
SOUTH AFRICA / JUDGMENT

Mduzulwana v Mduzulwana and Others (1470/2017) [2017] ZAECHMHC 7 (26 May 2017) [2017] ZAECHMHC 7

COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana, Alkema

CASE / FILE NUMBER

1470/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 1470/2017

DUMISANI MDUZULWANA

1st Applicant

And

XOLISWA MDUZULWANA

1st RESPONDENT

NOLI MCHAPHAZELI

2ND RESPONDENT

AVBOB FUNERAL PARLOUR

3RD RESPONDENT

JUDGEMENT

JOLWANA AJ:

- [1] This is an application to interdict the respondent from burying the deceased contrary to the provisions of a Will.

- [2] The deceased, Siyabulela Mduzulwana, died at his home at Bongweni Locality, Zimbane Administrative Area, Mthatha in the afternoon on 27 March 2017. The Applicant who is the elder brother of the deceased had visited the deceased at his home on the day he died. He returned to the home of the deceased on hearing of his death where funeral arrangements were discussed by the members of the family who were there at the time. The applicant reluctantly agreed to the deceased being buried at Bongweni after they were told by the first respondent, the widow, that it was her late husband's, wishes to be buried at Bongweni.
- [3] A memorial service was arranged at Libode and the applicant was in the programme to pass a vote of thanks at the end of the service. He also announced to those gathered there that the deceased would be buried at Bongweni.
- [4] After the memorial service the family convened at Bongweni at the invitation of a family relative, Major Mduzulwana. It was at this meeting that Major produced a sealed envelope and opened it in their presence telling them that it is the Will of the deceased. He proceeded to read it. Among other provisions of the said Will was a wish by the deceased to be buried at his rural home in Mphumezo A/A, in Qumbu. After reading the Will, Major left and the meeting ended without any meaningful discussion. This bothered the applicant because the provisions of the Will contradicted the earlier announcement and apparent agreement by the family members who were present that the deceased would be buried at Bongweni as his wife had announced to be his wishes. The applicant arranged another meeting at Bongweni. In that meeting first respondent made it clear that the will was not going to change anything and that the deceased would still be buried at his Bongweni home.
- [5] It was at this stage that the applicant went to Mr Bodlani's firm of attorneys to seek guidance and to obtain the copy of the Will. In terms of the Will the applicant together with the first respondent were appointed as the Co-Executors of the deceased estate. He felt that he had the responsibility to resolve the impasse. It was on this basis that he approached court on an urgent basis to seek an order that would ensure that the deceased's wishes as expressed in the Will are respected and the deceased is consequently buried at Mphumezo A/A in Qumbu and not at Bongweni in Mthatha as the widow insisted
- [6] The court interdicted the burial of the deceased pending the final determination of the application by issuing a Rule Nisi with interim relief.
- [7] The first respondent opposed the application resulting in the matter being referred for hearing of oral evidence as there was a huge dispute of fact about the validity of the Will and therefore the determination of the burial place as expressed in the Will and as allegedly expressed by the deceased to his wife. The parties agreed that if the will is found to be valid the Rule Nisi should be confirmed; if not, the Rule Nisi should be discharged.
- [8] It is common cause that the deceased was married to the first respondent and that they lived together as husband and wife at their home in Bongweni Locality, Mthatha. The deceased had other six children from an earlier marriage and had three children from his widow. The first respondent took care of him. The second respondent is the elder sister of the deceased

and the eldest sister in that family. The applicant and the first respondent did not know about the existence of the Will until it was produced and read in that family meeting on the 30 March 2017. Both the first and the second respondents challenge the validity of the Will.

- [9] The applicant gave evidence that he is unable to have a view about the validity or otherwise of the Will as he was not aware of it. He did however testify that as the Will is dated 24 March 2016 he was with the deceased at a funeral in Qumbu on the 25 March 2016 at which the deceased was a programme director and this places the deceased at or around Mthatha about the time the Will was signed. This is rejected as untrue by the first and the second respondents and one Tabita Mchaphazeli, a niece of the deceased, all of whom said that from 21 March 2016 until 06 April 2016 the deceased was with them at Pietermaritzburg at Tabita's home where he needed to be in order to be closer to his specialist doctor. He could, therefore, not have signed a Will in Mthatha on the 24 March 2016 as he was simply not in Mthatha.
- [10] The applicant called Mr Bodlani the attorney who drew the Will to testify and confirm its validity. Mr Bodlani testified that he had seen the deceased once before when he and his other brothers approached him about a possibility of drawing a family trust. He testified that they did look alike. Beyond this he did not know the deceased. On the day the Will was drawn and signed the deceased came to his office and instructed him to draw the Will. He drew the Will and the deceased signed it in his presence and in the presence of his secretary and both of them witnessed the Will. Mr Bodlani testified that he did not keep any file notes or even contact details of his client the deceased as he did not deem it necessary to do so. Most startlingly, there was no copy of the marriage certificate or anything that indicates that the marital regime of the deceased's marriage was taken into account in the process of drawing the will. Again Mr Bodlani testified that he did not deem it necessary to do so. The file he had only had a copy of the Will as well as a hand written entry indicating that his client had paid for the Will and the receipt number. Mr Bodlani's secretary, the second witness to the Will was not called to testify and the receipt in respect of the payment made for the drawing of the Will was also not tendered as evidence.
- [11] The idea of not keeping file notes or client contact details by Mr Bodlani is rather strange. For example, it makes it impossible for Mr Bodlani to contact his clients should it be necessary to do so, for instance if the Will, as indeed any other document, could become unserviceable or damaged. Mr Bodlani would in that unlikely but ever possible situation, not be able to contact his client and ask him to come and sign another Will. What Mr Bodlani called a file appeared more like a folder with a copy of the Will inside, than a file with client's instructions.
- [12] Mr Bodlani did seem to be honestly, oblivious to the provisions of the Financial Intelligence Centre Act[1]. In terms of section 1 of the Act Mr Bodlani as an attorney is an accountable institution. Section 22 (1) of the Act provides:

“Whenever an accountable institution establishes a business relationship or concludes a transaction with a client, whether the transaction is a single transaction or concluded in the cause of a business relationship which that accountable institution has with the client,

the accountable institution must keep record of the identity of the client”.

[13] The Minister of Finance passed regulations in terms of the Act. Regulation 3 (1) provides as follows:

- (1) “An accountable institution must obtain from, or in respect of a natural person who is a citizen of or a resident in the Republic, that person’s
 - (a) Full Names
 - (b) Date of birth
 - (c) Identity Number
 - (d) Income Tax registration Number if such number has been issued to that person, and residential address.

[14] Regulation 4 provides:

- (1) “The accountable institution must verify the full names, date of birth and identity number of a natural person referred to in regulation 3(1) (a) (b) or (c) or 3(2) (a), (b) or (c) by comparing these particulars with (a)(i) An identification document of that person....
- (2) An accountable institution must verify the income tax registration number referred to in regulation 3(1) (d) by comparing this number with a document issued by the South Africa Revenue Service bearing such a number and the name of the natural person.
- (3) An accountable institution must verify the residential address referred to in regulation 3 (1) (e) or 3 (2) (f) by comparing these particulars with information which can reasonably be expected to achieve such verification and is obtained by reasonably practical means, taking into account any guidance notes concerning the verification of identities which may apply to that institution.

[15] From his own evidence it is clear that Mr Bodlani made no attempts to comply with the Act at all. In terms of Section 23 an accountable institution must keep the records which relate to:

- (a) “The establishment of a business relationship for at least five years from the date on which the business relationship is terminated.
- (b) A transaction which is concluded for at least five years from the date on which that transaction is concluded”.

The Act defines a business relationship as “an arrangement between a client and an accountable institution for the purposes of concluding transactions on a regular basis.” Transaction is defined as “a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution.”

- [16] It has been just over a year since the Will was drawn and Mr Bodlani has already destroyed crucial information and his client's instructions leaving the Will only.
- [17] I do not believe that non-compliance with the Act would on its own invalidate an otherwise valid Will. This therefore means that with or without compliance with the Act the Will in this matter could still be valid. It should be remembered that the Act was passed for a specific purpose and its principal objective is the combating of money laundering activities and financing of terrorist and related activities. To visit invalidity on the transaction concluded between the attorney and his client or by an attorney on behalf of his client is not only uncalled for but it would also go far beyond what the Legislature intended in the circumstances of this case.
- [18] However, all of the deficiencies as pointed out above do not on their own mean that a person whom Mr Bodlani believed to be the deceased did not instruct him to draw a Will and signed it. However, this non-compliance with the Act has affected most detrimentally the probative value of Mr Bodlani's evidence. There is a real possibility that he, as an officer of this court is telling the truth in his testimony, when he says that the deceased signed the Will in his presence and he witnessed the signing. This would be what Mr Bodlani believed at the time the Will was drawn and signed in his presence. However, a possibility looms very large that he, himself, may have been a victim of machinations of a determined and astute imposter. He would have been vulnerable to such machinations as a direct consequence of non-compliance with the Act. The whole verification exercise was not done at the time the Will was drawn. Even in court when he gave evidence, he was not in a position to objectively convincingly show that the deceased signed the Will or that the person who signed the Will in his presence was in fact the deceased. In the circumstances his evidence stands to be rejected, not necessarily as false, but certainly as being so lacking in essential details as to be rendered irrelevant for the purposes of determining the veracity of the testator to the will dated 24 March 2016.
- [19] The first respondent testified that she was with the deceased in Pietermaritzburg from 21 March 2016 to 06 April 2016 at the house of deceased's niece, Tabita Mchaphazeli. She further testified that the deceased did not leave Pietermaritzburg on those days to go anywhere. This evidence is corroborated by the evidence of Tabita who was the host to the Mduzulwana couple during those two weeks. Even under cross-examination she remained steadfast that she was with the deceased at her house during that period and the deceased did not leave the house even for a day. He therefore could not have been in Mthatha on the date the will was signed. Even if the possibility of bias is factored in considering that Tabita is the second respondent's daughter and therefore caution is required in dealing with her evidence, there was no reason to cast doubt on her credibility.

- [20] The first respondent testified that when she realised that the 24 March 2016, the date on which the purported Will is said to have been signed in Mthatha coincided with the period in which the deceased was in Pietermaritzburg, she realised that there was something amiss with the Will. This spurred her to verify the authenticity of the signature on that Will by a forensic expert. She then commissioned Grafex Forensic Handwriting Examiner, Mrs Lourika Buckley who compiled a report which she attached to her answering affidavit. The report is the comparison between the so called standard signatures of the deceased with the signature on the Will. The report compared features on the signatures in quite some detail explaining all the noticeable differences. It then concludes that: “in view of the dissimilarities in individual writing characteristics and primary indicators of forgery that the Questioned signature was not made by the same person that executed the Known signatures and is therefore not authentic.”
- [21] The above conclusion is preceded by an analysis of the process that went into the examination of the deceased’s known signatures against the Questioned signature on the Will. I do not consider it necessary to reproduce the dissimilarities that Mrs Buckley found nor the report itself.
- [22] Under a very gentle but incisive cross-examination by Mr Mantyi, the applicant’s attorney, Mrs Buckley was able to assist the Court to understand the basis of her conclusions. She was able to explain the dissimilarities in some detail both between the Known signatures compared with each other and the Known signatures compared with the Questioned signature.
- [23] Having said that, it should never be assumed that the opinion of an expert will easily be accepted nor should it be. In our law evidence of experts is treated with caution.

In the case of *Coopers (SA LTD) v Denture*[2] the Appellate Division per Wessels JA had this to say about expert evidence:

“Proper evaluation of the opinion can only be undertaken if the process of the reasoning which led to the conclusion, including the premises from which the reasoning proceeds are disclosed by the expert. Even bearing in mind that the addressee of the summary is probably also an expert, I am of the opinion that the addressee may not be able to evaluate the opinion, so as to enable him to advise the party consulting him thereon, if he is not informed in the “summary of the reasons” for the opinion. Having regard to the above meaning of the word “reasons” in the context of the subrule as a whole and the purpose thereof, I am of the opinion that the summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion (i.e. the opinion). Where the process of reasoning is not simply a matter of analysing logic, but involves the application of the scientific principles, it will ordinarily also be necessary to set out the reasoning process in summarised form. The addressee should then be in a position to evaluate the opinion, and be in a position to advise the party consulting him whether the opinion can be controverted and if so what evidence is required to do so”

[24] It should be pointed out, however, that there have been cases in which our courts have rejected the opinion of the hand writing experts in favour of the evidence of the witnesses where the probative value of such evidence was found to be more and the evidence credible. In the case of *Levin v Levin*[3] the Supreme Court of Appeal upheld the decision of the court a quo in which it had been found that the evidence of the handwriting expert was trumped by the direct testimony of the other witnesses. This was based on the principle that courts should apply caution before accepting handwriting expert evidence and indeed any expert evidence.

[25] Mr Mantyi did suggest and put it to the expert witness Mrs Buckley that she is biased in favour of the first respondent being the party that requested her opinion and paid her. It would have been better if the suggestion of bias was based on the basis of illogical conclusions or findings which the expert could not explain and in the absence of those I have difficulty in accepting that Mrs Buckley was biased merely because she was commissioned by the first respondent. In the case of *Schneider NO v AA*[4] the court had this to say about the imputation of bias based only on the fact that the expert was paid by a particular party:

“In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purpose of the particular case. An expert does not assume the role of an advocate nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge of which that expert claims to possess.”

[26] I am in agreement with the sentiments expressed by Davis J in the above case. No basis was laid before us for the suggestion of bias nor were any illogical conclusions pointed out to the court. I therefore reject the suggestion of bias on the part of the expert witness and accept the conclusion of the report and her evidence. Once more the Applicant inexplicably decided not to call his own expert to gainsay what the first respondent’s expert testified. Once the evidence of the expert was not cast in some doubt there is no basis for not accepting her testimony as her credibility remained unquestionable throughout her evidence.

[27] I have come to the conclusion that in all probability the deceased was in Pietermaritzburg from 21 March 2016 to the 06 April 2016 and this therefore means the evidence of the first respondent as well as Tabita in that regard is reasonably probably true. This therefore means that on a balance of probabilities he could not have signed the Annexure “DM1” annexed to the Applicant’s affidavit.

[28] I therefore find that DM1 is not the Will of the deceased and therefore the Rule Nisi issued by this court on the 07 April 2017 stands to be discharged.

[29] On the issue of costs I have come to the conclusion that the applicant could not turn a blind eye to what appeared to be the Will of the deceased. He in fact had a responsibility in his capacity as a Co-executor in the purported Will to approach the court to ensure that it is respected, observed and complied with as at that stage he had no reason to suspect that it was not authentic. His coming to this court in the circumstances was not frivolous as Mr Nabela, first respondent's counsel suggested that it was. I therefore make the following

orders:

1. That the Rule Nisi in this matter is discharged.
2. That costs shall be costs in the estate.

M.S. JOLWANA AJ

ACTING JUDGE OF THE HIGH COURT

I agree

S. ALKEMA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Mr Mantyi

Instructed by

Mantyi Attorneys

Applicant's Attorneys

First Floor, Clublink Building

28 Madeira Street

MTHATHA

Counsel for Respondent: Mr Nabela

Instructed by

Bavu Attorneys

1st and 2nd Respondents' Attorneys

c/o Hlazo Attorneys

Durham Street

Matter heard on: 23 May 2017

Judgment

delivered on: 26 May 2017

- [1] Financial Intelligence Centre Act 31 of 2001
 - [2] Coopers(South Africa) (PTY)Ltd v Deutsche Gesellschaft fur. MBH 1976
 - (3) SA 352 (A)at 370 E-H
 - [3] Levin v Levin 2011 ZASCA 114
 - [4] Schenieder NO and OTHERS v AA and ANOTHER 2010 (5) SA 203 (WCC) at P212
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECMHC/2017/7.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mduzulwana-v-mduzulwana-and-others-unknown-topic-aecmhc-2017>

Prepared on 24 October 2026 · Esheria