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

Case No.: 1680/2014

In the matter between:-

F[...] G[...] M[...]

First Applicant

M[...] G[...] M[...] N.O.

Second Applicant

In his capacity as father and guardian of

B[...] P[...] D[...] M[...] and

K[...] L[...] M[...]

and

THE MASTER OF THE HIGH COURT

First Respondent

D[...] M[...] M[...]

Second Respondent

P[...] S[...] G[...] M[...]

Second Respondent

FAKUDE SARAH LETSABA

Fourth Respondent

JAN BRUWER HUGO N.O.

Sixth Respondent

JUDGMENT BY:

POHL, AJ

HEARD ON:

28 AUGUST 2014

DELIVERED ON:

4 SEPTEMBER 2014

INTRODUCTION:

[1] The deceased in this matter, the late B[...] M[...], died on 11 February 2013. After her death, it appeared that she left behind two Wills. The first in time was dated 4 April 2012 and the second in time was dated 4 February 2013. The Master of the High Court accepted the latter Will as the deceased's Will and Testament. This is an application by the applicant for the following relief:

- (a) that the document titled "Last Will and Testament" dated 4 February 2013 (hereinafter referred to as the Second Will), be declared invalid and not the Last Will and Testament of the late B[...] M[...].
- (b) that the document titled "Testament" dated 4 April 2012 (hereinafter referred to as the First Will) be declared the valid Last Will and Testament of the late B[...] M[...].
- (c) that the first respondent (the Master of the High Court) be directed to administer the estate of the late B[...] M[...] in terms of the First Will.

[2] The first respondent, being the Master of the High Court, filed a notice to the effect that it abides by the court's decision. The application is only opposed by the second and the third

respondents. Although service was effected on the fourth and fifth respondent they did not file any papers or notices.

**FACTS AND/OR FACTORS WHICH ARE COMMON CAUSE OR NOT
IN DISUTE:**

- [3] The first and the second applicant is the same person. He brings this application as first applicant in his personal name and as second applicant in his capacity as father and guardian of his two children. I will hereinafter refer to the first and the second applicant, collectively, as the applicant. The applicant, the second respondent and the third respondent are all children of the deceased, B[...] M[...], who died on 11 February 2013.
- [4] It is common cause between the parties that the First Will is a valid Will in terms of the Wills Act, Act 7 of 1953. In terms of the First Will, the deceased bequeathed her estate to the applicant, his two children and the second and third respondents.
- [5] In terms of the document purporting to be the Second Will of the deceased, she revoked the First Will and then bequeathed her estate to the applicant, the second respondent and the third respondent. The only other bequest in this document was a special bequest to the fifth respondent, who apparently was an employee of the deceased. The applicant's children were thus left out in the Second Will.

- [6] It is common cause that the second respondent produced the Second Will after his mother passed away, indicating that the deceased gave the Will to him a few days prior to her death.
- [7] The Second Will consists of one page and appears to be signed at the bottom thereof by the testator, the late B[...] M[...]. Right below the testator's signature, it was also signed by two witnesses. The one witness is identified as being one Johannes Mthimkhulu. This Mr Johannes Mthimkhulu made two statements that forms part of the papers and which will be referred to later in this judgment. The other witness to the Second Will could not be identified. There is also a third person that signed the Will as interpreter.
- [8] *Ex facie* the document, the Second Will appears to be a valid Will in accordance with the requirements of the Wills Act, Act 7 of 1953. When the Second Will was produced, the applicant felt that it was a fraudulent document. He then proceeded to lay a charge of fraud in relation to this Will at the South African Police. The South African Police then investigated the matter and took a number of statements in this regard. In the end the docket was closed due to lack of evidence. The Police docket, however, forms part of the papers before this court. The police, *inter alia*, took a statement from the abovementioned Johannes Mthimkhulu. Mr Mthimkhulu also made an affidavit to the applicant's legal representatives, and this affidavit forms part of the replying papers before this court.

- [9] For purposes of this judgment it is necessary to repeat certain sections of the two statements made by Mr Mthimkhulu. In the police affidavit he, *inter alia*, declares the following:

“That on the date 04/02/2013 I never signed any Will/statement of Mrs B[...] M[...]... I also do not know any Patric Nthagase (that is the interpreter that allegedly also co-signed the Second Will) whom is stated on that Will M[...] G[...] M[...] shown to me on the date 31/03/2014 as an interpreter/tolk.

I do not know why my name is doing on that Will that I never-ever signed or see before to days date 2014/03/31.”

- [10] In the affidavit of Mr Mthimkhulu that forms part of the replying papers he declares the following:

“4. I wish to specifically confirm the following:

4.1 I did not sign the document dated the 4th of February 2013;

4.2 I was not present at the time when a document was signed by any of the parties appearing on the documents;

4.3 I cannot remember my exact whereabouts on the 4th of February 2013 but I would have remembered signing a document where the deceased also signed.”

- [11] The only reply the second respondent had to the abovementioned police statement of Mr Mthimkhulu is contained in paragraph 20 of the opposing papers, which reads as follows:

“Ad paragraph 27 thereof

My mother was a traditional healer and she had many patients and knew a lot of people which I don't know. I also do not know the other

witness. I strongly deny that the affidavit attached as annexure B was drafted by Johannes Mthimkulu. I know the handwriting of my brother, the applicant, and this affidavit is clearly drafted by him.”

THE LEGAL POSITION:

[12] Section 2 of the Wills Act, Act 7 of 1953, *inter alia*, provides as follows:

“2 Formalities required in the execution of a will

(1) Subject to the provisions of section 3*bis*-

(a) no will executed on or after the first day of January, 1954, shall be valid unless-

(i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and

(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

(iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person;”

[13] The following dictum appears at page 760B of the decision of **Harpur NO v Govindamall and Another** 1993 (4) SA 751 (A):

“The requirement for signatures of witnesses to a will provides a main safeguard against the perpetration of frauds, uncertainty and speculation. Disputes regarding the validity of a will can arise only after the death of a testator, which may occur many years after it was executed. Ordinarily the only persons other than the testator who are likely to have knowledge of the circumstances of the execution of a will are the witnesses who, being present, personally saw or perceived it, and can testify in that regard. That purpose fails when the witnesses cannot be identified.”

THE MAIN ISSUE IN DISPUTE:

- [14] The main issue in dispute is whether or not the Second Will complied with the formalities required for the execution of a valid Will as envisaged by section 2 of the Wills Act, Act 7 of 1953.

APPLICABILITY OF THE FACTS TO THE LEGAL POSITION:

- [15] A proper reading of paragraph 20 of the second respondent's opposing affidavit, referred to above, clearly indicates that, at best, the second respondent doubts whether the affidavit Mr Mthimkhulu made to the police was drafted by him. He says that the handwriting is his brother's and it must have been his brother that drafted the document. This is clearly untenable. It must be borne in mind that this is an affidavit in a police investigation which was taken down by the police. In any event, this affidavit to the police was reaffirmed in Mr Mthimkhulu's further affidavit annexed to the replying papers. The nett result of this is that *ex facie* the papers,

there appears to be no factual dispute as to the factual allegations made by Mr Mthimkhulu in his affidavit.

[16] Ms Oosthuizen, who appeared for the second and the third respondents, submitted that the court cannot place any reliance on the version of Mr Mthimkhulu, because his affidavits, according to her, differ substantially. This submission by Ms Oosthuizen is clearly without substance. A proper reading of both the affidavits indicates that in both affidavits the deponent, Mr Mthimkhulu, stated that he did not sign any Will of the deceased. The fact that his name appears there and that there is a signature appended thereto, does not mean that he put it there. It must clearly follow, that if Mr Mthimkhulu is to be believed, then he could never have been present when anybody affixed their signatures to the Second Will.

[17] In the premises I am satisfied and accept the evidence as contained in the two affidavits of Mr Mthimkhulu, namely that he did not sign the Second Will. I accept his evidence that he was not present at the time when the Second Will was signed by any of the parties appearing on the Second Will.

[18] Both Mr Roux and Ms Oosthuizen submitted to the court that should the court have any doubts about this issue, that I then should exercise my discretion and refer the application for the hearing of oral evidence on this point in terms of the provisions of Rule 6(5)(g). My above acceptance of Mr Mthimkhulu's evidence makes this unnecessary.

[19] The nett result of my acceptance of Mr Mthimkhulu's evidence is that the Second Will is invalid for want of compliance with the formalities as required by section 2 of the Wills Act, Act 7 of 1953.

ORDERS:

[20] In the premises I make the following orders:

1. There will be an order in terms of prayers 1, 2 and 3 of the Notice of Motion; and
2. The second and third respondents are ordered to pay the applicant's costs of the application.

L. le R. POHL, AJ

On behalf of applicant: Adv L.A. Roux
 Instructed by:
 Plaatjies Attorneys
 BLOEMFONTEIN

On behalf of respondents: Ms M.A. Oosthuizen
 Instructed by:
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