THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 605/09

HENDRIK VAN DER MERWE	**Appellant**
and	
MASTER OF THE HIGH COURT	**First Respondent**
SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS	**Second Respondent**

Neutral citation: *Van der Merwe v Master of the High Court & another* (605/09) [2010] ZASCA 99 (6 September 2010)

CORAM:	Navsa, Cloete and Shongwe JJA and Bertelsmann and Ebrahim AJJA
HEARD:	**23 August 2010**
DELIVERED:	**6 September 2010**

SUMMARY: Acceptance of document as will in terms of s 2(3) of the Wills Act 7 of 1953 – absence of signature not an absolute bar – document authentic and intended to be deceased's will.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Tsoka J sitting as court of first instance).

1. The appeal is upheld.

2. The order of the court below is set aside in its entirety and the following order is substituted:

'The first respondent is directed to accept the document executed by the deceased during 2007, annexure 'HVDM 1' to the founding affidavit, as the will of John Henry Munnik van Schalkwyk for the purposes of the Administration of Estates Act 66 of 1965.'

JUDGMENT

NAVSA JA: (Cloete and Shongwe JJA and Bertelsmann and Ebrahim AJJA concurring)

[1] This is an appeal, with the leave of this court, against a judgment of the Johannesburg High Court (Tsoka J), in terms of which an application under s 2(3) of the Wills Act 7 of 1953 (the Act), to have an unsigned document declared to be the will of the late John Henry Munnik van Schalkwyk (the deceased) and to authorise the Master of the High Court to accept it as such, was dismissed. The background is set out hereafter.

[2] The appellant, Hendrik van der Merwe, and the deceased first met in 1969 when they were both resident and employed in Heidelberg, Gauteng. Later they both moved to Johannesburg. In 1972 the appellant moved to Cape Town but returned to Johannesburg six years later. In 1990, the appellant returned to Cape Town where he resides to this day. From the time that the appellant and the

deceased had first met a friendship began to develop and continued to strengthen, notwithstanding the later geographical distance between them. Their relationship was such that their respective parents became friends. The appellant and the deceased regularly travelled overseas together on holidays and visited each other. They kept in regular telephone contact and had no secrets from each other. The appellant describes the friendship as follows:

'Ons verhouding kan dus beskryf word as dié van jarelange vriende en vertrouelinge, wat geen geheime vir mekaar gehad het nie.'

[3] In 2007 the appellant and the deceased discussed the future. The deceased intended to retire in 2008 and was keen to make important decisions in relation to his retirement. During these discussions the two friends decided that they would each execute a will in terms of which the other would be the sole beneficiary of his deceased estate. Both were unmarried and neither had descendants or immediate families to whom they could bequeath their estates – the deceased's parents had by then died. Following on these discussions and in accordance with their agreement the deceased sent the appellant an e-mail on 26 July 2007 (the document at the centre of this case) which reads as follows:

'

TESTAMENT

Ek, die ondergetekende,

JOHN HENRY MUNNIK VAN SCHALKWYK (ID No. 4803285060086)

Tans woonagtig te EENHEID N0 29 BERGBRON VILLAS, WHITERIDGE UITBREIDING 9, ROODEPOORT herroep hiermee alle vorige testament, kodisille en ander testamentêre aktes deur my gemaak en verklaar die volgende my testament te wees.

A

Ek bemaak my boedel, wat roerende en vaste eiendomme insluit aan: HENDRIK VAN DER MERWE – ID NO. 480218-5052-086. NO 1 LAETITIA STRAAT CHRISMA BELVILLE 7530

B

Ek benoem ABSA TRUST BEPERK as eksekuteur van my boedel en ek stel hulle vry van die verpligting om sekuriteit aan die Meester van die Hoogegeregshof te verskaf.

C

ABSA TRUST BEPERK word verder gemagtig om volgens diskresie gebruik te maak van die dienste filiaal of verwante maatskappy en sal gevolglik geregtig wees op enige vergoeding vir sodanige dienste gelewer.

D

My stoflike-oorskot moet terug vervoer word na Suid Afrika (indien nodig). My troeteldiere (indien enige bestaan op hierdie tydstip) moet aan die slaap gesit word deur n gekwalifiseerde Veearts, en dan saam met my stoflike-oorskot veras word. Die as moet begrawe word in dieselfde graf waar my ouers begrawe is te: BENONI-begrafplaas, Afdeling DR5 ─ Graf No's 681/2.

Geteken_____
Op hierdie_____dag van_____2004
in die teenwoordigheid van die ondergetekende belanglose
getuies, almal terselfdertyd teenwoordig.
AS GETUIES:

1. _____ _____
TESTATEUR

2. _____'

[4] After sending this e-mail the deceased contacted the appellant telephonically to ask if it met with his approval. During August 2007 and in accordance with the agreement referred to above the appellant reciprocated. He approached an attorney and instructed him to draft a will in similar terms, which instruction was carried out. On 17 August 2007 the appellant signed the will prepared for him by his attorney. The deceased was aware of this fact.

[5] The deceased retired on 20 March 2008, and died less than a month thereafter on 12 April, without having executed the document sent by e-mail to the appellant ─ he did not comply with any of the formalities prescribed by s 2(1)(a) of the Act. According to the appellant the deceased gave no indication at all before his death that he wanted to revisit their mutual decision. The appellant is the only beneficiary of the deceased's pension fund, which the former submitted indicates that the latter had not changed his mind. At the time of his death the e-mail was still stored on the deceased's computer. The appellant speculated that the deceased had not taken the time to sign the document because he had not contemplated his early demise.

[6] It is necessary to record that the deceased had signed a properly executed will on 23 September 2004, in terms of which he had bequeathed his entire estate to The Society for the Prevention of Cruelty to Animals, the second

respondent. Save for the identity of the beneficiary the will is in an identical format to that which appears in paragraph 3 above.

[7] Following on the deceased's death, as stated above, the appellant applied to the Johannesburg High Court to have the document set out above, declared the deceased's last will and testament. In response the Chief Executive Officer of the second respondent, Ms Marcelle Meredith, filed an affidavit stating that the second respondent had no knowledge of the discussion referred to by the appellant and was unable to speculate on the reason for the deceased's failure to sign the will in favour of the appellant. Importantly, the second respondent chose to abide the court's decision. Effectively there was no opposition to the application and in these circumstances a court should guard against uncritical acceptance of the appellant's version.

[8] In his report to the court below the Master of the high court, the first respondent, noted that he had received and accepted the prior properly executed will in favour of the second respondent but that he had no objection to the relief sought by the appellant.

[9] The high court considered the absence of the deceased's signature to be of critical importance. In his judgment dismissing the appellant's application Tsoka J said the following:

'In my view, the formalities referred to in Section 2 of the Act centre around the signature of the testator. The signature is the centre that brings the other formalities together. In the absence of the signature, there is no legal nexus between the alleged Will and the testator. In the absence of the signature, which may be of the testator in the form of the signature of himself/herself or a thumb print of the testator or a signature of a person signing in the presence and under the direction of the testator, it is impossible to link a document alleged to be a Will, to the testator. In this instance one cannot speak of a Will, otherwise any document as long as it contains the particulars of the testator, may be characterized as a Will.'

[10] Tsoka J took the view that admitting the document referred to above as the deceased's will would be to 'open the floodgates for any person to submit any document…as a Will of a testator'. The learned judge considered the existence

of the earlier properly executed will as a further factor militating against the acceptance of the document under discussion as the deceased's last will. He accordingly dismissed the application. There is no reference to decided cases in the judgment of the court below.

[11] The formalities required in the execution of a will are set out in s 2(1) of the Act. The relevant parts of s 2(1)*(a)* provides:

'*(a)* no will executed on or after the first day of January, 1954, shall be valid unless –

(i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and

(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

(iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and

(iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page; and . . .'

[12] On the other hand, s 2(3) of the Act sets out the power of a court in relation to a will or amendment thereof which does not comply with the prescribed formalities. It 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 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).'

[13] It is clear that the formalities prescribed by s 2(1) and s 2(2) in relation to the execution of a will and amendments thereto are to ensure authenticity and to guard against false or forged wills.[1]

[14] By enacting s 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or

[1]See in this regard *Logue & another v The Master & others* 1995 (1) SA 199 (N) at 202D-E and *Anderson and Wagner NNO & another v The Master and others* 1996 (3) SA 779 (C) at 785B-C.

defeat the genuine intention of testators.[2] It has rightly and repeatedly been said that once a court is satisfied that the document concerned meets the requirements of the subsection a court has no discretion whether or not to grant an order as envisaged therein. In other words the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.[3]

[15] Turning to the provisions of s 2(3) the first question to be considered is whether the document in question was drafted or executed by the deceased. Following on this is the question whether the deceased intended it to be his will. In *Letsekga v the Master & others* 1995 (4) SA 731 (W) the following was stated at 735F-G:

'The wording of s 2(3) of the Act is clear: the document, whether it purports to be a will or an amendment of a will, must have been intended to be the will or the amendment, as the case may be, ie the testator must have intended the particular document to constitute his final instruction with regard to the disposal of his estate.'

[16] A lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of s 2(3). In *Letsekga*, decided in the division from which this appeal emanated, the lack of a signature was not held to be a bar to an order in terms of s 2(3) of the Act. *Ex parte Maurice* 1995 (2) SA 713 (C) decided in the same year as *Letsekga* was to the same effect. In *Thirion v Die Meester & andere* 2001 (4) SA 1078 (T) an unsigned document drafted by a person shortly before he committed suicide was held to be a valid will and declared as such in terms of s 2(3). In that case the deceased had executed a prior will that had complied with all the prescribed formalities. The very object of s 2(3), as pointed out above, is to ameliorate the situation where formalities have not been complied with but where the true intention of the drafter of a document is self-evident. A basic trawl through the decided cases reveals that the absence of a signature has not been seen as a bar to relief in terms of s 2(3). On the other hand, it must be emphasised that the greater the non-

[2]See *Logue op cit* at 203F-G. In *Anderson op cit* at 785C the following is said about s 2(3) of the Act:
'Section 2(3) is in the nature of a special exemption from the rigours of the requirements of s 2(1).'
[3]See *Anderson* at 785E-F and the cases there cited.

compliance with the prescribed formalities the more it would take to satisfy a court that the document in question was intended to be the deceased's will.

[17] I return to consider the document in question against the jurisdictional requirements of s 2(3) of the Act. The appellant provided proof that the document had been sent to him by the deceased via e-mail, lending the document an aura of authenticity. It is uncontested that the document still exists on the deceased's computer. Thus it is clear that the document was drafted by the deceased and that it had not been amended or deleted.

[18] The document is boldly entitled 'TESTAMENT' in large type print (6 mm high), an indicator that the deceased intended the document to be his will. Furthermore, the deceased nominated the appellant as the sole beneficiary of his pension fund proceeds. This is an important and objective fact which is consonant with an intention that the appellant be the sole beneficiary in respect of the remainder of his estate. It is also of importance that the deceased had no immediate family and that the appellant was a long time friend and confidante. The fact that his previous will nominated the second respondent as his sole heir indicates that he had no intention of benefiting remote family members. The appellant's version of the mutual agreement to benefit each other exclusively by way of testamentary disposition is uncontested by the second respondent, the sole beneficiary of the prior will, and is supported by the fact that after the deceased had sent the document to the appellant, the latter executed a will nominating the deceased as his sole beneficiary ─ another objective fact. All of this leads to the inexorable conclusion that the document was intended by the deceased to be his will.

[19] In light of the aforegoing it is clear that the court below erred in dismissing

the application. The appellant was clearly entitled to the relief sought. The following order is made:

1. The appeal is upheld.

2. The order of the court below is set aside in its entirety and the following order is substituted:

‘The first respondent is directed to accept the document executed by the deceased during 2007, annexure ‘HVDM 1’ to the founding affidavit, as the will of John Henry Munnik van Schalkwyk for the purposes of the Administration of Estates Act 66 of 1965.’

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M S NAVSA

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	H G McLachlan Instructed by Visagie Vos Goodwood E G Cooper Majiedt Inc Bloemfontein
For 1st Respondent:	Abide decision of the court Instructed by Master of the High Court Johannesburg
For 2nd Respondent:	Abide decision of the court Instructed by Marston & Taljaard Bedfordview