

SOUTH AFRICA / JUDGMENT

Van Vuuren and Another v Master of the High Court and Others (37901/2014) [2015] ZAGPPHC 67 (3 March 2015)

[2015] ZAGPPHC 67

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

37901/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case number:

37901/2014

Date: 03 March 2015

In the matter

between:

CHRISTELLE

VAN

VUUREN.....First

Applicant

STEPHANIE

VAN

VUUREN.....Second

Applicant

And

THE

MASTER OF THE HIGH

COURT.....First

Respondent

CHRISTELLE

VAN VUUREN N.O

.....Second

Respondent

STEPHANIE

VAN VUUREN N.O

.....Third

Respondent

DANIEL
VAN
VUUREN.....Fourth
Respondent
MARIUS
VAN
VUUREN.....Fifth
Respondent

JUDGMENT

PRETORIUS J.

- [1] In this application the court is requested to make an order in terms of Section 2(3) of the Wills Act, 7 of 1953 that the document purported to be the will of the late Dawid Johannes van Vuuren to be declared to be his last will. The Master of the High Court declined to accept the document as will, hence the present application. At the outset counsel for the Respondent indicated that the respondents will no longer dispute that the deceased was the author of the document and that he had signed the document.

Background:

- [2] On 7 July 2008 the testator handed the disputed document to Ms Prinsloo, his secretary, and told her it was his will which he had signed and requested her to sign as witness. She was employed as his secretary at Loadcell Manufacturing and Services (Pty) Ltd, at 359 Souter Street, Pretoria-West. She signed the document and gave it back to the deceased.
- [3] A branch office of Loadcell Manufacturing and Services (Pty) Ltd was operated in Johannesburg where Ms H. A. Kotze was employed as accountant and personal assistant to the testator. She had been working closely with the applicant for 18 years. On the morning of 7 July 2008 the testator phoned Ms Kotze and enquired whether she was at her desk at work.

After she had answered in the affirmative the testator informed her that he was faxing her a copy of his testament. He told her that the contents of his testament was confidential and instructed her to file and store the document with his personal documents. She filed the testament in a filing cabinet in her office. After the testator's death on 20 January 2014 she retrieved the document from the filing cabinet and handed it to the applicants' attorney.

The document provides:

"07/07/2008

TESTAMENT

VAN

DANIEL JOHANNES VAN VUUREN

HIERMEE LAATEK AL MY

AARDSE BESITTINGS AAN MY

TWEE DOGTERS, CHRISTELLE & STEFANIE

CM VAN VUUREN WORD

AANGESTEL AS EKSEKUTEER

(signed DJ van Vuuren)

(signed AF Viljoen)”

[4] The fifth respondent is opposing the application. He is the illegitimate son of the deceased. The deceased had two daughters and a son, as well as the fifth respondent. The fifth respondent argued that the deceased had died intestate and that the division of the estate should take place according to the Intestate Succession Act 81 of 1987.

It is so that should the court declare the document as the last will of the deceased the fourth and fifth respondents will be disinherited.

This court has to decide whether the deceased intended this document to be his last will and testament.

[5] The law:

The formalities required in the execution of a will are set out in Section 2(1) of the Wills Act 7 of 1953 which provides, inter alia:

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

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

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

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

[6] In *Van der Merwe v The Master* 2010(6) SA 544 (SCA) Navsa JA held at paragraph 14:

“By enacting s 2(3) of the Act, the legislator 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.² It has rightly and repeatedly been said, that, once a court is satisfied that the document concerned meets the requirements of the subsection, a court has no discretion whether or not to grant an order as envisaged therein. In other words, the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.³

- [7] In *Olivier v Die Meester en Andere: in re boedel wyle Olivier* 1997(1) SA 836 (TPA) it was found that there must be a document which the deceased had compiled or executed. In the present matter it is common cause that the deceased had executed the disputed document.
- [8] This court has to establish that the deceased had the requisite intention when drafting and signing the document that the document was his final will and testament. It is common cause that no will and testament could be found after the deceased's death, apart from this document. The applicants searched all the deceased's documents, but could not find the original of the document or any other will or testament.
- [9] In *De Reszke v Marais and Others* 2006(2) SA 277 (SCA) Mlambo JA explained the legal position:

"Section 2(3) lays down the requirements which a document which does not comply with the formalities for the execution of a will has to meet before a court will order the Master to accept it as a will. The effect of an order under s 2(3) is that a document which is not a will for want of compliance with certain prescribed formalities but purports to be a will is given effect to if the requirements of the section have been met. For the grant of relief under s 2(3) a court must be satisfied that the deceased person who drafted or executed the document intended it to be his will. "

- [10] In *Van Wetten and Another v Boch and others* 2004(1) SA 348(SCA) Lewis JA held at paragraph 16

"In my view, however, 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. That enquiry if necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances."

- [11] The court has to be satisfied that the disputed document was drafted by the deceased and that it was the deceased's intent that this is to be his last will. The surrounding circumstances in this instance have to be examined and considered for this court to make a decision. The deceased had told his secretary, Ms Prinsloo, who was employed in his Pretoria office, on 7 July 2008 that the disputed document was his testament, which he had signed. At the same time he requested her to sign as a witness, which she did. Although he had not signed the document in her presence, she is convinced that he had written the document in his own handwriting and that it was his signature on the document.
- [12] Ms Kotze is still employed at Loadcell. At the time of the deceased's death she had been working in close co-operation with the deceased in the branch office as his personal assistant and accountant. She was responsible for the safekeeping and filing of the testator's personal documents. Her uncontested evidence is that on 7 July 2008 the testator had phoned her and told her that he was in the process of faxing a copy of his testament to her. Thereafter he faxed a copy of his will to her. He informed her that the content of the testament was confidential and she had to store it with his personal documents, which she did until she handed it to the applicant's attorney after his death.

- [13] The fifth respondent, the illegitimate son of the deceased, contests the document as not being the will of his father. Firstly he relies on a conversation he had with his late father's sister, Mrs Pretorius. Her evidence takes the matter no further.
- [14] It is common cause that the deceased had threatened to disinherit the fourth respondent should he not stop smoking. The fourth respondent deposed to a supporting affidavit to the applicants' replying affidavit. He denied that he had told the fifth respondent that the testator drafted the 2008 will as a threat to stop the fourth respondent from smoking. The first time the fourth respondent realised that his father had been serious when threatening to disinherit him, was after the deceased had passed away. He only became aware of the existence of the disputed document of 2008 after the testator's death.
- [15] The fifth respondent provides no details of when, where and how the deceased had threatened to disinherit the fourth respondent. He makes a statement stating that the fourth respondent had told him that his father had threatened him should he not stop smoking he would be disinherited.
- [16] The court must conclude that this evidence of the fifth respondent cannot be relied on. It would have been in the fourth respondent's interest to support the fifth respondent if these allegations were true.
- [17] The fifth respondent further alleges that the deceased had been aware of the requirements for drafting a valid will, as the deceased had been the executor in his (the deceased's) father's estate. I cannot agree with this submission as it is based on conjecture.
- [18] The will, which the deceased describes as "Testament", provided for the appointment of an executrix. The testator was thus aware of the role and function of an executor. There can be no doubt that he had the intention that the document was legally his will.

The wording: "hiermee laat ek my aarse (sic) besittings aan my twee dogters, Christelle en Stefanie" leaves no doubt as what his intention was and that at his death his entire estate should devolve upon his two daughters.

- [19] The facts are that, despite searching for the original document and a later will, it could not be found. The court will not adhere to the fifth respondent's submission that due to the fact that the original document cannot be found that the deceased had destroyed it. There is no evidence at all that the deceased had destroyed the original "Testament".
- [20] I am satisfied, when considering all the facts placed before me, that the contested will was indeed intended to be the will of the deceased, and that the Master should be directed to deal with the testament in terms of section 2(3) of the Wills Act.
1. It is declared the document attached as Annexure 'A' to the Notice of Motion (hereinafter 'the 2008 Will') is the last will of the late Daniel Johannes van Vuuren ('hereinafter the Testator');

2. The First Respondent is ordered to accept the 2008 Will as the Testator's will for the purposes of the Administration of Estate Act, Act 66 of 1965;
3. No order as to costs.

Judge C Pretorius

Heard on: 24 February 2015

For the Applicant: Adv. B Stoop

Instructed by: AJ KACHELHOFFER ATTORNEY

For the Fifth Respondent: Adv. J Schoeman

Instructed by : DE KLERK ATTORNEYS

Date of Judgment: 03 March 2015

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