**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case no: 9510/2019**

In the matter between:

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| **MARY GWENYTH MARSHALL** | Applicant |
| v | |
| **LAUREN MAIRI BAKER N.O.** | First Respondent |
| **LAUREN MAIRI BAKER** | Second Respondent |
| **MASTER OF THE HIGH COURT, WESTERN CAPE** | Third Respondent |
| **REGISTRAR OF DEEDS, CAPE TOWN** | Fourth Respondent |
| **REGISTRAR OF DEEDS, KING WILLIAMS TOWN** | Fifth Respondent |
| **PAGDENS INCORPORATED** | Sixth Respondent |
| **FRIEDMAN SCHECKTER ATTORNEYS** | Seventh Respondent |
| **CHRISTOPHER RICHARD BAKER** | Eighth Respondent |
| and | |
| **KEITH STONE CATTELL** | First Interested Party |
| **LIZELLE BAKER** | Second Interested Party |
| **ADELAIDE ZANANA QOKOQA** | Third Interested Party |
| **CHRISTOPHER RICHARD BAKER** | Fourth Interested Party |

**Coram:** Justice J I Cloete

**Heard:** 28 November 2019, supplementary notes delivered 3 and 10 December 2019

**Delivered:** 25 February 2020

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## JUDGMENT

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**CLOETE J:**

**Introduction**

[1] The applicant is the former life partner of the late Mr Peter van Heerden ("the deceased") who passed away at the age of 63 on 17 October 2018 as a result of complications following cardiac surgery. In essence, she seeks an order declaring that a document executed by the deceased on 7 October 2018 ("the 2018 document") is his last will and testament, together with ancillary relief.

[2] Although the prayers in the notice of motion were formulated in far reaching terms, the applicant abandoned prayers 1.3 and 1.15 as well as costs on a punitive scale as envisaged in prayer 1.6. The remaining prayers in Part A[1] were also clarified with her legal representative and crystallised into the following:[2]

2.1 The review and setting aside of the decisions of the third respondent ("the Master"): (a) accepting what is now common cause is a validly

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1 Part B pertained to interim relief and an order was granted by consent on 2 July 2019.

2 The eighth respondent was added as the fourth interested party at the commencement of argument by consent. The applicant also abandoned her points *in limine.*

executed will of the deceased dated 9 October 2011 and appointing the second respondent (his niece, Ms Lauren Baker, (*'Lauren'*)) *as* executrix in terms thereof; and (b) subsequently rejecting the 2018 document as the deceased's last will and testament;

2.2 Declaring, in terms of s 2A(c) of the Wills Act 7 of 1953 ("the Act") that the 2018 document revoked the 2011 will in its entirety;

2.3 Declaring that the 2018 document is the deceased's will and ordering the Master to accept it as such in terms of s 2(3) of the Act (coupled with attendant declarators that if the original cannot be found the Master is to accept a copy, as well as aspects pertaining to the content thereof); and

2.4 Given the absence of a nominated executor/trix in the 2018 document, ordering the Master to convene a meeting for this purpose (in Cape Town) in terms of s 18(1) of the Administration of Estates Act 66 of 1965.

[3] Lauren is an adult. Her mother, Mrs Lizelle Baker, who is cited as the second interested party, is the deceased's sister, and is married to Lauren's father, the eighth respondent and fourth interested party, Mr Christopher Baker (*'Chris'*). The latter and Lauren (in both her personal and representative capacities) oppose the relief sought, and also brought a conditional counter-application in respect of an earlier will executed by the deceased on

7 January 1999, which has fallen away given the applicant's concession at the commencement of argument that the 2011 will was validly executed.

[4] For convenience I will refer to Chris and Lauren (in both capacities) as "the respondents" where applicable. In addition the respondents' alternative argument that the 2018 document was intended to be an amendment to the 2011 will, and the dispute as to whether a formal counter-application to this effect was required, are not necessary to determine as a result of the conclusion which I have reached.

[5] The sixth respondent (*'Pagdens'*) is the firm of attorneys appointed by Lauren to wind up the deceased's estate, and the seventh respondent (*'Friedman Scheckter'*) represents Lauren and Chris in this litigation. The applicant, Lauren and interested parties are all potential beneficiaries in terms of the 2018 document.

[6] It is common cause that the 2018 document was written (albeit in schematic form) by the deceased in his own handwriting[3] and signed by him on 7 October 2018; that it was not witnessed as required by s 2(1)(a)(ii) and (iii) of the Act; and that the Master's reliance on s 2(1)(a)(v) in rejecting it was clearly an error, given that the deceased did not sign the will by the making of a mark. By agreement, the matter was argued on the assumption that the Master intended to refer to s 2(1)(a)(ii) and (iii) thereof. There is also no

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[3] The document was thus created by the deceased personally and was thus *'drafted or executed'* by him: see *Bekker v Naude en Andere* 2003 (5) SA 173 (SCA).

dispute that the deceased was of sound mind when he executed the 2018 document, and no suggestion of fraud or undue influence.

[7] The principal issue to be determined is whether the deceased intended the 2018 document to be his will as contemplated in s 2(3) of the Act.

**Relevant factual background**

[8] The material facts, which are now largely common cause, are as follows. The deceased was an intelligent person and a meticulous planner. He held four university degrees and at the time of his death was employed at the City of Cape Town's Transport Development Authority as a Principal Planning Officer in Urban Planning and Mechanisms. He was unmarried with no children. In addition to the applicant, Chris, Lizelle and Lauren were his family.

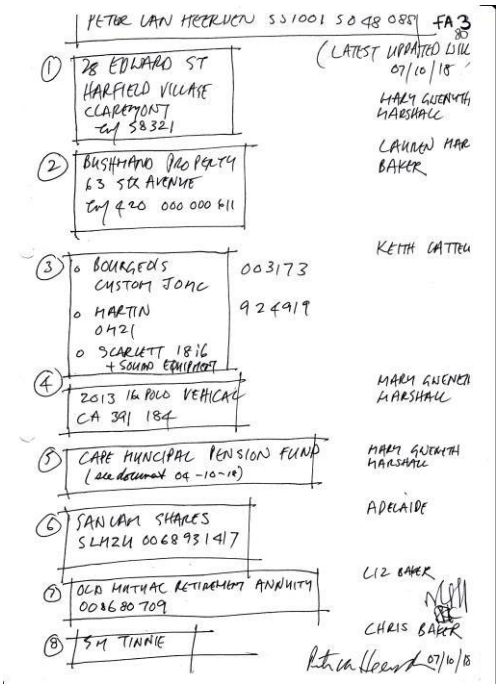
[9] During August and September 2018 the deceased's health deteriorated to the point where he became physically weak. He consulted his doctor who referred him to a cardiologist. On 27 September 2018 he underwent an angiogram. The results showed a leaking heart valve and an aortic aneurysm, necessitating urgent heart surgery.

[10] On 3 October 2018 the deceased, accompanied by the applicant, consulted the specialist who would perform the surgery. They learnt that it was scheduled for Monday 8 October 2018 and the deceased would be admitted to hospital on Sunday 7 October 2018. Based on the consultations which the deceased had with the cardiologist and specialist, he was acutely aware that

the surgery could be life-saving but could also trigger a death-causing event. After consulting with the specialist the deceased informed Chris, Lizelle and Lauren that he was due to undergo surgery. He underwent the surgery on 8 October 2018, but remained in intensive care until he passed away on 17 October 2018.

[11] According to the applicant, although the deceased was understandably hopeful that the surgery would save his life, he was also a realist, and prepared himself and his affairs in case of the worst possible result.

[12] On Thursday 4 October 2018 he nominated the applicant as the sole beneficiary of his Cape Municipal Pension Fund. According to the applicant, from Friday 5 October 2018 until Sunday 7 October 2018 he spent considerable time thinking about, and drafting, the 2018 document. That document is fully reproduced hereunder:



[13] The applicant states that on Saturday 6 October 2018 the deceased told her that he was writing his will and asked her for the identity document of their domestic worker Adelaide, to whom he wished to bequeath his Sanlam shares, as well as the erf number of the Harfield Village property. She could not locate Adelaide's identity document and this is why her surname is not mentioned in the 2018 document. The deceased signed the 2018 document at about 11am on Sunday 7 October 2018, before leaving for hospital at around midday. However, after signing the 2018 document and before leaving for hospital, the deceased had an exchange of WhatsApp messages with Chris, who was not only his brother-in-law, but is also an attorney who for many years advised him on his work, personal and legal affairs.

[14] At 11.17am the deceased, having taken a photograph of the 2018 document, sent the following message to Chris:

> *'Bakes, here are some thoughts regarding an updated Will which has not been legalized yet. For the record If something should happen, I would like my ashes scattered on the Bushmans river. Kins.'*

[15] The response from Chris, sent at 11.23am, reads as follows:

> *'OK – will arrange accordingly – will finalize with you over Christmas – will also need to decide how you will deal with the bond on the property – thinking of you tomorrow – sure all will be well.'*

[16] The deceased's response a minute later at 11.24am was *'Thanks Bakes Boet'.*

[17] The reference to *'the bond'* in the WhatsApp message from Chris was to the mortgage bond registered over the immovable property in Harfield Village, Cape Town in which the applicant and deceased resided at the time of his death and which is registered in their names jointly. It was purchased in July 2016 for R1.6 million and a mortgage bond was registered in favour of SB Guarantee Company (Pty) Ltd for R750 000. According to Chris it is the amount still owing under this mortgage bond which is largely responsible for the shortfall in the deceased's estate.

[18] Prior to its purchase the property was rented by the applicant, and she and the deceased resided there together from time to time from 2007 until 2012 when he moved in with her permanently. He previously owned a flat in Kloof Street, Cape Town, where they also resided together from time to time during that 5 year period. This flat was bequeathed to the applicant in the deceased's 2011 will, but subsequently sold by him in 2016. The proceeds were applied to the purchase of the Harfield Village property with the bond securing the balance of the purchase price.

[19] The applicant maintains that *'bequeathing'* his undivided half share of the Harfield Village property to her in the 2018 document is a *'strong indicator'* that it was intended by the deceased to be his will, because it reflects his intention to ensure that she would be secured in their home if he died, whereas if the 2011 will is accepted then his share of the property devolves on Lauren as residual heir. As I understood it, there is no insurance policy in

place to settle the amount owing under the mortgage bond in the event of the death of either the applicant or the deceased.

[20] The crux of the applicant's case is furthermore found in the following paragraphs of her founding affidavit:

> *'210. Pete did not simply write his name, surname and identity number on the 2018 Will. He signed it too. His signature is a clear indication that Pete took ownership of the contents in the 2018 Will and intended it to be his final "will". Pete knew and understood the value of a signature on a document. During his 63 year life, Pete signed many documents (such as, reports, wills and contracts). Pete knew that his signature on the 2018 Will would mean that he consented to it and recorded that he regarded it as binding on himself.*
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> *211. As stated above, I knew Pete for more than 30 years. I knew him well enough to say confidently that if Pete did not intend the 2018 Will to be his will then he would not have signed it. Nor would he have carefully put the signed document in an envelope that he then placed into a holder which he kept in his briefcase that he stored safely in our kitchen cupboard where it could be found if he were to die.*
>
> *212. The fact that Pete did all this speaks volumes for its consistency with how I came to know Pete as a person, namely, he did this with a clear purpose in mind: he intended the 2018 Will to be his "will" if he died.*
>
> *213. This is the reason he chose to send a copy to Chris, an Attorney, who Pete knew as someone who understood the law and would be able to take the necessary steps to give effect to the 2018 Will even though Pete understood that the "updated Will … has not been legalized yet" by witnesses signing it.*
>
> *214. I verily believe that, although Pete was not schooled in law, he may well have been aware that the 2018 Will may be "legalized" later on by our courts if needs be…'*

[21] Years earlier, and during 1998, the deceased told Chris that he wished to appoint his nieces as his heirs. As they were still minors at the time, Chris suggested that he appoint Lizelle, failing whom their daughters, as they would in any event inherit from Lizelle if she were to predecease them. The deceased followed this advice, which he also considered to be appropriate given the role that his sister had played in his life.

[22] Chris prepared a will for the deceased to this effect, which he sent to him for consideration. The deceased signed it in Cape Town but returned it to Chris unwitnessed and undated. A copy of this document is annexed to the answering affidavit. Chris telephoned the deceased and informed him that a will that is not signed before 2 independent and competent witnesses is not valid, and that he should therefore re-sign it on his visit to Port Elizabeth for the Christmas holidays, which were imminent. The deceased duly did so on 7 January 1999 before 2 independent and competent witnesses, namely Jessie McMorland and Therese Lightfoot, to whom he was personally known. A copy of the 1999 will is also annexed to the answering affidavit together with confirmatory affidavits from the 2 witnesses concerned. Chris states that the deceased was thus fully aware of the requirement that a will, in order to be valid, had of necessity to be signed before 2 witnesses.

[23] During 2011 the deceased discussed with Chris his wish to leave the Kloof Street flat to the applicant, indicating that he had already spoken about it with her. He also wanted to leave his musical instruments to his friend, Keith Cattell, and the rest of his estate to Lauren, including the Bushmans River

property, which he had by then acquired.[4] Again Chris prepared a will for the deceased in accordance with his wishes. The deceased thereafter accompanied the family on holiday to Botswana in October 2011, and on their return to Port Elizabeth, Chris arranged for the deceased to sign the will before 2 witnesses to whom he was personally known. This is the 2011 will.

[24] According to Chris the deceased called him a few days before his scheduled 2018 surgery. He told Chris that he was having thoughts about a proposed update to his will. He said that he would send Chris this update via WhatsApp. Chris cannot recall the precise exchange, but states that it was clear to him from their discussion that the purpose in sending the 2018 document to him was, once again, to obtain input and advice and to assist the deceased in finalising it. Chris confirmed that he would look at the document and thereafter revert with advice. The applicant is unable to dispute that the conversation took place although she claims that, if it had occurred, it would reasonably have been expected of the deceased to refer to it in the message he later sent.

[25] The subsequent WhatsApp exchange on 7 October 2018 was the product of that discussion. The reason why Chris raised the bond issue was because he was aware of its existence, and the deceased had previously mentioned that the outstanding indebtedness was sizeable. Chris states he was also aware that there were no substantial or realisable assets in the deceased's estate other than the Harfield Village property. He therefore considered it

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[4] Chris and Lauren tragically lost their elder daughter (Kerri-Lee) in 2003.

important that, if the deceased's half share was to be left to the applicant, the bond indebtedness be appropriately addressed, ideally without having to dispose of the property.

[26] In this regard it should be mentioned that the applicant made much of the disputed value of the Bushmans River property which is referred to in the 2018 document. In my view, nothing turns on this, given that in the same document it is *'bequeathed'* to Lauren and would therefore in any event not affect the *'bequest'* to the applicant of the deceased's half share of the Harfield Village property. Further, and while it is so that the estate inventory signed by Lauren reflects a motor vehicle with a value of R200 000, this too was *'bequeathed'* to the applicant in the 2018 document, and cash in bank accounts and the like totalling R365 856 is not mentioned in that document at all. In any event, and as is apparent from the applicant's replying affidavit, she subsequently had no regard to the vehicle or cash when contending that *'…but for the undervaluation of* [the Bushmans River] *property, there would be no shortfall'.*[5] This therefore does not advance the applicant's case, but rather lends credence to Chris' version that the bond issue would need to be appropriately addressed.

[27] According to Chris, at no stage did the deceased indicate to him that the 2018 document was intended to be his will. Moreover, despite the deceased's prior knowledge of the witnessing requirement, and the applicant's own version that it was drafted over a period of days, the

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[5] At para 170.

deceased took no steps to have it witnessed either. Chris disputes the applicant's claim that the deceased did not have *'the luxury of time'* in having the document witnessed, pointing out that on the evening of 5 October 2018 the deceased even met Lauren for dinner at a restaurant (at which the applicant herself was not present).

[28] The last interaction which Chris had with the deceased was a telephone conversation between them (and Lizelle) on the morning of his admission to hospital on 7 October 2018, in which the deceased was optimistic that the surgery would be a success, and was looking forward to spending Christmas with them again at Bushmans River. Although the applicant concedes that the deceased was hopeful, she maintains that he made no plans for the forthcoming Christmas holiday due to the uncertainty about the success of the surgery.

[29] The nub of the respondents' opposition may be found in the following paragraph in the answering affidavit:

> *'138. I do not dispute that the 2018 document sets out Pete's* "thoughts regarding an updated Will" *and, consequently, that the 2018 document may in certain respects align with his intentions regarding the disposal of his assets on his death. Importantly, however, the WhatsApp exchange to which I have already referred (annexure FA20) makes it clear that the 2018 document was not his final will and was not intended to be. It was a preliminary document that was subject to my advice and input and to subsequent finalisation.'*

**Discussion**

[30] Section 2(3) of the Act provides as follows:

> *'(3) 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 No. 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).'*

[31] Section 2A(c) of the Act reads as follows:

> *'**2A. Power of court to declare a will to be revoked.**---If a court is satisfied that a testator has--- …*
>
> *(c) drafted another document or before his death caused such document to be drafted, by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked.'*

[32] The purpose of s 2(3) is to empower courts:

> *'… to validate a document that would otherwise not pass muster as a will due to a technical flaw in its attestation… to avoid thwarting the lawful wishes of the deceased would-be testator.'* [6]

[33] The court must be satisfied on a balance of probabilities that the deceased intended it to be his or her will.[7] With reference to Supreme Court of Appeal

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[6] *Grobler v Master of the High Court and Others* (645/2018) [2019] ZASCA 119 (23 September 2019) at para [13].

[7] *Grobler* (*supra*) at para [17].

authority[8] the test was described by a full court of this division in *Westerhuis and Another v Westerhuis and Others*[9] as follows:

> *'[50] The Supreme Court of Appeal has stated repeatedly that, when applying s2(3), the real question is whether the deceased intended the document (or any amendment) thereto to be her will. And so, the court is required primarily to ascertain whether at the time of drafting or executing the document, or any amendment thereto, as the case may be, the necessary intention on the part of the testator has been established. Such an enquiry entails an examination of the document in the context of the surrounding facts and circumstances and the party so alleging must show unequivocally that the intention existed concurrently with the execution or drafting of the document…'*[10]

[34] A helpful exposition of the approach to be adopted is to be found in *Letsekga v The Master and Others*[11] where Navsa J (as he then was) stated as follows:

> *'In* Ex parte Maurice *1995 (2) SA 713 (C) Selikowitz J, in dealing with s 2(3) of the Act, says the following at 716E-F:*
>
> *"In my view, s2(3) requires that the document in question must have been intended by the testator to be his/her will. A document which was intended to convey information about what a testator wishes to have included or has already included in his/her will does not suffice. Written instructions to an attorney or other adviser so as to enable the recipient to draft the testator's will are not intended by such testator to constitute his/her will albeit that they record the author's intended testamentary dispositions…"*
>
> *I am in respectful agreement with this interpretation of s 2(3) of the Act…*

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8 *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA) at para [16]; *De Reszke v Marais and Others* 2006 (2) SA 227 (SCA) at para [12].

9 (A276/2017) [2018] ZAWCHC 84 (27 June 2018) at para [50].

10 I do not understand the full court's reference to *'unequivocally'* to set a standard of proof higher than the usual civil standard as set out in *Grobler* (*supra*).

11 1995 (4) SA 731 (WLD) at 735C-G which was referred to with approval in *Grobler* (*supra*).

*The wording of s 2(3) of the Act is clear: the document, whether it purports to be a will or an amendment of a will, must have been intended to be the will or the amendment, as the case may be, ie the testator must have intended the particular document to constitute his final instruction with regard to the disposal of his estate.'*

[Emphasis supplied].

[35] By way of further elaboration, it was held by Thring J (with whom Friedman JP concurred) in *Anderson and Wagener NNO and Another v The Master and Others*[12] as follows:

*'To me the words of s 2(3) of the Act are clear. The provisions of the subsection apply only to certain documents. To come within the ambit of the subsection the document concerned, be it a will or an amendment of a will, must have been drafted or executed by the person concerned with a certain intention. That intention must have been that the document should itself constitute his will or an amendment of his will, as the case may be. An instruction by a testator to his attorney or other adviser to draft or prepare a will or an amendment of a will along certain lines or in certain terms, no matter how precisely defined, is not written with the intention required by the subsection, and consequently cannot be brought within its terms. The difference between a document which is intended by its maker to be his will, or an amendment of his will, on the one hand, and an instruction by him to another person to draw a will or an amendment to a will, is neither merely technical nor insubstantial: in my view it is fundamental. In the former case, the maker of the document intends it to constitute the final expression of his wishes as regards the disposal of his estate. It is not subject to change, save, perhaps, by means of a subsequent and entirely fresh and separate amendment or codicil. In the latter case, the maker of the document does not vest it with the same intention of finality: he anticipates that another document will, in due course, be prepared and placed before him for his consideration*

[12] 1996 (3) SA 779 (CPD) at 784G-785H.

*and approval, which he may or may not sign or alter, as he may wish when it is presented to him.*

*Any other interpretation of the subsection would seem to me to be unjustified, and would open the door to fraud and abuse…*

*…Once it is satisfied that the document concerned meets the requirements of the subsection, the Court "shall" order the Master to accept it…*

*These considerations all lead me to conclude that s 2(3) of the Act must be strictly, rather than liberally, interpreted. Whilst the pursuit of equity (sometimes erroneously confused by laymen with "justice") and the elimination of hardships are consummations devoutly to be wished, their attainment can often not be justified if it entails the sacrifice of certainty and legal principle. I do not think that the Legislature had such a sacrifice in mind when it placed s 2(3) on the statute book. I find myself in respectful agreement with what Selikowitz J said at 716I-717B in* Maurice's *case* supra*, which I have already set out above.'*

[36] A strict approach to interpretation in relation to the intention requirement was confirmed by Brand J (as he then was) in *Ndebele and Others NNO v The Master and Another*[13] where the learned Judge stated that:

*'Thring J prescribes a strict approach with reference to the third requirement – i.e. with regard to the testator's intention. In fact, as far as I am aware, no-one has thus far suggested that there should be a flexible approach to the issue of intention…'*

[37] The question arises whether the principles of interpretation enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[14] have altered the established approach of a strict interpretation in relation to the intention requirement. *Endumeni* was handed down on 16 March 2012. The two

[13] 2001 (2) SA 102 (CPD) at para [27].
[14] 2012 (4) SA 593 (SCA).

decisions to which I was referred in argument delivered after *Endumeni*, and which dealt more specifically with the intention of the deceased, are *Westerhuis* and *Osman and Others v Nana NO and Another.*[15]

[38] In *Westerhuis*, as set out above, it was stated that the party seeking to establish the necessary intention on the part of the testator must show unequivocally (my emphasis) that it existed concurrently with the drafting or execution of the document. This appears to me to support the strict interpretation approach. In *Osman* no reference was made to the strict interpretation requirement. And in *Grobler* (also handed down after *Endumeni*) it was not necessary to deal with this aspect because the case was decided on a different basis.

[39] Moreover, the applicant has not suggested that the strict interpretation approach is incorrect, but has limited her reliance on *Endumeni* to support the now well-established contextual approach in achieving that interpretation. Presumably for this reason, much emphasis was placed by her on the wording of the 2018 document which *Endumeni* made clear is that the *'…inevitable point of departure is the language… itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document'*, which is an objective, and not a subjective, process.[16]

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[15] (37220/2018) [2019] ZAGPJHC 161 (3 May 2019). *Cf Taylor and Others v Taylor and Others* 2012 (3) SA 219 (ECP) at para [6], a decision handed down on 15 November 2011 and thus pre-*Endumeni.*

[16] *Endumeni* at para [18].

[40] Although each case must be decided on its own particular facts, I have found guidance for present purposes in the decision of the Supreme Court of Appeal in *Van Wetten and Another v Bosch and Others*.[17] In that case it was accepted that letters by the deceased which accompanied the contested will threw light on his intention in composing it. It was also found 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.

[41] In that case the words used by the deceased in the contested will included *'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'.* In addition, the deceased was contemplating suicide when he drafted the document, and he handed it to a friend (and not his attorney for drafting purposes) for safekeeping, to be opened only in the event of something happening to him or him changing his mind. 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 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.'*

[17] 2004 (1) SA 348 (SCA) especially at paras [9], [21], [25] and [26].

[42] In *Van Wetten* it was also held 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'.*[18]

[43] Having considered the aforementioned authorities, my view is that the further reliance placed by the applicant on the interpretive approach considered in *KPMG Chartered Accountants (SA) v Securefin and Another*[19] is misplaced. That decision had nothing to do with s 2(3) of the Act. It dealt with the parol evidence rule.

[44] The applicant submitted that in *Schnetler NO v Die Meester en Andere*[20] the Court rejected a similar argument to that raised by the respondents. However this submission overlooks the fact focused nature of the enquiry. The only similarities to the instant matter were that the document (also written in the deceased's handwriting and not signed by witnesses) was signed by him at the end of the document; and those to whom *'bequests'* were made were identified.

[45] The differences were that the document comprehensively set out the deceased's assets, specifically named his children but made no *'bequests'* to them (he had a poor relationship with them and stated during his lifetime that he would disinherit them), made stipulations about his funeral arrangements and stated further that it was his *'last will'*. The document was also the sole memorial of the deceased's intention. It was found in a sealed envelope in

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[18] At para [16].
[19] 2009 (4) SA 399 (SCA) at paras [38] and [39].
[20] 1999 (4) SA 1250 (C).

his home after his death, was unaccompanied by any other instruction of whatsoever nature, and there was no information about any previous wills drawn up or executed by him.

[46] It is against this background that I now consider the facts in the present case in order to determine whether the deceased intended the 2018 document to be his *'final will and testament'*,[21] i.e. whether that document constitutes a *'fixed and final expression'*[22] of the intention to dispose of his property on death. In this regard it is necessary to bear in mind that it is not the applicant's case that the 2018 document was intended to be an amendment to the 2011 will. She has pinned her colours firmly to the mast of the 2018 document being the deceased's will and for this reason has sought an order declaring that it revoked the 2011 will in its entirety.

[47] The objective facts reveal the following. The deceased was an educated man who was meticulous in the planning of both his work and personal affairs. He was well aware that in order for a will to be properly executed, it was necessary for him to sign it in the presence of two witnesses. This he had done on no less than two previous occasions. Furthermore, when he executed both the 1999 and 2011 wills, he devoted considerable thought to what they should contain, and on each occasion discussed his intentions with Chris, who subsequently drafted them in accordance with his final instructions.

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[21] *Van Vuuren and Another v Master of the High Court and Others* (37901/2014) [2015] ZAGPPHC 67 (3 March 2015).
[22] *Osman* (*supra*) at para [23].

[48] He knew, by the latest, on 3 October 2018 (and in all probability earlier) that his scheduled surgery could just as likely be life-saving as it could trigger a death causing event. He was undoubtedly under an enormous amount of stress but, as the facts demonstrate, he nonetheless followed the same *modus operandi* as he had in respect of both the 1999 and 2011 wills.

[49] The deceased contacted Chris and told him that he was thinking about a proposed update to his will. This undisputed fact alone is a strong indicator that he was considering, at best, an amendment(s) to the 2011 will, and not that he intended to revoke it in its entirety. This is supported by the facts that nowhere in the 2018 document did he nominate an executor/trix and nor were all of his assets (i.e. cash in bank accounts) dealt with. Chris told him that he would look at the proposed update and revert with advice thereon.

[50] The words *'latest updated will'* on the 2018 document cannot be viewed in isolation. The deceased prepared the document, after his discussion with Chris, over a few days (indicating, yet again, that he gave considerable thought to this proposed update). The applicant contends that if Chris is to be believed then she would have expected the deceased to specifically refer to their conversation in his first WhatsApp message on 7 October 2018. However this contention is not supported by the contents of that message. Nor is it supported by the message from Chris in response.

[51] If this was something out of the blue, Chris would surely have asked the deceased why he had sent him *'some thoughts regarding an updated Will which has not been legalized yet'.* Nor would Chris have responded *'…will*

*finalise with you over Christmas – will also need to decide how you will deal with the bond… thinking of you tomorrow – sure all will be well'.* And if the deceased had intended the 2018 document to be his final testamentary instruction, it is difficult to understand why instead of immediately pointing this out in response, he simply conveyed his thanks to Chris.

[52] To my mind, the deceased's signature at the foot of the 2018 document, viewed in proper context, was nothing more than a confirmation of his *'thoughts'*. The applicant's belief that the deceased may have been aware that the 2018 document could be legalised by the courts in the event of his death is not supported by the historical facts and is in any event subjective. Even accepting the applicant's evidence that on 6 October 2018 the deceased told her that he was writing his will, and asked for certain information for this purpose, it cannot be overlooked that he only completed the document on the following morning, and almost immediately thereafter took a photograph and sent it to Chris with his accompanying message. And if the deceased had already decided that if he survived the surgery he would in any event not be able to visit Chris at Christmas, this too would surely have been pointed out by him when Chris responded in the manner that he did.

[53] The applicant also made much of her nomination as sole beneficiary of the deceased's pension fund on 4 October 2018, maintaining that its incorporation by reference in the 2018 document is a further indicator that it was intended to be his final will. But the simple fact of the matter is that,

given her nomination, the proceeds would be paid directly to her, and would not fall into the deceased's estate. Moreover, given the deceased's discussion with Chris, he may well have considered it important that Chris knew what he planned to do with the proceeds of his pension fund, particularly in light of the sizeable bond liability.

[54] Accordingly, an examination of the document itself and of the document in the context of the surrounding circumstances, leads me to conclude that it was a recordal of the deceased's testamentary intentions, and not what he intended to be his will for purposes of s 2(3). It follows that s 2A(c) need not be considered. It also follows that the application must fail.

**Costs**

[55] As alluded to earlier, the notice of motion was couched in far-reaching terms, and some prayers (along with two unmeritorious points *in limine*) were only abandoned when the matter was argued. Moreover the applicant's affidavits contained not only a number of unfortunate *ad hominem* attacks on the respondents, but also an attack on the validity of the 2011 will itself, separate from the issue of its purported revocation. Given the tragic circumstances of this case, I might otherwise have been inclined to make no order as to costs. However, given the aforegoing, and the wasted time and expense to which the respondents were put as a result, it is my view that the appropriate order is the one that follows.

[56] **I accordingly make the following order:**

**1. The application is dismissed and the interim interdict granted by agreement between the parties on 2 July 2019 is discharged.**

**2. The applicant shall bear the costs of both the application and the conditional counter-application on the scale as between party and party as taxed or agreed, as well as any reserved costs orders.**

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**J I CLOETE**