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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal Case No:A16/2021
Case No in court a quo: 4574/2017

In the matter between:

NICOLETTE **VENTER**
Appellant

and

PHILIPPINA MARIA CHARLOTTE WESSELS First Respondent

THE MASTER OF THE HIGH COURT BLOEMFONTEIN Second Respondent

ELNA POHL N.O. Third Respondent

CORAM: LOUBSER, J *et* WRIGHT, AJ *et* VAN RHYN, AJ

HEARD ON: 13 SEPTEMBER 2021

DELIVERED ON: 4 NOVEMBER 2021

JUDGMENT BY: VAN RHYN, AJ

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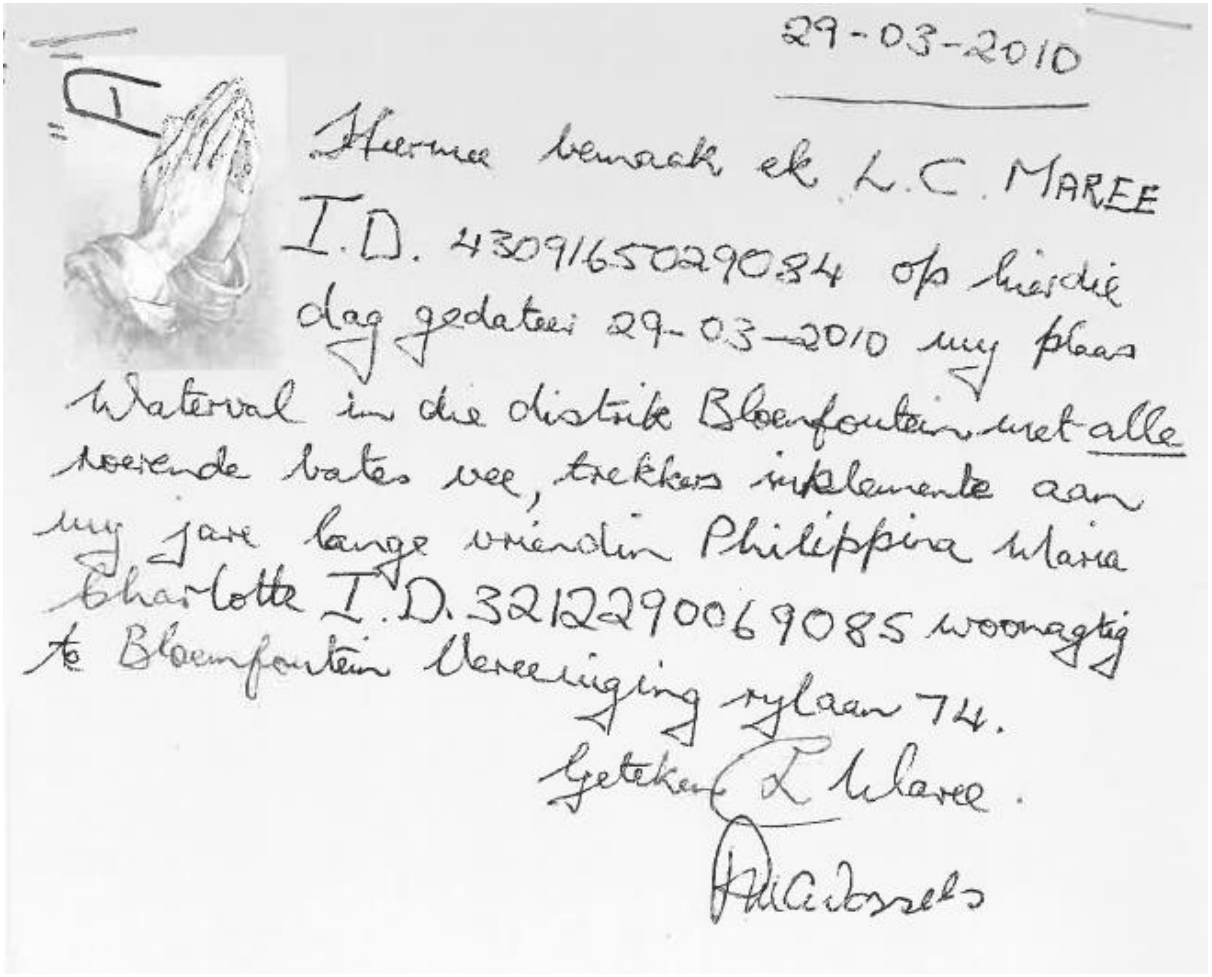
[1] The appellant in this matter is the daughter of the late Louis Christopher Maree (the "deceased") who passed away on 25 May 2017. Van Zyl J granted orders prayed for by the first respondent, Mrs. Petronella Maria

Charlotte Wessels, applicant in the court a quo, declaring that the document executed by the deceased on 29 March 2010, annexed to the founding affidavit as part of Annexure "A", as the deceased's last will and directing the Master of the High Court to accept same for the purposes of the Administration of Estates Act, 66 of 1969.

[2] The court a quo found and declared that the first respondent is competent to receive the benefits from the will in terms of the provisions of section 4A(2)(a) of the Wills Act, 7 of 1953 ("Wills Act"). The appeal is with the leave of the court a quo. The first respondent had been the life partner of the deceased since their respective divorces in the late 1970s up until the deceased's death. The deceased and the first respondent got engaged during 1990 but never got married. The second respondent is the Master of the High Court (the "Master"), Bloemfontein. The Master did not oppose the application but filed a report indicating that he has no further information to bring to the court's attention and abides by the decision of the court. The third respondent is Elna Pohl in her capacity as the appointed nominated executor in the deceased's estate. The application was not opposed by the third respondent.

[3] The circumstances surrounding the drafting of the document can be summarized as follows: On Saturday, 27 March 2010 the deceased accidentally shot and killed a man on his farm, Waterval situated in the district of Bloemfontein. On Monday, 29 March 2010 the deceased, in his own handwriting and while in the presence of the first respondent, drafted a document which I will refer to as the "contested will". Subsequent to drafting and signing the contested will, the deceased handed the original contested will to the first respondent and requested her to sign the document. The deceased informed her that the document is his will and that she will be his heir. She then signed the contested will as a witness. The first respondent kept the contested will in her possession for approximately 7 years until the deceased's death.

[4] Because of the importance of the contested will it is reproduced in full hereunder:



29-03-2010

I

Hiermee bemaak ek L.C. MAREE I.D. 4309165029084 op hierdie dag gedateer 29-03-2010 my plaas Waterval in die distrik Bloemfontein met alle roerende bates vee, trekkers inkelemente aan my jare lange vriendin Philippina Maria Charlotte I.D. 3212290069085 woonagtig te Bloemfontein Vereeniging rylaan 74.

Geteken L Maree.

H.M. Crosselo

[5] On the same day that the deceased drafted the contested will he handed himself over to the police. The late Mr. Nico Naude, a friend and attorney of the deceased, represented the deceased and brought a successful bail application. According to the first respondent she had provided the deceased with an amount of R300 000.00, to assist him with his legal costs relating to the criminal proceedings that followed. The first respondent moreover provided emotional support and accompanied the deceased during each court appearance. The first respondent averred that the appellant failed to support the deceased during these difficult times and failed to attend even a single day of the court proceedings.

[6] Subsequent to the death of the deceased the contested will was lodged with the Master. It is common cause that the contested will was rejected by the Master because it was not compliant with the relevant formalities. On 5 September 2017, the first respondent (as applicant) sought an order in terms

of the provisions of section 2 (3) of the Wills Act for the court to validate the contested will. The application was opposed by the appellant. The court a quo found in favour of the first respondent. Judgment was delivered on 8 August 2018. On 11 February 2021 the appellant filed her notice of appeal. The grounds for the appeal are that the court a quo erred on the following factual and legal issues:

6.1 The appellant did not lay a proper basis for her allegations regarding the deceased's condition on the day he executed the contested will in that the court a quo failed to appreciate:

6.1.1 That the appellant had provided credible evidence, which was not seriously disputed, that the deceased had a drinking problem and consumed alcohol almost every day.

6.1.2 That given the traumatic events that occurred, the deceased would have consumed alcohol subsequent to the shooting incident.

6.1.3 The court could not have simply accepted the first respondent's version regarding the happenings and events at the time when the deceased wrote the contested will and should have referred the matter to trial.

6.2 The version of Mr. Verster, a friend of the deceased, that the deceased had intimated to him that he will inherit the farm Waterval. The deceased furthermore, on several occasions subsequent to writing the contested will, had expressed wishes that the farm Waterval will pass to the appellant and on other occasions intimated that his entire estate should pass to a trust.

6.3 That the deceased did not express the wish that his entire estate should pass to the first respondent. The estate of the deceased consisted of 5 farms. A person making a will in which he disposes of his property does not wish to leave a partly testate and partly intestate inheritance.

6.4 By incorrectly applying the principles expressed in the matters of Havemann's Assignee v Havemann's Executor[1], Brunsdon's Estate v Brunsdon's Estate[2] and Others and Van Wetten and Another v Bosch and Others.[3]

[7] Mr Grobler SC, who appeared on behalf of the appellant, argued that because of the deficiencies and arguments of non-compliance with the provisions of the Wills Act the first and primary consideration involve the question of whether the court could find that the document was intended to be the deceased's last will. The wording of the document itself plays a significant role in answering this question. The language used, its syntax and structure are important considerations as well as the deceased's knowledge of the necessity to comply with the formalities relating to legal documents such as a will. On behalf of the appellant, it was contended that the court a quo did not embark upon the question of whether the contested will could have been regarded as a will in the first place. At best for the first respondent, so the argument goes, the contested will constituted a *donatio mortis causa*. Furthermore, the deceased only referred to the farm "Waterval" and moveable assets on the farm and his failure to deal with the whole of his estate is an indication that he merely wanted the first respondent "to receive something" after his passing.

[8] Section 2(3) of the Act is cast in peremptory terms and it does not permit the exercise of a discretion. [4] Counsel for the first respondent, Mr Reinders contends that Van Zyl J duly considered the provisions of Section 2(3) of the Act which reads as follows:

> "If a court is satisfied that a document or the amendment of a document drafted or executed by a person who had 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 Estates 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 ss (1)"

[1] 1927 AD 473.
[2] 1920 CPD 159.
[3] 2004 (1) SA 348 (SCA).
[4] Logue v The Master and Another 1995 (1) SA 199 (N) at 2013 F.

[9] In Ex Parte Maurice[5] Selikowitz J held that before a court can make an order pursuant to section 2(3) a court must be satisfied that it has before it a document:

9.1 which was drafted or executed by a person;

9.2 who had since died; and

9.3 who intended that document to be his/her will.

The first two requirements are not in dispute. According to Mr. Reinders, the court a quo applied the principles as stated in the decision of the Supreme Court of Appeal in Van Wetten and clearly indicated that "*the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all*". The court a quo specifically dealt with the question whether the deceased intended the contested will to be his will. With reference to Smith v Parsons[6] the court a quo examined the contested will taking into consideration the surrounding circumstances and found that it is evident from the totality of the facts, and even on the appellant's own version, that the deceased and the appellant did not have any relationship at the time when he drafted the contested will.

[10] While, in contrast, the first respondent and the deceased had not only been life partners since the late 1970s, but the first respondent furthermore financially assisted and also emotionally supported the deceased during the troubling times that he endured subsequent to the shooting accident. In as far as the deceased's subsequent conduct may be relevant for purposes of determining what was on the mind of the deceased when he wrote the contested will, the appellant provided typed recordings of conversations between herself and the deceased that occurred on 16 and 17 May 2017. The appellant relies on the content of these recordings in support of her argument that the deceased intimated that the farm would pass to her after his death.

[11] With regard to the deceased's state of health and state of mind at the time of the recordings, the appellant contends that the deceased was of a much more sober and lucid mind than at the time of the drafting of the contested will. He

[5] 1995 (2) SA 713(CPD).
[6] 2009 (3) SA 519 (D) at [21].

was not intoxicated at the time when she made the voice recordings. The appellant contends that the deceased was an alcoholic and most probably consumed alcohol on the day he drafted the contested will.

[12] From the contents of cell phone messages that the appellant sent to Mr. Naude on the same dates as the recordings, it is evident that the contents thereof contradict her version and actually provides support for the first respondent's version. In the cell phone messages sent to Mr. Naude, the appellant indicated that the deceased suffered from a loss of memory and a state of confusion. He was very weak at the time.

[13] The deceased suffered from a serious illness and was admitted to the Pelonomi Hospital on 10 May 2017. The appellant expressed her concerns regarding her fathers' state of health and indicated that: "He was literally skin and bone and clearly undernourished. His eyes were deeply sunken into their pockets and his skin had a very strange colour to it". The deceased was also treated at MediClinic and the Universitas Hospital in Bloemfontein. Subsequent to his discharge the appellant took him in and cared for him until his passing on 25 May 2017.

[14] The court a quo found that the appellant's perception that the deceased had at the time of his death been forgetful provides support for the fact that he might have forgotten about the contested will and that this fact can therefore not be considered to be indicative of a lack of intention to draft his will at the time when he wrote the contested will and handed same to the first respondent. I agree with this finding.

[15] The contents of the affidavit by the late Mr. Naude, leaves no doubt that he was well acquainted with the first respondent and the deceased for many years. Mr. Naude confirmed the loving relationship that existed between the first respondent and the deceased and explicitly stated that the deceased had indicated to him that he (the deceased) preferred not to have any contact with his daughter and actually did not acknowledge the appellant. Mr. Naude unequivocally stated that: "During his lifetime the only person of concern to him,

was the applicant (first respondent in the appeal). There was no other person in his life who cared for him or for whom he cared". Even on the appellant's own version she did not have any relationship with the deceased and only reconciled with her father during October 2016. The first respondent denies any allegation of a reconciliation between the deceased and the appellant.

[16] The appellant furthermore indicated that she searched for a will in her father's residence on the farm after his death. She found, much to her dismay, a horrid scene of neglect and decay. The appellant took photographs depicting cases of beer bottles, dirty clothes, rotting food and unhygienic living conditions. The appellant stated that she had not been to the deceased's house for many years. The first respondent, in reply appended photographs of the deceased's wardrobe in her residence which clearly depicts rows of clean, ironed shirts confirming the fact that the deceased had resided with her and that she cared for him during the last two years of his life prior to him being admitted to hospital.

[17] In order to be declared a valid will, the document must be sufficiently clear on its construction. In this regard Mr. Grobler SC argued that the Master should not be ordered to accept a document as a will and neither should it be expected of an executor of an estate to give effect to its terms if it is vague to such an extent that it cannot be interpreted with any efficacy so as to show the deceased's intention. The contested will only bequeaths upon the first respondent "die plaas Waterval" and other movable assets. According to the appellant the crucial problem is that the deceased was the owner of 5 farms of which 3 farms bear the name Waterval namely, the farm Waterval 3, the farm Waterval 259 and remaining portion of the farm Waterval Drift 160.

[18] Interpreting as to whether the deceased meant to only include the movable assets on the farm or all his movable assets and whether he only intended to bequeath one of his five farms, the court a quo remarked that it is common practice and common knowledge that farmers very often call their farms by a specific name although such farm very often consists of more than one adjacent farm, each with its own name and its own title deed. In any event, it

was not necessary to decide upon the question of interpreting the wishes of the deceased at this stage.

[19] In Van Wetten the central issue on appeal was whether the deceased had intended a document, written more than two years prior to his death, to be his final will and testament or merely instructions to an attorney to draft a will. The contested will in that matter, was contained in one of several envelopes which had been left in an outer, sealed envelope, addressed and handed to a friend of the deceased. The envelope which contained the contested will was addressed to the deceased's attorney. The appellant in the Van Wetten matter was the brother of the deceased. The court was urged to interpret the document, looked at as a whole, in accordance with the established principles of documentary interpretation to ascertain the intention of the deceased, having regard to the words and language used and, only if an ambiguity or uncertainty were to be found, then look at the circumstances surrounding the drafting of the document. Lewis JA held that in his view the real question to be addressed at that particular stage is not what the document means, but whether the deceased intended it to be his will at all.[7] That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.

[20] It was held in the Van Wetten matter that evidence of subsequent conduct is relevant only insofar as it indicates what was in the deceased's mind at the time of making the document. The words used included the following: "… I have made the following decisions … declare all previous will and testaments not valid from this day … as of today 5 September this is my will to be followed". The deceased was contemplating suicide at the time of drafting the document and he handed it to a friend for safekeeping to be opened only in the event of something happening to him. All of these factors led the Supreme Court of Appeal to conclude that:

> "[26] These are not the words of a person giving instructions for the drafting of his will. They are the words of a person who has made a decision to which

[7] Van Wetten at [15] and [16].

> immediate effect is to be given. They are his will. The very words used by the deceased are thus also decisive of the question before the court: the deceased intended the document to be his will. The surrounding circumstances, and in particular, as I have said, the handing over of the documents in sealed envelopes to Van der Westhuizen, to be opened only should something happen to him, lead to the same conclusion."

[21] Mr. Reinders argued that the court a quo correctly found that it will be a matter of interpretation as to whether the deceased meant to only include the movable assets on the farm or all his movable assets and that there is no evidence in any event that, at the time of the drafting of the contested will, it did not include all the deceased's assets. The court a quo held that the interpretation question regarding the contents of the contested will is not an impediment in the circumstances for a finding that the deceased intended it to be his will. I agree.

[22] The appellant provided instructions to a handwriting expert to report on whether or not the contested will was indeed written by the deceased. The report revealed that the deceased was the author thereof.

[23] Regarding the argument that the matter should be referred for trial so as to determine the primary consideration i.e., whether or not the deceased had intended the contested will to be his last will and had signed it free of undue influence or coaxing, I am of the view that the findings made by Van Zyl J cannot be faulted. The appellant alleges that the deceased most probably consumed alcohol due to the predicament he encountered with reference to the criminal charges during 2010.

[24] In Katz and Another v Katz and Others,[8] it was alleged that the testator had been improperly influenced by his second wife to make a new will. The court emphasised that an allegation that the testator had been influenced had to be supported with evidence and that unfounded suspicion and speculation were not sufficient. The fact that the testator was dependent on his wife after he suffered a stroke was not sufficient proof of undue influence. Further, the

[8] [2004] 4 All SA 545 (C).

amount of pressure resulting in invalidity may vary from case to case. In the *Katz* matter it was held that if, after the execution of a will, a period of time elapses during which the testator could have altered the will should he or she have wished to do so, the failure to take advantage of this opportunity is a circumstance from which it may be inferred that the will was not made against the testator's wishes.[9]

[25] Taking cognizance of the evidence that the deceased and the appellant had no meaningful relationship at the time when the contested will was drafted by the deceased, I am satisfied that the averment by the first respondent that she took care that the deceased was sober for his court appearance is reliable and credible under the circumstances.

[26] The court a quo found that the onus rests upon the appellant to prove absence of testamentary capacity on the part of the deceased at the time when he executed the contested will.[10] The appellant failed to place any evidence in support of a conclusion that the deceased was unduly influenced by the first respondent. The court a quo correctly, in my view, held that the appellant did not lay a proper basis for her allegations regarding the deceased's intoxicated condition or undue influence by the first respondent. Referral for trial was thus correctly dismissed by the court a quo. In any event, if the deceased considered himself to have been unduly influenced or coaxed into bequeathing his estate (or part thereof) to the first respondent, he had ample time to rectify the situation by simply instructing his attorney and friend, Mr. Naude, to draft a will revoking any previous will or testamentary document.

[27] A person may acquire rights to the property of a deceased upon his or her death under the provisions of an antenuptial contract, a trust *inter vivos*, a *donatio mortis causa*, a will or codicil or in terms of the law of intestate succession. A testamentary document is the result of a unilateral act by the testator or more than one testator in respect of a joint or mutual will. A

[9] Spies NO v Smith en Andere 1957 (1) SA 539 (A).
[10] Harlow v Becker NO and Others 1998 (4) SA 639 at 647B-D.

donatio mortis causa is a gift made by the donor in contemplation of his or her death.[11] The question whether the language in a suicide note is that of a *donatio mortis causa* rather than a will, was decided in Smith v Parsons[12]. A *donatio mortis causa* must be executed with the formalities required for the execution of a will.[13] The court held that it was common cause that the suicide note did not comply with the formalities required for a valid will and, furthermore, that the deceased did not have a donation in mind as he did not contemplate a donation that would have to be accepted by the donee. The deceased was regulating the disposition of his estate in anticipation of his death.

[28] I am of the view that the same argument applies to the present matter. The first respondent furthermore appended two documents to her founding papers indicating that the deceased contemplated that the first respondent would assume responsibility in respect of "Waterval" and will act as executor of his estate. Both these handwritten documents are dated 8 October 2004. One of these documents contains a cession of a Momentum policy in the favour of first respondent. A will takes effect only *morte testatoris* which means that the testator may at any time prior to his or her death revoke the will. These two documents were not executed with the formalities of a will and were not referred to in the contested will. It however serves as a clear indication that the deceased did not consider the appellant as the heir to his estate nor did he indicate that she should take control of his property. His intentions are clear. Since 2004 and again in 2010 the deceased undoubtedly considered the first respondent to be the beneficiary of his estate.

[29] The formalities prescribed by section 2(1) in relation to the execution of a will are to ensure the authenticity and to guard against false or forged wills. In Van der Merwe v Master of the High Court,[14] the Supreme Court of Appeal per Navsa JA, gave the following interpretation of this section:

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[11] Meyer v Rudolph's Executors 1918 AD 70 at 83.
[12] 2010 (4) SA 378 [21] – [22].
[13] Jordaan and Others NNO v De Villiers 1991 (4) SA 396 (C) at 402E-H.
[14] 2010 (6) SA 544 (SCA).

> "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 defeat the genuine intention of testators. 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."[15]

[30] The wording and meaning of the provisions of section 2(3) of the Wills Act are very clear and unequivocal. In terms of this section, the court must direct the Master of the High Court to accept the document after it has satisfied itself that indeed it reflects the true intentions of the deceased. I furthermore agree with the court a quo's conclusion that having regard to the wording of the contested will and the use of the word "bemaak" (bequeath), it was the deceased's intention to draft his will when he wrote the contested will.

ORDER: .

[31] I therefore make the following order:

1. The appeal is dismissed with costs.

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VAN RHYN, AJ

I concur.

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LOUBSER, J

I concur.

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[15] At [14].

WRIGHT, AJ

On behalf of the Appellant: **Adv S GROBLER SC**
Instructed by: SYMINGTON & DE KOK ATTORNEYS
BLOEMFONTEIN

On behalf of the First Respondent: **Adv S J REINDERS**
Instructed by: McINTYRE VAN DER POST ATTORNEYS
BLOEMFONTEIN

On behalf of the Second Respondent: (No appearance)

On behalf of the Third Respondent: (No appearance).