.

17 The candidate will also included a new provision that the cash and policies in the first applicant and deceased’s investment portfolio would be cashed in and split in equal amounts between “our 5 siblings”. This provision did not appear in the 2003 handwritten draft will. No explanation of its inclusion in the candidate will is provided in the founding affidavit. Moreover, no explanation is provided for why the candidate will referred to “5

siblings" when it was presumably the 5 *children* who were going to inherit in equal proportions from the cash and policies of their parents.

18 It is against these facts that I must determine whether the candidate will was executed by the deceased and whether he intended it to be his will.

Executed by the deceased

19 It is common cause that the deceased did not draft the candidate will. The execution of the document, according to the applicants, involved the affixing of the deceased's thumbprint to both pages of the document.

20 Section 2(1)(a)(v) of the Wills Act sets out the formal requirements that apply when a testator signs a will by affixing a mark to the will. The section provides, amongst other things, that the affixing of the mark must be done in the presence of a commissioner of oaths who is satisfied as to the identity of the testator and that the will so signed is the will of the testator.

21 It is common cause between the parties that there was no commissioner of oaths present when the deceased affixed his thumbprint to the candidate will. The relevant legal question is whether the absence of a commissioner of oaths means that the candidate will was not executed by the deceased for the purposes of section 2(3) of the Wills Act.

22 The first respondent says that the absence of the commissioner of oaths is fatal. The argument was that section 2(1)(a)(v) of the Wills Act sets very specific requirements for

execution of a will by the making of a mark and unless those requirements are met, the document has not been executed for the purposes of section 2(3) of the Wills Act. In support of this proposition, the first respondent's counsel, Ms Gabriel, referred to a number of cases dealing with the requirements of section 2(1)(a)(v) of the Wills Act. However, those cases are of limited assistance because they do not address the question that arises in this case, namely, whether "executed" *under section 2(3)* of the Wills Act is broad enough to cover a form of execution that does not meet to requirements for signing set in section 2(1)(a)(v).

23 It is clear that the purpose behind section 2(3) of the Wills Act is ensure that a failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators.[2] As a result, the legislature gave the courts the power 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.

24 However, the logical end point of the first respondent's argument is that a will cannot be found to have been "executed" for the purposes of section 2(3) unless the formal requirements for the affixing of a mark under section 2(1)(a)(v) are met. In other words, if one is dealing with a document to which a testator's mark was affixed then, unless a commissioner of oaths was present when that took place and followed the requirements of section 2(1)(a)(v) of the Wills Act, the document may not be accepted as a will under section 2(3) of the Act.

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

25 Adopting such an approach would mean that the protection afforded by section 2(3) does not apply to when the particular instance of non-compliance relates to signing by the making of a mark. If the first respondent's argument is correct, then, while the court can condone non-compliance with the other subsections of 2(1), it cannot condone non-compliance with the requirements under section 2(1)(a)(v) for signing by affixing a mark to a will.

26 There is, however, no textual support for this interpretation of the section. If the legislature had wanted to limit the section 2(3) condonation power so that it did not apply to instances of non-compliance with section 2(1)(a)(v) of the Wills Act, then it would have been a simple matter to say so expressly. But that is not what the section says. Instead, the section says that a court may order that the Master accept a document "although it does not comply with all the requirements for the execution … of wills referred to in subsection (1)". Section 2(3) is neutral as to which of the section 2(1) requirements are not met. It does not specify that compliance with some of section 2(1)'s requirements remain mandatory.

27 There is a further factual consideration of importance in this case. The cases dealing with section 2(1)(a)(v) of the Wills Act explain that the purpose behind the formality of having a commissioner of oaths present when the mark is affixed to the will is to "secure evidence to establish the identity of the testator and show that the will was the will of the testator who signed the will by the making of a mark".[3]

28 In this case, although there was no commissioner of oaths present, there were at least three people, other than the deceased, present with him when he affixed his thumbprint

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[3] *In re Jennett NO* 1976 (1) SA 580 (A) 582H

to the candidate will. They were his wife (the first applicant), his son (the second applicant) and the first applicant's friend, who has since passed away. Both the first and second applicants provided affidavits to the court confirming that the deceased affixed his thumbprint to the two pages of the candidate will in their presence. They knew the deceased well so there could be no dispute as to his identity when he applied his thumbprint. There was also no suggestion on the papers that the deceased was pressured into placing his thumbprint on the page or did so under some form of duress. This means that the purpose that is served by requiring a commissioner of oaths to be present when a testator signs a will by affixing his mark was achieved by other means in this case.

29 These facts tend to support the conclusion that the deceased did execute the candidate will for the purposes of section 2(3) of the Wills Act. However, I do not need to make a final finding on this issue because, even if the deceased did execute the will for the purposes of section 2(3), in order for the applicants to succeed in this application, they need to show that the deceased intended the candidate will to be his will. On this latter question, I am not satisfied for the reasons that follow.

Intended to be the deceased's will

30 In *van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA), the Supreme Court of Appeal explained that the question whether a document was intended by the

deceased to be his will must be answered by examining the document itself, as well as the context of the surrounding circumstances.[4]

31 A Full Bench of this Court has also held that the party alleging that the requirements of section 2(3) were met must show "unequivocally that the intention existed concurrently with the execution or drafting of the document".[5] In *The Law of Succession*, the learned authors make the point that given the nature of an application under section 2(3) of the Wills Act, "the parties must exercise utmost good faith and place all relevant facts evidence before the court".[6] This heightened standard is appropriate in the context of section 2(3) applications because those who are before the court are purporting to speak for someone who is not there, namely, the deceased. In those circumstances, as with others where a party is not before the court such *ex parte* applications,[7] it is appropriate that the standard of the utmost good faith is observed and that serious attention is given to placing all the relevant facts before the court.

32 It is in relation to the latter aspect – the requirement to place all the relevant facts before the court – that I find the case of the applicants wanting.

33 When the founding papers were prepared, the applicants knew that they were dealing with a situation in which the deceased had suffered a stroke a few months before he affixed his thumbprint to the candidate will. They knew that, as a result of the stroke, he could not read, write or speak. One of the most obvious matters that the founding papers

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

5 *Westerhuis and Another v Westerhuis and Others* 2018 JDR 0951 (WCC) para 50

6 Hofmeyr & Paleker *The Law of Succession in South Africa* 3rd ed (2023) 108 footnote 139

7 *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) para 84

needed to address was how the contents of the candidate will were conveyed to the deceased on 14 February 2007 and how he responded. They were required to take care in explaining these facts to the court so that it could be satisfied that the deceased intended the candidate will to be his will.

34 They also knew that the candidate will differed from the handwritten draft of their joint will that had been prepared at a time before the deceased had suffered his stroke. They therefore needed to deal with those differences in a candid manner.

35 However, on both of these pivotal aspects, the founding papers are deficient. No explanation at all was provided of how the contents of the candidate will were communicated to the deceased when he could not read, speak or write, nor how he communicated his agreement with its terms. The treatment in the founding papers of the differences between the 2003 handwritten draft of the will and the candidate will raised more questions than it answered because the first applicant's own explanation of those differences was wrong. She said that the differences were small and related to movable property, when the differences were material and related to immovable property.

36 When I put these difficulties with the applicants' case to Mr Coston, who appeared for the applicants, he encouraged me to have regard to the facts set out in the replying affidavit where the first applicant said that the contents of the candidate will were read out to the deceased and he communicated his agreement "by nodding and showing a thumbs up".

37 It is trite that an applicant must make out a case for relief in the founding papers.[8] On a strict application of that rule, what was said in reply could not save the applicants' case.

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[8] *Airports Co SA Ltd v Spain NNO and Others* 2021 (1) SA 97 (KZD) para 27

However, I do not need to apply the rule strictly to find the applicants' case inadequate. This is because their own treatment of these pertinent issues in reply still fails to meet the requirement of complete and fair disclosure. I mention only a few examples:

37.1 There is no explanation in the reply of why the fact that the candidate will was read out to the deceased was not included in the founding papers. Given the importance of this issue in the proceedings, some explanation ought to have been forthcoming.

37.2 There is no explanation of whether the deceased was given time to indicate his agreement with each pertinent provision of the candidate will or whether his agreement was only sought at the end of it having been read out. In the context of a person who had severe difficulties communicating, it would be relevant for the court to know whether he had been given a proper opportunity to confirm his agreement in respect of each pertinent aspect of the candidate will. But the papers are silent on this.

37.3 There is also no explanation of how the deceased might have communicated his disagreement with a provision of the candidate will. If he was not given time to do so and only asked at the end of the process whether he agreed, there is no way of knowing how much of what was read to him he agreed with.

37.4 There is no explanation of the first applicant's own error in describing the changes from the 2003 handwritten draft will to the candidate will. The first applicant made a material error in her founding papers when she said the only changes that were made were small ones affecting movable property. And yet, when the addition of an entirely new immovable property was pointed out in the answering affidavit of the first respondent, the applicants failed to explain to the court how the first

applicant made this error when she first described the contents of the candidate will. Without a frank explanation, the court is left wondering whether the first applicant, let alone the deceased, fully appreciated the changes that had been made in the candidate will.

37.5 There is no explanation at all of why the first applicant, or the deceased for that matter, did not pick up that their children had been described as their "siblings" in the candidate will.

38 In order to grant relief under section 2(3) of the Wills Act, I must be satisfied that the deceased intended the candidate will to be his will. But the discrepancies I have listed above are too many and too material to be overlooked. More was required of the applicants to give the court comfort that the candidate will reflected the intentions of the deceased. They did not discharge their burden.

39 Despite the fact that I raised some of these difficulties with Mr Coston during the hearing, he confirmed that the applicants would not seek a referral to oral evidence or to trial. His instructions were that the applicants wanted finality in the matter.

40 In the circumstances, the application must fail.

41 In the light of this finding, it is not necessary for me to deal with the first respondent's further argument that the deceased lacked testamentary capacity. The issue does not arise because the candidate will does not satisfy the requirements of section 2(3) of the Wills Act to be accepted as the deceased's will. As a result, there is no will in respect of which the question of the deceased's testamentary capacity can be raised.

42 On the issue of costs, both parties emphasised that the matter of costs was in my discretion. As is customary in cases involving the validity of wills, in my view, the fairest order would be that all the costs be paid by the estate on an attorney and client scale.

Order

43 I therefore make the following order:

(a) The application is dismissed.

(b) All the costs of the applicants and the first respondent are to be paid by the estate on the attorney and client scale.

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K HOFMEYR

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicants' counsel:	**Adv. P Coston**
Applicants' attorneys:	Brunsdon Attorneys per Mr John van Onselen
First Respondent's counsel:	**Adv. P Gabriel**
Respondent's attorneys:	Boshoff Incorporated per Ms Mariska Kuit