OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 17695/21

KIM VAN ZYL	Applicant
V	
THE MASTER OF THE HIGH COURT, CAPE TOWN	First Respondent
JENNIFER GLORIA TYLER	Second Respondent
NEDBANK LIMITED	Third Respondent

JUDGMENT DELIVERED ON THIS 28th DAY OF FEBRUARY 2023

FORTUIN, J:

A. INTRODUCTION

[1] This is an application in which the applicant seeks certain relief in respect of a document signed by the late Dale Charles Kelly ("the testator") dated 6 November 2018 ("the purported will"). The applicant seeks an order that the non-compliance with the

formalities contained in the Wills Act, 7 of 1953 (“the Wills Act”) be condoned and that, insofar as may be necessary, the purported will be declared to be a valid will in terms of section 2(3) of the Wills Act. The applicant also seeks an order that she be declared competent to receive a benefit from the purported will in terms of section 4A of the Wills Act.

B. COMMON CAUSE FACTS

[2] The applicant, Kim Sharon Van Zyl, was the life partner of the testator at the time of his passing on 18 February 2021. Second respondent, Jennifer Claudia Tyler, who opposes this application, was previously engaged to the testator. Her relationship with the testator ended before the applicant and the testator met.

[3] It is common cause that the testator executed a previous will on 12 August 2010 while he and the second respondent was still in a relationship in which the second respondent was the beneficiary. The purported will was executed after the relationship with the second respondent had ended and while the testator and the applicant were life partners.

[4] The following timeline is also common cause:

a. During October 2002 the second respondent commenced a 12-year relationship with the deceased;

b. The testator and the second respondent got engaged in 2005;

c. On 12 August 2010 the will benefiting the second respondent was signed;

d. At some point thereafter the relationship between the testator and the second respondent came to an end;

e. In 2011 the applicant met the testator and sometime thereafter they moved into the same house where they lived together for 4 years until his death. They regarded each other as life partners;

f. In February 2016 the second respondent's son, who was also to benefit from his previous will, moved to the United Kingdom;

g. In October 2017 the testator submitted a form to Liberty Life in which he changed his life policy to reflect the applicant as his beneficiary and to remove the second respondent as a beneficiary. In that application the testator described the applicant as his "common law spouse".

h. In October 2018 the testator raised the issue of his will with the applicant and she then purchased a *pro forma* document on his behalf;

I. on 6 November 2018 the testator penned the contents of the document and indicated to the applicant what he was writing;

j. The applicant's son, Devon Steenkamp, and his girlfriend visited the applicant and the testator shortly thereafter with the intention of signing the will as witnesses. This was however not done as both the applicant and the testator forgot to remind them to sign as witnesses.

k. On 8 February 2021 the second respondent contacted the testator for the last time via WhatsApp regarding a time share which was in both their names;

l. On 11 February 2021 the testator met with Mr Antony Allende and mentioned in a conversation that he had drawn up a will some time ago and discussed the beneficiaries, including his two biological daughters. During this conversation he expressed regret at the state of his relationship with his daughters.

m. On 18 February 2021 the deceased passed away.

n. On 14 September 2021 the applicant's attorney obtained a report from a handwriting expert that in his opinion the will was signed by the testator and the written portions were completed by him.

o. On 2 February 2022 a supplementary report was submitted dealing with the expert's inspection of the will at the Master's office. In this report he confirms his earlier findings.

[5] In essence the testator left his estate to the applicant. He also provided in the purported will that the proceeds of certain life policies be paid to his daughters of his previous marriage.

C. THE SECOND RESPONDENT'S CASE

[6] The second respondent opposes the relief sought on the following grounds:

a. The purported will effectively disinherit the second respondent and her son while benefiting the applicant and his biological daughters.

b. She would've expected the testator to have informed her and her son of the contents of his last will.

c. The testator should and would have instructed a professional to draw up his will but did not do so.

d. There is no reason for the testator to have disinherited the second respondent's son while benefiting his daughters in the purported will.

e. The purported will is incomplete and not final.

f. The second respondent criticizes the opinions expressed by the handwriting expert Mr. Bester for a number of reasons.

D. THE CONTENTS OF THE PURPORTED WILL

[7] The will was a standard form document which was purchased by the applicant on behalf of the testator. The testator inserted, by his own hand, the contents set out in the document. In the document the testator essentially bequeathed his entire estate to the applicant. Certain assets are described as being:

a. The property at 7 Lyndwood Grange, Lyndwood Road, Durbanville;

b. The 50% share held by the Testator in Frandale Imports, trading as The German Grocer. The Testator indicated that a first option should be offered to Mr FS Vuchs, who held the other 50% in that business;

c. Certain Liberty Life insurance policies in which he recorded that those policies would cause certain payments to be made to the applicant and his two daughters, Vickey Kelly and Carla Kelly; and

d. The testator also stated that all Glacier Investments 90 shares should be bequeathed to the applicant. That was a reference to a living annuity in which the applicant was nominated as beneficiary.

[8] The document was signed by the testator and the handwritten contents was also completed by him. It is common cause that the document does not comply with the number of requirements set out in the Wills Act. In particular:

a. The purported will was not signed by two witnesses but only by the applicant

b. The applicant signed as a witness to the purported will while named as a beneficiary.

c. She was appointed as an executor of the estate while named as a beneficiary.

E. RELEVANT LEGAL PROVISIONS

[9] Firstly, three sections of the Wills Act are at issue. It is trite that the purpose of the strict requirements of section 2(1) of the Act is to prevent fraud and to apply caution when attempting to ascertain the true intention of the deceased. In this regards see **Ndebele and Others NNO v The Master and Another**[1].

[10] Section 2(3) of the 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 the drafting of 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 subsection (1)."*

[11] Section 4A provides that:

> *"(1) Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.*
>
> *(2) Notwithstanding the provisions of subsection (1)-*
>
> *(a) 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;*

[1] 2001(2) SA 102 (C) par 30.

…"

[12] The second legal issue at hand is where final relief is sought in motion proceedings. The manner of establishing facts in such matters is set out in **Plascon-Evans Paints Ltd**[2]**.** Denials by a respondent which do not raise a real or genuine dispute of fact or which are not *bona fide* should not be accepted by a court. In this regards see **Pipoll-Dausa v Middleton NO and Others**[3].

[13] It is trite that a version which does not raise a genuine dispute of fact should be rejected. A court should adopt a common sense approach and reject a fanciful and untenable detailed version. This was at issue in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**[4] where the SCA stated as follows:

> *"A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settle an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes full and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."*

[2] 1984(3) SA 623 (A) 643 E-635C.
[3] 2005(3) SA 141 (C).
[4] 2008 (3) SA 371 SCA.

[14] The third issue is the law relating to expert evidence. In order for a court to determine the correctness of an opinion expressed by an expert, it is necessary that the reasoning which led to it, as well as the assumptions on which it was based, had to be disclosed to the court. In this regards see **Visagie v Gerryts en 'n Ander**[5].

F. DISCUSSION

[15] In *casu*, the onus is on the applicant to demonstrate that the purported will was intended by the testator and that she did not defraud or unduly influence him in the execution thereof.

[16] From the evidence provided, I am satisfied that the testator intended the applicant to be his beneficiary. The evidence of their relationship was not gainsaid by the second respondent. The fact that the deceased included his two biological daughters as beneficiaries is, in my view, in line with the evidence presented that he regretted the neglect of his children. In considering the probabilities, I find that the applicant's version in this regard is more probable. Consequently, I find that the purported will intended the applicant to benefit in terms of section 2(1) of the Act.

[5] 2000 (3) SA 670 (KPA) at 681.

[17] I am satisfied that the applicant did not defraud the testator, or unduly influence him in the execution of the purported will. Any allegation by the second respondent to the contrary, is not supported by any evidence and is, in my view, not to be accepted. Consequently, I declare the applicant to be competent to receive the benefit.

[18] In terms of section 2(3) of the Wills Act the court may declare a will to be valid notwithstanding non-compliance with the requirements of the act. This will be done in the event that the court is satisfied that the document was intended by the testator to be his/her will. I declare that this will is valid in terms of section 2(3) of the Act.

[19] Moreover, in terms of section 4A of the Wills Act, a court may declare a witness to a will competent to receive a benefit if the court is satisfied that the person did not defraud or unduly influence the testator in the execution of the will. As found above, I am satisfied that the applicant did not defraud or unduly influence the testator, and, consequently, I also declare her to be competent to receive a benefit in term of section 4A.

[20] The applicant in *casu* submitted a report of a handwriting expert. It is trite that it is not permissible for a lay witness to express opinion evidence regarding matters which require experience and/or qualifications of an expert nature. Much was made by the applicant regarding the second respondent's failure to place her own expert's evidence

before the court. I do not find it necessary to comment on this failure. The court was provided with the evidence of an expert by the applicant, which was accepted as such.

G. CONCLUSION

[21] Consequently, I am of the view that the applicant demonstrated on a balance of probabilities that the document was intended to be the testator's last will. Moreover, that she did not unduly influence or defraud the testator in executing the will.

H. ORDER

[22] In the circumstances, I make the following order:

1. That the non-compliance of formalities as contained in the Wills Act, 7 of 1953, as amended ("the Wills Act"), in respect of the will of the testator a copy of which is annexed hereto marked "A" ("the will"), be condoned.

2. That, insofar as may be necessary, the will be declared a valid will in terms of Section 2(3) of the Wills Act.

3. That the applicant be declared competent to receive a benefit from the will in terms of Section 4A of the Wills Act.

4. That the first respondent be ordered to accept the will as a valid will for the purposes of the Wills Act and Administration of Estates Act, 66 of 1965.

5. Costs of this application to be borne by the second respondent.

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FORTUIN, J

Date of hearing:	10 October 2022
Date of judgment:	28 February 2023
Counsel for plaintiff:	Adv S van Reenen
Instructed by:	Lazzara Leicher Inc
Counsel for 2nd respondent:	Adv N Kruger
Instructed by:	Doms Attorneys