

JUDGMENT

Case No: 187/09

HEATHER WENDY SMITH

Appellant

and

CHARLES PARSONS N.O.

First Respondent

FRITZ ALBERT VOLKER N.O. Second Respondent

JEREMY ALAN SMITH Third Respondent

THE MASTER OF THE HIGH COURT Fourth Respondent

Neutral citation: *Smith v Parsons*(187/07) [2010] ZASCA 39 (30 March 2010)

Coram: LEWIS, HEHER, MHLANTLA, LEACH JJA and SERITI AJA

Heard: 5 March 2010

Delivered: 30 March 2010

Summary: Wills Act 7 of 1953 – Question is whether the suicide note written by the deceased was intended to be an amendment of his will as contemplated by section 2(3) of Wills Act. Wording of note and the surrounding circumstances indicate that the deceased intended it to be his will. Master of high court directed to accept note as amendment to will

for purpose of the Administration of Estates Act 66 of 1965.

ORDER

On appeal from: Kwazulu–Natal High Court (Durban and Coast Local Division) (Luthuli AJ sitting as court of first instance).

- (a) The appeal is upheld with costs, including the costs of two counsel where so employed.
- (b) The order of the court a quo set aside and replaced with the following:

‘1 The Master of the High Court is directed to accept the document annexed to the Notice of Motion as Annexure "A", as an amendment to the will of the late Walter Percival Smith (identity number 511027 50335 089) for the purposes of the Administration of Estates Act 66 of 1965.

2 The costs of the application are costs in the winding up of the deceased's estate.

3 The third respondent is to pay the costs occasioned by his opposition, which include costs of two counsel where so employed.’

JUDGMENT

Seriti AJA (Lewis, Heher, Mhlantla and Leach JJA)

Introduction

[1] This is an appeal which emanates from the Durban and Coast Local Division of Kwazulu-Natal High Court. The appellant, who was

the applicant in the court below, an application seeking an order directing the Master of the High Court to accept a document, which was termed a suicide note, as an amendment to the will of the late Walter Percival Smith (herein called the deceased) for the purposes of the Administration of Estates Act 66 of 1965.

[2] The first and second respondents, who are the executors of the estate of the deceased, elected not to oppose the application. The fourth respondent, the Master of the High Court, also did not oppose the application. The application was opposed only by the third respondent, Jeremy Smith who is the son of the deceased.

[3] Smith filed a conditional counterclaim seeking certain relief in the event that the application was granted. The court below the application and consequently did not deal with the conditional counterclaim. The parties have agreed that if the appeal is successful, the counterclaim will have to be adjudicated by the high court.

[4] The court below (Luthuli AJ), found that the suicide note was written by the deceased personally. However, he held that the deceased did not unequivocally intend the suicide note to be an amendment of his will. The appellant is appealing against the latter finding with the leave of the court below.

Issues for determination

[5] Both parties agree that the only issue to be decided in this appeal is whether the suicide note written by the deceased was intended by him to be the his will as contemplated by section 2(3) of

the Wills Act 7 of 1953.

[6] Section 2(3) of the Wills Act, 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 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)'.

[7] Thus if the document in issue is shown to have been drafted or executed by a person since deceased who intended the document in issue to be his or her will, or an amendment of his or her will, the court must direct the Master of the High Court to accept that document as a will or an amendment to it – see *Van Wetten & another v Bosch & others*¹ and *Harlow v Becker NO & others*.²

[8] In order to ascertain whether the deceased intended the suicide note to be an amendment to his will, the document itself must be examined and the surrounding circumstances must be taken into account – see *Van Wetten* 15 -16.

Background facts

[9] The deceased was a senior pilot employed by South African Airways. His wife died on 4 September 2002. Smith was their only child. After the death of his wife, the deceased met the appellant, they developed a relationship and in January 2003, the appellant moved into the house of the deceased where they lived together. At that time, the appellant was employed by British Airways as a customer service agent based at the Durban International Airport.

¹ 2004 (1) SA 348 (SCA) para 14.

² 1998 (4) SA 639 (D) at 647C-D

[10] Whilst living together, the deceased, who was earning much more than the appellant, assisted the appellant financially with accommodation and food. Essentially he supported her financially and at some stage he provided her with a motor vehicle for her to use. During February 2004, the appellant, after an argument with the deceased, left his home and went to stay on her own. During February 2005 the appellant returned to the United Kingdom, her country of origin.

[11] She kept in contact with the deceased. He visited her and persuaded her to come back to South Africa to stay with him. She returned in December 2005 and again went to live with the deceased.

[12] On the morning of 25 February 2007 she left home and went to work. The deceased was at home. Whilst at work, she spoke to the deceased over the telephone. On her return, she discovered that he had committed suicide. He had shot himself in the bathroom. The suicide note under consideration was found on the kitchen counter. A crucifix had been placed on top of it.

[13] The suicide note reads as follows:

'(De)ar Heather,

Thanks for all you have done and tried to do for me –
I'm sorry I've been miserable – I do love you, but this depression and continuous pain and battle with my health is no longer tolerable. If I've hurt you it has not been intentional – please forgive me. I love Jeremy more that I can express and I'm sorry if I have not been the best Father to Him. God knows I've tried. Forgive me Jeremy.

Heather you can have this house, you will obviously³ sell it and should meet all your future needs. Also I authorise Standard Bank to give you immediate access to Plusplan – there is R579,000.00 which will not leave you battling. My love (and forgiveness) to

³ This correctly reflects text of the note.

your folks – they are fine people. There are also several thousand Rands in the bottom drawer of the safe.

Forgive me – it's not your fault. Move on, I pray you will find happiness that I couldn't give you.

God – forgive me.

Lastly – Please tell Barry and SAA it's no reflection on our pilot-body – wonderful people.

I've just had enough of fighting this health on a daily basis.

God Bless you always, my blessings upon Jeremy for his future – He's strong and will come through O.K. Please look after Him for me.

My will is in the Brown envelope in the safe. I leave everything else to Jeremy as stated therein.

Bless you – Wally xxx
Sunday 25/02/07 xxx.

The intention of the deceased

[14] The suicide note is dated 25 February 2007 which is the date on which the deceased died. The appellant left for work in the morning and came back home just after 14h00. It can safely be inferred that the deceased wrote, or at least signed and dated the note, that morning. He had a will in the safe. It follows that he probably knew that formalities are required for making a will. For reasons that follow he clearly intended the note to be an amendment to his will.

[15] In the note the deceased wrote that 'Heather you can have this house, you will obviously? sell it and should meet all your future needs.' In this statement, the deceased is giving clear instructions on what should happen to his house. There is no ambiguity in the statement. The house would devolve on the appellant on his death.

[16] The note further stated that 'Also I authorise Standard Bank to give you immediate access to Plusplan – there is R579,000.00 which will not leave you battling.' Smith's counsel submitted that the

deceased, when writing this note, could not have thought that he was giving instructions to the bank. But the question whether the bank could have acted on his instructions does not come into the picture. What is relevant is the intention with which he wrote the instruction. My view is that the deceased was expressing an instruction that the money in the account should be given to the appellant. The instruction clearly demonstrates his wish as to what should happen to the money.

[17] Another telling indication that the deceased wanted the note to be acted upon are the following words at the end of the note: 'My will is in the Brown envelope in the safe. I leave everything else to Jeremy.' He was conscious of the fact that he had a will and that it did not make provision for the appellant, hence the instructions contained in the suicide note making provision for her. The instructions are clear and unequivocal. It can thus reasonably be inferred that when he wrote the suicide note, the deceased intended that his instructions would be implemented by the bank and his executors.

[18] Counsel for Smith submitted that when he wrote the suicide note the deceased intended to give instructions for the drafting of a formal amendment to his will. One of the reasons for the submission is that there was no formal signature on the note – just the name 'Wally'. I find no merit in this submission. The deceased could not have thought about drafting instructions for the amendment to his will as he knew that he was about to commit suicide. And signing the note as 'Wally' was the most natural way to sign an essentially personal letter, albeit one with instructions as to the disposition of his property. A formal signature is not required to meet the requirements

of s 2(3) of the Wills Act. The section requires only that the document is drafted or executed with the intention of making or amending a will.

[19] The note was placed by the deceased, who was apparently a committed Christian at a place where it could be seen, under a crucifix. This fact fortifies my view that he wanted the instructions contained in it to be implemented on his death.

[20] I agree with the submission by appellant's counsel that the words used in the suicide note indicate that the deceased was expressing his clear instruction that, save for the house, the money in the Plusplan account and cash in the safe, the residue of his estate should go to Smith.

Donatio mortis causa

[21] Smith's counsel further submitted that the language in the suicide note is that of a *donatio mortis causa* than a will and as such fails to comply with the formalities required by the Wills Act and was not accepted by the applicant prior to the deceased's death.

[22] For a *donatio mortis causa* be valid it must be executed with the same formalities as are required for a will – see *Jordaan & others NNO v De Villiers*.⁴ is common cause that the suicide note does not comply with the formalities required for a valid will. But in my view the deceased did not have a donation in mind: he was regulating the disposition of the estate in anticipation of death. He did not contemplate a donation that would have to be accepted by the appellant.

⁴ 1991 (4) SA 396 (C) at 402E-H, and *Lawsa* (reissue) vol 31 para 370 and the authorities cited.

[23] I am satisfied that the suicide note was intended by the deceased to be an amendment of his will as contemplated by s 2(3) of the Wills Act.

Order

[24] (a) The appeal is upheld with costs, including the costs of two counsel where so employed.

(b) The order of the court a quo set aside and replaced with the following:

'1 The Master of the High Court is directed to accept the document annexed to the Notice of Motion as Annexure "A", as an amendment to the will of the late Walter Percival Smith (identity number 511027 50335 089) for the purposes of the Administration of Estates Act 66 of 1965.

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3 The third respondent is to pay the costs occasioned by his opposition, which include costs of two counsel where so employed.'

W L SERITI
Acting Judge of
Appeal

APPEARANCES:

For appellant: C J Pammenter SC

Instructed by: Anthony Whatmore & Company, Durban North
Webbers, Bloemfontein

For respondent: A W M Harcourt SC

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