

SOUTH AFRICA / JUDGMENT

Karani v Karani NO and Others (02266/2014) [2017] ZAGPJHC 318; [2018] 1 All SA 156 (GJ) (20 October 2017) [2017] ZAGPJHC 318

COURT

South Gauteng High Court, Johannesburg

BEFORE

RE Monama

CASE / FILE NUMBER

02266/2014

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REPUBLIC
OF SOUTH AFRICA
HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG.

Case

No: 02266/2014

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED.

20

October 2017

In

the matter between:

ABDULHEY
EBRAHIM
KARANI Plaintiff
and
MOHOMEDALI
AHMED KARANI
N.O. 1st
Respondent
MOHOMODALI
AHMED
KARANI 2nd
Respondent
ADBUSAMAAD
KARANI 3rd

Respondent
THE
MASTER OF THE HIGH COURT,
JOHANNESBURG 4th
Respondent

JUDGMENT

Coram: RE Monama, J

Introduction.

[1] The matter came before me in terms of the order of my Brother Spilg J of 1 June 2015[1]. That court referred this matter to trial. The Fourth Defendant is not opposing or supporting any of the affected parties.

[2] The issue between the parties is the validity of the will allegedly executed during 7 February 2013 (The Contested Will). In this regard, the Plaintiff seeks two orders. The first order is to declare the will

of the deceased dated 7 February 2013 to be null and secondly the will of the deceased dated 15 September 2006 to be valid.

As a corollary thereto, he seeks an order of costs against the 2nd and 3rd Defendants for the initial application proceedings and this trial.

[3] The main personae dramatis are relatives. The Testatrix is Rukeya Karani (herein referred to as “the Testatrix” and or “the Deceased”). The Plaintiff is her direct brother . The Second and the Third defendants are the nephews to them. The First and Fourth Defendants are cited herein nomine officii.

[4] The Plaintiff’s relies on the evidence of Me. Lourika Buckley , the hand writing expert, Me. Sherifa Karani , the Plaintiff’s wife, Me. Ayeshabibi Nabee, the Plaintiff’s and the Testatrix’s sister, Me. Khatija Veeran (born Karani and the sister to the Second and the Third Defendants) and Mr. Ebrahim Mia, the Testatrix’s neighbour , who resided directly opposite the Testatrix’s property. The family members testified about their relationships.

[5] The Defendants case is based on the evidence of the Second Defendant and. Mr. Yossi Vissoker ,who testified as a handwriting expert witness . Mr. Mohomedali Ahmed Karani testified about the family relationships, particularly how the Contested Will came about.

The brief factual background.

[6] As stated, this case involves the the Contested Will. But there are three other wills which feature prominently in this matter. The first will is dated 31 August 1994. It was drawn by an attorney. The second will is dated 15 February 2006 and was drafted by the Third Defendant. The third will is dated 15 September 2006. This will was drawn by an attorney, Ms. Singh. The fourth will is dated 7 February 2013. This will was dawn by the Third

Defendant in Canada. It was downloaded by the Second Defendant from his electronic mail.

[7] The beneficiaries in terms of the first will are two unnamed charities to be chosen by her executors at their sole discretion, her sister Ayeshabibi Abdul Razak or Nabee, the Plaintiff and her nephew Dr Zeedat Karani. At that time of the execution of that will the Testatrix was approximately 57 years old.

[8] The beneficiaries in terms of the second will are the Second and Third Defendants and their brother Suleiman Karani. They are also the executors. The Testatrix was 69 years old when this was executed.

[9] In terms of the third will the beneficiaries are the Plaintiff, the Second Defendants, the sister of the Testatrix , Mrs Ayesha Bibi Nabee (born Karani), Suleiman Karani, (who is the Testatrix's nephew and the brother to the Second and Third Defendants). The nephews are all the children of the Testatrix's late brother, Ahmed Ebrahim Karani. The Plaintiff was appointed an executor . The testatrix was 69 years old when this will was executed.

[10] In terms of the fourth will, only the Second and Third Defendants are the beneficiaries. They are also the executors. When the will was executed the Testatrix was approximately 76 years old and living alone.

The dispute amongst the parties.

[11] The issue in this case as stated above, is whether the will dated 7 February 2013 is valid .The Plaintiff contends that the Will of February 2013 is invalid. The first ground of invalidity is non -compliance with the mandatory provisions of the Wills Act. The second ground of attack is the allegation that the will is a forgery.

The legal formalities for the execution of a will

[12] Section 2(1)(a) of the Wills Act 7 of 1953 provides the formalities in respect of execution of wills.

The Section provides that:

“(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 each other and, if the will is signed by such other person, in the presence also of such other person; and

(iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page;...” [Emphasis added]

The above provisions must be read together with the provisions of Section 2(3) which provides that:

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

The second ground of that the Plaintiff attacks the validity of the will is that the signature on the will was forged

by the Second Defendant.

The common cause facts.

[13] There is no dispute between the parties that the first witness, Mr. Abudakr Cujee did not sign the will dated 7 February 2013 in the presence of the Testatrix or in the presence of Mrs. Sarah Bulewan, who signed as the witness.

[14] It is also common cause that the Third Defendant drafted the Disputed Will in Canada and transmitted it to the Second Defendant via electronic mail. The Second Defendant printed the it. He took same

to his aunt, the testatrix, and interpreted the contents thereof in the presence of his wife. The Second Defendant's

wife returned the next day together with Mrs. Bulewan. During that visit the testatrix signed the Disputed

Will and Mrs. Bulewan signed as witness. The second witness to this Disputed Will, Mr. Cujee, was not present at the time the Will was witnessed by Mrs Bulewan.

The onus and the standard of proof.

[15] There several onus in this matter. First, the Plaintiff bears the onus that the Disputed Will dated 7 February 2013 is a fraudulent document with a forged signature . The Second and Third Defendants must

demonstrate that the Disputed Will complies with the legal formalities. In both scenarios the standard is on the balance

of probabilities.

The plaintiff's case.

[16] Me Khatija Amhed Veeran is the sister to the Second and Third Defendants. The testatrix is her aunt and the Plaintiff is her uncle . She testified that, her uncle's wife, Mrs. Karani and Mr. Mia cared for the deceased. She was emphatic that the Mr Mia played a great part.

[17] Mr. Ebhrahim Mia testified that he had an excellent relationship with the deceased and that he took care of the deceased. He assisted the deceased. He also testified that he paid for the funeral expenses of the deceased and was subsequently

reimbursed for some of the expenses by the Second Defendant. 4 Both Mr. Mia and Me. Karani testified that the

deceased's health was in a deteriorating state. Mr. Mia used the services of Dr Bawa who confirmed same.

[18] Me. Sherifa Karani, the wife to the Plaintiff testified that she her husband, the Plaintiff had a good relationship with the Deceased and that she spoke with her frequently. Her husband did not testified as he had voice problems. She and Mr. Mia were each provided with a set of spare keys to the Deceased's house. She testified that when the Testatrix fell ill, Mr. Mia contacted her and her husband. Me. Karani testified that the Testatrix contacted her via telephone during the first quarter of 2006 to discuss the execution of Will 2. She

testified that the Testatrix informed her that the Third Defendant visited her. He enquired from her about the ultimate destination of her property after her death. She informed him that she had already executed a Will. He asked to see the said Will, took it away and told her that he will review it and return same in two days' time. A week passed, the Deceased became worried, went to the Second Defendant's house in search of the Third Defendant who was not available . She testified that the Testatrix felt uncomfortable with the second will . This led to execution of the of third will. In this regards she engaged and the assisted by an attorney of her own choice, Me. Singh, who lived in vicinity. She retained these two wills in her safe possession.

[19] Ayesha Nabee is the sister to the Testatrix. She is currently staying I the house of he Testatrix . She testified and confirmed that the Contested Will 4was disclosed to the other family members at the funeral of the Testatrix and that the family members were informed by the Deceased of the second will. She confirmed that the said will

was also drafted by the Third Defendant.

The evidence of the plaintiff's expert witness

[20] The Plaintiff's expert witness, Me Lourika Buckley testified about the signature of the Testatrix on the Contested

Will and compared them to the other specimen . She is a qualified Forensic Documents Examination Expert and member of the American

Handwriting Analysis Foundation and of the South African Chapter of the Association of Certified Fraud Examiners. She has been involved in 828 cases both nationally and internationally including the High Courts of Zimbabwe, South Africa, CCMA hearings and Regional Courts[2].

[21] Me Buckley testified that the signature on the Contested Will 4 is a forged, copied or traced from a previous known signature of the Testatrix. She testified that the indentation of the signature signifies that a person who made the said signature has made it with a lot of focus. The forger was focussing on getting the signature correct. She indicated with reference to Exhibit F those items where the forger stopped and proceeded again with a letter. She stated that the forger made patch-ups in that the forger made a marking and correcting same afterwards. She testified that given the Deceased's age, possibility of arthritis and health deterioration her signature especially in a period of 7 years would have changed substantially.

[22] She testified that the signatures on the Contested Will have not changed substantially from that compared to previous signatures in subsequent years. In her view, a person's last signature on a document where that person has signed six times would be substantially different. She examined fourteen signatures on the Contested Will and Power of Attorney.

[23] Me. Buckley explained that a person with arthritis would where his/her signature is made in poor quality, correct same in a spontaneous/ natural manner without much attention to try and correct every detail of the signature. She further explained

that the signatures of the testatrix on Contested Will were not done in a spontaneous manner. There was much attention paid as to the quality of the signatures.

The defedants version

[24] The Second Defendant, Mr Mohomedali Ahmed Karani, is the only witness who testified. He testified that had a good relationship with the Deceased and took care of her and that there was nothing wrong with the deceased's health condition. He tendered a few pictures all taken on 11 February 2013 during the birthday party attended by him and his wife. He maintain that these pictures proves that he had a good relationship with the deceased.

[25] He testified that he received a copy of the Contested Will from the Third Defendant . The will was sent to him from Canada. He downloaded it and he and his wife took it to the Deceased and explained it I her native language and in English. The next day it was signed and witnessed to separately by Me Beluwan and Mr Cujee.

The testimony of the defendants' expert witness

- [25] Mr. Yossi Vissoker is a Forensic Graphologist and testified as an expert on the handwriting issues. He did not obtain any formal training or qualification in forensic document examination but is certified by the American College of Forensic Examiners Institute.
- [26] Mr Vissoker confirmed that the Deceased was not familiar with English language, her education extended to grade 4 and that had advanced and deteriorating arthritis[3]. He confirmed that he was pre-disposed to the facts of the case and did not consider the impact of the arthritis in the assessment of the signatures.
- [27] Graphology refers to the determination of personality characteristics, physical attributes or injuries to an individual based on the appearance of one's handwriting. To the contrary, forensic document examination refers to determination of authenticity of a document or disputed signature[4].
- [29] In Mr. Vissoker's report it is stated that he used more documents to analyse the signature. He makes six distinct determinations that equates to :

'An individual and unique elements or characteristics'

He stated such elements and characteristics cannot be forged. He concluded that:

"Based on and in accordance with accepted and proven examination standards and in view of the certain individual characteristics, as has been described above (including the elaborated description of the paradoxes that have been found in Grafex report) and considering the attached technical report (with especially attention to clauses 14, 17 to that report and other clauses that specify An individual and unique element/ characteristic) I can positively conclude that Set 1 and Set 2 were signed by the same person-be it RE Karani."

He referred to paragraph 29 of his report[5] where he stated that the upper turn of the letter "N" is round – therefore "an individual and unique element / characteristic". He explained that it is not possible for a forger to duplicate the N in a round motion.

The analysis and evaluation

- [30] I have stated the issues in dispute between the parties earlier. These are alleged non – compliance with the provisions of the Wills Act and the alleged forgery on the Contested Will.
- [31] The legislation provides that two or more witnesses must sign a will and do so in the presence of the testator and in the presence of each other. The Second Defendant testified that the Will was signed the next day with Mrs. Bulewan and later with another witness Mr Cajee. Mr. Cujee did not sign the Will in the presence of the Testatrix and Mrs. Bulewan. Such a conduct violates the provision of the relevant law. In *Van der Merwe v Master of the High Court* & another it was held:-

"It is clear that the formalities prescribed by s 2(1) and s 2(2) in relation to the execution of a will and amendments thereto are to ensure authenticity to guard against false or forged wills."[6]

The formalities are peremptory but S2(3) of the Wills Act provides some amelioration from the rigorous implementation of the law. But the provision of the said section must be complied with. There are therefore two requirements that must be satisfied before relief can be granted in terms of s 2(3):

- a) that the document was drafted by the deceased personally, and
- b) that the deceased intended the document to be her will.

The Contested Will was drawn by the Third Defendant in Canada. It was downloaded from the electronic mail by the Second Defendant. The said document is in English and the Testatrix had rudimentary understanding of the language. Accordingly, the said document cannot be said to have been drafted by the Testatrix personally[7].

[30] There were problems regarding the availability of Me Bulewan to testify. It is irrelevant whether or not Mrs. Bulewan signed the Contested Will in the presence of the Testatrix. The issue is that the Contested Will was not signed by two or more witnesses in the presence of the Testatrix and at the time in the presence of each other. The rationale for such a provision is to eliminate fraud and misrepresentation. The court in *Harpur NO v Govindamall and Another*[8] restated quite eloquently the purposes and the rationale when it held that:-

“The requirement for signatures of witnesses to a will provides a main safeguard against the perpetration of frauds, uncertainty and speculation.”

The other safeguard is the signature and or initial by witnesses on each page. The Contested Will is only signed on the last page. The Wills Act is silent on the issue of whether witnesses are required to sign each page or only the last page and our courts have accepted that witnesses need only sign the last page of a will containing a Testatrix's signature. In my view, the Act that requires the signature must be interpreted widely to mean that each and every page must be signed by all. To hold

otherwise would lead to an anomaly. If witnesses do not sign each and every page of a Will, it creates the risk whereby anyone can amend pages to a Will which no longer safeguards against fraud and legal uncertainty.

[32] The Contested Will does not comply with the requirements stipulated in Section 2 of the Wills Act in more than one way. This failure to comply renders the Contested Will invalid. In my view, the non-compliance renders this Contested Will invalid. The last will and testament is an important document. The importance is demonstrated by the strict requirements.

The probative value of the experts' testimony.

- [33] I now turn to the evaluation of the experts. The Defendant's expert was pre-disposed to the facts of the case. That brings me to the function of experts in any litigation. The expert must be objective irrespective of the party calling it[9]. The expert must be properly qualified and provide the factual basis for the opinion[10]. The evaluation of such evidence must be done according to the accepted principles[11].
- [34] It is accepted that the health condition of the Testatrix was not ideal. On the version of the Defendants' evidence he was suffering from arthritis. She was approximately 76 years old. This condition must have affected her signature. Therefore any reference to old signatures on the old paper cannot be reliable. Yet the Defendants' expert concluded that the signature on the Contested Will is that of the Testatrix. The Defendants reliance on the volume of documents is equally unhelpful. It is not the quantity but the quality that is important. His further evidence that the ink faded when the Testatrix signed is unconvincing because it subsequently improved.
- [35] Me Buckley's view that fading demonstrated the patch up. That explanation is sensible and reasonable. She explained the patch-ups found in her examination of the Testatrix' signature. She referred to the following text on the subject where it is stated that the :

"On the other hand, retouching and patching done in the course of simulations (forgeries) tends to be less obvious, more subtle, often requiring examination by microscope to confirm its existence [12]."

As regards the traced signatures, she referred to page 292 of the book mentioned above where it is stated that :

"Traced signatures usually depart from genuine signatures (1) in fluency that is the result of greater speed of execution in normal, natural writing, (2) in line quality that a racing lacks, (3) the presence of pen lifts and/or retouching that is indicate of the uncertainty of the writing instrument movement, and (4) the attendance of guidelines in the form of graphite or carbon lines or indentations[13]."

"Typical tracing contains a rather uniformly heavy stroke without the variations in pen pressure characteristic of natural writing. Also symptomatic of tracings are frequent interruptions in the movement of the writing instrument that may be found as full pen stops or as pen lifts in abnormal locations that display some care and accuracy in the subsequent application of the instrument to the paper. These hesitations or interruptions provide the individual with a momentary opportunity to review and to plan the ensuing course to be taken by the pen. Imperfections in the product are often corrected or concealed by patchings or retouchings[14]"

In my view, she materially substantiated her findings. I find her to be credible. Her opinion is , therefore more probable and reliable.

[36] Mr Vissoker's findings are unsubstantiated and improbable. He does not give convincing reasons. For example, the alleged athratis, the advanced age and the poor health in his views could not have affected the Testatrix signature patterns. I am conscious that the witness had language problems. But the difficulty of language did not appear to be so serious. His opinion, for the reasons already mentioned defies logic.

The Conclusion and order

[41] In my view, the Plaintiff discharged the burden of proof that the signature on the Contested Will is forgery. The Defendants have failed to prove that the Contested Will does comply with the requirements of the

Wills Act.

[2] Trial Bundle 2 – page3

[3] Par 7, page 76, Application Bundle 1

3 Article from Drexdoclab – Annexure “B”

[5] Page 97, Application Bundle 1

[6] Unreported Case No (605/09) [2010] ZASCA 99 (6 September 2010).

[7] In Opperman v Opperman and others Unreported (3659/2016)[2016]ZAFSHC 26 (3March 2016). See also Bekker v Naude en Andere 2003 (5) SA 173 (SCA), Van Wetten and Another v Bosch and Others 2004 (1) SA 348 (SCA) at 354

[8] Last par, page 21, (730/91)

[1993] ZASCA 110; 1993 (4) SA 751 (AD); [1993] 2 All SA 582 (A) (6 September 1993)

[9] National Justice Compania Naviera S.A v Prudential Assurance Co.Ltd (“The Ikarian Reefer”.) 1993 (2) Llyods Reports 68 81 , quoted in The South African Law of Evidence – Second Edition by Zeffert and Paizes page 330.

[10] Hotzhauzen v Roodt 1997 (4) SA 766 (W) at 771H-J to at 772A-J, See unreported case of Twaine and Another

v Naidoo Case No 38940/14 Gauteng Local Division delivered on 18 October 2017.

[11] Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001(3) SA 1188 SCA at paragraphs 34-40.

[12] See page 206 handbook on Handwriting Identification: Facts and Fundamentals by Huber and others,

[13] Par 5

[14] Par 6

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