



# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Not Reportable**

Case No: 645/2018

In the matter between:

**PAULA GROBLER**

**APPELLANT**

**and**

**MASTER OF THE HIGH COURT**

**FIRST RESPONDENT**

**MARTHINUS CHRISTOFFEL BARNARD NO** **SECOND RESPONDENT**

**(IN HIS CAPACITY AS THE EXECUTOR OF THE  
ESTATE LATE L P GROBLER)**

**LEON RUDOLF GROBLER**

**THIRD RESPONDENT**

**PIETER JOHANNES GROBLER**

**FOURTH RESPONDENT**

**HENK JOHANNES GROBLER**

**FIFTH RESPONDENT**

**ELSIE SUSANNA OLIVIER**

**SIXTH RESPONDENT**

**Neutral citation:** *Grobler v Master of the High Court & others* (645/2018)  
[2019] ZASCA 119 (23 September 2019)

**Coram:** Maya P, Leach and Dambuza JJA and Mokgohloa and Plasket  
AJJA

**Heard:** 28 May 2019

**Delivered:** 23 September 2019

**Summary:** Will – validity of unsigned draft will in terms of s 2(3) of Wills Act 7 of 1953 – not established that deceased received, approved and intended draft will prepared by his financial advisor to be his last will and testament – appeal dismissed.

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### **ORDER**

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**On appeal from:** Gauteng Division, Pretoria (Janse van Nieuwenhuizen J sitting as court of first instance):

The appeal is dismissed with costs.

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### **JUDGMENT**

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**Maya P:** (Leach and Dambuza JJA, Mokgohloa and Plasket AJJA concurring):

[1] This is an appeal against the judgment of the Gauteng Division, Pretoria (Janse van Nieuwenhuizen J). The court a quo dismissed an application in which the appellant, Mrs Paula Grobler, sought, inter alia, (a) a declaration that an unsigned will of the late Mr Leon Peter Grobler (the deceased) constituted his last will and testament and (b) the appointment of the appellant and Imke Dekker Prokureurs as the executors of his estate. The appeal is with the leave of the court a quo.

[2] The appellant is the deceased's widow and second wife to whom he was married, out of community of property, at his death. The third to the sixth respondents, Mr Leon Rudolf Grobler, Mr Pieter Johannes Grobler, Mr Henk Johannes Grobler and Mrs Elsie Susanna Olivier, are the deceased's biological children who were born of his marriage to his first wife. The second respondent, Mr Marthinus Christoffel Barnard, is the executor of the deceased's estate. The only relief sought against him was that he and the first respondent, the Master of the High Court, Pretoria should stay the finalisation of the deceased's estate pending the outcome of the application.

[3] It is common cause that before he died on 26 December 2015, the deceased had signed a properly executed will on 16 April 1996, which was still in existence at his death. This was before he met the appellant whom he married on 30 January 2010. It appears, however, that he wished to revise it because in January 2013 he instructed Mr Siegfried Eugene Stander, a senior financial advisor employed by Old Mutual Life Assurance Company (SA) Ltd, to prepare a will for him. Their exchange on this subject is contained in a chain of email communications, which commenced with a message dated 9 January 2013. The deceased requested Mr Stander to provide him with specimens of wills dealing with bequests of movable and immovable assets to surviving partners and children.

[4] The correspondence between the deceased and Mr Stander and among Mr Stander's office staff, each one acknowledged by the deceased in writing, went back and forth until 8 August 2014. By then a draft will, which had been amended a few times to incorporate the deceased's various wishes, was in place. The long

email trail shows that over that period of 20 months the deceased doggedly sought an equitable disposition of his assets among the appellant and his children, the respondents. The main assets were his immovable property, the family home in Helderkruijn, Roodepoort and a holiday property in Margate, in respect of which he wanted the appellant to enjoy only a right of usufruct either until her remarriage or her being in an intimate relationship that had lasted for longer than six months.

[5] The last email before the deceased died, was sent to him by the appellant on 12 August 2014. This was apparently in response to an email he sent to Mr Stander's personal assistant, Ms Hannelie van der Walt, on 8 August 2014. The deceased's message was copied to both the appellant and Mr Stander and was, in turn, a reply to Mrs Van der Walt who had recently sent him yet another revised draft with an invitation for his comments. He wrote as follows:

'Hi Hannelie,

Thank you for the will

This, however, does not address my property in Margate

I think it will be better to keep both houses in Trust with Paula having sole usufruct of the house in Helderkruijn and the Margate property for everybody's use (Paula and the children)

Both properties can be sold and divided up with a greater benefit to Paula with regard to the house at Helderkruijn, if Paula and the children reach consensus on this, at any stage.

Please advise if this could be a possibility.'<sup>1</sup>

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<sup>1</sup> The original Afrikaans text reads:

'Hi Hannelie

Dankie vir die testament

Dit spreek egter nie my eiendom in Margate aan nie

Ek dink dit sal beter wees om beide huise in Trust te hou met vrug gebruik uitsluitlik aan Paula tov die Helderkruijn huis en [g]ebruik aan almal [Paula en kinders] tov die Margate eiendom

Beide eiendomme kan verkoop word en verdeel word, met n groter voordeel vir Paula –m.b t die Helderkruijn huis se opbrengs, as Paula en kinders konsensus het oor die verkoop, op enige stadium

Adviseer asb of dit moontlik sal wees.'

[6] The tone of the appellant's response to the deceased was rather sharp. The email also disclosed that this was a touchy subject. This may also explain why she decided to communicate with her husband, with whom she lived, in writing, instead of talking to him. She wrote:

'You and I have had this discussion already.

I do **NOT** want usufruct, Margate is fine, but not Helderkrui.

Can I make a suggestion that I pay each of the children R250 000. That would mean that I buy the Margate house for a million. The rest is my share. I should be able to get a loan at the bank for R1 million. I know it is uncomfortable talking about this, but I will not live like a squatter in my own house. Why are we making the house beautiful – so that somebody else can buy it one day?

Who is to say that I [will not] pass away before you – then you will not have a problem anymore and you can give the house to whomever you want.'<sup>2</sup>

[7] Thereafter, the deceased and Mr Stander met on 18 and 19 November 2014 and again, for the last time, at the deceased's home on 25 November 2014. According to the appellant and Mr Stander, at the last meeting the deceased suggested further amendments to the draft will. Mr Stander recorded these on a typed version of the draft will in manuscript and understood them to constitute the deceased's final instructions that he would later effect electronically. He would thereafter arrange a formal meeting with the deceased and the appellant for the signing of their final separate wills as he was also tasked with drafting one for the appellant.

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<sup>2</sup> The original Afrikaans text reads:

'Ek en jy het mos nou al gepraat hieroor

Ek wil NIE vruggebruik he NIE Margate is fyn, maar nie Helderkrui

Kan ek eerder `n voorstel maak dat ek dan die kinders elk R250 000 betaal Dit beteken ek koop die huis vir 1 Miljoen Die res is my gedeelte Ek behoort seker `n lening van R1 miljoen by die bank te kry

Ek weet dis ongemaklik om hieroor te praat, maar ek gaan nie soos `n bywoner in my eie huis bly nie Hoekom maak ek en jy nou die huis mooi – sodat iemand dit eendag kan koop?

Wie se dalk gaan ek voor jou dood – dan het jy nie meer `n probleem nie en kan die huis bemaak aan wie jy wil'.

[8] On 17 December 2014 Mrs Van der Walt sent the draft will to the deceased and the appellant, who were on holiday abroad. The accompanying message requested the deceased to read the draft will and inform Mrs Van der Walt if he wished to make any alterations.<sup>3</sup> The draft will, inter alia, vested the appellant with lifelong usufruct, free of the obligation to pay security, over the immovable property and one half of the nett profit of any sale proceeds if they were sold, the rest to be shared among the respondents in equal parts. Nothing happened thereafter and all was quiet until the deceased died a year later, whereupon the appellant approached the court a quo in these proceedings. According to her, the deceased and Mr Stander were unable to meet and finalise the draft will during 2015 because of the deceased's busy schedule. Nevertheless, no correspondence confirming the deceased's receipt of the email of 17 December 2014, as he previously did, or setting up a meeting between him and Mr Stander during that entire year was produced.

[9] The court a quo dismissed the application on the bases that the final draft will was not drafted by the deceased and that there was no proof that he even received the email of 17 December 2014 and approved the draft will. The court held that in light of relevant case law, in particular the judgment of this Court in *Bekker v Naude en andere*,<sup>4</sup> the unsigned document could not be accepted as the deceased's will within the exceptions set out in s 2(3) of the Wills Act 7 of 1953 (the Wills Act).

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<sup>3</sup> The original Afrikaans text reads: 'Ek heg die veranderde testament vir u aandag hierby aan. Lees asseblief die dokument deur en kontak my asseblief indien daar enige veranderinge ens aangebring moet word.'

<sup>4</sup> *Bekker v Naude en andere* 2003 (5) SA 173 (SCA).

[10] On appeal before us, it was contended on the appellant's behalf that she was entitled to the declaratory relief she sought because the requirements of s 2(3) of the Wills Act were met. This was so, it was argued, because the deceased 'played an active role in the drafting and completion' of the draft will and it could be inferred in the circumstances of the matter that he did receive it. We were urged to consider the technological advances since the *Bekker* case, which make it easy for people to communicate by electronic means, and accordingly apply the relevant statutory requirements.

[11] Section 2(1) of the Wills Act, which is designed to ensure authenticity and guard against false or forged wills,<sup>5</sup> stipulates the formalities required in the execution of a valid will. It reads, in relevant part:

'(1) Subject to the provisions of section 3 *bis* –

- (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 same 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; and
  - (iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page; and . . . .'

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<sup>5</sup> *Van der Merwe v The Master & another* [2010] ZASCA 99; 2010 (6) SA 544 (SCA) para 13.

[12] However, s 2(3) creates an exception to these requirements and 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).’

[13] Condonation of non-compliance with the testamentary formalities set out in s 2(1) is, therefore, possible in terms of these provisions as they empower courts to validate a document that would otherwise not pass muster as a will due to a technical flaw in its attestation. The purpose of the provisions is to avoid thwarting the lawful wishes of the deceased would-be testator. However, the document must have been drafted or executed by the deceased whose will it purports to be, ie created or prepared by the deceased personally.<sup>6</sup> Furthermore, the court must be satisfied on a preponderance of probabilities that the deceased intended it to be his or her will.<sup>7</sup> And once satisfied that the document meets the requirements of s 2(3), the court is obliged by these peremptory provisions to order the Master to accept it as the deceased’s will.<sup>8</sup>

[14] The question relating to the first jurisdictional requirement ie whether the draft will was drafted by the deceased, presents no difficulty. The answer is an unequivocal ‘No’. It is clear from the evidence that the document was prepared by Mr Stander. The amendments which followed were also effected by him. The

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<sup>6</sup> *Bekker v Naude*, ibid para 9; *Van Wetten & another v Bosch & others* 2004 (1) SA 348 (SCA) para 14.

<sup>7</sup> *Letsekga v The Master & others* 1995 (4) SA 731 (W) at 735F-G.

<sup>8</sup> *Van der Merwe v The Master & another*, ibid, para 14; *Stolz ID v The Master & another* 1994 (2) PH G2 (E); *Back & others NNO v Master of the Supreme Court* [1996] 2 All SA 161 (C).



deceased was then presented with the draft will under cover of Mrs Van der Walt's message which expressly anticipated further consideration and alterations. And as the court a quo rightly found, there is simply no indication on the record that the deceased received the document sent on 17 December 2014 and accepted it as his will, which merely awaited signature. The uncertainty is heightened by the apparent discord between the deceased and the appellant regarding the nature of the latter's inheritance of the deceased's immovable property and the lapse of a whole year with no tangible move by any of the parties to finalise the exercise. In the absence of evidence that establishes that the deceased received, perused and approved all the contents of the draft will, I am unable to find that he intended it to be his will. The appeal must accordingly fail.

[15] In the result the following order is made:

The appeal is dismissed with costs.

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**MML Maya**  
**President of the Supreme Court of Appeal**

**APPEARANCES:**

For the Appellants:

Adv C Goosen

Instructed by:

B J Erasmus Pieterse Attorneys

Honey Attorneys, Bloemfontein

For the Third and Fourth Respondents:

Adv H Fraser

Instructed by:

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