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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No:017606/2023

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: NO |

19 February 2024

DATE

.....

SIGNATURE

In the matter between:

MAHLAPE MOHANOE N.O.

1st Applicant

SIBONGILE NTANDO SKELE

2nd Applicant

NKOSINATHI SIPHIWE MASHININI

3rd Applicant

ZANELE BUSISIWE MASHININI

4th Applicant

RACHEL SIBONGILE GAMA

5th Applicant

And

**THE MASTER OF THE HIGH COURT, 1st Respondent
JOHANNESBURG.**

BUSISIWE SHARON MASHININI

2nd Respondent

NELISIWE ORA HLATSWAYO

3rd Respondent

SIPHIWE MADLALA

4th Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicants launched an application in terms of section 2(3) of the Wills Act 7 of 1953 (*Wills Act*) for an order directing the Master of the High Court, first respondent (*the Master*) to accept a typed Will as the last Will and Testament of the Late Themba Solomon Mashinini (*Late Mashinini/deceased*). Two Wills, one typed and the other one handwritten, both undated, were discovered after the passing of the Late Mashinini and were submitted to the Master who rejected them as they were not signed by witnesses.

[2] The distinction between the two Wills is that in the typed version the deceased granted a usufruct in respect of the deceased's immovable property, *to wit*, 1[...] V[...] W[...] L[...] D..., P[...] D..., P..., B... (*Property*) in favour of the deceased's second respondent whereas in the handwritten version the immovable property is awarded to the second respondent.

[3] The respondents are opposing the application and have launched a counter application praying for, *inter alia*, an order directing the first respondent to accept the handwritten Will. The applicants oppose the counter application and has raised points *in limine*.

Background

[4] The deceased was married to the second respondent out of community of property without accrual on 11 June 2009. The marriage was dissolved by the passing of the deceased on 17 August 2022. This marriage was not survived by children though the deceased had four children from his previous marriage and other three children who were born out of wedlock.

[5] At the time of passing the deceased was residing with the second respondent at the deceased property described above.

[6] The first applicant was appointed as the executrix pursuant to her nomination by the children of the deceased and the second respondent.

[7] In addition to order directing the Master to accept the typed Will the first applicant sought further orders, namely, interdicting the second respondent from obstructing the first applicant in discharging her duties as the executrix, ordering the auctioning of the property alternatively directing the second respondent to grant access to the property for the purpose of sale, alternatively further, ordering the body corporate and or trustees of P[...] D[...] to grant access to the auctioneers or estate agents access to the property for the purpose of selling it.

[8] The second respondent has in addition sought an order that the first applicant be removed as the executrix and be replaced by the second respondent.

Issues

[9] The issues for determination are, first, to consider points *in limine* raised in respect of the counter application. Secondly, an interdict against the second respondent from her obstructive conduct. Thirdly, removal and substitution of the first applicant as the executrix and lastly, the determination of whether a proper case has been made out for an order in terms of section 2(3) of the Wills Act.

Submissions and contentions by the parties.

Wills

[10] The first applicant contends that she has demonstrated in her papers that there was a clear intention on the part of the deceased to execute a Will and further that it must be deduced, so she argued, from the fact that the deceased

had children who should benefit from his estate including the property. To this end it is logical, she submitted, that the typed Will was intended to amend the provision in the handwritten Will that the second respondent should inherit the property and be amended to state that the property be bequeathed to his children subject to the second respondent's right to benefit as a usufructuary and no longer as the owner.

[11] The respondents' counsel contends that the signature on the typed version is not that of the deceased. The second respondent contends that the manuscript version of the Will should be accepted as it is written in the deceased's handwriting and was signed by him. She persisted that the deceased used to consistently ensure that his documents are properly signed and could not have just written his names when signing a Will. In contrast, so she argued further, the typed Will was not drafted by the deceased and does not contain the signature but just the names of the deceased. The names this could have been written by any other person but the deceased.

Obstruction by the second respondent

[12] The first applicant's counsel submitted that the second respondent has not been cooperating with the executrix in the administration of the estate. A request was made by the executrix to her to avail a list of the assets of the deceased but to no avail. She has been in possession of the deceased's motor vehicle, *to wit*, A200 Mercedes Benz (motor vehicle) and though she initially cooperated to have the motor vehicle sold she subsequently recanted on the arrangement for no cogent reason. The said motor vehicle is in arrears and Nedbank has been demanding payment.

[13] Further that at some stage, during a meeting to discuss the return of the motor vehicle, there was physical confrontation between the first applicant and the second respondent's children. The confrontation ended up in criminal charges being proffered against each other and culminated in the arrest of the first applicant and her detention for six hours. The charges against the first

applicant were however withdrawn by the prosecution at Palm Ridge Court, Johannesburg.

[14] The counsel further stated that another meeting was convened with the second respondent where she was informed that the property was in arrears in relation to bond repayments, levies and taxes. The first applicant suggested that the property should be rented out so that funds would be procured through rentals for the purposes of settling the levies and rates.

[15] The counsel for the respondent contended, in retort, that the reliefs sought by the applicants are vague and wide with far reaching consequences. With regard to the A200 the counsel for the second respondent submitted that he advised the second respondent to co-operate with the executrix, and the vehicle would be handed over. And since she has paid the balance of the money, which was owing to the bank, she would have to settle to lodge a claim with the executrix.

[16] In addition, she has been residing on the property together with the deceased who had other businesses, including a shopping centre and rental accommodation, from which she presumed that payment for the bond and other expenses associated with the estate, especially the property, will be catered for. In view of the executrix's failure to properly manage the businesses and collect income to pay for the expenses she is then, so the second respondent contended, disqualified to act as an executrix.

[17] The second respondent concedes that she consented to the first applicant's appointment as an executrix which was as a result of the pressure from the deceased's children. This was also after being informed by the first applicant that since the estate is in excess of R250 000,00 the Master would insist that an attorney should be appointed as the executor/executrix. Unfortunately, the relationship has now soured, and the first applicant fails to give her any update and only communicate with the children.

[18] Further that the first applicant has conducted herself unprofessionally by assaulting her child and broke her hand which landed up in her being hospitalised for 4 days. A complaint against the first applicant was subsequently lodged and is pending with the Legal Profession Council.

[19] She further contends that to the extent that the first applicant is taking the side of the children through this proceedings second respondent's interest will be prejudiced as she will be restricted to only benefit as a usufructuary. The first applicant has entered the fray and is conflicted. She would not be impartial as it is expected of an executrix. She must therefore be excused as the executrix.

Sale of the property.

[20] The first applicant contends that the property is in arrears with regards to the loan account with standard bank and she is concerned that foreclosure proceedings may ensue at any time. The estate has no funds and is unable to keep up with monthly instalments. Further that the second respondent has not cooperated with valuer who was instructed to conduct valuation for the property to be placed in the market for sale. To this end an order is requested to allow access to the property and also to order the body Corporate and/or the Trustees of Piazza Decampo to grant access to the auctioneer and or estate agents to the property to facilitate the sale.

[21] The second respondent in return contends that the first applicant is malicious as there are other properties which may be sold to cater for the expenses associated with the property. In addition, that she appears to be pursuing an agenda to ensure that the second respondent becomes homeless.

Counter application

[22] The second respondent emphasised in her counter application that the first applicant is biased against her and is also conflicted. Further that she is in the process of selling the property being occupied by second respondent and has left out deceased's other properties which are not occupied. In the premises

the first applicant should be removed as an executrix in terms of section 54 of the Administration of Estates Act (*Estates Act*).

[23] The first applicant in retort raised few arguments in response to the counter application and contends as set out below.

[24] First, that the counter application is irregular as it was not served separately from the answering affidavit as contemplated in rules 18 and 24 of the Uniform Rules of Court.

[25] Secondly, the first applicant contends that there is a pending application launched by the second respondent with similar prayers, hence raises point *in limine* of *lis pendens*. The first applicant stated that the second respondent brought an urgent application for the same relief which was removed from the urgent roll for the second respondent to serve and file the replying affidavit which was never served. The said application was never withdrawn.

[26] Thirdly, that the second respondent has failed to apply for the condonation for the late filing of the answering affidavit which was served outside the prescribed time frames. The answering affidavit should have been served on 3 April 2023 but was served on 13 April 2023 which is six days after the expiry of the *dies*.

[27] The applicants in reply on the merits contend that the second respondent cannot challenge the signature on the typed Will without evidence from an expert.

[28] Further that the businesses which are referred to by the second respondent are not generating any profit and some need, *inter alia*, structural maintenance. In addition, twelve rooms of the 34 are not habitable and rental generated from the remainder of the rooms is applied to the operational expenses including payments to the salaries of the employees.

[29] The businesses are heavily indebted, so the argument continued, and owes Eskom and City of Ekurhuleni in the sum of R439 880.69 and R106 640.00 respectively. The butchery which is operating on the deceased's property is owned by the deceased's son and the proceeds thereof '*...are not enough to keep the rates and electricity bills up to date*'.¹

[30] Pertaining to the claim for the removal of the first applicant as executrix the first applicant contends that there is no evidence which buttress that the provisions of section 54 of the Act have been triggered. The said prayer should therefore be dismissed.

Legal principles and analysis

Points in limine

Condonation

[31] The respondent's answering affidavit was indeed served out of time and the respondent having failed to request condonation I am therefore ordinarily constrained not have regards to its contents. This point was not raised vociferously by the applicants. It however appears that the first applicant's replying affidavit was also served out time with no request for condonation. The issue of lack of condonation in the respondents' papers was raised in the applicant's replying affidavit for which I must condone its late service prior considering the points raised therein. In the premises the replying affidavit is also besieged by the same shortcoming. Any further delay in adjudicating (by striking the affidavits off), this *lis* may unnecessarily burden the estate financially and it appears that the issues raised by the parties can be dealt with summarily without burdening another judge who may have to re-look into the matter later. The court held in *Melanie v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) that the issue of condonation is a discretionary issue for which the court would consider having regard to fairness to both parties.

Lis pendens

¹ See para 44 of the Applicant's Replying Affidavit at 009-11.

[32] The first applicant contends that there is a *lis* pending under case number 02080/2023 in terms of which the second respondent sought relief which is similar to the one sought in the counter application. Though the first applicant attached notice of removal of the said urgent application in her replying affidavit she failed to attach at least the notice of motion. (reflecting the prayers) issued for the urgent court. To this end relevant evidence (as set out in the urgent application) has not been presented to me to buttress the argument on *lis pendens*. The point *in limine* would then not be sustained in the absence of such evidence.

Rules 18 and 24 read with rule 6(5)

[33] It must be conceded that the draftmanship displayed in the papers does not meet the traditional standard of what would ordinarily be expected. The presentation of the counter application has indeed not complied with the letter of the rules as contended by the first applicant.

[34] The second respondent has also failed to react properly to the *points in limine* raised by the applicant. The respondents should have served a replying affidavit which will address non-compliance with the rules as raised by the applicants. Neither of the parties has applied for condonation of the late filing of their affidavits. The respondent sought to introduce new issues in the heads of argument, e.g. argument regarding dispute of fact.

[35] It must be emphasised that the rules are promulgated for a purpose and should not just be ignored for flimsy reasons or be waived generally to condone ineptitude. At the same time justice should not be denied to those members of the populace who placed their hopes in the hands of those who presented themselves to be better informed. The innocent parties should not be sacrificial lambs in the temple of perfunctory preparation of their cases by the legal representatives.

[36] I had regard for the possible prejudice to visit either of the parties relative to non-compliance with the rules and have found none. The applicants were able to sufficiently engage with the issues raised in the lopsided affidavit served on behalf of the respondent and to this end the point *in limine* is not sustained.

[37] I am alive to the fact that the proceedings before the high courts are ordinarily defined by the court. It is stated that '*the object of the rules is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves. Consequently, the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible. Further that 'Formalism in the application of the rules is not encouraged by the court.'*² In view of the assessments of the arguments advanced by the parties together with the outcome I arrived at I decided to proceed with the matter in the interest of justice despite the shortcomings.

Merits

Section 2(3) of the Wills Act

[38] Section 2(1)(a)(ii) of the Wills Act decrees that the Will must be signed in the presence of two witnesses. There is no motivation advanced by either of the parties with the necessary vigour as to why the non-compliance in this instance should be condoned. The rationale to have witnesses of the execution of the Will is, *inter alia*, that since the essence and interpretation of the Will is considered after the demise of the testator such witnesses would come forward to assist the court/parties in resolving any impasse whenever it lurks including even to confirm that indeed the testator is the person who executed the Will.

[39] The contention submitted by the first applicant's counsel that the typed Will was an amendment of the handwritten Will fails to take into cognisance that evidence and arguments presented fails to identify which of the Wills is the last one in time and would have amended the first one. In any event '*...the*

² HJ Erasmus '*Superior Court Practice*' at B1-5.

amendment is identified by the signatures of the witnesses in the presence of the testator and of each other...'.³ No such alleged amendment was witnessed.

[40] It is not a requirement that the Will should be dated but a date would ordinarily be apt in instances where there is more than one Will. The parties are not able to persuade me to accept any one Will and jettison the other. There is no evidence to buttress possible conclusion as to which will was executed last. The contentions by the parties regarding the contents of the Wills do not provide a good cue to address the problem of the date.

[41] Whilst there could be merits in the second respondent's argument that the handwritten Will present a clear evidence supporting the fact that it is the deceased's Will and was signed by him as compared to the writing of the names of testator in the typed Will, section 2(1)(a)(i) provides that a signature could be in different forms including an initial, a mark or even a thumb print.

[42] The SCA in *Global & Local Investments Advisors (Pty) Ltd*⁴ had regard to the definition of a signature and stated at para 10 that '*To sign*', *it explain is to affix ones' name to a writing or instrument, for the purpose of authenticating or executing it, or to give it effect as one's act; To attach a name or cause it to be attached to a writing by any of the known methods of impressing a name on paper; To affix a signature to ... To make a mark, as upon a documents, in token of knowledge, approval, acceptance, or obligation'. Signature is defined as 'the act of putting one's name at the end of an instrument to attest its validity; the name thus written... And whatever mark, symbol or device once may choose to employ as representative of himself is sufficient.'*⁵ (Underlining added).

[43] It therefore follows that signature for the purposes of executing a will cannot be limited to a stylistic representation of a person's name, surname and /or initials applied to a document.

³ See 'Wille's Principles of South African law', Francois du Bois, 9th edition, at p688.

⁴ *Global & Local Investments Advisors (Pty) Ltd v Nicklaus Ludick Fouche* (721/2019) [2019] ZASCA 08 (18 March 2020).

⁵ The case dealt with the signature in a context of contracts and has been referred to herein on the basis of parity of reasoning.

[44] The second respondent's contention that the Will should have drafted personally was considered by the SCA in *Van Witten*⁶ that a person who dictates the actual words of a document to be typed by another was deemed to be the person who drafted the document. The word 'draft' did not require that the person concerned physically had to write out the document in his own hand.

[45] Whilst it is acknowledged that freedom of testation is an enshrined right and should be protected and preserved at all times, it would be grave injustice if the decision to protect such a right is based on one exploiting his wits in the realm of conjecture which adventure one should generally be loath to venture in.

[46] In the premises I am not persuaded by either of the parties' case that the decision of the Master to reject the Wills is assailable and to this end the request that the Master should accept either of the Wills is bound to be refused.

Obstruction and Access for sale also estate agent

[47] In view of the outcome reached herein below there are no reasons which should detain me in addressing other issues. In any event the request that the body corporate and or Trustees of P[...] D[...] be ordered to allow access would not be competent without the said parties are cited in the papers.

Removal and substitution of the executrix.

[48] The second respondent contends that the first applicant is conflicted and bias. The executrix is ordinarily required to be impartial when dealing with the administration of the estate in the interest of all parties affected. Executrices have fiduciary responsibilities and are enjoined to act honestly, diligently and with fairness and compliance. In this instance the first applicant has entered the fray by approaching the court to request that one of the Wills should be accepted by the Master. It follows from this stance that the executrix is biased

⁶ *Van Witten and Another v Bosch and Others* [2003] JOL 11581 (SCA).

towards the beneficiaries who are favoured by the interpretation of the Will she espouses.

[49] It would have been proper that the beneficiaries to the Wills be the parties contesting the decision of the Master. The position of the first applicant is worsened by the fact that her own law firm is also involved in the litigation. The evidence is clear as to who are the likely beneficiaries of the first applicant's effort, namely, all other beneficiaries excluding the second respondent and more importantly her own law firm in terms of fees for the work done.

[50] It was emphasised in *Brimble-Hennath*⁷ that the basic principle that nobody can be judge in his/her own case, and that, because the executors had to take decisions about two competing claims which would influence their own interests, they were insurmountably conflicted. The court ordered their removal as executors under the provisions of section 54(1)(a)(v) of the Estates Act. The judge further referred in para 12 of the judgment to *Van Niekerk*⁸ and stated that *'in dealing with a claim an executor is expected to assess its merits on a fair consideration of the facts and its legal merits. Should an executor also be one of the creditors of the estate an unenviable situation will arise in which he or she will have to be judged of his or her own claim.'*

[51] In casu the executrix instructed her own law firm to represent herself as the executrix and will at the end have to consider the statement of fees rendered by her law firm submitted to herself as the executrix. She would therefore be creditor to the estate. This is certainly one being a judge in her own claim and is untenable.

[52] She has also presented a truncated position with regards to the businesses of the deceased. She mentioned in general terms that monies generated from all the businesses is spent on the operational expenses without referring to any documents in support of the monies received into the estate and proof of where the funds are being expended on. The allegations of the perilous

⁷ *Brimble-Hennath v Hannath and Others* (3239/2021) [2021] ZAWCHC 102 (25 May 2021).

⁸ *Van Niekerk v Van Niekerk and Another* 2011(2) SA 145 (KZP)

state of the business should not only be supported by the list of expenses but also provide details of the income generated. One also fails to fathom the *raison d'être* underpinning the executrix's stance of keeping businesses which appear not to be generating an income.

[53] The fact that there are charges and counter charges and referral to the LPC muddy the waters further and put the first applicant in a precarious position as to whether she will be able to be impartial and procure the support of all the interested parties to the estate including the beneficiaries.

[54] Section 54(1)(v) of the Estate Act provides for the removal of the executor by the court if '*... for any other reason the court is satisfied that it is undesirable that he should act as an executor of the estate concerned*'.⁹ It is certainly undesirable to be a creditor and the executrix and further putting the law in motion to advance a case which tends to prefer one beneficiary against the other.

[55] Whilst administration of estate may be considered simple and straight forward this case is an epitome that one should always enquire and expand knowledge acquired. The constitutional court in *Le Roux*¹⁰ quoted with approval the sentiments of Didcott J in *Waglines*¹¹ who '*... alluded to the duty to acquaint one with the area of law they were involved in and to seek advice to that effect if necessary*.'

Conclusion

[56] I therefore conclude that failure to properly comply with the rules cannot derail the effort to ensure that the parties access justice sooner. In addition, the first respondent's conduct in rejecting the Wills is not found wanting and the wishes by the parties that the first respondent be directed to accept any of the Wills are rejected.

⁹ Section 54(1)(a)(v) of the Administration of Estate Act 66 of 1965. See also *Gory v Kolver NO and Others* (CCT28/06) [2006] ZACC 20; 2007 (4) SA 97 (CC), at para 56.

¹⁰ *Le Roux and Ano v Johannes G Coetzee & Seuns and Another* [2023] ZACC 46, at para 60.

¹¹ *S v Waglines (Pty) Ltd* 1986 (4) SA 1135 (N).

Costs

[57] Both parties' legal representatives appear not to have prudently applied their wits and made effort to interrogate the strengths and weaknesses of their respective clients' cases. It is abundantly clear that both Wills are not compliant and either of the parties failed to put up strong arguments supported by authorities to lay the basis as to why one of the Wills should be presumed to have been executed after the other. The conceptualisation of their arguments fails to demonstrate any fidelity to the legal prescripts and procedural law. To this end neither of the parties should benefit from failing to exert themselves appropriately. There shall therefore be no costs awarded to either of the parties. In view of the conduct of the first applicant aggravated by the active role in the litigation about the Will it is my considered view that the estate should also not be liable for her legal costs.

[58] I grant the following order:

1. *The application and the counter application, subject to 2 below, are dismissed.*
2. *The first applicant is removed as an executrix and the Master of the High Court, Johannesburg is directed to appoint another executor/executrix.*
3. *Each party shall be liable for their respective legal costs and the Estate of the Late Mashinini shall be not liable for any party's legal costs.*

Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **19 February 2024**.

Date of hearing:

9 November 2023

Date of judgment:

19 February 2024

For the Applicants:

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