IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3659/2015

In the matter between:-

LOWIKA OPPERMAN Applicant

and

JONATHAN OPPERMAN 1st Respondent
CHRYS'ANNE NEL 2nd Respondent
ALEACIA OPPERMAN 3rd Respondent
WENDY MYBURGH 4th Respondent
MASTER FOR THE HIGH COURT, BLOEMFONTEIN 5th Respondent

JUDGMENT BY: VAN DER MERWE, J

HEARD ON: 4 FEBRUARY 2016

DELIVERED ON: 3 MARCH 2016

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[1] Mr Jonathan Jan Daniël Opperman (the testator) passed away on 28 May 2015. The question in this application and counter-application is which of several documents should be declared to be the testator's last will.

[2] The applicant is the surviving spouse of the testator. They were married to each other out of community of property. The first,

second and third respondents are the children of the testator born of a previous marriage (the testator's children). The fourth respondent is the daughter of the applicant born of a previous marriage. The fifth respondent is the Master of this court. Only the testator's children opposed the applicant's application and they launched the counter- application.

[3] On 4 August 1989, prior to his marriage to the applicant on 14 January 1995, the testator executed a document entitled "LAST WILL AND TESTAMENT" (the 1989 document). The 1989 document was clearly drafted by a professional and was signed on each page thereof by the testator as well as by two witnesses. In terms of the 1989 document the testator's children were appointed the sole and universal heirs of the entire estate of the testator.

[4] It is common cause that the testator personally drafted a document entitled "LAST WILL AND TESTAMENT" that was signed on 1 May 2006 (the 2006 document). The 2006 document consisted of three pages. The testator signed each page thereof in the presence of the applicant and of Ms Daisy Levena Vorster, a neighbour and close friend of the testator and the applicant. The testator requested the applicant and Ms Vorster to sign the 2006 document as witnesses. In the presence of the testator and each other, the applicant and Ms Vorster signed the document as witnesses on the last page and initialled the first two pages thereof. The testator sealed the 2006 document in an envelope and wrote the following on the front of the envelope: "LAST WILL AND TESTAMENT J J D OPPERMAN ID 481007 5030 088". He handed the envelope to Ms Vorster for safe-keeping and requested her to make it available to his bank after his

death. During 2010 Ms Vorster moved to Bloemfontein. From time to time thereafter Ms Vorster visited the testator and the applicant. On these occasions she brought the envelope with her and enquired from the testator as to what she should do with the envelope. On each occasion he said that she should continue to keep it with her.

[5] In terms of the 2006 document the testator essentially provided, in lay terms, that after his death the applicant would be entitled to the use of his house and motor vehicles and would be entitled to the interest on all monies accruing to the estate, which were to be placed in trust. He further provided that upon the death of the applicant, the entire remainder of his estate should be liquidated and divided equally between the first to fourth respondents. The last paragraph of the 2006 document read:

> "This Will and Testament will supersede/revoke any other will previously drawn-up in the name of Jonathan Jan Daniel Opperman – Id No: 481007 5030 088 and this Will and Testament cannot be changed, altered or replaced by any other Will or testament except with the written approval of J J D Opperman ID NO: [.....]."

[6] The first respondent said that shortly before the testator had to undergo surgery, he emailed a document to the first respondent on 13 November 2009 (the 2009 document). The email also contained instructions to the first respondent as to how the latter should deal with the document. Counsel for the applicant correctly conceded that it must for present purposes be accepted that the 2009 document had been drafted by the testator. It was also drafted in lay terms. No signature was appended to the 2009 document. It did

not purport to revoke any previous will. The contents of the 2006 document and 2009 document were essentially the same, save that in terms of the latter all monies accruing to the estate had to be paid into a money market account in the name of the first respondent. The 2009 document made it very clear, however, that the first respondent would be obliged to deal with the monies in the account only in accordance with wishes of the testator, that is, to pay the interest on the account to the applicant during her lifetime and after her death, to distribute the monies in the account in equal shares to himself and second to fourth respondents.

[7] After the death of the testator the applicant found a further unsigned document entitled "TESTAMENT" on the testator's desk (the 2015 document). It appears from the evidence that the 2015 document was drafted by an attorney on the instructions of the testator and sent to the testator by email on 25 February 2016. In terms of 2015 document the house of the testator and the cash in his estate were bequeathed to the testator's children in equal shares, subject to the lifelong usufruct of the applicant in respect thereof. Clause 4 thereof *inter alia* provided:

> "Aan my stiefdogter WENDY MYBURGH bemaak ek twee present van enige beskikbare vondse maar enige rente daarop is ook onderworpe aan 'n lewenslange vruggebruik ten gunste van haar moeder LOWIKA OPPERMAN."

Counsel for the testator's children submitted that the correspondence indicated that the quoted paragraph had been inserted by the testator and that he had thus amended the draft will

prepared by the attorney. I am prepared to accept that this submission is correct. The 2015 document (in amended form) was also in possession of the first respondent, as it had been emailed to him by the testator on 28 March 2015, but without comment or instruction.

[8] The case for the applicant is that the 2006 document is the last will of the testator and should be given effect to. The testator's children ask for an order declaring the 2015 document, alternatively the 1989 document, to be the last will of the testator.

[9] Section 2(1) of the Wills Act 7 of 1953 (the Act) sets out the formalities required in the execution of a will. For present purposes it is only necessary to refer to the following: In terms of section 2(1)(a) of the Act no will executed after 1 January 1954 shall be valid unless the will is signed by the testator at the end thereof and anywhere on each page other than the page on which it ends, in the presence of two or more competent witnesses present at the same time. In terms of section 1 of the Act "sign" includes the making of initials. The witnesses must sign the will in the presence of the testator and of each other. However, the witnesses need only sign the last page of the will, they do not have to sign all the pages thereof. (See Section 2(1)(a)(iv) of the Act; **The Law of South Africa**, 2nd edition, p179, para 262, footnote 13; Corbett, Hofmeyr and Kahn, **The Law of Succession in South Africa**, 2nd edition, p56, footnote 53).

[10] Section 2(3) of the Act provides:

> "If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (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)."

[11] It has been held that the meaning of the phrase "a document drafted or executed by a person" is that the document must have been created by the deceased personally. (See **Bekker v Naude en Andere** 2003 (5) SA 173 (SCA).) The two requirements for relief in terms of section 2(3) are therefore that the deceased person must have personally drafted or executed a document and must have intended that document to be his will. (See **Van Wetten and Another v Bosch and Others** 2004 (1) SA 348 (SCA) at 354, para [14]) The absence of a testator's signature is, however, not an absolute bar to the unsigned document being declared a will in terms of section 2(3). (See **Van der Merwe v The Master and Another** 2010 (6) SA 544 (SCA))

[12] There is no averment or evidence in the affidavits of the testator's children that the testator personally drafted the 2015 document. I agree with counsel for the applicant that this in itself puts an end to the reliance on section 2(3) in respect of the 2015 document. In any event, I do not think that it could be said that the testator personally created the 2015 document. He amended a comprehensive will prepared by his attorney by the insertion of a single sentence in clause 4 thereof. The affidavits also do not contain any averment or

evidence that the testator intended the 2015 document to be his will. The testator did not sign it. He gave no notice or instruction in respect thereof as he did in respect of the previous documents, but simply left it on his desk from 28 March 2015 until his death some two months later. These are strong indications on the probabilities that the testator did not intend the 2015 document to be his will. I conclude that the counter-application in respect of the 2015 document must fail.

[13] It will be recalled that the testator's children did not ask for an order declaring the 2009 document to be the testator's will. As I see it, this stance is justified by sound reasons. Despite the fact that the testator emailed the 2009 document to the first respondent and therefore at least had it in his possession on his computer, it was not found in his possession after his death. In these circumstances there is a rebuttable presumption that the testator destroyed the 2009 document *animo revocandi* (See **The Law South Africa,** *supra*, p208, para 298; ***Ex parte* Warren** 1955 (4) SA 326 (W)). The presumption was not rebutted. On the contrary, the conclusion that the testator destroyed or abandoned the 2009 document is materially supported by the evidence that on more than one occasion since 2010, the testator requested Ms Vorster to continue safe-keeping of the 2006 document. In addition, the conclusion is supported by the fact that the 2009 document did not differ from the 2006 document in any material respect.

[14] The 2006 document was signed by the testator and the witnesses at the end thereof and by the testator on each preceding page. Even though not required by the Act, the preceding pages were also

initialled by the witnesses. The 2006 document therefore complied with all the formalities in terms of the Act. The 2009 document did not purport to revoke the 2006 document. The 2006 document should therefore be declared to be the testator's last will.

[15] One matter remains. Section 4A(1) of the Act provides that any person who signs a will as a witness shall be disqualified from receiving any benefit from that will. However, section 4A(2)(a) provides that notwithstanding the provisions of subsection (1), a court may declare a person referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that the person did not defraud or unduly influence the testator in the execution of the will. It is clear that the applicant did not defraud or unduly influence the testator in respect of the execution of the 2006 document. Counsel for the testator's children rightly did not offer any objection to an order in terms of section 4A(2)(a) in favour of the applicant, in the event of a finding that the 2006 document was the last will of the testator.

[16] In the exercise of my discretion in respect of costs, it is in my view appropriate to order that the costs of the application and counter-application be paid from the testator's estate.

[17] In the result the following order is issued:

1. It is declared that the document executed by the late Jonathan Jan Daniël Opperman on 1 May 2006 is his last will and the fifth respondent is directed to register and accept it and to give effect thereto.

2. It is declared in terms of section 4A(2)(a) of the Wills Act 7 of 1953 that the applicant is competent to receive a benefit from the will of the late Jonathan Jan Daniël Opperman dated 1 May 2006.
3. The counter-application is dismissed.
4. The costs of the application and counter-application shall be paid from the estate of the late Jonathan Jan Daniël Opperman.

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C. H. G. VAN DER MERWE, J

On behalf of the applicant: Adv. N. Snellenburg SC
Instructed by:
Phatshoane Henney
BLOEMFONTEIN

On behalf of the first, second and third respondent: Adv. A. Berry
Instructed by:
Hugo & Bruwer Attorneys
BLOEMFONTEIN

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