



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

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

DATE 14/11/2017 SIGNATURE M. P. M. M.

CASE NO: 2464/2017

In the matter between:

ANDRE DERECK FRIEMAND N.O

APPLICANT

IN RE: ESTATE LATE

ADRINA JACOBA VAN NIEKERK

And

THE MASTER OF THE HIGH COURT POLOKWANE

1ST RESPONDENT

MARY ELIZABETH JANSE VAN RENSBURG

2ND RESPONDENT

MARTHA SUSANNA STEYN

3RD RESPONDENT

CHRISTOFFEL JONANNES JACOBS

4TH RESPONDENT

JANETTE SOPHIA POLLOCK

5TH RESPONDENT

MARIETTE VAN NIEKERK

6TH RESPONDENT

ELMARIE VAN RENSBURG

7TH RESPONDENT

ERNA EMSLEY

8TH RESPONDENT

HANNES VAN DER WESTHUIZEN

9TH RESPONDENT

JUDGMENT

M.G PHATUDI J

[1] This is an application in terms of which the Applicant is desirous for an order that the decision by the Master of the High Court, Polokwane, ("the Master"), the first Respondent herein, to the effect that a Codicil dated 04 February 2015 to the deceased's Last Will and Testament, ("the Will") and as executed on 17 February 2015, was in fact revoked by a latest Will of the testator dated 17 February 2015, be set aside.

[2] The Applicant also seeks relief that the First Respondent is directed to accept the codicil dated 04 February 2015 together with the deceased's Will dated 17 February

2015, as the last Will of the deceased for purposes of the Administration of Estates Act ¹) ("the Act 1965") and ancillary costs relief. The application is opposed.

A. BACKGROUND INFORMATION:

- [3] The deceased, Andrina Jacoba Van Niekerk ("the deceased") died on 19 August 2015 leaving a Will in which she nominated the Applicant as executor of her estate. Prior to her death, the deceased on 17 February 2015, allegedly signed a codicil dated 04 February 2015.
- In terms, of the Will, the Second to the Ninth respondents are all heirs of a portion of the residue available in terms of the Will. (Annexure "ADF").
- [4] According to the Applicant, the codicil dated 04 February 2015 was signed by the deceased on 17 February 2015 (Annexure ADF2).
- [5] The Applicant, the nominated executor, attended to submit the Will to the First Respondent ("the Master") who appointed him as an executor under reference No.: 008165/2015. A copy of Letters of Executorship dated 02 December 2015 was

¹ Act 66 of 1965, as amended

issued in Applicant's favour. It appears that this was the only Will which was lodged with, accepted and registered by the Master. No other prior Will was ever mentioned.

- [6] Pursuant to Applicant's appointment as executor, the First Respondent subsequently requested that a codicil dated 04 February 2017, which according to the Applicant was allegedly signed with the Will dated 17 February 2015, be submitted. This was apparently because the assets contained in the codicil were already distributed amongst the heirs mentioned therein allegedly in accordance with the wishes of the testator. These were distributed despite the fact that they were not then covered in the Liquidation and Distribution Account ("L & D").²
- [7] The First Respondent in its letter dated 28 March 2017 directed to the Applicant, intimated that:-

"The Codicil dated 04 February 2015 and the Will dated 29 September 2014, executed by the deceased were revoked by a latest Will of the deceased dated 17 February 2015. Therefore the Will of the deceased

dated 17 February 2015 is the only Will that shall be used by the Executor to distribute the estate".³

- [8] It was against this adverse nature of the First Respondent's decision that triggered the present application.
- [9] It is the Applicant's submission that it was the deceased's true wishes that the codicil had to be considered when the estate is administered in terms of her Will dated 17 February 2015.
- [10] Apart from the previously and registered Will as indicated, the Applicant somewhat introduced or makes reference to the "previous will" of the testator. This "previous will" is dated 29 September 2014. According to the Applicant he assisted the deceased in drafting both her Wills on different dates. This Will, I must mention, was undoubtedly not submitted to the First Respondent, whatsoever for purposes of the winding -up of the deceased estate. If one assumes for a moment that it was also found as one of the deceased's Will, which in any event, was not submitted to the Master when the deceased's death was reported, its relevance becomes obscure considering that the deceased in her last Will dated 17 February 2017 declared that:

³ Annexure "ADF14" Index bundle 1 p64 -65,

“1. Ek herroep hiermee alle vorige testament, kodisille en of ander testamentere aktes deur my voor die datum hiervan gemaak.”

- [11] What therefore stands to reason is that the “previous will” even though had a codicil accompanying it, had been revoked by the latest Will of the testator dated 17 February 2015. Consequently, all dispositions previously made therein falls away by virtue of this revocation. It serves no useful purpose therefore to have any further regard to this document.

B. THE ISSUE FOR DETERMINATION:

- [12] I am called upon to determine whether the First Respondent (“the Master”) was correct in deciding that the codicil to the deceased’s Will, was revoked by her Last Will and Testament.
- [13] It seems not an issue whether the deceased on 17 February 2015, consulted with the Applicant with a view to “amend” her Will so as to bequeath her household contents and cash amounts to certain specific heirs and institutions.

It appears that during consultation she handed to the Applicant a document captioned "Kodisil": Testament – Mev A.J Van Niekerk "dated 04 February 2015. This codicil lies at the heart of the present dispute. I mention in passing, that the rest of the allegations made by the Applicant during the parties' consultation in its founding affidavit do not enhance the crisp issue for adjudication in this instance.

- [14] The Applicant having submitted to the First Respondent all relevant documentation commencing the administration of the deceased's estate, one Mr P.G Steyn of the law firm P.G Steyn Attorneys issued a letter to the Applicant dated 10 November 2013, amounting to an objection within the purview of Section 35 (7) of the Estates Act which provides:

Section 35 (7)

"Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefore, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents

which such person may have submitted to the Master in support thereof."

- [15] Prior to Mr Steyn's objection, the L& D Account was already received by the clerk of court, Modimolle Magistrate court on 09 September 2016, and had lain for inspection 21 days from 19 August 2016 to 09 September 2016.
- [16] I must point out, without much ado, that the letter dated 28 March 2017 addressed to the Applicant (Annexure "ADF¹⁴") had thrown a dim light on how Applicant conducted himself in handling the deceased's estate and its winding-up process. I shall however refrain from expressing any opinion on this aspect in as much as I have not been called upon to decide on the matter.
- [17] It is crystal clear that the deceased on 17 February 2015 in the presence of two witnesses during attestation of her Will, revoked "alle vorige testamente, Kodisille en of ander testamentere aktes" made under her hand prior to that day and date.
- [18] Because of this revocation as expressed in the testator's Last Will and Testament dated 17 February 2015, all prior written instruments, codicils and testamentary

dispositions made beforehand by the testator, naturally fall away and are of no legal consequence or effect.

In any event, the Applicant proffers no cogent explanation as to the reasons why he did not advise the deceased to correct the codicil of 04 February 2015 to coincide with the "amendment" of her last Will dated 17 February 2015. Nothing could have restrained the deceased or the Applicant from correcting or amending the clerical error on the codicil either.

[19] In addition, the confirmatory affidavit deposed to by one Walize van Niekerk, an employee attached to the Applicant's practice, again does not offer any explanation why the date of 04 February 2015 was left uncorrected. The same could be said of the confirmatory affidavit of a certain Chantelle Kruger which is similar to that of Nalize van Niekerk. I take both their depositions with a pinch of salt, to say the least.

[20] Turning to the cardinal issue raised, I find myself in agreement with the decision arrived at by the First Respondent when it took a decision and correctly so, in my view that the codicil dated 04 February 2015 and the Will previously executed by the testator dated 29 September 2014 were "revoked by a latest Will of the deceased dated 17 February 2015".

- [21] I am unable to find fault against the directive issued to the executor, in casu, the Applicant (if he remains still as such) to accept that the last Will to be relied on to proceed with the administration of the deceased's estate is the Will executed on 17 February 2015 which in essence had no codicil when the deceased's death was first reported to the Master. This somewhat controversial document was first submitted on 27 February 2017 only after it was requested by the Master. Furthermore, this codicil again differs in dates from the one dispatched to Mr Steyn. On Applicant's own version, the deceased authored the contested codicil, however, Mr Kruger's confirmatory affidavit projects a contrary view.
- [22] Apart from the sceptical date of the initially unsubmitted codicil, the manner in which the Applicant purported to wind up the deceased's estate leaves much to be desired. Some of further criticism is that, even though one could for a while accept that the much contested document was the deceased's valid codicil, the assets mentioned therein were not included by the Applicant in the L& D Account. These assets were allegedly distributed or allocated at the deceased's funeral by two of her family friends, namely Drs. de Villiers and Farrel, even before Applicant's appointment as an Executor.

- [23] The conduct of the Applicant and third parties was repugnant to Section 26 (1) of the Estate's Act which provides :

SECTION 26(1):

"Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all property, books, and documents in the estate and not in possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment"

- [24] The executor duly appointed by the Master is accordingly the only functionary entrusted under Section 26 (1) to collate assets, payment of debtors and distribution of the residue thereof to qualified heirs as beneficiaries. The role played by DRs de Viviers and Farrel in the allocation of assets technically forming part of the estate was not only irregular, but also unlawful. The said assets could only be distributed after 21 days had expired after advertisement period referred to in Section 29, being a notice by executors to lodge claims.

[25] On a semblance of the preceding considerations, I am of the view that the decision taken by the First Respondent that the Will of the testator dated 17 February 2015 is the only Will left by the deceased, and that it shall be used to guide the executor in winding – up the deceased's estate was correctly and lawfully taken. The decision cannot in any way be faulted so as to lean in favour of the Application. The application falls to be dismissed with costs.

C. COSTS

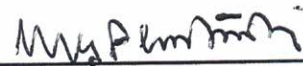
[26] A word on costs. I find no reason, even with the bestowed discretion, to deviate from trite practice that the costs follow the cause. In this instance, the Applicant should have foreseen that the objections made to his office and that of the Master, sounded cautionary bells. A violation by third parties in distributing certain specified assets within the deceased's estate, was a flagrant violation by third parties of established law. The distribution as it were of certain specified assets within the deceased's estate, was a flagrant violation of the spirit of Section 26 of the Act. The master correctly directed the Applicant in terms of Section 35 (9) to heed its directives, and took a dim view of the conduct of the Applicant in the matter. As

indicated elsewhere in this judgment (Para. 22 and 23) the Applicant's conduct in which he handled the estate was dishourable.

I find no logical reason to burden the deceased's estate with costs. It is, in my view, in fact the Applicant who should and must be burdened with costs of application.

In the result, I make the following order:-

- (a). The application is dismissed.
- (b). The Applicant is personally ordered to pay the costs including the costs occasioned by the employment of counsel.



M.G PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

REPRESENTATIONS

- | | | |
|--|---|---|
| 1. For Applicant | : | Adv. H.M.B |
| Instructed by | : | Abel Mulder & Son, Attorneys
Modimolle |
| 2. For 2 nd , 3 rd , 4 th and 5 th Respondents | : | PG Steyn Attorneys
New Castle, KZN
c/o Pratt, Luyt And De Lange |
| 3. Date heard | : | 20 SEPTEMBER 2017 |
| 4. Date delivered | : | 14 NOVEMBER 2017 |