

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 3634/15
Date Heard: 22/09/16
Date Delivered: 14/02/17

In the matter between:

ANNIE ELEEN HELMIE First Applicant

DAVID BEKAARDT Second Applicant

and

LINDA RUITERS First Respondent

MAGDALENE MARY UITHALER Second Respondent

MONA BENTLEY Third Respondent

NADINE BEKAARDT Fourth Respondent

HANNAH SMITH Fifth Respondent

MASTER OF THE HIGH COURT, PORT ELIZABETH Sixth Respondent

ANNE SWANEPOEL Seventh Respondent

JUDGMENT

MALUSI J

[1] This is an application for a document to be declared the last will and testament of the late David Bekaardt (the deceased) who died aged 67 years old. The application is opposed by the first to the fifth respondents.

Whenever reference is made to respondents in this judgment it must be understood to refer only to first to fifth respondents as the sixth and seventh respondents did not participate in the matter.

[2] It is necessary to provide a brief background for a better appreciation of the issues. The first applicant was a girlfriend of the deceased during the last few years of his life. The second applicant was a nephew of the deceased whom the latter raised as if the former were his own child.

[3] The first, second and third respondents are the biological offspring of the deceased. The fourth respondent is a child of the third respondent and a beneficiary in the purported will. The fifth respondent is a child of the second applicant and a beneficiary in the purported will. The sixth respondent is the Master. The seventh respondent is the nominated executrix in the purported will and was once a practising attorney.

[4] The deceased lived and worked in Benoni, Gauteng. After his retirement he relocated to Port Elizabeth during the year 2008. Thereafter he started a relationship with the first applicant. Towards the end of 2009 or early 2010 the first applicant decamped to the deceased residence with her three children.

[5] Since his thirties the deceased had been diagnosed with diabetes. During December 2013 he suffered kidney failure which required that he undergo dialysis. His health further deteriorated which necessitated treatment in various hospitals.

[6] The first applicant avers that between February 2014 and March 2014 the deceased drafted a will in his own handwriting. The draft will was given to the seventh respondent to draw a valid will as she was then a practising attorney. The will drawn by the seventh respondent was provided to the deceased. He amended the typed will in his own handwriting and signed it. He returned it to the seventh respondent presumably for the amendments to be effected. The first respondent avers that the amended draft will is the final expression of the deceased wishes and he intended it to be his will.

[7] The deceased was apparently so seriously ill he could not sign the final will drawn by the seventh respondent which had been sent to him between September 2014 and November 2014. The deceased succumbed to his illness on 14 December 2014 without having signed the final will.

[8] The first applicant is not in possession of the original amended draft will. Both applicants are applying that a copy be declared to be the last will. The reason proffered for the absence of the original is that the seventh respondent has not responded to any form of communication

from the applicant's attorney. This is apparently due to the seventh respondent having suffered the ignominy of being struck off the roll of attorneys.

[9] The respondents vigorously dispute the authenticity of the purported will. They raised the preliminary point that there has been non joinder of an heir in the estate. They pointed out numerous anomalies which they contend indicate the purported will is a forgery.

[10] It is trite that any person who has a direct and substantial interest in any order the Court might make should be joined as a party.¹ It is generally accepted what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the order of the Court and not merely a financial interest.²

[11] Ms Beneke, who appeared for the respondents, submitted that the deceased was survived by descendants only. The deceased late son, Claude had a child, Gryphone who is an intestate heir in the deceased estate. She submitted that the deceased grandson should have been joined as a party and there has been material non-joinder. She contends that the application should be dismissed with costs due to this non-joinder.

¹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657.

² *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (CPD) at 415 E-H and the authorities cited therein.

[12] I do not agree. Every heir of a deceased person has a separate right to bring action to challenge the validity of her/his will. Any applicant who does not cite an intestate heir opens him/herself up to the expense and inconvenience of a multiplicity of applications. The ratio was explained by Caney AJ in the following terms:

"But I do not think that it by any means follows that every intestate heir must be joined in an action to challenge the will, notwithstanding, that a judgment against one of them who sues to attack it, would not debar another of them from bringing action for the same relief on the same grounds".³

[13] Section 2 (3) of the Wills Act 7 of 1953, "the Act" (as inserted in the Act by section 3 (g) of Act 43 of 1992) 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 Estate Act, 1965 (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)".

³Angath Mothari NO & Others 1954 (4) SA 285 N at 289 G.

[14] It is settled law that two requirements need to be satisfied before a document may be accepted as a will of the deceased as provided in the Act:

- (a) The document must have been drafted or executed by a person who has subsequently died.
- (b) The document must have been intended by the deceased to have been his or her will.⁴

[15] The provisions of section 2 (3) are peremptory once the jurisdictional requirements have been satisfied. This means the Court has no discretion whether or not to grant an order as envisaged once the requirements are satisfied.⁵

[16] The issue for decision is whether the deceased is the author of the contested document. It may be convenient to start that enquiry by examining the draft on which the contested document is based.

[17] The purported draft is a four page document in manuscript. The first page is written in block letters. It is a list of names of some of the deceased relatives. The last three pages are written in cursive. The first applicant makes the bald allegation that the deceased wrote it "*in his own hand*".

⁴ *Van Weften & Another v Bosch & Others* 2004 (1) SA 348 (SCA) at paragraph 14; *Van de Merwe v Master* [2011] 1 ALL SA 298 (SCA) at paragraph 15; *Ex parte Maurice* 1995 (2) SA 713 (C) at 713G.

⁵ *Van de Merwe ibid* at paragraph 13.

[18] The respondents aver that two different people must have written the draft. None of these two people was the deceased as either handwriting is different from that of the known handwriting of the deceased. Various specimens of documents written by the deceased were annexed to the answering affidavit. The respondents point out that the deceased was well educated and would not refer to himself alternating between first and third person. Likewise the deceased would never misspell his own name.

[19] I am unable to accept that the deceased was the author of the draft. The applicants have not explained the strikingly different handwriting on the draft. Either handwriting appears to be different from the specimen of the deceased known handwriting provided by the respondents.

[20] The first applicant makes the bald allegation that the draft was written sometime in a period of a month during 2014. She does not state that she personally saw the deceased writing the draft. This is crucial in light of the fact that the draft is undated. She does not allege that she is familiar with the deceased handwriting and vouch that all the handwriting in the draft belongs to the deceased. The draft has no signature or identifying mark that distinguished it as that of the deceased.

[21] The purported will suffers from the same defects as the draft. The purported will is signed on the last page under the space provided for witnesses. That is the only signature on the document. That signature is strikingly different from the known signature of the deceased. The same is true of the handwriting that effected amendments and additions on the purported will.

[22] I find it strange that the amended will provides for an “executrix” to sign on the last page. If the deceased directly instructed the seventh respondent as alleged by the first applicant it is odd the latter used the female description for the former who was a male. There could be an innocent explanation for this but none has been provided. It only compounds the problems with the purported will.

[23] The first applicant has not disclosed whether she was present when the deceased allegedly amended the will. She contends herself with the bald allegation that the deceased amended the purported will *“in his own writing, signed it and returned it to the seventh respondent”*. The statement is unexplained and unsubstantiated.

[24] The striking feature of the first applicant’s affidavit is her failure to state who had made the copy of the purported will; whether it is a true copy of the original without alteration by anyone; how did she obtain the

copy. The last issue arises from her allegation that the deceased himself returned the purported will to the seventh respondent.

[25] In my view the probability of the purported will being a forgery is too great for it to be accepted as the will of the deceased. The applicants have failed to satisfy the first requirement.

[26] In the result the following order is made.

(a) The application is dismissed with costs.

T MALUSI
Judge of the High Court

Beshe J: I agree.

NG BESHE
Judge of the High Court

Appearances

On behalf of the Applicants:	First applicant in person
On behalf of the Respondents:	Adv M Beneke Port Elizabeth
Instructed by:	Gregory Van Vught Attorneys Port Elizabeth
Date Heard:	22 September 2016
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