

SOUTH AFRICA / JUDGMENT

Assumption and Another v Reid and Others (3328/2015) [2017] ZAECPEHC 21 (22 February 2017) [2017] ZAECPEHC 21

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas, J M Roberson

CASE / FILE NUMBER

3328/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – PORT ELIZABETH

Case

No.: 3328/2015

In

the matter between:

CANDICE
GAY ASSUMPTION
First
Applicant
LILLIAN
JOAN PRIMO
Second Applicant
and
CHERYL-ANN
REID
First Respondent
THE
MASTER OF THE HIGH COURT

Second
Respondent
THE
REGISTRAR OF
DEEDS
Third Respondent

JUDGMENT

REVELAS J:

- [1] This matter concerns the validity of either of two contested wills signed by the late Mr Peter Reid (“the deceased”) respectively on 5 July 2005 (“the first will”) and 23 February 2009 (“the second will”). The deceased died on 22 July 2012. The two applicants, the deceased’s granddaughter and her mother, are the sole heirs in terms of the second will. Under the first will, the deceased’s other granddaughter, the first respondent, was the deceased’s sole heir. In terms of the first will the first respondent inherited the deceased’s immovable and movable property. The only immovable asset owned by the deceased was Erf [...], Korsten Division, Port Elizabeth, Eastern Cape also known as [...] W. S., Schauderville, Port Elizabeth (“the property”). In terms of the first will the property was transferred to the first respondent in 2013. The two applicants together with other family members occupy the property at present.
- [2] In this application, brought on 27 August 2015, more than 3 years after the death of the deceased, the applicants seek declaratory orders to the effect that the second will is the valid will of the deceased; that the first will was revoked thereby; that any act performed in terms of the first will is unlawful, and accordingly that the transfer of the property into the name of the first respondent was unlawful. The applicants also seek an order directing the Registrar of Deeds (the third respondent) to transfer the property into the name of the applicants. In addition, they seek an interdict against the first respondent, preventing her from harassing and interfering with the applicants and evicting them from the property.
- [3] After the death of the deceased, the first will was submitted to the second respondent (“the Master”) on 26 July 2012 and the first respondent was appointed as executrix of the estate. Thereafter, on 23 August 2013, the property was transferred into the first respondent’s name as heir in terms of the first will. According to the first respondent, the first applicant was present at the Master’s offices when this occurred and she was well aware of the existence of the first will. The first applicant, who decries any knowledge of the first will, insists that the first respondent had known all along of the second will. The first respondent states that she was told about the second will by the applicants only when they visited the Master’s offices together, to submit the first will. As she understood the applicants, they only “arranged” for the drafting of this second will to prevent one of the family members also living on the property (Furgl Reid), from selling it. They accordingly did not dispute the validity of the first will at that point. The applicants dispute the aforesaid. From these allegations disputes

of fact emerge which are not capable of being resolved on the papers. However, that would not be necessary, as these disputed allegations themselves do not affect the determination of the primary question in this matter, as will become clear below.

- [4] The first respondent's opposition to the relief sought by the applicants is premised on her assertion that the second will is invalid in that it does not comply with the requirements of section 4 of the Wills Act, 7 of 1953 ("the Act").
- [5] Section 4 of the Act, states that "every person ... may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall vest on the person alleging the same".
- [6] In support of her case, the first respondent attached the affidavits of several persons, attesting to the deceased's lack of mental capacity during 2009 and prior thereto. Dr Henry J van Staaden, a medical practitioner, deposed to one of the affidavits. He has been in medical practice since 1995, having obtained his MBCHB degree at the University of Stellenbosch in 1993. He had known the deceased for twenty years as his friend and doctor and had treated him for diabetes and high blood pressure. He reports that during 2007 the deceased had developed dementia and by December 2008 the deceased no longer recognized him, had no real sense of time and space, spoke incoherently and was unable to answer simple questions. The deceased had by then lost most of his short term memory. Dr van Staaden was of the opinion that the mental condition of the deceased was permanent and progressive. He believed it to be highly unlikely that the deceased would have experienced a clear moment after his last meeting with him in 2008.
- [7] Ms Linda Swartz, a nurse who obtained a BA Cur degree in Nursing Administration and Community Health, also deposed to an affidavit. She is inter alia, a qualified psychiatric nurse (apart from qualifications in midwifery and general nursing). She visited the deceased in July 2009 with a social worker to assess his health. According to her the deceased presented with classic symptoms of dementia. He was disorientated and had an impaired memory. She therefore concluded that the deceased was unable to care for himself or to handle his affairs.
- [8] Ms Maurishe Reid, the first respondent's former partner also deposed to an affidavit wherein she also gave an account of the deceased's mental deterioration since 2007 and cited examples of very peculiar behaviour on his part which was, if true, is a clear indication that he was not of sound mind.
- [9] Barry Reid, the grandson of the deceased also deposed to an affidavit. He stated that when he visited the deceased in 2008, the latter did not recognize him despite the fact that the deceased regarded him as a favourite grandson. (The first applicant, disputed that Barry was a favourite grandson.)

- [10] The deceased's neighbour, Elaine Brown, also told about the deceased's mental deterioration noticed since 2008, and referred to several examples of his conduct observed by her which amply demonstrated that the deceased was not of sound mind and therefore did not have the mental capacity to make a valid will during 2009.
- [11] The applicants did not provide sufficient proof to counter the allegations pertaining to the deceased's lack of mental capacity. A photograph of the deceased walking down the aisle with the first applicant in July 2007, twenty months prior to signing the second will, was attached to the first applicant's replying affidavit. She argued that "no insane person" could have given her away as a bride and walked her down the aisle. It was not alleged by anyone that the deceased was insane. Also the photograph as such, is not incompatible with Dr van Staaden's opinion that the deceased suffered from advanced dementia which began developing during 2007 and had become a permanent condition by December 2008. The first applicant's

assertion that the deceased was of sound mind in 2009 is unpersuasive, given the evidence of Dr van Staaden and Ms Swartz, to the contrary, which in effect amounts to indisputable expert evidence.

- [12] The applicants challenged the opinion of Dr van Staaden as not being independent since he was a friend of the family. In my view, his friendship with the deceased would have placed him in a more advantageous position to assess the deceased's mental health. He also stood nothing to gain from fabricating his evidence. In any event, there are four other persons, particularly the psychiatric nurse, whose testimonies corroborate Dr van Staaden's findings.
- [13] To further bolster her case, the first applicant alleged that the second will was signed by the deceased in the presence of his attorney after he had requested to be taken to this particular attorney for purposes of making a new will. The applicants are unable to state who this attorney was, except that he was from the firm McWilliams and Elliot which, according to them, was the firm that dealt with the signing of the second will. There is no affidavit attached to the replying affidavit, from any attorney of the aforesaid firm to confirm this allegation, nor to confirm that the deceased was of apparent sound mind when he signed this will. Ms Robyn Zieseniss of McWilliams and Elliot submitted the second will to the Master on 9 June 2014, but she appears to have had no involvement with the deceased's will or his estate prior to 2014. There is also no affidavit from her to confirm that the second will indeed emanated from the offices of McWilliams and Elliot. The aforesaid firm is also not the applicants' attorneys of record in the present matter. McWilliams and Elliot were, in terms of the second will, purportedly nominated or appointed as the successive executors of the deceased's estate in the event that the first applicant (who was nominated as executor in the second will) did not take up her appointment. It would have been a relatively easy task to establish which attorney from the aforesaid firm attended to the deceased and his second will, as alleged by the first applicant, and to have obtained an affidavit supporting the applicants' version. Accordingly, the applicants have not provided cogent evidence to support their contention that the deceased's mental capacity was unimpaired.

[14] The evidence advanced by the first respondent overwhelmingly indicates that the deceased could not have been of sound mind in February 2009, and therefore it has to be accepted that the second will was signed by the deceased when he was mentally incapable of appreciating the nature “and effect of his act” (signing the will) as envisaged in section 4 of the Act. He was therefore incapable “of comprehending the nature and extent of his property, of recollecting and understanding the claims of relations and others upon his favour and upon his property and of forming the intention of granting each of them a share in the property set out in the will or excluding them from any share...., as the case may be.”[1] The first respondent had clearly discharged the burden of proof referred to in the same section of the Act. Consequently, in terms of the provisions of that section, the second will is invalid and a nullity.

[15] There is another aspect which raises concerns regarding the validity of the second will, and that is the extraordinary late stage at which that will was submitted to the Master, i.e. two years after the death of the deceased (9 June 2014). According to the first applicant, she and her mother simply continued to live on the property after the death of the deceased and did not submit the second will to the Master. The applicants failed to deal with the deceased’s estate in terms of the second will. This is not the kind of conduct one would reasonably expect from the two sole heirs nominated in the will.

[16] The relationship between the parties hereto soured considerably when, during 2014, the applicants refused to sign any lease agreement presented to them by the first respondent, who threatened to exercise her rights as owner of the property and to evict the applicants if they remained on the property. Only when faced with the threat of eviction, did the applicants produce the second will, and submit it to the Master. The first applicant also brought an application for a protection order against the first respondent. The application was eventually dismissed, but the cause of all the acrimony between the parties, namely the applicants’ continued occupation of the first respondent’s property, remained unresolved.

[17] The first respondent argued that the applicants were estopped, as envisaged in *Van Der Byl and Haupt v Scholtz*,^[2] from challenging the first will, because of their apparent acquiescence in its existence, as demonstrated by their lethargy in

pursuing their rights in terms of the second will. In my view, acquiescence on the part of the applicants was not clearly

established on the facts, some of which are in dispute. I have referred to these previously herein, in paragraph [3]. It

is, however, not necessary to decide this aspect, as the second will has been found to be invalid on other sound grounds.

[18] Since the second will is invalid, it follows that the first will was not validly revoked and therefore remains the deceased’s last valid will and testament. Accordingly, the transfer of the property to the first respondent was lawful. As the lawful owner of the property she may

deal with it as she deems fit, provided that she exercises her property rights within lawful parameters. The consequences of the invalidity of the second will is that the first applicant's appointment as executrix was unlawful. The applicants are therefore not entitled to any of the relief sought by them in their notice of motion and their application falls to be dismissed.

- [19] Pursuant to the submission of the second will the first applicant was appointed by the Master as executrix of the deceased's estate on 23 January 2015, in terms of the second will. It was argued on the applicants' behalf that the first applicant ought to remain as the executrix of the deceased's estate, even if the first will is held to be the valid will of the deceased, because the first respondent did not seek appropriate relief, such as orders declaring the second will invalid, and setting aside the first applicant's appointment.
- [20] The applicants' argument is, with respect, misplaced. A finding that the second will is invalid, and thus that the first will was not revoked, ipso facto means that the first will is the valid will of the deceased. It logically follows further, that the appointment of the first applicant as executrix is also unlawful. The Master has acted bona fide in this matter. In view of the findings in this judgment, if brought to his attention, he will undoubtedly not expect the first applicant to continue to act, or permit her to act as executrix of the deceased's estate.
- [21] In the circumstances, I make the following order:
1. The application is dismissed with costs.
 2. A copy of this order may be served on the Master by the first respondent by way of hand delivery.

E REVELAS

Judge of the High Court

ROBERSON J:

I agree.

J M ROBERSON

Appearances:

For the applicants: Adv M W Nobotana instructed by Andile Ngqakayi Inc, Port Elizabeth

For the first respondent: Adv D S Bands instructed by Swarts Attorneys, Port Elizabeth

Date heard: 02 February 2017

Date delivered: 22 February 2017

[1] Per Breitenbach AJ in Naidoo NO and Another v Crowhurst NO and Others [2010] 2 All SA 379 (WCC) at para 17.

[2]

(1897) 14 SC 483

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