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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 5444/2019P

In the matter between:

PETER PILLAY

FIRST APPLICANT

SALOSHINI PILLAY

SECOND APPLICANT

And

HIMERSHAN GANGA N.O.

FIRST RESPONDENT

THE MASTER OF THE HIGH COURT

SECOND RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] On 9 September 2019 a rule *nisi* was granted returnable on 7 October 2019 where in the relief sought was that a document entitled Affidavit dated 20 March 2016 be declared the last Will and testament of the late Sivana Kaylene Ganga. It also contained relief that First Respondent, who was appointed as executor of the estate, does not continue with the winding up of the estate.

[2] It is not clear from the file why the matter was only heard on 25 February 2023 and what had expired between the granting of the rule *nisi* on 9 September 2019 until 7 February 2023. Counsel were also unable to enlighten me in this regard.

[3] The issue is whether the document which is entitled Affidavit and dated 20 March 2016 is to be declared the deceased's last Will and testament in terms of section 2(3) of the Wills Act 7 of 1953 (the Act). Section 2(3) stipulates as follows:

“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 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 the Estates Act, 1965 (Act 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).”

[4] In this case the Master of the High Court has filed a report setting out that the basic requirements for the operation of section 2(3) the Act that there is a document executed by a person who has died with the intention that the document must be the persons Will has been complied with and that in light of the decision of *ex parte* Williams in re Williams estate 2004 (4) SA 168 (T) that the order must be granted as prayed for in prayer A of the notice of motion as no prejudice would be suffered by the heirs should the order be granted.

[5] At the return date now the application is opposed by First Respondent who is the executor of the estate and also the late husband of the deceased.

[6] It is necessary in determining the issues herein to set out what is contained in the document which is termed Affidavit. The document annexure “SP4” at page 31 of the papers has a bold heading “Affidavit” and then reads as follows:

“This document is to confirm that we the parents **(Father) Mr Peter Pillay, Id No [....]** and **(Mother) Mrs Saloshini ID No [....]** will transfer our house which is situated in **[....] K [....] Rd Northdale Pietermaritzburg** which is registered at the deeds office as **Portion [....] of ERF [....]** to my **(daughter) Sivana Kaylene Govender ID No [....]** just for convenience. She is financially strong and would be able to get a bond to refurbish the same. However when a bond is taken on her name **(Sivana Kaylen Govender)** we the parents will be the bond payers if we the parents should fail in our obligation to pay towards the bond, This affidavit will become null and void and the property shall continue to be in the mane of the bond holder **(Sivana Kaylen Govender)** (Should anything should happen which would result in our demise the above property will remain in her name. Should she marry this property shall not form part of the marriage, should she pass on the property will then be transferred back into the actual legal owners **Mr P and Mrs S Pillay** her parents.

We the parties have willingly come to this agreement.”

[7] It is signed by Mr. Peter Pillay and Mrs Saloshini as well as the deceased Sivana Kaylene Govender. It was then on that same day 20 March 2016. Certified by The South African Police Services as a true copy of the original. It does not appear to be commissioned as alleged in the founding papers.

[8] A reading of the document indicates that an arrangement had been reached between the Mother and Father of the deceased and her in their respective capacities that she would obtain a bond, the house would be registered in her name but her parents would pay the bond instalments, that on her death the property would be transferred back to her parents. Tragically the deceased died in a motor vehicle accident and accordingly the issue arose whether it was a Will or not.

[9] It is common cause that the deceased left no Will, that she was married to First Respondent in community of property and that he was appointed the executor of for

estate. It is further undisputed by First Respondent that the parents were, in terms of the agreement which was reached between them and the deceased, entitled to have the house returned to them. He does not dispute what is contained in the document termed "Affidavit" and he is in agreement with what is contained therein. The issue that he raises is that there is debt in the estate in the sum of approximately R 240 000.00 and that accordingly the property must form part of the joint estate and also that the agreement which the deceased had reached with her parents shall be obeyed if there is sufficient funds in the estate to do so.

[10] In *ex parte Williams in Re Williams Estate* 2000 (4) SA 168 (TPD) it was held that as set out in section 2(3) it does not relate to a prescribed course of conduct but to the creation of a document (howsoever it may be accomplished) which the testator intended to be his Will. It was held at 179 F:

"In that case the test to be applied after his death without proper execution of the Will is not whether he in life regarded the document as a valid Will but regarded it as an expression of a final disposition of his estate"

In *Reszke v Marais & Others* 2006 (1) SA 401 (CPD) it was held at 407:

"The appearance of the document goes to evidentiary weight, however, and cogent evidence would be required to persuade a court that an educated person such who signs a document, which does not in substance appear to be a Will nonetheless intended it to be such."

In *Kotze v Die Meester en Andere* 1998 (3) SA 523 (NKA) it was held:

"That before section 2(3) of the Wills Act 7 of 1953 can be applied to elevate a defecting Will to the status of a valid will there must be proof of the intention of the testator which is of such a nature that a court is satisfied with a great

measure of certainty that it was actually his intention that the document in question was to be his will.”

[11] It was submitted on behalf of Applicants that First Respondent does not oppose the transfer of the property and that the “Affidavit” was the last wish of the deceased. Her intention was clear that the house must go to her parents. Accordingly it was her intention that the “Affidavit” be her last Will.

[12] On behalf of First Respondent it was submitted that it was never intended to be a Will. The wording is indicative of this fact and nothing in the affidavit indicates that the deceased stipulated what she wished to have done with her estate.

[13] In deciding whether indeed it was the intention of deceased that the document termed “Affidavit” be her last Will the wording of the document and the way in which it was drafted must be considered. The document was headed “Affidavit”. In my view, clearly a reading thereof indicates that there was an agreement reached between the deceased and her parents to bond the property that her parents would refurbish the property. In the event that she died the property would be transferred back to them as they would have paid all the bond instalments in the interim. It does not refer in anyway to her estate or to any other assets which she may have. It is also signed by all three of the parties. There is also no indication of her bequeathing anything to any specific person. The whole document only deals with this property. The last sentence reads “We the parties have willingly come to this agreement.” That is not indicative of a person expressing their intention that the document be their Will. The documents relates to a purely financial transaction as appears from the wording “She is financially strong and would be able to get a bond to refurbish the same.”

[14] As already set out the contents of the “Affidavit” is not disputed by First Respondent, the executor. He states that it is not her last Will but she had died in testate and that the property has to be brought into the estate so as to wind up the estate. The parents of the deceased, Applicants will indeed have a claim against the

estate, not only in respect of the instalments which they may have paid but also in terms of the agreement which was reached with the deceased and which is not disputed. It would appear to me that in practical terms there would be no difference in the end result if it is accepted as a Will or not.

[15] Considering the cases referred to above and the “Affidavit” after careful consideration of the document I am not satisfied that it has been shown that it was the intention of the deceased that the document was to be her Will.

[16] In my view it is apparent from a reading of the papers that both Applicants and First Respondent are trying to deal with the estate of the deceased to the best of their abilities and to protect certain rights. Accordingly in my view it would not be appropriate in these circumstances to grant a cost order against any party but that it would be more appropriate that the costs of this application be costs in the estate.

[17] Accordingly the following order is made:

1. The rule *nisi* granted on 9 September 2019 is discharged
2. The costs of the application are to be costs in the estate of the late Sivan Kaylene Govender estate number as: 728/2078.

P C Bezuidenhout J.

JUDGMENT RESERVED: 7 FEBRUARY 2023

JUDGMENT HANDED DOWN: 3 MARCH 2023

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