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NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 22960/2011

DATE:25/04/2012

In the matter between:

ASTRID HASSAN

First Applicant

BJORN MICHELSEN

Second Applicant

ASTRID HASSAN N.O.

in her capacity as the executrix of the estate of the late HANS-PETER MICHELSEN

(Masters ref: 16243/2010)

Third Applicant

and

ANALISE GLORIA MENTOR N.O.

First Respondent

THE MASTER OF THE NORTH GAUTENG

HIGH COURT

Second Respondent

JUDGMENT

DAVIS, AJ

[1] This is an application for the declaration of a certain document to be the Last Will and Testament of the late Hans-Peter Michelsen and for an order directing that the devolution of his estate shall take place in terms thereof. There is also a prayer for costs with which I will deal with later.

[2] The factual matrix of the matter is as follows:

2.1 Hans-Peter Michelsen was born in Germany on 22 July

2.2 On an undisclosed date said Hans-Peter Michelsen married one Manuela Adam.

2.3 Of the aforesaid marriage two children were born, being Bjorn Michelsen born on 4 December ... and Astrid Michelsen born on 23 June

2.4 In 1983 the family described above emigrated from Germany and settled in South Africa.

2.5 On 1 September 1989 Hans-Peter Michelsen and Manuela Adam were divorced.

2.6 On 18 September 1993 said Hans-Peter Michelsen married the First Respondent, Analise Gloria Mentor. Of this marriage a son, A M. M was born on 18 June 1994. At the time of the hearing he is still a minor but will soon attain the age of majority.

2.7 On 22 December 1994 Hans-Peter Michelsen and the First Respondent became divorced.

2.8 Hans-Peter Michelsen passed away on 29 June 2010 and he will henceforth be referred to as "the deceased".

2.9 The deceased's daughter from his first marriage is the First Applicant and his son from the same marriage is the Second Applicant. The daughter is also in her capacity as executrix in terms of the contested will the Third Applicant. The deceased's second wife is the mother of his child from their marriage and she acts in her capacity as such and as guardian of her

minor son as First Respondent.

2.10 The Second Respondent is the Master of this court who, apart from his citation as such, did not feature in the papers and no report was received from him.

[3] JURISDICTION:

At the time of his passing away, the deceased was permanently resident within the area of jurisdiction of this court and the uncontested allegation is that all the assets owned by him, including immovable property was situated within the same jurisdiction. The administration of his estate also falls under the jurisdiction of the Second Respondent.

[4] THE CONTESTED WILL:

4.1 No original properly attested and executed will of the deceased which complies with the provisions of the Wills Act, No. 7 of 1953 could be found or was presented to this court.

4.2 In its stead, the Second Applicant who currently resides in Tanzania and who came to South Africa during mid June 2010 at the time when his father was complaining of feeling unwell and who stayed with him until he passed away, found a copy of a document amongst the personal documents of the deceased.

4.3 The aforesaid document is annexed to the papers as Annexure "I" to the First Applicant's founding affidavit. On the face of it, it is a copy of a typewritten document which bears the heading "LAST WILL AND TESTAMENT. This is the Last Will and Testament of H Peter Michelsen." The address of the testator is correctly indicated as his address at the time of his death.

4.4 For sake of completeness the contents of the document reads further as follows:

"1.

I hereby cancel, annul and revoke all previous Wills, Testaments or other Testamentary Documentation hereto before made or executed by me.

2.

As Executor of my Estate I hereby nominate DIANE SHERMAN, an Attorney of the firm OOSTHUIZENS INC., practising in Kempton Park. The Executor appointed in terms of this Will shall not be required to provide security to the Master of the High Court and I grant to my Executor the power of assumption as well as all other powers allowed by law.

3.

3.1 Upon my death I bequest my entire estate as follows:

3.1.1 50% of my entire estate to my daughter ASTRID VINGERHOUTS;

3.1.2 50% of my entire estate to my son BJORN MICHELSEN.

3.2 Thus meaning that my estate is to be divided equally

between my two children as mentioned in paragraph

3.1 above.

4.

4.1 Should one of my children predecease the other child, then the estate of the first dying bequest to that child's children, being my grandchildren subject to the same conditions as set out above.

4.2 In the event of a bequeathment as mentioned in clause 4.1 above then a trust should be

erected to control the bequeathment until my grandchildren has/have reached the age of 21 years.

4.3 The trust must at all times have two trustees, being the Executor and another nominated by the Executor.

5.

None of my beneficiaries shall require to collate.

6.

I declare the above to be my Last Will and Testament and desire that it shall have effect as such.

THUS DONE AND SIGNED AT KEMPTON PARK ON

THIS THE..... DAY OF..... IN THE YEAR OF OUR LORD TWO THOUSAND AND

THREE (2003) IN THE PRESENCE OF THE UNDERSIGNED WITNESSES, WHO IN THE

PRESENCE OF EACH OTHER AND MYSELF, ALL BEING PRESENT AT THE SAME TIME

HAVE HEREUNTO SUBSCRIBED THEIR NAMES."

4.5 The document bears a signature in the bottom right-hand corner above the word

TESTATOR which no one has contested to be anything else than the signature of the

deceased. To the left of his signature on each of the three pages of the document space was provided for witnesses to sign and it appears that the same two witnesses signed each page, apparently being one Lodewyks and one E Retief.

4.6 As aforestated, the document is a copy of a document and accordingly all the signatures

must have appeared on the original document from which the copy was made. The only original inscription on the document is the insertion of "18th" and "November" in the relevant spaces provided therefor as a date on the last page of the document.

[5] The Applicants rely on Section 2(3) of the Wills Act, No. 7 of 1953 for the declaration sought in the notice of motion. This section provides as follows:

"If a court is satisfied that a document... drafted or executed by the person who has died since the drafting or execution thereof, was intended to be his will ... the court shall order the Master to accept that document ... for the purposes of the Administration of Estate Act, 1965 (Act 66 of 1965) as a will, although it does not comply with the formalities for the execution ...of wills referred to in sub-section (1)"

[6] As described above, on the face of it, said Annexure "I" to the founding affidavit accords in all respects with the requirements of Section 2 of the Wills Act, save for the fact that it is a copy and that none of the signatures thereon are accordingly original.

[7] As additional evidence in order to convince this court to accept the aforesaid document, the following was produced:

7.1 The founding affidavit of the First Applicant. She refers to some of the facts referred to above and in addition thereto states that the deceased and the First Respondent had a very short marriage. (From the common cause facts it appears that the deceased and the First Respondent were married on 18 September 1993 and divorced on 22 December 1994.) The First Applicant further stated that the divorce settlement between the Applicant and the First Respondent provided for maintenance for the minor child of that marriage which provides for

maintenance and medical care.

7.2 The First Applicant further states that the "current factual position regarding the maintenance and benefits payable by the estate of the deceased to the minor child is as follows:

7.2.1 A cash payment of R2 300,00 per month;

7.2.2 School fees at a private school of approximately R4 500,00 per month;

7.2.3 Stationery and books of approximately R300,00 per month;

7.2.4 Medical aid to be put in place as well as payment of shortfall medical bills.

7.3 She further states that approximately two weeks before the death of the deceased she and her current husband, Muhammad Yusuf Hassan visited her father as he was terminally ill with cancer. The deceased explained to her that he had left a will with Oosthuizen Attorneys in Kempton Park in terms of which the First and Second Applicants were the sole heirs. He also repeated this statement to the First Applicant's husband whose confirmatory affidavit was also presented in this regard.

7.4 It was also indicated to the First Applicant that the deceased held a life insurance policy "which would cover certain of the needs of A M M".

7.5 After the passing away of the deceased the Applicants approached Oosthuizen Attorneys. This much is also confirmed by a separate full and detailed affidavit from the Second Applicant (i.e. not the customary two paragraph so-called "confirmatory" affidavit).

7.6 The Applicants obtained and produced an affidavit from one Dubretha Oosthuizen who states that she is a major female of this court practising at Oosthuizen Attorneys Inc. in Kempton Park and that she confirms that her firm held instructions from the deceased to prepare his Last Will and Testament. She states that the copy of the will attached to the founding affidavit of the First Applicant is the document that was prepared in her offices by

Diane Sherman, an attorney who has subsequently left their employ, She further states that, despite a diligent search conducted at their offices, the original could not be found.

7.7 Diane Sherman declined to make an affidavit and merely produced a letter in which she declined the appointment of executorship.

7.8 A separate affidavit was produced by one Denise Watts who stated that she was a general assistant employed by the Respondent until 2009. She remembers him having mentioned that he was consulting Oosthuizen Attorneys with regard to the preparation of his will. She never actually saw the will which was prepared but was informed by the deceased prior to his death that he was dividing everything in his estate between the Applicants and "... had provided separately in a policy for his son of his second marriage who he referred to as Alex".

7.9 Yet another affidavit from another attorney was presented, being one Aletta Johanna Smit. She stated that she practised under the name Etha Smit Attorneys in Kempton Park and that she acted with regard to personal matters and business affairs on behalf of the deceased from approximately 2008 until 2010. She confirms however that at no stage during that period had she received any instructions to prepare any will on his behalf. What is further produced is a death notice, a draft liquidation and distribution account and the indication that a "tertiary policy" in favour of the minor child A was in existence.

[8] Against the abovementioned summary of evidence produced by the Applicants, the First Respondent stated the following:

8.1 That the deceased and the minor son A were close to each other.

8.2 That the deceased always provided for maintenance for A.

8.3 That, in terms of the divorce settlement between the First Respondent and the deceased, he had been obliged to act as aforesaid and to further provide for an insurance policy which were to "provide specifically for the minor child's tertiary education".

8.4 She furthermore repeatedly states that she "could not believe" that the deceased would exclude A from his will.

8.5 She disputed the authenticity of the copy of the will produced and made the point that the document had no distinguishing features by which any of the Applicants' witnesses, in particular attorney Oosthuizen could identify the copy.

8.6 She lastly denied that the First Applicant was the daughter of the deceased and his first wife.

[9] In reply the issue of the birth of the First Applicant has being the daughter of the deceased and his first wife was sufficiently put beyond doubt by way of the production of a birth certificate in German together with a sworn translation thereof. The First Applicant also in reply confirmed that the estate would be liable for the maintenance of the minor child A in accordance with the settlement agreement which was made an order of court at the time of the divorce of the deceased from the First Respondent.

[10] She also disputes the allegation that the deceased was very close to the minor son A. She states that the deceased and the First Respondent were separated very shortly after their marriage and even before the birth of the minor child A. (I interpose here to mention that the Second Applicant makes the allegation that the First Respondent and the deceased had never even lived together as husband and wife. This allegation was not disputed by the First Respondent in her answering affidavit.) The First Applicant proceeded to state that the deceased had very little contact with the minor child A who lived in Cape Town and who was not even visited on the last occasion when the deceased was in Cape Town on the last few occasions that he was there prior to his passing away. She further states that, in going through her father's personal effects, she found correspondence between him and the

Second Applicant but no correspondence with the minor child A.

[11] So far the evidence.

[12] Apart from her belief and from her expressing doubts as to the authenticity of the documents produced by the Applicants, the First Respondent could produce no contradictory evidence or even make a direct allegation of fact. If one were to view the scales of justice, the scale containing the allegations and evidence produced by the Respondents overwhelmingly weigh heavier than that of the scale of the First Respondent. Even if one bears in mind that, due to the circumstances it would be difficult or impossible for the First Respondent to produce any other evidence and even if one were to entertain the theoretical notion of a possible falsification of a document, none of the surrounding circumstances or circumstantial evidence or even the nature of the copy of the document as I have described above indicate sufficient probabilities that this might have happened.

[13] I have considered whether this matter should be referred to the hearing of oral evidence but, on the evidence produced, there is insufficient indication that the overwhelming probabilities which are in favour of the Applicants as matters now stand, might be disturbed.

[14] In the premises and on the documents presented to court in this application, I make an order corresponding with the terms as claimed by the Applicants in their notice of motion as follows:

14.1 It is declared that the document attached to the First Applicant's founding affidavit as Annexure "I" thereto is the Last Will and Testament of the late Hans-Peter Michelsen (identity number) and I direct that the devolution of his estate shall take place in terms thereof.

14.2 The costs of this application shall be costs in the winding-up of the estate of the said late Hans-Peter Michelsen.

N DAVIS AJ

ACTING JUDGE OF THE HIGH COURT