IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: No
Of interest to other Judges: No
Circulate to Magistrates: No

Case number: 3969/2014

In the matter between:

MURIEL ADA RIEKERT	Applicant
and	
MEV SM BRAUN	1st Respondent
MNR AJ VAN TONDER	2nd Respondent
MEV MMM STEENKAMP	3rd Respondent
DIE MEESTER VAN DIE Hoe HOF, BLOEMFONTEIN	4th Respondent

HEARD ON: 16 MAY 2016

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 18 AUGUST 2016

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[1] These were essentially motion proceedingsly though they were further amplified by oral evidence. **Lekup Prop Co No 4 (Pty) Ltd v Wright** 2012 (5) SA 246 (SCA) par [12]. The applicant applied for a declaratory order. The principal relief she sought was to have "anx 2" declared as the last will and testament of the late Phillippus Rudolph Geldenhuys. The application was opposed by the respondents, with the exception of the fourth respondent.

[2] The applicant's version as set out in the founding papers was amplified by the oral testimonies of the following six witnesses:

Ms Muriel Ada Riekert, the applicant and a friend to the late PR Geldenhuys; Mr Othniel Sabata Mere, the applicant's fellow employee; Ms Anna Maria Magdalena Eksteen, the applicant's fellow employee; Mr Walter Luco Crispin, a funeral undertaker; Mr Hendrik Stefanus Havenga , an independent building contractor; Ms Nontutuzelo Agnes Mjika, a domestic housekeeper in the employ of Dr Venter's parents.

[3] The, respondents' version as set out in the answering papers was amplified by the oral testimonies of following three witnesses:

Mr Adolf Johannes van Tonder, Mr Christiaan Reynolds, an employee of the Absa Bank; a relative of the late PR Geldenhuys and Mrs Denise Magdalena Swartz, also an employee of the same bank.

[4] Certain undisputed facts could be extrapolated from the testimonies of the various witnesses. There once lived a man by the name of Phillippus Rudolph Geldenhuys with national identity number […]. He earned his livelihood as a postmaster general in Pretoria. He got married to a lady by the name of Elfrieda Elisabeth X with national identity number […]. I could not find her maiden surname on the papers. The couple did not have children. The couple met the applicant in Pretoria through their relative, Mrs S Braun, during a social visit.

[5] Sometime after his retirement, the couple moved to Bloemfontein. They solicited

the help of the applicant to find a residential property. They ultimately bought a house commonly known as […] C. Avenue Fichardtpark in Bloemfontein. On 11 January 2012 the couple executed a joint will in Bloemfontein - vide "anx 1" founding affidavit. The couple jointly nominated four of their relatives as beneficiaries. Clause 2 of the joint will reads:

> "Indien die langslewende van ons te sterwe kom sander om 'n verdere geldige testament na te laat, bemaak sodanige langslewende sy of haar boedel soos volg:
>
> 2.1. 30.00% aan suster van testateur SMMBARNARD (geboortedatum …/…/1941).
> 2.2. 20.00% aan suster vsn testatrise SM BRAUN (geboortedatum …/…/1937).
> 2.3. 30.00% aan neef van testateur AJ VANTONDER (geboortedatum …/…/1955).
> 2.4. 20.00% aan niggie van testateur MMM STEENKAMP (geboortedatum …/…/1967)."

The joint will was drawn up by Absa Trust Beperk. Ms EE Geldenhys predeceased her husband in Bloemfontein on 9 May 2014.

[6] Following the death of his wife, the widower instructed Absa Trust Beperk to draw up a new will to revoke, annul and replace the joint will, which he and his late wife had executed on 12 January 2012. Absa Trust Beperk made two attempts to carry out the widower's instructions.

[7] As regards the first attempt clause 1 of the first draft will provided:

> "Ek bemaak my boedel aan my neef, AJ VAN TONDER (Gebore:[…] 1955), my niggie, MMM STEENKAMP (Gebore: […] 1967) en my niggie MA RIEKERT (Gebore: […] 1955)"

Vide p9 Eiser Se Bundle Dokumente.

The first draft was never signed.

[8] As regards the second attempt clause 1 of the second draft will provided:

> "Ek bemaak my boedel soos volg:
>
> 1.1 50.% aan my neef AJ VAN TONDER (gebore …/…/1995).
> 1.2 25.% aan my niggie MMM STEENKAMP (gebore …/…/1967).
> 1.3 25.% aan my vriendin MA RIEKERT (gebore …/…/1995)."

Vide p11 Eiser se bundel dokumente.

The second draft also was never signed.

[9] Mr PR Geldenhuys, died of cardiac arrest in Bloemfontein on 18 July 2014. On 29 August 2014 the applicant filed the current application. She sought a declaratory order in the following terms:

> "1. Dat 'n bevel verleen word wat verklaar dat bylaag "2" tot die funderende beedigde verklaring as die laaste wil en testament van Phillippus Rudolph Geldenhys met identeitsnommer […] verklaar word.
>
> 2. Dat die 4de Respondent gemagtig en gelas word om die gemelde testament, bylaag "2" as die laaste wil en testament vab Phillippus Rudolph Geldenhuys met identsnommer […] aanvaar word en om die boedel van voornoemde in terme van bylaag "2" te beredder.
>
> 3. Dat slegs sodanige Respondente wat die aansoek opponeer gelas word om die koste van die aansoek te betaal."

[10] The aforesaid "anx 2" appeared to be a copy of a testamentary document signed and witnessed in Bloemfontein on 2 June 2014. The testator appeared to be the widower, Phillippus Rudolph Geldenhuys. It was drawn up by Mrs MA Riekert, in

other words, the applicant. The testamentary document was at the heart of the current dispute. The original thereof could nowhere be found. The circumstances of how it went missing were in dispute.

[11] The crutial part of "anx 2" was clause 1 which stipulated:

> "1. **ERFGENAME**
> Ek bemaak my boedel soos volg:
> 1.1 33.3% van die restant van die boedel aan my neef AJ VAN TONDER tans woonagtig te Bloemfontein.
> 1.2 33.3% van die restant van die boedel aan my niggie MMM STEENKAMP tans woonagtig te Pretoria.
> **1.3 Eiendom met inhoud en twee voertuie en dan ook 33.3% van die restant van my boedel aan my familie vriendin MA RIEKERT tans woonagtig te Bloemfontein."**

[12] On 8 October 2014 the first respondent filed a notice whereby she withdrew her opposition. The second and the third respondents filed an answering affidavit deposed to by the second respondent, Mr Adolf Johannes van Tonder. He remarked that the applicant's version was untrue and incorrect to the extent that it differed from his. He also pointed out that, in her founding affidavit, the applicant did not aver that the facts contained therein were true and correct. He stated that the late PR Geldenhuys and the late EE Geldenhys were his uncle and aunt respectively as they were to the third respondent. He also stated that there were no familial ties between the late couple and the applicant.

[13] The second respondent denied the allegations or suggestions:

- that the late PR Geldenhuys executed a will, identical to "anx 2", in Bloemfontein on 2 June 2014;
- that the late PR Geldenhuys was the applicant's father as the applicant suggested in her email, "anx a" dated 7 August 2014;
- that the late PR Geldenhuys by way of the alleged testamentary act, the

original of "anx 2", executed on 2 June 2014 drastically varied his earlier testamentary wishes as evidenced by "anx b" answering affidavit drawn up on 20 May 2014 by Absa Trust and "anx f' answering affidavit drawn up on 21 May 2014 by Absa Trust Beperk but more so by "anx 1";

- that the alleged last · will was strongly, executed at Dr Venter's consulting rooms in Harveyweg instead of his place of residence in Cornforth Avenue;
- that the applicant handed the last will of the late PR Geldenhuys being the original of "anx 2" to Mr Reynolds at Absa Bank on 3 June 2014 for safekeeping;
- that the original of "anx 2" was a true reflection of the genuine and last wishes of the late PR Geldenhuys but averred that such wishes were truly reflected in "anx f";
- that the late PR Geldenhuys personally made arrangements to have his last will witnessed by two witnesses who were the applicant's fellow employees;
- that Mr Reynolds ever issued a written acknowledgment of receipt on 3 June 2014 in respect of the alleged original and last will that was executed on 2 June 2014;
- that the late PR Geldenhuys ever had the alleged health problems and never personally discussed any such problems with Mr Reynolds.

[14] On behalf of the respondents two confirmatory affidavits were filed - one by Mr Christiaan Reynolds and the other by Mrs Denise Magdalena Swartz. The purported confirmatory affidavit by Mrs MMM Steenkamp was unsigned and unattested. That being the case, it did not beef up the answering affidavit. I would, therefore, ignore it.

[15] There was no replying affidavit filed by the applicant. By agreement between the parties, the matter was referred to oral evidence. An order to this effect was made by Mia AJ on 21 July 2015. Since these were motion proceedings the dispute had to be resolved on the strength of the amplified facts as averred in the founding affidavit by the applicant, which the second respondent admitted together with the amplified facts as averred in the answering affidavit by the second respondent unless the second respondent's version is so far-fetched or untenable as to warrant its rejection. The proposition means that, as a general rule, the respondent's version would be

accepted unless it is so farfetched or clearly untenable as to warrant rejection. **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (AD) at 634H.

[16] All in all I heard the oral testimonies of 9 witnesses to supplement the affidavit. Of those 6 testified in support of the applicant's version and 4 the respondent's version. The applicant and the second respondent also testified. They were included in the figures I have mentioned. The third respondent did not testify.

[17] The material aspects of the applicant's version as well as the material aspects of the respondent's version can be logically discerned from the summary of the respondent's denials as set out in para 13 above. The summary of the undisputed facts as set out in para 2 - 11 above and the summary of the disputed facts represented a fairly accurate reflection of the evidence. Therefore, I shall make no attempt to summarise the individuals testimonies of the nine witnesses. I shall, however, evaluate the witnesses along the way.

[18] The main issue in the declaratory application was whether the deceased Phillippus Rudolph Geldenhuys annulled the joint will "anx 1", executed in Bloemfontein on 11 January 2012 and replaced it with a single will or a last will, "anx 2", executed in Bloemfontein on 2 June 2014.

[19] On behalf of the applicant, Mr Maree submitted that the issue must be affirmatively adjudicated. Accordingly, counsel urged me to grant the relief sought by the applicant.

[20] On behalf of the respondents, Mr Coetzer submitted that the answer to the crucial question must be negative. Accordingly, counsel urge me to refuse the relief sought by the applicant.

[21] Mr Mere testified in favour of the applicant. The material aspects of his evidence were that he knew the deceased well; that he knew Ms Eksteen; that he and Ms Eksteen were in the employ of Dr Venter as was the applicant, Ms Riekert; that on 2 June 2014 Mr Geldenhuys and the applicant arrived together at his workplace; that

he was in the reception where his workstation was located; that they left the reception; that Mr Geldenhuys came back alone; that he, Ms Eksteen and Mr Geldenhuys ended up in the administration office; that they gathered at the request of Mr Geldenhuys; that Mr Geldenhuys was carrying a briefcase; that he took out a document from the briefcase; that he informed them that the document was his will; that he requested them to witness his will; that Mr Geldenhuys signed the will first in their presence; that he signed the will as the first witness in the presence of the gentleman, Mr Geldenhuys and the lady, Ms Eksteen; that Ms Eksteen signed the will as the second witness in his presence and in the presence of the testator, Mr Geldenhuys; that the will was signed in the morning; that once the will had been signed, Mr Geldenhuys took it; that he put it back in the briefcase and that there was no-one else present in the room at the time the will was signed other than the three of them only. He positively identified the signatures appended to "anx 2".

[22] Nothing of significance emerged during the cross examination of Mr Mere. He did not contradict himself. He gave evidence in a logical, systematic and simple manner. He answered opposite questions in a confident, objective, consistent and satisfactory way. He displayed a positive and relaxed demeanour in the witness box. He had no ulterior motive to give false evidence for or against any of the funding parties. His evidence was not contradicted by any of the witnesses. He impressed me as a truthful witness who gave a probable credible and reliable evidence. He repeated that the will was signed in the morning and not at night as Ms Riekert had stated in her email of 3 June 2014 to Mr Reynolds. Vide first email on page 5 Bundle Documents.

[23] Ms Eksteen materially corroborated the evidence of Mr Mere. She was employed as the medical aid claims processor. She too was an impressive witness. Her evidence, like that of Mr Mere, was not tarnished by any unfavourable features. I have no hesitation to accept her evidence as a true and honest account of her dealings with the late PG Geldenhuys on 2 June 2014. She too impressed me as a good and truthful witness who gave a probable, credible and reliable evidence concerning the signing and witnessing of the will Mr Geldenhuys signed on that particular day. She added that the applicant, Ms Riekert, was the practice manager of the medical enterprise. The two ladies were not friends.

[24] Ms Riekert's evidence was that Mr Geldenhuys no longer enjoyed good health in 2014. His spouse died on 9 May 2014. Her death had an adverse impact on him. According to the witness' evidence, his condition rapidly deteriorated after the death of his spouse. He became very lonely - so lonely that he started accompanying her to work in an endeavour to avoid loneliness. Besides that she also preferred it that way so that she could have him nearer to her and Dr Venter in case he required emergent medical or healthcare. Therefore, even before 2 June 2014, he was accustomed to wiling away time at the applicant workplace The witness confirmed the evidence of Mr Mere and Ms Eksteen that Mr Geldenhuys had indeed accompanied her to her workplace, being Dr Venter's consulting rooms, on 2 June 2014.

[25] Mr Van Tonder gave evidence. It emerged from his evidence that he met Mr Mere sometime during October 2014. He asked Mr Mere about the will in dispute. He ascertained from Mr Mere that the late Mr Geldenhuys signed the will at Dr Venter's consulting rooms and that he did so in the morning.

[26] The second respondent's evidence bolstered Mr Mere's evidence. It showed that he gave a consistent account of the circumstances in which the will was signed. His explanation to Mr van Tonder was also consistent with the evidence of Ms Eksteen. The evidence of Ms Riekert was in harmony with that of her two witnesses. However, her email to Mr Reynolds on 3 June 2014 contradicted her evidence. In that email she wrote that Mr Geldenhuys signed the will last night. When she was confronted with the difference, she said she made a mistake in her email.

[27] There was virtually no other reliable and credible evidence to support the email. It's author repeatedly replied that the email was wrong. In my view, her testimony had to prevail. She gave evidence that was in line with that of two credible and reliable witness. The discrepancy in the email was, therefore, immaterial. It could not be persuasively contended, on the strength of such discrepancy, that the late Geldenhuys did not sign any will on 2 June 2014.

[28] On the strength of the evidence as a whole, I am satisfied that the above facts

justified the conclusion that a valid will was signed and executed by the late PR Geldenhuys in Bloemfontein on 2 June 2014 in the presence of two witnesses, Mr Mere and Mrs Eksteen. I would, therefore, decide the first issue in favour of the appellant.

[29] The second issue was whether "anx 2" was a true copy of the original will executed by the late PR Geldenhuys in Bloemfontein on 2 June 2014 or not.

[30] On behalf of the applicant it was submitted that the annexure was a genuine copy of the missing original. On behalf of the respondents, a contrary submission was made. It was submitted that, on a balance of probabilities, it could not be said that the disputed document was in fact a true copy of the last will of the testator.

[31] Mr Crispin gave evidence concerning the circumstance in which "anx 2" came to his attention. On 9 October 2015, before he testified at the trial, he deposed to an affidavit. The material aspects of his testimony and affidavit were the following:

He was a funeral undertaker by occupation. He traded under the name and style of "Avalon Funerals". By virtue of his occupational designation, he also held an official appointment as ex officio commissioner of Daths. He knew the late PR Geldenhuys. He first met him shortly after the death of his wife, Ms EE Geldenhys. He was charged with the responsibility of making arrangements for her funeral and burial. After the funeral he assisted Mr PR Geldenhuys to have the personal belongings or apparels of his deceased spouse donated to the under privileged members of society. As a result of such dealings he visited the couple's home on a few occasions. He thus became acquainted to the widower.

[32] On 2 June 2014 he drove to 17 Conforth Crescent Fichardtpark Bloemfontein to collect apparels of the deceased lady from her surviving husband, Mr PR Geldenhuys. He arrived there in the afternoon. On that occasion, Mr PR Geldenhuys produced two documents from his briefcase. The one document was an original will. The other was its copy. Mr PR Geldenhuys then asked him to certify the copy.

[33] He took the two documents, perused them and satisfied himself that they were

identical. He then proceeded and certified the copy as a true copy of the original. He identified "anx 2" as the testamentary document that he so certified.

[34] During cross examination, Mr Crispin admitted that he did not read any of the documents word by word. He considered it inappropriate to do so. The will was a two page document. When he had certified the copy, he handed both testamentary documents back to the widower. The latter put both of them back in his briefcase.

[35] I have combed the evidence of Mr Crispin with a fine comb. I was looking for facts that militated against the reasonable possibility of the disputed testamentary document ("anx 2") being the genuine copy of the last will and testament of the deceased widower. Looking at his entire evidence, not in isolation but cumulatively, and assessing it together with the total evidence in the melting pot, Icould find no such negative facts. There was simply nothing unexplained. Advantage Riekert. **Smith v Arthur** 1967 (3) SA 378 (AD) at 384 F-H. **Haribans NO & Another v Haribans** (AR 227/2011) 2011 ZAKZP 46 at pars 39-1.

[36] In the absence of evidence, contrary to Crispin's, by any trustworthy witness, it has to accepted that the disputed testamentary document, "anx 2", was a true copy of an original testamentary document executed by the late PR Geldenhuys in Bloemfontein on 2 June 2014 as his last will and testament. In the circumstances, I am satisfied that the applicant has established that the disputed copy of the testamentary document produced by the applicant was a true copy of the missing original.

[37] Mr Crispin was an excellent witness. He gave a good account of his encounter with the late PR Geldenhuys on the day in question. His evidence was probable, credible and reliable. He had no motive to give false evidence against or in favour of any of the parties. He testified in a confident, consistent logical and systematic manner. He was calm and relaxed in the witness box. He did not contradict himself at all. No sound reason existed why his evidence should not be accepted as true.

[38] In the light of the aforegoing evidence, I am inclined to conclude that the evidence showed, on preponderance of probabilities, that "anx 2" was and authentic

copy of the missing original will and that it was certified by Mr Crispin as such in Bloemfontein in the afternoon of 2 June 2014. Therefore, I determine the second issue in favour of the appellant.

[39] The third issue is whether the copy contains the contents of the original will which was executed by the gentleman, PR Geldenhuys in Bloemfontein on 2 June 2014.

[40] The second respondent had serious reservations about it. The following exchange between him and the appellant's legal representative during his cross-examination underlined his reservations:

> Mr Maree: "Mnr van Tonder, blyk dit uit die beweerde gesertifiseerde afskrif van die testament, dat die testament verly is op 2 Junie 2014. U stem daarmee sekerlik saam?"
> Mr van Tonder: "Ja **ek weet nie of ek kan saamstem nie. Waar is die testament?** Dit is 'n getekende ding. Ek kan nerens sien soos ek genoeg is. **Dit is maklik om 'n testament te verander deesdae met die elektroniese sagteware wat 'n mens kry.** So vir my om dit te bevestig het ek 'n oorspronklike testament nodig. **So ek wil vir u se ek twyfel daaroor. Dit is juis hoekom ons hier is vandag."** (my emphasis)

[41] The second respondent's counsel, Mr Coetzer, argued that in the current day and age it is relatively easy to amend the contents of a document in order to satisfy one's needs by simply copying, scanning and pasting documents. He then went on to articulate the foundation of the second respondent's concern. He then submitted that there were sufficiently suspicious circumstances in the instant matter, to cast some doubt on the validity of the contents of the disputed copy or testamentary document.

[42] Indeed the applicant was not a member of the late PR Geldenhuys's family. She only became involved in the elderly couple's lives at a fairly late stage. She first met the Geldenhuys couple in Pretoria during the year 2000, approximately some 14 years before the demise of the testator. By then he was 63 years old. She was not a

beneficiary in terms of the couple's joint will. SMM Barnard, SM Braun, AJ van Tonder and MMM Steenkamp were the only beneficiaries jointly nominated by the couple. The four of them were relatives. Save for the first beneficiary who was the late EE Geldenhuy's sister, the other three were the late PR Geldenhuys' sister nephew and niece - "anx 1".

[43] Subsequently to the death of his spouse, the widower attempted to revoke the joint will. Absa Bank made the first attempt on or about 20 May 2014 to carry out his testamentary instructions. The first draft will indicated that the widower had nominate three persons as beneficiaries. They were AJ van Tonder, his nephew, who is the second respondent, MMM Steenkamp, his niece and MA Riekert, the applicant who was described as his "niece". We know she was not. By implication the three were supposed to be equal beneficiaries. The impression created was that the share of each of them was supposed to be 33%%. The first draft will was never executed. There was a query. The essence of the testator's query was that the shares were not specified percentagewise, according to the applicant's evidence.

[44] Absa Bank made a second attempt on or about 21 May 2014 to carry out the widower's testamentary instructions. According to clause 1 of the second draft will, the widower had nominated the same three person as the beneficiaries but had specified the size of each one's inheritance. AJ van Tonder stood to inherit 50%, MMM Steenkamp 25% and MA Riekert 25%. The applicant was described as the widower's friend. The second draft will, like the first, was never executed. There was a query again. The testator's query was the incorrect dates of birth of two or so of the beneficiaries, according to the applicant's evidence.

[45] The widower persisted with his attempt to make a single will. He was annoyed by the mistakes. Since he got no joy from Mr Reynolds of Absa Bank, he turned to the applicant for help, according to the applicant's evidence. The applicant carried out the widower's testamentary instructions, being his third attempt to annul the joint will and to replace it with his own single will. The third draft will, unlike the previous two drafts, was executed in Bloemfontein on 2 June 2014.

[46] There were substantial changes. The testator specially bequeathed to the

applicant, his residential property, the contents thereof and the two motor vehicles. Vide clause 1.3 "anx 2". Apart from the legacy awarded to the applicant, the testator nominated the same three persons as equal beneficiaries to the residue of his estate

- AJ van Tonder awarded 33.3% - vide clause 1.1
- MMM Steenkamp awarded 33.3% - vide clause 1.2
- MA Riekert awarded 33.3% - vide clause 1.3

[47] Seemingly, the residential property is a major asset in the deceased estate. The applicant was not a beneficiary in terms of the previous joint will, "anx 1". Now she is a major beneficiary in terms of the current single will, "anx 2", which she drafted. The second respondent, who previously stood in line as the possible major beneficiary, is now a minor beneficiary. The second respondent's suspicion stemmed from that radical sudden change.

On behalf of the second respondent, Mr Coetzer argued:

> "5.4 The applicant, who was previously not a beneficiary of the estate, will benefit substantially from a will of which the original cannot be found. She, unlike ABSA, has therefore a substantial interest in the outcome of the will.
>
> 5.5 **SMM Barnard, SM Braun, AJ Van Tonder** and **MMM Steenkamp** were the only beneficiaries and in terms of the amended will substantial changes are proposed. All of a sudden the Applicant is a beneficiary and another beneficiary is removed without explanation been given for this sudden change in (sic) heart."

[48] It would appear that SMM Barnard, who was previously nominated in terms of the joint will as one of the beneficiaries, died before the widower decided to annul and to replace the joint will. Therefore, Mr Coetzer, had SM Braun in mind when he referred to the "beneficiary removed without explanation". The testator owed no explanation to anyone as to why he chose to disinherit anyone. Similarly (s)he he owed nobody any explanation as to why he chose to benefit anyone as he did. This is a salient principle termed freedom of testation.

[49] The evidence showed that the applicant was introduced by Ms RM Braun, her

neighbour and seemingly previous friend, to the elderly couple more than 16 years ago. She became a family friend. The couple decided to move away from Pretoria. They settled in Bloemfontein in 2005. It was to the applicant they turned for help. She helped them in their search for a house in Bloemfontein. She helped them sell their house in Pretoria. She was previously an estate agent. The ties of friendship between her and the testator grew stronger and stronger with the passage of time. He affectionately referred to her as "my girl". In turn she affectionately referred to him as her dad and to his wife as "mummy". People regarded him and her as father and daughter. She cared for him a great deal. She stood by his side during his bereavement. She helped him with the funeral arrangements of his late wife.

[50] He became very lonely after the death of his wife. She went out of her way to care for him. She cooked for him. She visited him almost every day. She took him to the hospital for treatment. He suffered from prostate cancer. It became malignant. She escorted him to the bank. They frequently ate out together at the restaurant with her family. He erected an outside cottage on his property. He vacated his main house and moved into the cottage. He invited the applicant and her family to stay with him. He let them occupy his main house. He needed them closer to him than anyone else. They meant a lot to him. He accompanied the applicant to her workplace almost every day. There she became acquainted to her fellow employees.

[51] His health rapidly deteriorated. He became weaker. It became increasingly cumbersome for him to go to Absa Bank to see Mr Reynolds or to generally attend to his own affairs. He gave his bankcard and its secret pin number to the applicant. Given all these circumstances, it was probable that he asked the applicant to act as an intermediary between him and Mr Reynolds. It was also not improbable that he freely decided to distribute his estate as he eventually did without any undue influence. At long last he had a fatal cardiac arrest and died. She was also responsible for his funeral arrangements. She barrowed R15 000 for that purpose. None of his relatives, including the second respondent, financially contributed anything towards the funeral costs. This careful survey of the whole history of the relationship of the parties and of their behaviour at all relevant times, and not an appraisal of each suspicious incident on its own circumscribed facts, tends to dictate that proper resolution of this thorny issue favours the applicant. **Smith v Arthur,**

infra.

[52] The second respondent's heavy reliance on "anx f' was misplaced. The second draft was just that - a draft. It was never finally executed. Because it was an unaccomplished testamentary document, whatever and however handsome bequest or inheritance was about to befall the second respondent, ultimately evaporated into thin air because it was never eventually executed. But even if was properly executed it was subsequently revoked by "anx 2". That being the case, the second respondent is precluded from relying on a will that never was, "anx f'.

[53] Mr Coetzer harshly criticised the conduct of the applicant. It is so that she studied the law of succession; that she acted as an intermediary between the testator and Absa Bank; that she corresponded with Absa Bank on his behalf; that two testamentary draft wills prepared and drafted by Absa Bank were rejected; that the third testamentary draft will she prepared was signed by the testator; that such draft will was witnessed by two persons who were the applicant's co-workers; that a copy of the will was certified by a commissioner of Daths known to the applicant; that the applicant had and still has in her possession the testator's file which contains his personal documents; and that the original will could not be found.

[54] I am not persuaded that there was anything untoward about the execution of the disputed will. Although the witnesses to the testator's signature were the applicant's co-workers, they were independent witnesses. So was the funeral undertaker, a witness who certified the copy. There was virtually no evidence to suggest, let alone to support, the insinuation that they were unduly or improperly influenced or manipulated by the applicant to do anything, an objective or neutral person would not have done. None of the three witnesses had anything to gain. They had no reason to lie by saying that they were called by the testator and that they saw the original will. Two of them witnessed the original whereas one of them certified the copy.

[55] We also know that the testator was a systematic, meticulous and independent individual with a strong character, mind and will of his own. It appeared quite unlikely that he could have been unduly swayed by the applicant to benefit her against his will. I believe he was prompted to do so by his own, genuine and abiding virtue of

gratitude. It was really not surprising that he bequeath so much to her. She endeared her to him through words and deeds of kindness.

[56] It may well be so that it is easy to falsify the contents of documents nowadays by simply copying scanning and pasting. But it is also equally easy to claim that a document has been falsified. It is, therefore, of utmost importance to scrutinise the evidence in order to ascertain whether a sound reason exists to believe that the copy was fake. I could find no evidence to sustain such a finding. All I could find was nothing more than the second respondent's suspicion that the copy was not a genuine reflection of the contents of the original. The suspicion was based on the fact that none of the witnesses had read the missing original and the perceived sudden change of heart. They say if you cannot change your mind, then you do not have any to change. It is not uncommon for a person on the verge of dying to disinherit beneficiaries.

[57] The witnesses were not required by law to have read the original will. They were only required to satisfy themselves about the identity of the person signing as the testator and that he signed it in the presence of both witness and that the signing was done by all three of them being together at the same time. There was no suggestion that those formalities were not complied with. The mere fact that the two who witnesses did not read the original will cannot by itself justify the conclusion that its contents were different from those of the copy. Likewise, I hold the same view as regards the certifying witness. His evidence that the testator presented two documents to him; that he perused both of them; and that he satisfied himself that the document he was asked to certify was a true copy of the original - was not destroyed or substantially dented by intense cross examination.

[58] The applicant's conduct was fairly criticised. It is undesirable for anyone to be so intimately involved in the drafting of a testamentary instrument whereby s(he) is nominated as a beneficiary. Such involvement is incompatible with the sacred principle, of freedom of testation. On the facts, however, I am not persuaded that the applicant could have exercised undue influence on the testator. Firstly, the testator was not a docile or timid man. He was a principled man with a strong character and independent mind. He was an unlikely candidate to be manipulated. He was not a

vulnerable old man.

[59] Secondly, because he was a meticulous individual, he probably read the missing original before it was signed. He probably made a copy thereof on his own. He probably read the copy before it was certified or satisfied himself that it was a true copy of the original before he caused it to be certified. In saying so I am forfeited by the evidence that on 20 May 2014 he queried the first draft because the inheritance shares were not expressed in the form of percentage. Similarly, on 21 May 2014. He queried the second draft because the dates of birth were incorrect. In the light of all these considerations I am not persuaded that the applicant could, even if she wanted to, have cheated the testator by falsifying the contents of the copy for her own selfish gain to the detriment of the testator's relatives, in particular the second respondent.

[60] Thirdly, the applicant did not struck me as a dishonest or untrustworthy character notwithstanding some lamentable features of her conduct. She displayed positive demeanour in the witness box. There were no material contradictions in her evidence. She generally acquitted herself well as witness. She impressed me as trustworthy witness. She gave credible and reliable evidence in my view.

[61] The primary purpose of a will is to provide a reliable and authentic record of the testator's last wishes. I am not called upon to find whether the disputed testamentary document was falsified or not. The onus is on the applicant, the person who avers that the disputed will is valid, to prove such as averment. **Haribans v Haribans,** *supra.*

[62] At best for the second respondent there were some suspicious features relative to the conduct of the applicant. In my view she gave a satisfactory explanation for her lamentable involvement. Notwithstanding such unfavourable features or suspicious circumstances, as the second respondent prefers to call them, I am satisfied that the applicant has discharged the onus. In my view she has proved, on a balance of probabilities, that the disputed testamentary document contained the true wishes of the deceased testator. The second respondent's version on this point lacked factual foundation. It was chiefly based on suspicion. It will be a sad day in our law of succession if a *prima facie* genuine copy of a will can be nullified by a

court merely because, nowadays, it has become relatively easy to falsify a document by scanning, copying and pasting. In the instant matter there was no evidence, other than mere suspicion, to beef up the contention that the disputed copy contained distorted contents of the original. Such a version warranted outright rejection on the ground that it was untenable. It has been held that even if there is no contention or suggestion that the disputed copy of the will does not, comply with all the statutory formalities, the applicant nonetheless bares the onus of establishing, on a balance of probabilities, that the disputed document is a genuine copy of the will executed by the testator. It follows, therefore, that the disputed copy is a genuine and valid will in my view. The submission that it was a fake, and, therefore, an invalid testamentary document failed to impress me.

[63] In the circumstances I am inclined to conclude that the disputed copy contains the true contents or wishes of the original will which the testator executed. This disposes of the third issue or leg of the dispute. Advantage Ms Riekert.

[64] In the fourth place, I proceed to examine the evidence in the affidavits as supplemented by the evidence in the oral testimonies in an attempt to ascertain the circumstances in which the original will probably went missing.

The practice and indeed the law is clear. In a case where there is no original will or duplicate will but rather a copy in existence, as in this instance - it becomes imperative to seek an order of the court whereby that available copy, if found to be genuine, is declared to be the true will of the deceased testator and the provincial master is authorised to accept it as such. **Smith v Sampson** (15741/2012) 2013 ZAWCHC 11 at par 12.

> "Where there is no dispute as to the facts they may usually be proved by affidavit but the court may require oral testimony. Naturally, the decree.of proof required in respect of any of the *above* allegations will depend on the circumstances of each particular case. **The existence or non-existence of a will is of great importance and the court will scrutinise closely the evidence tendered."**

Compare: **The Law and Practice** of Administration of Estate and Estate Duty, p 3-4

[65] Now i proceed to take a closer look at the evidence tendered. There are thorny questions to be answered. Was the missing original will innocently lost? If so, has a diligent and sufficient search been made to trace it? This is the one scenario - innocent loss. Was the missing original will deliberately destroyed? If so, was it destroyed on purpose by the testator as an act of revocation or mischievously spirited away by a disgruntled potential beneficiary as an act of dishonesty or spitefully shredded by a third party with an ulterior motive? This is the other scenario - purposeful destruction.
Compare: **Revoked, Missing or Last Will,** http://www.Australia probate.com/lost. htmI.

[66] These and many other vexed questions arose in the instant matter. In every case dealing with all such situations, the end result or the final outcome depends on the overall evidence presented to the court by the claimant who must, on a balance of probabilities, prove the case in order to be awarded judgment.

[67] As regards the question whether the missing original will had been deliberately destroyed by the testator, there are two presumptions operative against the acceptance of the disputed copy.

> "There are, however, two rebuttable presumptions relating to the destruction of a will which was in the possession of the testator at the time of his death, namely, that if a will has been destroyed by the testator it is presumed that he destroyed the will with the intention to revoke it. Similarly, if the will, having been in his possession, cannot be traced amongst his other documents following his death, it is also presumed that he destroyed it *animo revocandi.* These presumptions can be rebutted with the onus of proof resting on the person who claims that the will has not been revoked."

Compare: **Willis and Trust p36(7).**

[68] In this matter, there was no evidence that the original will was in the testator's

possession at the time of his death. The undisputed evidence showed that the joint will (vide anx 1) which the Geldenhuys couple jointly executed was held in the safekeeping by Absa Trust. At the time the testatrix died, the testator did not have the joint will in his possession. After the death of the testatrix, the testator manifested an intention to revoke the joint will. He made two attempts through Absa Trust not only to revoke but also to replace the joint will. He made one attempt through the applicant to achieve the same objective. All those actions by the testator manifested his intention to die testate. He was determined not to die intestate. Moreover, he would probably also have preferred to have his original sole will held in a secure safekeeping facility provided by the same agency he trusted, Absa Trust, just like the joint will. This militated against the contention that he would have kept it in his briefcase at home among his other valuable personal documents.

[69] I could find nothing to support the suggestion that he had a change of heart which change prompted him to destroy *cum animo revocandi* the original will he individually executed in 2014 and thereby revived the joint will previously executed in 2012. By the time the testator died, one of the beneficiaries appointed in terms of clause 1 of the joint will, namely: SMM Barnard, had already predeceased him. That event alone was a material consideration among those which probably prompted him to make a new will. Moreover, it must also be borne in mind that the second respondent was the testator's occasional visitor. The frequency of his visits was about once a month. He obviously played no vital role in the testator's life. He made no financial contribution towards the costs of his funeral and burial, as did the applicant, who was not his relative.

[70] On the contrary, the applicant was a daily caregiver to the testator. She stood by him and his spouse through thick and thin. That is one of the material consideration. It seemed unlikely, given all these considerations and many more, that the testator would have deliberately destroyed the original of the disputed copy with the intention of revoking it. He would have been mindful that doing so would boil down to completely disinheriting and removing the applicant, "his girl", from his estate.

[71] About the significance of the relationship between the parties and the cumulative impact of all the relevant factors was articulated in **Smit v Arthur 1967** (3) SA 378

(A) at 384F-H per Miller AJA:

> "But the proper resolution of the issues in this case must be sought not by appraising each incident simply on its own circumscribed facts, but by a careful survey of the whole of the history of the relationship of the parties and of their behaviour at all relevant times. All the relevant facts must necessarily go into the melting pot and the essence must finally be extracted therefrom."

[72] In follows, as a matter if logic, therefore that in the absence of evidence that the original will was in the possession of the testator and that he destroyed it shortly before his death - the presumption that the destruction of the original will was an act of revocation cannot operate against the claimant. It being the case, i find that the applicant has rebutted the presumption that the missing original will has been destroyed by the testator *cum animo revocandi.*

[73] The second presumption is, if the missing original will which had been in the testator's possession all along, cannot be traced among his other personal documents following his death, it is also presumed that he destroyed it *cum animo revocandi.*

Compare: **LAWSA Volume 31 pars 270, 298 and 303**
Wills & Trusts, page 36(6) at par 16.1
Davis v Steel & Eriksen 1949 (3) SA 177 (W)
Ex Parte Warren 1955 (4) SA 326 (W)
Theart v Scheibert & Others [2012] 4 All SA 278 (SCA).

[74] The applicant gave evidence to the effect that shortly after the testator had executed the missing original will, he had its copy certified. She added that, having done so, the testator caused the original will to be delivered to Absa Bank. She alleged that she personally delivered the original will to Mr Reynolds by hand. At the testator's special request she obtained a written acknowledgement of receipt from Reynolds. She added that Ms Swartz witnessed the issuing of the receipt. She further mentioned that, after the testator's death the second respondent had access to the testator's briefcase which contained the testator's personal document. Among them, was the acknowledgement of the receipt, in other words proof that the sole will

was at Absa Bank.

[75] The second respondent denied the allegations. He called Reynolds to support his version. He categorically denied the allegation that he ever received the alleged original of the disputed copy. Absa Trust is a business entity. Financial considerations fuel its business operations. For instance, can Absa Trust, nominated as an executor by a millionaire testator, refuse to secure his will in its safekeeping facility merely because the will was drafted by someone not employed by itself? I doubt it. The evidence that it was contrary to the policy of Absa Trust to acknowledge receipt of a will struck me as odd. If a customer is not furnished with any written proof that (s)he has deposited a will with a particular bank for safekeeping, how would the family of the deceased testator trace the will if the testator was never issued with any written proof that the bank has his will in its possession?

[76] The essence of Mr Reynolds evidence was that he did not receive the alleged original of the disputed copy. He also denied the allegation that he even issued a written acknowledgment of its receipt to the applicant. He later produced a letter from Absa Bank stating that it does not accept wills for safekeeping unless they had been drafted and prepared by Absa Trust itself. When counsel for the second responded confronted the applicant about the alleged policy of Absa Trust - her reply was that she had never heard about such a policy before. She persisted with her steadfast evidence that Mr Reynolds did receive the testator's sole will and that he even acknowledged such receipt in writing.

[77] Commonsens tends to indicate that banks would probably acknowledge receipt of any valuable article deposited by a customer for safekeeping. From experience, know my bank does. Since it a service rendered to customers, banks charge a fee for rendering it. The letter from Absa Bank dated 10 May 2016 signed by Mr Du Toit was of no probative value. It was written *ex post facto* Mr Reynold's testimony that had already been placed on record. Consequently it gave no credence to his evidence. A pre-existing practical manual or policy guide by Absa Trust that had been used over the years prior to 3 June 2014 would have been a more reliable, objective and independent document with a high probative value than the letter relied upon. In my view, letter was something short of self-corroboration by Mr Reynolds,

something the law does not counternance.

[78] The second respondent also called Ms Swartz. To a certain extent, she corroborated her colleague, Mr Reynolds. She emphatically denied the allegation by the applicant that she was present when Mr Reynolds handed the alleged acknowledgement of receipt to her as written proof that he had received the original will from Ms Riekert, on 3 June 2014.

[79] After the testator's death, the applicant approached Absa Trust as the nominated executor to report his death. She discovered that the original will could not be found. She also perused the testator's briefcase and discovered, to her great dismay, that the written acknowledgement of receipt that was issued by Mr Reynolds was also missing. She then turned to Ms Swartz to give her a statement to confirm that Mr Reynolds did give her a written proof showing that he did receive the original will. Ms Swartz obliged but asked her colleague to help prepare the statement. The statement was drafted as follows:

> "I Denise Magdalena Swartz […] hereby state under Dath the following. That on the 3 June 2014 Mrs Riekert was in my office with other clients Mr Reynolds flung is signed acknowledgement receipt of the original updated testament of Mr PR Geldenhuys to Mrs M Riekert. The original updated testament was handed to Mr Reynolds which he signed acknowledgement for is now lost in transit." (vide "exi y")

[80] Ms Swart's oral evidence was irreconcilable with her previous statement. So was her confirmatory affidavit which she had made in support of the second respondents' answering affidavit. She found it difficult to give satisfactory answers to a few questions during cross examination. When the applicant could not find Mr Reynolds' note, she turned to Ms Swartz in a desperate *effort* to combat Mr Reynold's denial. Firstly, i found it improbable that she would have picked on Ms Swartz, who was not really her friend, among all the bank officials, to falsely confirm an incident which she, in actual fact, never witnessed. Secondly, i found it improbable, that the applicant would have knowingly dictated an untrue statement to Ms Swartz colleague and hoped that Ms Swartz would confirm her lies. Thirdly, the applicant would not

have done so with the remote hope that Ms Swartz would blindly sign the false statement without first reading it. Therefore, she would not have caused lies to be put in the statement knowing that Ms Swartz would not confirm them. All these probabilities strongly militated against Ms Swartz evidence.

[81] In my view, Ms Swartz, evidence that she did not read the statement before she signed it and that she would not have signed it if she had read it because its contents were factually untrue was unconvincing. Her unsatisfactory evidence could not explain away the material inconsistency. It failed to impress. The magnitude of the discord between her oral evidence and her previous written statement was disturbingly huge. Such material inconsistency was telling against the veracity of her oral evidence. A witness is not allowed to somersault in such a remarkable manner. If a witness does, as did Ms Swartz, then s(he) is held to her or his earlier version. Her later version in court was, in my view, not only improbable but also far-fetched evidence. She was a poor witness. Accordingly I repudiate her. I accept her averments as contained in "exi y" as true.

[82] If the previous statement of Ms Swartz is accepted, and I think it has to, then there is material corroboration of the applicant's version on the one hand. On the other hand, the same previous statement constitutes a drastic destruction of the second respondent's version as given by Mr Reynolds. The denials of this witness were, therefore, untenable. Wherever his evidence deflected from that of the applicant's, the latter's must be preferred. He failed to answer some important questions during cross examination. On a few occasions he became evasive. In my view he was not an impressive witness. The evidence he gave was not credible and reliable.

[83] I am, therefore, satisfied that the deceased testator did not have the original of the disputed will in his possession immediately before his death which was why it could not be traced among his other personal documents following his death. It could not be traced at home subsequent to his death because shortly before his death he did not have it in his possession and under his direct control. apply. Seeing that it was not, the second presumption does not In my view the applicant has rebutted the second presumption as well. Therefore, he cannot be presumed to have destroyed

his last with the intention of revoking it.

[84] Consequently I have come to the conclusion that the original of the disputed copy of the will, was probably mislaid or innocently lost. All the indications tended to point in one direction, the direction of Absa Bank. Mr Reynolds probably neglected to load it onto the system. The possibility that it was deliberately destroyed cannot be entirely ruled out. However, I believe, and it is a firm belief, that neither the deceased testator nor the applicant had anything to do with such an act of destruction, if there was any. Because the original will went missing, the applicant could not rely upon the presumption *omnia praesumuntur rite* esse *acta donec probetur* in *contrarious.* Instead the applicant, as the claimant or proponent of the assertion that the dispute testamentary document is a true copy of the original but missing will, had to persuade me, on a balance of probabilities, that the will was lawfully executed; that it was lost or destroyed; that the deceased testator had no intention to revoke the will; that the disputed testamentary document is a true copy of the missing original will and that it contains true wishes of the last will so executed. In my view the applicant has discharged that onus. I am, therefore, inclined to grant the relief sought.

[85] According I make the following order:

85.1. That anx 2 to the founding affidavit is hereby declared to be the last will and testament of the late Phillippus Rudolph Geldenhuys whose national identity number is […];

85.2. That the fourth respondent is ordered and authorized to accept the aforesaid testamentary document, "anx 2", as the last will and testament of the aforesaid deceased testator and to administer his estate in accordance with its provisions;

85.3. That the costs of this application must be borne and paid by the second respondent;

_____

MH RAMPAI, J

On behalf of applicant: Attorney JJ Maree

Instructed by:
Schoeman Maree Inc.
Bloemfontein

On behalf of 2nd respondent: Adv. JC Coetzer
Instructed by:
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