THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 402/2002

Reportable

In the matter between

C E VAN WETTEN

1st APPELLANT

A STOKES NO

2nd APPELLANT

AND

K A BOSCH

1st RESPONDENT

THE MASTER OF THE HIGH COURT

NATAL PROVINCIAL DIVISION 2nd
RESPONDENT

HENRY SELZER NO 3rd

RESPONDENT

J A N BORMAN NO **4th**

RESPONDENT

CORAM: MPATI DP, FARLAM, LEWIS JJA, SOUTHWOOD, VAN HEERDEN AJJA

HEARD: ***21 AUGUST 2003***

DELIVERED*: 19 SEPTEMBER 2003*

Summary: Section 2 (3) of the Wills Act 7 of 1953: intention of deceased to make a will.

JUDGMENT

LEWIS JA

[1] The central issue in this appeal is whether Tertius Bosch, who died on 14 February 2000, intended a document that he had written in September 1997 to be his final will or merely instructions to an attorney to draft a will. If the former, then in terms of s 2(3) of

the Wills Act 7 of 1953[1] the Master of the High Court must be ordered to accept the document as a will. The section provides:

'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 (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).'

[2] The first appellant, the first applicant in the court below (Mrs Van Wetten), sought an order in terms of the section that a document written by the deceased, her brother, be recognized by the Master of the High Court, Natal as one intended to be the deceased's will. (I shall refer to the document as 'the contested will'). The order was refused by Booysen J in the Durban High Court. The appeal is pursued with the leave of that Court. The other issue to be determined is whether Van Wetten had *locus standi* to bring the application and to prosecute the appeal before us. Ancillary to this is the question of costs should she be found not to have had standing to sue.

[3] At the instance of the court below the second appellant was joined as a second applicant, being appointed as a *curator ad litem* to C.B., the minor son of the deceased and his widow, Karen-Anne Bosch, (Bosch) the first respondent. The second, third and fourth respondents are the Master and successive executors of the estate of the deceased, respectively. They abide the decision of

1 Inserted in the Act by s 3(g) of Act 43 of 1992.

the Court.

The circumstances surrounding the making of the contested will

[4] Some background is required. The deceased and Bosch had been married for some six years when the deceased, a dentist by profession, and a sportsman and businessman as well, died in February 2000 from septicaemia following on contracting Guillain-Barré syndrome. The couple had two children, C., who was born in September 1994, and Eathan, born in April 1998.

[5] It was assumed by Bosch that she was the sole heir to the deceased's estate in terms of a joint will executed in 1995. An executor had been appointed and had commenced the winding-up of the estate in terms of that will.

[6] Some 18 months after the death of the deceased Van Wetten launched the proceedings for the acceptance by the Master of the contested will. She alleged that she had found the contested will in a cupboard in Bosch's home shortly after his death, but had not brought it to the attention of Bosch or the then executor because she had assumed that Bosch had been acting in the interests of her child C. who would, if the contested will were recognized, be the deceased's sole heir. The motive for the delay by Van Wetten may of course be called into question, and indeed was done by Bosch: it does not, however, impact on the principal issue – the intention of the deceased in drafting the contested will.

[7] Van Wetten alleged, and this was not in dispute, that the

contested will had been left in a sealed envelope, addressed to a friend of the deceased, Mr Jan van der Westhuizen, which had been handed by the deceased to Van der Westhuizen towards the end of 1997. The envelope contained three other envelopes. The outer envelope addressed to Van der Westhuizen bore the words '(Maak net oop as daar iets met my gebeur of ek ander besluit!)'. The one inner envelope, containing the contested will, was addressed to 'Mr Mike Nolan, Tate-Nolan Attorneys'; another was addressed to 'Karen-Anne'; and the third was addressed to 'C. op 21ste verjaarsdag!'. Van der Westhuizen confirmed that he had been given the outer envelope but stated that he had not ever opened it. After the deceased's death the envelope had been given to Bosch by Van der Westhuizen's wife at his request.

[8] Van der Westhuizen also confirmed the evidence of Van Wetten that the deceased had been distraught during the period when the envelope had been handed to him. The deceased had believed that Bosch had been having an extra-marital relationship: he was in a state of emotional turmoil. When he asked Van der Westhuizen to keep the outer envelope, he did not explain what he meant by saying that it should be opened in the event of something happening to him. Van der Westhuizen had, however, asked the deceased what was in the envelope. The response was 'to the effect that "if you don't know better you don't know"'. Some time later, however, the deceased had seemed to him to be in an improved frame of mind, and had said that his relationship with his wife was better. Van der Westhuizen had forgotten that he had the envelope until after the deceased's death. He had attempted then to contact Mike Nolan. When he could not do so he asked his wife

to hand the envelope to Bosch, which she did.

[9] The contested will and the letters addressed to Bosch and C. bear out the allegations that the deceased had been distressed by his wife's conduct at the time when he composed these documents. Because the letters throw light on the deceased's intention in composing the contested will, I shall set them out in full after reproducing the contested will itself. Later in this judgment I shall discuss the legal principles to be invoked in determining the relevance and weight of these letters.

The documents in the outer envelope

[10] All the documents are dated 5 September 1997, and all were written by the deceased on the stationery used in his dental practice.

[11] The contested will reads:[2]

'5 September 1997 Tate & Nolan
Durban North

Re: Will & Testament

To Mr Mike Nolan

As you are aware of the present situation which I am finding myself I have had a long thought about the matter and I have made the following decisions

1 Declare all previous will & testaments not valid from this day the 5 Sept 1997 drawn up by me or Karen-Anne.

2 I want you (Mr Mike Nolan) the executor of my will and cancel all previous executor's.

2 The exact wording,spelling and punctuation are reproduced.

3 If or when there should be a change of plan or situation for the good (Positive) I might have a change of heart. At present moment it doesn't seem to going to change. I am just trying to see if might work out, I do care and Karen-Anne a lot but I don't think I can say the same for her. I think she wants freedom but don't want to loose the comfortable lifestyle that she has. Surely it should work 50/50?

4 I want my son (CORBIN BOSCH) born on 10th September 1994 to be my beneficial party (Person). At this stage he will be to small to take charge so I want Mr Nolan to executor of his trust that we (I) create for him.

5 All suretyship I have for Karen-Anne Bosch (formerly Blignault) shall and must be withdrawn.

6 All policy's should go into a trust as C.B. as benefactor.

7 TKC action CC, I withdraw first[l]y my suretyship as 50% holder (member) and lease holder. Karen-Anne cannot by my share I don't want that to happen (I have to much problems with this Action Cricket.

8 I want you to create a trust for him and look at a decent monthly retainer for him to be well looked after. I have provided school policy's from him to go to private primer and secondary schools and university funds.

9 When he is 21 year old on his birthday the trust can be fully seeded [ceded] to him and he can do as he wishes!

10 I will if the situation changes itself drastically, may consider changing my will & Testament but as of today 5th September this is my will to be followed

Regards

Tertius Bosch

Addings to previous page to Mr Mike Nolan.

1 I want all bank accounts to be closed immediately

1 Credit cards

2 Current & cheque account

3 Any money to her accounts an that of after the day be returned to drawer.

2 I will supply you with all of the Private Investigation reports that has led me

to all my decisions
3 She hurts me to much and I just trying for my son's sake.
4 I want you to put this money in a trust for C..
5 Sell off own [all] my assets and then put it in a trust.'

[12] The letter to Bosch read:

'Karen-Anne, Ek is jammer wat ek nou gedoen het, maar dit is maar hoe die lewe is (onregverdig).
Ek weet ek het baie dinge in die lewe verkeerd teenoor jou gedoen, ek dink ek het genoeg daarvoor geboet!
Daarom het ek die besluite geneem wat C. sal baie bevoordeel.
Jy bly (het) seker maar net by my omdat dit vir sy onthalwe was, jou gees en liefde is (was) by iemand anders. Wie ook dit al mag gewees het, hetsy Gary; Craig of iemand anders. Nou kan jy jou lewe geniet en doen wat jy wil met dit, jammer oor die klein terugslag, maar ek glo jy sal bo uitkom.
Ek moes al met Gary se tyd al gewaai het, want jou gevoelens was nooit weer terug by my nie. Dis baie jammer, ek het baie lief geword vir jou, maar dit was seker maar te laat.
Toe jy by Craig was het jy my liefde dood, dood gemaak, maar ek het probeer vir C. se onthalwe.
Dit is moeilik om te dink jou vrou wil jou nie eers behoorlik soen nie. Ek moes baie pes aan my hê, moeilik om saam met dit te lewe! Dit het my toetaal en al verskeur, jy weet nie seer het ek binne in my gehad nie, maar dit rus nou in vrede.

Groete
Tertius'

[13] The letter to C. read:

'C., my heelwaarskynlik my enigste seun, jammer dat ek nie by jou 21ste Verjaardag kan wees nie.

Wat ook al oor die jare goed of sleg van my gesê, ek was baie life vir jou, al geskenk wat ek jou kan gee is, alles wat in die trust is en alles van die beste vir jou toe te wens in hetsy jou sport of akademiese gebied.
Baie, baie liefde
Pappa'.

It should be borne in mind that on 5 September 1997 C. was not yet three years old, and that Eathan was born in April of the following year.

The intention of the deceased

[14] Against that background I turn to consider whether the deceased had intended the contested will to be a will at all. Section 2(3) of the Wills Act is clear: the court must direct the Master to accept the document in issue as a will once certain requirements are satisfied. First, the document must have been drafted or executed by a person who has subsequently died. Second, the document must have been intended by the deceased to have been his or her will. It is only with the latter that this Court is now concerned. The meaning attributable to the phrase 'drafted or executed' has recently been clarified in *Bekker v Naude en andere*:[3] the document must have been created by the deceased personally. This requirement is not in issue here.

[15] Did the deceased intend the document he wrote on 5 September 1997 to be his will? The appellant urged us to interpret the document, looked at as a whole, in accordance with

3 As yet unreported decision of the SCA: case 179/01, judgment handed down 31 March 2003.

established principles of documentary interpretation. Thus, it was argued, the Court should, in attempting to ascertain the intention of the deceased, have regard to the words and language used, and only if an ambiguity or uncertainty were to be found, then look at the circumstances surrounding the drafting of the document. The classic cases dealing with contractual interpretation were adduced as authority, notably *Delmas Milling Co Ltd v Du Plessis*.[4]

[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. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances. I shall, however, first discuss the circumstances of the deceased, and his conduct in handing to Van der Westhuizen a sealed envelope containing others addressed to his wife, to his child and to an attorney.

[17] At the time of writing the contested will the deceased had confided to a number of people that he was unhappy: that he suspected his wife of infidelity. He made it plain in his letter to her that he no longer felt loved. She remained with him, he said, not because she wanted to but for the sake of C.. He found this hurtful. He had decided to give her her freedom. The letter to C., then three years old, also clearly indicates that the deceased assumed that when C. turned 21 his father would for long have been dead.

[18] It is particularly significant that the contested will was handed

4 1955 (3) SA 447 (A) at 454F-55C.

over not to the attorney Mike Nolan, but to a friend, Van der Westhuizen, for safekeeping. It was to be opened only in the event of ‘something happening’ to the deceased, or his changing his mind. It was one of a number of documents that were to be opened in such an event. The parties to this dispute and Van der Westhuizen were coy in saying directly that they inferred from the behaviour of the deceased that he was contemplating suicide at the time when he wrote the documents. But it is an obvious inference to be drawn from his letter to his wife, from the tenor and the terms of the contested will, and from the remarks made by him to Van der Westhuizen.

[19] The inference that the deceased contemplated suicide leads inevitably to the conclusion that, when he gave the envelope to Van der Westhuizen, it was not intended that the latter should hand the enclosed document to attorney Mike Nolan so as to see to the drafting of his will. At the time when it was envisaged that the envelope would be opened, and the document read, the deceased would already be dead. A dead man cannot execute a will, and the deceased, even in a troubled frame of mind, would have appreciated that. This fact alone, in my view, shows that the contested will was intended by the deceased to be his will. The terms of the contested will bear that out.

[20] It was argued for Bosch, on the other hand, that the deceased had changed his mind after 5 September 1997: that she and the deceased had been reconciled; that they had had another child; that she had subsequently been designated as a beneficiary under various new insurance policies (this is in issue since it was

contended that the existing policies had been renewed rather than new policies taken out after the contested will was made); and that the deceased had not mentioned the contested will to anyone in the period of his illness preceding his death. He appeared to have forgotten about the documents that he had entrusted to Van der Westhuizen.

[21] These factors are, in my view, not relevant in determining what the deceased's intention was at the time of writing the contested will. Evidence as to subsequent conduct is relevant only in so far as it throws light on what was on the mind of the deceased at the time of making the contested will (as in *Schnetler NO v Die Meester en andere*[5]). There is no such evidence in this case.

[22] It was also argued that the deceased could not have intended the contested will to be a valid will, for he knew that formalities were required for the execution of a will. He had, after all, had one drawn up a few years previously which had been formally executed. The terms of the document belie this contention, however.

[23] The contested will is a somewhat incoherent document. It reads in part like a letter to Nolan, the deceased sometimes recording his decisions, sometimes giving instructions, sometimes offering explanations for his decisions. But what it does state very clearly are decisions reached by the deceased. Bosch contended that the heading – 're: Will & Testament' – indicated that

5 1999 (4) SA 1250 (C).

the deceased was writing a letter to Nolan giving instructions on what should be put in his will. Similarly, it was argued that paragraph 3, which stated that he might change his mind in the future, showed that he had not finally settled what he proposed to do. The explanations for disinheriting Bosch (also in paragraph 3) showed, it was argued, that the document was not intended to be a will but a justification for the instruction to draft a will excluding Bosch. So too, contended Bosch, the 'addings' to the previous page, which included a statement that the deceased would supply Nolan with private investigation reports, indicated that the deceased intended to provide further information for Nolan before his will was executed.

[24] Van Wetten argued, on the other hand, that the proffering of explanations for disinheriting Bosch was not inconsistent with the intention to make a will in the same document. Indeed, even in formally executed wills testators might choose to explain their choices. The 'afterthoughts' on the last page were no more than instructions to Nolan on what he had to do after the deceased's death: the deceased could hardly have wanted Nolan to close all bank accounts and cancel credit cards if he were still alive. The instructions to create a trust for C. were also no indication that the deceased was not thereby creating his will: he would probably not have known that he could create a testamentary trust.

[25] In my view, the presence of explanations in the contested will does not in any way detract from what are very clearly stated decisions:[6] 'I have made the following decisions: . . . declare all

6 The precise wording and punctuation are set out above, and are not reproduced here.

previous will and testaments not valid from this day the 5 Sept 1997 drawn up by me or Karen-Anne. . . . I want you (Mr Mike Nolan) the executor of my will and cancel all previous executors . . . . I want my son (C.B.) . . . to be my beneficial party (person). . . . but as of today 5th September this is my will to be followed'.

[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.

[27] I am satisfied therefore that the contested will was indeed intended to be the will of the deceased, and that the Master should be directed to deal with it in terms of s 2(3) of the Wills Act. The appeal should thus succeed.

***Locus standi* of Van Wetten**

[28] When Van Wetten launched the application for the order that the contested will be accepted by the Master, the court of first instance considered that she had no *locus standi.* However, the second appellant accepted appointment as the *curator ad litem* for

the minor child C. and was joined as an applicant in that capacity. He is before us as the second appellant. Counsel for Van Wetten appeared for him also. Counsel submitted initially that Van Wetten did have *locus standi* in that she had an interest both as C.'s aunt, and because she might, if he were to die intestate, be an heir. It was conceded that the latter possibility was extremely remote, and gave her no direct interest in the litigation. And it was eventually conceded as well that Van Wetten should have brought an application in the first instance for the appointment of a *curator ad litem* and that her application for the relief that she did seek was ill-advised. Similarly it was conceded that Van Wetten should not have pursued the appeal before this Court save in so far as the adverse costs order against her in the court below was concerned. Moreover, since the matter is before this Court at the instance of the second appellant as well, the lack of standing on the part of Van Wetten is relevant only to the order of costs in the court below.

Costs

[29] In dismissing the application the court below ordered Van Wetten to pay Bosch's costs, and that the fees of the *curator ad litem* be paid from the deceased estate. It was argued in this Court that Van Wetten should not be penalized by a costs order against her if the appeal were to succeed. Even though she had not had *locus standi*, she had in fact served the interests of C. in bringing the application. Although the procedure adopted by her was incorrect she had nonetheless placed the matter before the court. Moreover, it was argued, no additional costs were incurred in the launching of the application, or the prosecution of the appeal,

through Van Wetten's initiative than were incurred in any event by the curator.

[30] It was argued for Bosch, however, that Van Wetten's conduct warranted an adverse costs order even should the appeal succeed. When she launched the application she had made a number of attacks on the character and conduct of Bosch, asking for orders related to these allegations. Yet the relief sought in respect of the allegations of misconduct was subsequently abandoned.

[31] In my view, Van Wetten was not entitled to a costs order in her favour in the Court below: she had no standing to bring the application. But that she had made allegations about Bosch that were unwarranted, and sought relief in respect thereof that was subsequently abandoned, is not reason enough to visit her with a punitive costs order. The main relief that she sought – that the Master be ordered to accept the contested will under s 2(3) – is to be granted, albeit not to her.

[32] The curator's costs in the court below were ordered to be paid from the deceased estate. That order was not appealed against.

Order

[33] (a) The appeal, including the first appellant's appeal against the costs order, is upheld with costs.
(b) The order of the court below dismissing the application and

directing the first appellant to pay the first respondent's costs is replaced with the following:

> 'The Master of the High Court, Natal Provincial Division, is ordered to accept the document marked "H", annexed to the founding affidavit of the first applicant, as the last will and testament of Tertius Bosch for the purposes of the Administration of Estates Act 66 of 1969.'

CH Lewis
Judge of Appeal

CONCUR:
Mpati DP
Farlam JA
Southwood AJA
Van Heerden AJA