# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 76/05

REPORTABLE

In the matter between:

**ANDRE DE RESZKE**
**APPELLANT**

**and**

**CZESLAW MARAS AND 18 OTHERS** **FIRST RESPONDENT**

**MASTER OF THE SUPREME COURT** **SECOND RESPONDENT**

**JACOBUS CHRISTIAAN KRIGE NO** **THIRD RESPONDENT**

**(TWENTY FIRST RESPONDENT)**

Before: Howie P, Streicher, Ponnan, Mlambo JJA et Combrinck AJA

Heard: 14 November 2005

Delivered: 30 November 2005

Summary: Will – whether document intended to be the deceased's last will as required in s 2(3) of the Wills Act No 7 of 1953.

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## JUDGMENT

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**MLAMBO JA**

[1] The issue in this appeal is whether a document (referred to herein as annexure A) was intended by William Maras de Reszke (the deceased), a Polish immigrant, to be his will within the meaning of the Wills Act 7 of 1953 (the Act). The Master declined to accept the document as a will. An application by the appellant to the Cape High Court (Moosa J), seeking to have annexure A declared a will in terms of the Act as well as certain alternative relief was dismissed. An appeal to the Full Court of the Cape High Court (Comrie and Meer JJ and Hiemstra AJ), which followed also failed. The appeal is with the special leave of this court.

[2] Firstly, an exhaustive exposition of the background facts and circumstances is necessary. The appellant is his son from a short-lived marriage. On 4 October 1999 the deceased executed a will which complied with the requirements of the Act ('the first will'). In terms of this will other beneficiaries stood to benefit much more than the appellant. Those beneficiaries, (cited collectively as the first respondent) have elected not to oppose the relief sought by the appellant electing instead to abide the decisions of the courts. That is also the attitude of the second respondent, the Master of the High Court. The third respondent, an attorney who was appointed the

executor in terms of the first will, is the only respondent who opposes.

[3] On 8 October 2001 the deceased gave Jienie-Michelle (June) Dreyer (Dreyer), an employee and confidante, a note and a file containing his first will and stated that he had revoked it. The note suggested that the deceased had become displeased with Julian Weil (Weil) his erstwhile attorney and was no longer interested in utilising his services. Weil is the author of the deceased's first will. The deceased instructed Dreyer to forward the note to Weil.

[4] The deceased then informed Dreyer that he wanted to draft a new will and mentioned how he wanted to dispose of his assets. Dreyer typed a document (the precursor to annexure A) setting out these instructions. He further instructed her to appoint attorney S J Burger to draft his will. Burger had, in the past, acted on behalf of Allied Credit Trust, one of the deceased's companies.

[5] In the days that followed the deceased changed his instructions a number of times, one such change, regarding a bequest to the deceased's housekeeper, was at Dreyer's prompting. Dreyer typed the final version of annexure A on 15 October 2001 on the letterhead of Allied Credit Trust (Pty) Ltd and addressed it to

Burger in keeping with the deceased's instructions. This was after the deceased confirmed to her that the document reflected his instructions. On 18 October 2001 the deceased effected another change to annexure A. This was after he had requested Dreyer to list all his paintings on the reverse side of annexure A (a two page document) and to take photographs thereof. He thereafter signed the document, had it witnessed by his caregiver Goosen, and kept it with him.

[6] On 21 October 2001 Benjamin Odin Knutzen (Knutzen), the deceased's neighbour, and his attorney, Wynand Albert Barnard (Barnard), visited the deceased to discuss a gift (a BMW motor vehicle) the latter intended to give to Knutzen. This meeting was at the instance of Knutzen who had, in discussions with the deceased earlier that month, learnt that the deceased wished to draw up a new will. When Knutzen introduced Barnard to the deceased he explained to the deceased that Barnard was the attorney he had contacted to draw up the deceased's new will in the light of the deceased's wish for that to be done. The deceased confirmed to Barnard that, indeed, he wanted a new will drawn up as he was dissatisfied with the previous one. He in fact requested Barnard to draft his new will. Barnard's response was that he would at a later

stage take proper instructions to draw up the will but in the presence of the deceased's physician, Dr Johan Herbst and Goosen the deceased's caregiver.

[7] The next day, 22 October 2001, the deceased requested Dreyer to read annexure A in every detail to him, which she did. It appears that during this discussion Dreyer informed the deceased that the will executed by him on 4 of October 1999 had been cancelled. After going through annexure A meticulously the deceased confirmed that was what he wanted and signed it again. He also wrote the words 'no more suffering' on the first page. Lindie Potgieter, one of his employees, signed as a witness.

[8] The next day, 23 October 2001, Weil visited the deceased and formed the view that the latter was physically and mentally compromised. Barnard visited the deceased again on 25 October 2001 and again declined to take instructions to draft a will. On 2 November 2001, after learning of the visits by Weil and Barnard, Dreyer telephoned Barnard to enquire whether he had taken instructions from the deceased to draft his new will. Barnard answered in the negative.

[9] On 5 November 2001 Dreyer telephoned Weil and informed

him that the deceased required a new will and enquired from him whether, during his visit to the deceased recently, he had taken such instructions. When the latter informed her that he had not done so she became agitated. On the same day Dreyer obtained annexure A from the deceased and handed it to Burger. The deceased died two days later on 7 November 2001.

[10] Annexure A, which I set out in full, is central to this matter. It reads:

'Re: Last Will & Testament

From J M Dreyer

Dated 16/10/2000
Dear Mr Burger

With reference to today's conversation, I hereby wish to advise you of the following:

Mr De Reszke has asked me to nominate a lawyer of choice to handle his last will and testament, with the following terms and conditions.

1. You are to appoint Jackson Neethling as Auditor of all companies held by Mr De Reszke. The person responsible will be no other than Herman Gerrits of Jackson Neethling.

2. All other previous wills and or Last Testaments are to be nil and void.
3. The following fixed assets and or goods are to be given upon his death to the persons of his choice. He has instructed me to fulfil his last wishes.
4. TOPLIN HOUSE C.C. is to be given to Andre De Reszke – His son.
5. SCOMBLIN HOUSE (PTY) LTD is to be given to Mrs. E.M.I. Dreyer a trusted employee.
6. ALLIED CREDIT TRUST (PTY) LTD will continue up and until such time as all monies have been collected – under the Management of Mrs E.M.I. Dreyer.
7. His watch a LONGUINES will be handed over to his son Andre De

Reszke.
8. His B.M.W. will be given to Oden Knoetzen, a trusted friend.
9. His house at 6 Adam Tas Road, Somerset West and all other goods within his house including any and all other assets not mentioned are to be sold, first to cover any and all debt including taxes, Vat, and the administration of his will. All balances thereafter are to be handed over to any and all living relatives in Poland. Should there be no living relatives in Poland, the money remaining after all Liabilities have been covered will remain within the Allied Credit Trust (PTY) Ltd, used to give his son Andre De Reszke a living wage of R5000.00 per month, up and until all funds of the Allied Credit Trust (Pty) have been exhausted.
10. His cook known as Christa Wagenaar Will receive a lump sum of R20000.00.
Should you require any other information do not hesitate to give the writer a call on the above numbers.

Thanking you.
Mr W. DE RESZKE'

[11] Section 2(3) lays down the requirements which a document which does not comply with the formalities for the execution of a will has to meet before a court will order the Master to accept it as a will. The effect of an order under s 2(3) is that a document which is not a will for want of compliance with certain prescribed formalities but purports to be a will is given effect to if the requirements of the section have been met. For the grant of relief under s 2(3) a court must be satisfied that the deceased person who drafted or executed the document intended it to be his will. That intention, in my view, must have existed concurrently with the execution or drafting of the document (*Harlow v Becker NO and Others* 1998 (4) SA 639 (D). It is with this exposition of the legal position that I return to the facts.

[12] I shall assume in favour of the appellant that the document was drafted and executed by the deceased as envisaged by s 2(3). Did the deceased by so doing intend the document to be his will is the issue. In considering that aspect I am guided by what was stated

by this court in *Van Wetten and another v Bosch and Others* 2004 (1) SA 348 (SCA) that it

'…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.'[1]

[13] Counsel for the appellant conceded that when the document was initially prepared on the instructions of the deceased it was intended to be no more than instructions to an attorney. Counsel's concession was inevitable as the evidence is clear that the deceased intended his will to be drafted by Burger and he instructed Dreyer to instruct him accordingly. The evidence also shows that at that stage the deceased did not intend to draft his own will. That much is plain on a reading of the document.

[14] Counsel argued however that at some stage thereafter the deceased by his conduct manifested a different intention, namely an intention that the document should be his will. The conduct to which he refers is the deceased signing the document, having it witnessed and writing the words 'no more suffering' on the document. Properly understood counsel's submission was to the effect that annexure A was transformed by the deceased's signature and the witnessing

[1] at 354 para 16.

thereof from instructions to an attorney to a will. For the reasons that follow this argument is also without merit.

[15] It is not in dispute that at Barnard's meeting with the deceased on 21 October 2001 Knutzen informed him that Barnard was the attorney who would draw up his new will in terms of his wishes. It is not in dispute that the deceased confirmed to Barnard that he indeed wanted a new will drawn up as he was dissatisfied with the first one and in fact he gave Barnard instructions to that effect. This is inconsistent with a belief on the part of the deceased that the document (annexure A) which he had signed on 18 October 2001 was his will.

[16] Furthermore the events following Barnard's visit indicate that Dreyer did not get the impression that the deceased considered annexure A to be his will. On 23 and 25 October 2001 the deceased was visited by Weil and Barnard (a second time) respectively. Dreyer, on hearing of these visits, first enquired from Barnard on 2 November 2001 whether he took instructions from the deceased to draft his will. When Barnard informed her that he did not, she took the enquiry to Weil on 5 November 2001 and became agitated when Weil told her that he, too, had not taken such instructions. On that same day Dreyer gave annexure A to Burger to whom it was addressed.

[17] Furthermore it must be so that if the purpose of annexure A had changed from being an instruction to Burger to becoming the deceased's will, it was not necessary that it be given to Burger. The fact that it was eventually given is consistent, in my view, with the initial intention. Furthermore the deceased, by all accounts, was an astute and meticulous business person. He had executed an earlier will (the first will). He therefore knew what was required to execute a

will. Annexure A is not consistent with that knowledge or his own prior conduct when he executed the first will. Furthermore, if he knew what he was doing, as I will assume to have been the case, it would have been obvious to him that annexure A did not purport to be a will but purported to be instructions to an attorney as to how to draft his will. In the circumstances the document itself indicates that it was not intended to be the deceased's will.

[18] Having failed to establish that the deceased had the requisite intention at either the time of the drafting of annexure A or the signing thereof the appellant had to fail in the court below as indeed he must before this court.

[19] With regard to the issue of costs counsel for the appellant requested us to follow the approach of the court of first instance and direct that costs be payable from the estate. This approach may have been appropriate then. I have, like the Full Court, found nothing to persuade me to exercise my discretion in a similar fashion. A Full Court of the High Court had expressed a unanimous view. The appellant has refused to heed that message and he must accept the consequences. In the circumstances I have not been persuaded that the costs of this appeal should be borne by the estate.

[20] In the result the appeal is dismissed with costs.

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**D MLAMBO**

**JUDGE OF APPEAL**

**CONCUR:**
**HOWIE P**

**STREICHER JA**
**PONNAN JA**
**COMBRINCK AJA**