

IN THE KWAZULU-N AT AL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.:9991/2010

In the matter between:

ZIYAAD MOT ALA	FIRST PLAINTIFF
RASHIDA MOTALA	SECOND PLAINTIFF
FAZIELA BIBI AYOB MOTALA	THIRD PLAINTIFF
EBRAHIM ESSOP DESAI	FOURTH PLAINTIFF
ESMAIL SALEJEE	FIFTH PLAINTIFF
AMINA MOTAL	SIXTH PLAINTIFF
ZAHEER MOTALA	SEVENTH PLAINTIFF
RAFIA MOTALA	EIGHTH PLAINTIFF
JOUBEDA MOTALA	NINTH PLAINTIFF
FAAIZA MOTALA	TENTH PLAINTIFF
NAZIRA HASSAN	ELEVENTH PLAINTIFF

and

MOHAMMED AHMED SALEJEE	FIRST DEFENDANT
ABDUL SAMED MOTALA	SECOND DEFENDANT
MASTER OF THE HIGH COURT	THIRD DEFENDANT

JUDGMENT

Introduction

1. The residual issue for consideration by this court is that of costs. This is so after the first and second defendants withdrew their defence to the action herein, - in circumstances which could be described as a last minute withdrawal. This they did without tendering costs but contending that they are not liable. As such, the entire argument before me was focused on the issue of costs. As one would expect in matters like this, for the court to come to one an appropriate decision, it needs to traverse the merits of the matter, which, I propose to do shortly. However, a brief reflection on the background to the dispute will be useful.

Background to the matter

2. The deceased, the late Ayob Ismael Motala, signed a document purporting to be his last Will and Testament (hereinafter his Will) on 26 October 2004, The said Will was said to be in accordance with Islamic law of Succession. Three executors, were appointed in the Will, one Amien Vania now deceased, first and second defendants. The latter is also one of the deceased children. The deceased died on 23 October 2007. Subsequent thereto, the Will was lodged with the third defendant who accepted it.

3. A dispute arose out of this Will with the plaintiffs contending that it was invalid in that at the time the deceased appended his signature to the Will, he was suffering from dementia or alternatively, other medical condition which affected him to such a degree that he was mentally incapable of appreciating the nature and effect of his actions. To this extent, an application was brought to court to set aside the said Will. On 20 July 2010, an order was granted by consent which among others directed the plaintiffs to institute the present proceedings within one month.

4. The plaintiffs instituted the proceedings in terms of the court order and the two defendants filed their plea accordingly. In the present proceedings, the substantive order sought by the plaintiffs is that I must declare the Will signed by the deceased on 26 October 2004 null and void and that I should declare that he died intestate. So much for the background.

The factual matrix of the issues at hand

5. I should state from the onset that there is no evidence around the circumstances under which the Will was signed. There appears though on reading the material properly placed before me that there exist bad blood between all the plaintiffs on the one hand and the second defendant on the other. With the first two defendants having withdrawn their defence, plaintiffs presented their evidence on default basis.

6. Differently put, plaintiffs evidence was uncontested. I will deal with the plaintiffs evidence first although it was preceded by argument pertaining costs. I do so because it is necessary to understand the nature of the dispute here and how it arose in the first place.

7. Two witnesses were called on behalf of the plaintiffs. Mr Jayprigason Reddy (Reddy), their attorney of record was the first to testify. His evidence in brief is this. He has been dealing with the matter for the last six or seven years prior to the trial, (this being 14 March 2011). The deceased had two sons and two daughters. These are the late Abdul Khaliek Motala (AK), the second defendant, third plaintiff and the second plaintiff. Second defendant wanted certain things to happen pertaining his late brother A K Motala who died in 2007. Certain documents were brought to Reddy regarding the deceased during or about 2008. At that time there was already a

dispute about the deceased mental state.

8. On 11 October 2004, fifteen days before the Will was signed, a conference was held between the parties with their respective attorneys present. The second defendant at the time was represented by Mr Aslam Mayat, of Shaukat Karim and Company, Attorneys. The details of the discussions of that conference are contained in a letter dated 20 October 2004, addressed by Mr Reddy to Shaukat Karim and Company. As there was a dispute about the deceased state of mind already at the time, with the second defendant holding that there is nothing untoward with the deceased mind, plaintiffs required that the deceased be present in the meeting. Second defendant's attorney was amenable to this but second defendant was totally against it saying that his father could not and would not attend any meeting.

9. One of the issues giving rise to grave concern in the meeting of 11 October 2004, was a draft sale agreement between the deceased and the second defendant. In this document, the deceased intended selling his member's interest, loan account and beneficial interest in a close corporation to the second defendant.

10. Sometime in 2006, third plaintiff approached court in which he sought a relief that a *curator ad litem* be appointed to the person of the Ayob Ismail Motala (the deceased). This application was granted. Among others a purchase and sale agreement between the deceased and the second defendant was given to the curator ad litem by the former. Again in terms of this agreement the deceased sold his member's interest, loan account and beneficial interests he held in two Close Corporations and one Trust to the second defendant. During the interview with the curator ad litem, the second defendant admitted to the deceased (his father) not being in 'any mental state at all, at the moment'.

11. On the 17 October 2006, a meeting took place among some of the children of the deceased represented by Mr Reddy on the one hand and the second defendant, then represented apparently by Attorney Mrs Zubeida Seedat on the other. It was in this meeting that the rest of the family became aware of the existence of the Will when it was opened by Mrs Seedat, On 30 October 2006, Mr Reddy addressed a letter to Seedat on his client's behalf among others advising that they intended challenging the validity of the Will and setting aside any disposition pertaining thereto. On 31 October 2006, Mrs Seedat replied stating that she was not acting for the second defendant but was endeavouring to facilitate a meeting of estranged family members with whom she had a long association. Furthermore, she advised that she was obliged to, and would as an officer of Court submit the Will to the office of the third defendant. This, she did.

12. It is in the above context that the third defendant received the Will. He, thereupon appointed the executors who include second defendant, in terms of the Will. The order taken by consent before me on 20 July 2010, set aside among others the appointment of the second defendant and

other executors in the estate of the deceased.

13. Second plaintiff, Professor Ziyaad Motala, is the son of the late Mr AK Motala and the grandson of the deceased. He is the family representative in the matter. He is a law Professor at Howard University in the United States of America (USA). He testified about the deceased state of mind in instances where the latter visited him. At that time the deceased behaved in strange ways and would not even recognize his grandchildren.

14. The evidence of Professor Motala is supported by various clinical and medical documented evidence filed of record. Without isolating one from the other, I make reference to the report prepared by Dr Ozayr S. Ameen, a specialist Neurologist. The report is dated 17 February 2011. In his concluding paragraph he has this to say: ⁴ Although I have not personally seen Mr A.I. Motala, had I been given the above history and examination findings in 2001/2002, I would have recommended at that stage already that curator bonis be appointed to look after his financial affairs. Mr A.I. Motala's cognitive skills and ability to make complex decisions such as drawing up of a Will and understanding the attributes of a trust were not sufficient for him to truly understand the implications of such decisions. I base these conclusions on the information given to date. Nevertheless, I reserve the right to review any data or opinion presented herein, should other information become available.'

This concluded plaintiff's oral evidence.

Submission by Counsel

15. Mr Omar for the first and second defendants contended that the two were not liable for costs in this matter. His contention is that once the Executors of the deceased estate were removed, the Estate was not before court and therefore no relief could be granted until such time that new executors are appointed. On this score, he referred me to a number of decided case law.

16. Mr Aboobaker for the plaintiffs took a different approach. He submitted that defendants' legal analysis of the case law is wrong. In cases where executors have been appointed and set aside or removed the question of joinder or non-joinder does not arise. He furthermore referred me to the provisions of the Administration of Estate Act 66 of 1965. In particular, sections 8(4) and 22(1). In terms thereof, the Master may refuse, where for any reason a document purporting to be a Will or where there is objection to the nomination of a person as an executor, to accept the Will until the validity thereof has been determined by the Court. Inherent in this argument is that in such instance the court could and have determined the validity of a will without executors being cited. Like Mr Omar, Mr Aboobaker referred me to various decided cases and literature on the subject matter.

Analysis of the submissions and conclusion by Court.

17. Firstly, I wish to express my gratitude to both legal counsel for the material they referred me to. To the extent that I might not have consulted each and everyone it is because I have a different view of what the issues are at hand.

18. As a stating point I conclude on the evidence at hand that the deceased did not possess the necessary legal capacity to appreciate the consequences of drawing up a Will at the times he signed the document which purports to be his last Will and Testament, being the 26 October 2004. Therefore, this document is invalid in law and falls to be set aside as such.

19. The deceased at all material times resided with the third plaintiff and worked closely with the second defendant. The evidence at hand overwhelmingly shows that second defendant was aware of the deceased mental condition. Instead, he took advantage thereof. While he opposed the matter strenuously, he did not refute the evidence at hand either by providing counter medical evidence or other forms of evidence. He, with the first defendant consented to the nullification of their appointment. He provides no argument why the Will should be considered valid.

20. With regards to the issue of non-joinder, the following would suffice. As the third defendant has accepted the contested Will as valid, he could only appoint the executors as nominated therein. Once these are set aside by a court order, the Master's hands are tied. The plaintiffs have no powers to seek to appoint executors in a will which is the subject of dispute. The power to appoint an executor only vests with the third defendant. Other interested parties can only make a recommendation, nothing more. The situation becomes untenable where the purported Will itself is the subject of a dispute. Mr Omar seems to suggest that when a Will is disputed the estate of the deceased is necessarily a litigant in court. This is not so. I think his analysis of *Ohlsson's Cape Breweries Ltd v Hamburg* is wrong.

21. In the present matter, the challenge is against a document which purports to dispose the deceased estate in a particular way. Until third defendant appoints someone as executor, the deceased estate vests in him. In the present matter it is inconceivable that the first two defendants would have been removed on the basis that the very foundation of their appointment, in this instance the purported Will is legally invalid, and yet to argue in the same breath that other executors could still have been appointed in substitution thereof. The argument is unsound in law and falls to be dismissed.

Costs

22. Mr Aboobaker has argued for punitive costs against both first and second defendants in both

actions under case numbers 9991/2010 and 10743/2009. His contention is that defendants did not raise their defence bona fide. He further argued for a special costs order relating to the traveling of the first and second plaintiffs. Both these are based in the USA and Canada respectively. The reason thereto is that both these witnesses had purchased their low costs non refundable air tickets in time with a view of attending a trial. First plaintiff had to travel and testify in court. He was there also as a family representative to give instructions to Counsel.

23. It is trite law that the award of costs is a matter of discretion by Court. Ordinarily the successful party will be awarded his or her costs. In a matter like this one the Court is bound to look at the merits of the case despite the fact that, that part is now resolved. It is evident that at all material times, the defendants' defence was suspect. I incline myself with Mr Aboobaker that this defence was from the onset not raised bona fide. For that reason I find no justification why the deceased estate should be mulcted with costs where this could be avoided. Furthermore, plaintiffs are entitled to attend a trial where they are parties. While their evidence might be rendered unnecessary by the withdrawal of the defence, the fact that a dispute remained unresolved in so far as the costs are concerned, did not exonerate them completely from attending trial. In any event if they bought non refundable tickets, it is only fair that they be recompensed their costs.

24. In the circumstances, I make the following order:

(a) The document dated 26 October 2004, purporting to be the last Will and Testament of Ismail Ayob Motara (or Motala), is hereby declared to be invalid and is hereby set aside.

(b) It is hereby declared that Ismail Ayob Motara (or Motala) born on 21 June 1916 and who died on 6 October 2006, died intestate.

(c) First and Second defendants are ordered to pay the costs on an attorney and client scale in cases No.9991/2010 and 10748/2009 jointly and severally, the one paying the other to be absolved.

(d) Any other costs including costs in this matter as well as special costs pertaining to the air tickets of the first and second plaintiffs are to be borne by the first and second defendants on a party and party scale, jointly and severally, the one paying the other to be absolved.

NGWENYA AJ

Appearances

Date of Hearing: 14 March 2011

Date of Judgment: 15 July 2011

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