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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1503/2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

In the matter between:

YVONNE PRETORIUS

1st Applicant

RACHEL CHARLOTTE VAN NIEKERK

2nd Applicant

and

HILDA MALAN

1st Respondent

GERHARD ROBIN KOTZE N.O.

2nd Respondent

MASTER OF THE HIGH COURT BLOEMFONTEIN

3rd Respondent

ABSA BANK

4th Respondent

HEARD ON: 15 JUNE 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 14h30 on 31 July 2023

[1] The relief sought in this application is for the court to grant an order that the written will by the late Rossouw Gouws dated 17 March 2020 is declared "*to have been the intended last will and testament, of the deceased Rossouw Gouws*".

[2] The application is opposed by the first respondent who alleged that the deceased made a further will dated 28 April 2022 which revoked all previous wills.

[3] At the inception of the hearing, the applicant's counsel handed up a draft order entreating the court to refer the matter to oral evidence on the issue of whether the second will dated 28 April 2022 is the last will and testament of the deceased. This approach was vehemently opposed by the first respondent. The first respondent contended that the real question to be asked was whether the second will constituted a valid will and, if it did, whether it revoked all previous wills. According to the first respondent, the application should be dismissed with costs as the applicants should have instituted an action instead of approaching the court by way of motion.

[4] The applicants stated in the founding affidavit that the deceased died on 18 April 2022, having signed a last will and testament in the presence of two witnesses on/or about 17 March 2021. After the deceased's demise, the first respondent produced and presented a second will that was signed on 28 April 2022 whereupon the third respondent appointed the second respondent as the executor of the deceased estate. The applicants alleged that both the witnesses to the second will, Felicia Christine Blom and Martin Du Bryn, confirmed that it was not valid as they did not sign it in front of the deceased but separately. This will was placed in between other documents and presented to the deceased who signed it unaware that he was doing so.

[5] The first respondent alleged that the fourth respondent was appointed as the executor of the deceased estate on 13 October 2022. On realising that the estate was reported twice, the third respondent appointed the second respondent as the

executor as he was nominated as such in terms of the second will. The letters of executorship issued to the fourth respondent were revoked. According to the first respondent, the applicants have not sought an order declaring the second will to be invalid and void. It was, therefore, valid and revoked the previous will.

[6] The first respondent denied that she promised Mrs Blom and Mr Du Bryn a piece of land in return for signing the April 2022 will as witnesses. She admitted that the witnesses and their families stayed at her residence situated at 3[...] R[...], Bloemdal, Bloemfontein from January 22 until 24 December 2022. On 31 January 2023, the applicant's attorney addressed a letter to her attorneys accusing her of influencing the witnesses to sign the second will in the absence of the deceased on the promise of a piece of land. At her instance, the administration of the estate was stayed until 7 April 2023 pending the first applicant's application or summons, based on the first respondent's alleged fraud and/or the submission of a null and void will for administration purposes as per the letter dated 7 February 2023 addressed to the applicant's attorneys.¹ The application had not been launched at this stage and the applicants were aware of the dispute.²

[7] Before launching the application, the applicants stated that they investigated the validity of the second will, which led to the two witnesses deposing to affidavits that pronounced that the second will was signed by them in the presence of the deceased at his residence. The first respondent was also present. The deceased was of sound mind as he signed the will in their presence. The contents of the witnesses' affidavits were clearly contradictory to the version raised in the founding papers.³ According to the first respondent, the applicants were aware that they did not disclose all the relevant facts to the court and secondly were aware of the contradictory versions put up by Mrs Blom and Mr Du Bryn prior to the institution of the application.⁴ Furthermore, on 10 February 2023 the applicants were aware of the

¹ Page 104 of the Indexed Papers.

² Paragraph 35 of the Answering affidavit.

³ Paragraph 36.8 of the Answering Affidavit.

⁴ Paragraph 39 of the Answering Affidavit.

factual dispute regarding the validity of the second will as its validity was already denied in February 2023.⁵

[8] In their reply, the applicants stated that the failure to pursue the matter further was their consideration that it had come to an end as the witnesses confirmed in their affidavits in September 2022 that the second will was valid.⁶ Three months later, in December 2022, the witnesses contacted the first applicant voluntarily and advised her that they had lied in their affidavits. They did not sign the second will in front of the deceased.⁷ The applicants did not foresee a factual dispute as it did not lie with the affidavits deposed to by the witnesses. The issue for determination was a crisp one: if the witnesses signed voluntarily in the presence of the deceased, the April will was valid, if not, the March will was valid.⁸ Should the court be of the view that the matter cannot be determined on the papers, then the matter should be referred to oral evidence in the interests of sound administration of justice.⁹

[9] Rule 6(5)(g) of the Uniform Rules of Court provides that where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

[10] The subrule is of wide import and empowers the court, where an application cannot properly be decided on affidavit, to make such order as it deems fit with a view to ensuring a just and expeditious decision. It is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits as

⁵ Paragraph 40 of the Answering Affidavit.

⁶ Paragraph 14 of the Replying Affidavit.

⁷ Paragraphs 15 and 18 of the Replying Affidavit.

⁸ Paragraph 52 of the Replying Affidavit.

⁹ Paragraph 51 of the Replying Affidavit.

opposed to *viva voce* evidence.¹⁰ As a general rule an application for the hearing of oral evidence must be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal.

[11] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, motion procedures cannot be used to resolve factual issues because they are not designed to determine probabilities.¹¹ The court should adopt a process that is best calculated to ensure that justice is done with the least delay on the merits of the case.

[14] In this matter, the dispute of fact is neither massive nor complicated and its resolution is dependent upon the evidence of the two witnesses to the second will. It is therefore not advisable to dismiss the application but to refer it to oral evidence. This, in my view, ensures that justice is done with the least delay on the merits of the case. It would therefore be proper that the two witnesses to the second will be subpoenaed to appear and be examined and cross-examined as witnesses. I therefore conclude that the application to refer this matter to oral evidence on the disputed fact of the validity of the second will should be allowed.

[15] The first respondent presented a strong argument that she was entitled to an award for costs. I am however not inclined to grant such an order and am of the view that costs should stand over for later adjudication.

[16] For these reasons, the following order is made:

ORDER:

1. The matter is referred to oral evidence for the resolution of the dispute surrounding the validity of the will signed on 28 April 2022.

¹⁰ Room Hire CO (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162.

¹¹ National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) paras 26-27.

2. The following witnesses, Ms Felicia Christine Blom and Mr Martin du Bruyn, are ordered to personally appear in this court to be examined and cross-examined as witnesses on a date to be determined in terms of paragraph 3 below.

3. The applicants, in consultation with the first respondent, must arrange and apply to the registrar for a date of hearing of this matter and inform the two witnesses accordingly. Alternatively, the applicants must subpoena the said witnesses to appear to be examined and cross-examined as witnesses.

4. At the hearing of the oral evidence, the affidavits will stand as evidence.

5. Costs to stand over for later adjudication.

MHLAMBI, J

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