

# SUMMARY OF THE JUDGMENT

## PROPERTY SALE HOLD-UP AS OWNER'S WILL CHALLENGED

**Young v Master of the High Court, Durban and Others (8502/2015)  
[2015] ZAKZDHC 65 (28 August 2015)**

*In this matter a surviving spouse brought an urgent application for an order acknowledging that a draft will attached to an e-mail from her late husband's financial advisor, should be accepted as his will and an executor appointed so that the property they sold, can be transferred promptly. The estate had run up substantial debt in the meantime. Lacking evidence that the document was drafted by the deceased or intended to be his will, could the court assist the spouse?*

*The Judgment can be viewed [here](#).*

### FACTS

Mr and Mrs Halliday married each other out of community of property on 4 February 2013. During early December 2013 Mr Halliday was diagnosed with cancer and passed away in April 2015.

Some 4½ years before his death Mr Halliday met with a financial planner, Mr Nazar, and instructed him to attend to his insurance, financial matters and succession of his business. At the same time, Mr Halliday also requested Mr Nazar to draft his will. Mr Nazar asked Mr Halliday to complete an instruction sheet setting out his directions concerning the content of the proposed will. Mr Nazar thereafter drafted a proposed will and sent it electronically to Mr Halliday as an attachment to a covering e-mail.

Mr Nazar stated that on numerous occasions thereafter he requested Mr Halliday to execute the document by printing it and signing it in the presence of two witnesses. Mr Halliday continually reassured Nazar that he would attend thereto, but this never transpired. According to Mrs Halliday, this was due to the rapid deterioration in Mr Halliday's health.

Neither the instruction sheet, nor the covering e-mail was placed before the court. There also was no evidence that Mr Halliday converted the proposed will into a hard copy format. It was therefore accepted that, during Mr Halliday's lifetime, the document existed only in electronic form as an e-mail attachment.

Mrs Halliday brought an urgent application to court to have the unsigned draft document declared the valid will of Mr Halliday and for the appointment of an executor. This was required in order to finalise an agreement of sale of immovable property owned jointly by Mr and Mrs Halliday, so as to relieve the deceased's estate financially.

**HELD:**

- The Wills Act sets down the formalities to execute a valid will. It requires that a will must be signed at the end thereof by the testator (or by some other person in his presence and by his direction), in the presence of two or more competent witnesses. If the will consists of more than one page, each page other than the last page must also be signed by the testator.
- Subsection 2(3) provides some relaxation of the strict validity requirements. It provides that 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 ... as a will, although it does not comply with all the formalities for the execution or amendment of wills ...".
- Sub-section 2(3) therefore requires proof that (i) the document concerned was drafted or executed by the deceased; and (ii) that it was intended by him to be his will.
- Our courts have held that the word "drafted" in the sub-section requires the personal drafting of the document by the deceased. (So, where a deceased had instructed a bank to draft a will, which the bank did using the deceased's instructions, but also added its own wording and standard clauses to the draft, the court held that it could not be said that the document was 'drafted' by the deceased.)
- In the present matter, the deceased's instruction sheet to Mr Nazar had not been placed before the court. Thus, apart from the deceased not being the actual draftsman of the document concerned, it had not been established that the document concerned accurately reflects the deceased's instructions to Mr Nazar.
- In the premises it could not be found that the deceased drafted the document concerned within the meaning of sub-section 2(3).
- In addition, with regard to the second requirement of sub-section 2(3), in the absence of the deceased's instruction sheet given to Mr Nazar, it could not be said that the document concerned was intended by the deceased to be his will. It was insufficient

merely to allege, as Mr Nazar did, that after he had sent the e-mail to Mr Halliday attaching the will, the deceased reassured him that he would attend thereto.

The application accordingly failed.

#### CONTACT US

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