

SOUTH AFRICA / JUDGMENT

Shushu and Another v Master of the High Court and Others (2404/2015) [2017] ZAECMHC 17 (7 May 2017)

[2017] ZAECMHC 17

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana, RWN Brooks

CASE / FILE NUMBER

2404/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION: MTHATHA

CASE

NO. 2404/2015

In

the matter between:

NONTUTHUZELO

SHUSHU (BORN BODOZA) 1st

Applicant

BELEZA

NONDI

BODOZA 2nd

Applicant

and

MASTER

OF THE HIGH

COURT 1st

Respondent

PUMZA

BODOZA 2nd

Respondent

AYADUMA

BODOZA 3rd

Respondent

ZIBUKO

BODOZA 4th

Respondent

JUDGMENT

JOLWANA AJ:

- [1] The applicants, who are children of the late Jimmy Gqibana Bodoza (“the deceased”), seek an order declaring a document

(“the document”) annexed to the founding affidavit of the first applicant to be the last will and testament of the deceased for the purposes of the administration of the estate. They seek a further order directing that any of the respondents who oppose the application should pay the costs thereof.

- [2] The first respondent is the master of this honourable court. He has been served with a copy of the application papers and has filed an affidavit in response thereto. However, he does not oppose the application and has indicated that he abides the decision of the court.

- [3] The second, third and fourth respondents are also biological children of the deceased. They have opposed the application and have filed answering affidavits.

- [4] The deceased appears to have drafted the document with which this application is concerned on 20 March 2006. It is common cause that it does not comply with some of the formalities prescribed by the Wills Act 7 of 1953, (“the Act”). On 26 March 2006 the deceased passed away. Soon thereafter the first applicant submitted the document to the first respondent, who rejected it because of the formal deficiencies therein.

- [5] This application was issued only on 21 August 2015, some nine years after the death of the deceased. On 13 October 2015 the second, third and fourth respondents filed a notice to oppose the application.

- [6] On 20 November 2015 the first respondent filed his report.

- [7] On 25 November 2015 the second, third and fourth respondents filed their answering affidavits. The matter was first set down for hearing on 15 October 2015. On that date it was removed from the roll without any order being made as to costs. It was re enrolled for 26 November 2015 but was again removed from the roll, with wasted costs being reserved. It was re enrolled for hearing on 2 June 2016 but then removed from the roll. The matter was re enrolled for hearing on 1 September 2016 but was then removed from the roll. The matter was re enrolled for hearing on 8 September 2016. On that occasion it was postponed sine die with an order directing the respondents to pay the wasted costs. It was re enrolled for hearing on 27 April 2017, but was removed from the roll because that date was a public holiday. It was re enrolled for hearing on 4 May 2017.

- [8] The applicants seek final relief. Consequently, the evaluation of the affidavits filed of record must occur in accordance with the Plascon-Evans[1] rule which has been restated recently[2] in the following terms:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.”

It is well-established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the

facts

alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy

denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[9] The facts alleged by the applicants in the founding affidavits are limited. Indeed, in the light of the information which emerges from the answering affidavits in due course, the founding affidavits can most generously be described as extremely terse. In the result, the facts which emerge as common cause are the following:

1. the deceased died on 26 March 2006;
2. the document purporting to be the last will and testament of the deceased was executed on 20 March 2006, does not comply in various respects with the formalities prescribed by the Wills Act 7 of 1953 and was rejected by the first respondent accordingly;
3. on 5 June 2009 the first applicant was appointed by the first respondent as executor of the estate of the deceased;
4. on 22 May 2013 the first applicant caused an advertisement to be published in the Daily Dispatch newspaper indicating that the first and second applicants intended to bring the present application and further requiring that any objection thereto should be lodged in writing with the first respondent within thirty days of the publication of the advertisement. However nothing turns on this advertisement.

[10] The following facts emerge from the affidavit deposed to by the first respondent and from the answering affidavits deposed to by the second, third and fourth respondents.

1. the applicants and the respondents accepted the first respondents rejection of the document under consideration and on 12 December 2006 met and agreed to nominate the first applicant and the second respondent as potential executors of the estate of the deceased:

2. the first applicant failed to comply with the directives of the first respondent, and after her inevitable removal from office as Executor, the majority of the heirs of the deceased nominated the third respondent as Executor. Reference to the Applicants and the second, third, and fourth Respondents as heirs is used herein with caution in light of the fact that nothing is bequeathed to them in the document annexed to the founding affidavit as “BOD3”, the document.
 3. in the result the first respondent appointed the third respondent as executor to the estate of the deceased on 14 March 2013.
 4. the executorship as such is not the issue before the Court and therefore no comment is made about how the first applicant in her capacity as Executor performed or failed to perform her duties as well as the allegations levelled against her. Save to say that the first respondent was within his rights to remove the Executor from office if he was not satisfied with how she performed her duties as the Executor.
- [11] The issue of the application by the applicants on 21 August 2015 occurred at a stage where the estate of the deceased was almost wound up by the third respondent. The third respondent is commended for the speed with which he progressed the winding up of the estate in circumstances where the first applicant had failed to do so over a long period of time. There has been no explanation in the papers for the delay by the first applicant to progress the process of winding up the estate of the deceased. Even during argument before Court Counsel for the applicants, Mr Mdozana, was asked to explain this inordinate delay and he was not able to do so.
- [12] The application seeks to address one issue only and that is the deficiencies in the formalities pertaining to the execution of the document under consideration. In the Notice of Motion the order sought by the Applicants is put as follows:
1. That the 1st Respondent be directed to accept the document marked Annexure “A” to the 1st Applicant’s founding affidavit as the last will and testament of the late Jimmy Gqibani Bodoza for the purposes of the administration of the estate of the said late Jimmy Gqibani Bodoza.
- [13] In other words a directive is being sought from this Court to the effect that the respondent must accept the document as the valid last will and testament of the deceased. Counsel for the second, third and fourth respondents, Mr Kubukeli, was asked pertinently whether in light of the fact that the distribution of the estate to the intestate heirs has not yet taken place, the Court should have any regard to the fact that the applicants delayed in making this application. He could not refer the Court to any authority for the proposition. This is important for these reasons namely:-
1. In itself it would amount to curtailing the freedom of testation solely on the basis of the delay in issuing the application before Court in circumstances in which there was not even a remote suggestion that the document may not have been drawn and signed by the deceased.

2. There is no provision in the Act as amended which sets time frames within which the application like the one brought by the applicants should be made.

[14] Section 2(3) of the Act provides as follows:

“If a Court is satisfied that a document or the amendment of a document or the amendment of a document drafted or executed by a person who has since died after 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 Estate Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of his will referred to in subsection (1)”.

[15] In the papers filed by all the respondents no case was made that the document is not a document as described in Section 2 (3) of the Act or that it may not be or that there is doubt that it is the document as referred to in section 2(3) of the Act. Even during argument no submissions were made to cast doubt as to the authenticity of the document as the will of the testator. What the respondents validity contended is that it does not comply with the requirements for a valid will which is the very problem that the legislature sought to address in enacting Section 2 (3) of the Act.

[16] The case sought to be made by the respondents was that there was an agreement in a meeting of all the heirs at the office of the first respondent in which all the parties agreed that it should be accepted that the will does not comply with the provisions of the Act and that “the estate should devolve intestate rather than making an application to Court for the declaration of the Will to be valid”[3]. This point is also made in the papers before Court by the respondents in which the first respondent in fact puts the position as follows[4]: “In 2006 the Applicants were part of a collective decision of the family that in the light of the invalid Will, the

estate should devolve in terms of the Intestate Succession Act”.

[17] Counsel for the respondents, Mr Kubukeli, was asked whether in our law heirs to an estate can enter into an agreement other than a redistribution agreement in terms of which they decide that the estate will devolve by way of the Intestate Succession Act[5] or in any way other than the one provided for in the Will. Mr Kubukeli could not refer the Court to any authority for that

proposition and the collective agreement amounted to doing exactly that. This is not and has never been part of our law, which upholds the freedom of testation.

[18] In the case of BoE Trust LTD NO[6] ERASMUS AJA writing a unanimous judgment of the full court gave the following exposition of our law on property rights and freedom of testation:

“Section 25(1) of the Constitution provides that no one may be deprived of property, except where the deprivation is done in terms of the law of general application. What is more, it entrenches the principle that no law may permit the arbitrary deprivation of property. The view that section 25 protects a person’s right to dispose of their assets as they wish, upon their death, was at least accepted in Minister

of Education v Syfrets, although no decision to this effect was made. This view, is to my mind, well held. For if the contrary were to obtain, a person's death would mean that the Courts, and the state, would be able to infringe a person's property rights after he or she has passed away unbounded by the strictures which obtains while that person is still alive. It would allow the state to, in a way, benefit from someone's death."

[19] He then goes on to quote Francios du Toit[7] as follows:

"Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South Africa testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit. This principle is supplemented by a second important principle, namely that South African Courts are obliged to give effect to the clear intention of the testator as it appears from the testator's will. Freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the ius dispendendi) constitute basic tenets of the South African law of property. An owner's power of disposition includes disposal upon death by any of the means recognised by the law, including a last will. The acknowledgment of private ownership and the power of disposition includes disposal upon death by any of the means recognised by the law, including a law a last will. The acknowledgment of private ownership and the power of disposition of an owner therefore serve as a sound foundation for the recognition of private succession of testation in South African law."

[20] After the above quotation Judge Erasmus expressed himself as follows at paragraph 27:

"Indeed, not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away".

[21] It is accepted that the above is an authoritative restatement of the legal position in South Africa. It follows that the Applicants should succeed in this matter. In my view it is not part of our law for heirs to enter into an agreement in terms of which the will of the testator is set aside in favour of the estate devolving by way of intestate succession. Even the delay in approaching court for a directive such as the one sought by the applicants, cannot, in my view, be used to trump the principle of freedom of testation because of the importance of the principle. However, there may be exceptions to this general rule. The first one is that if at the time an applicant, seeking the directive to be issued to the Master to accept a defective document as the will of the testator the beneficiaries in terms of intestate succession have already been paid out, it would be undesirable that such beneficiaries be expected to return the assets so received to the estate. Practically and legally there would be no estate as it would have been wound up.

[22] The second exception would be any another good cause shown. For instance when that document embodying the testator's wishes is fraught with practical difficulties in its implementation to the extent that the Master feels that what the testator expressed to be his wishes is impossible or difficult to be carried out. The idea of another good cause shown is to enable courts to assess each case on its own merits and thus avoid having an exhaustive list of situation that would justify a departure from the general rule.

[23] Both of these exceptions would not be applicable in this case and no case was made that they could be. In fact it is clear from the papers that distribution has not yet taken place and no case was even attempted to be made to justify a departure from the principle of upholding freedom of testation. No case was made or reason given of some or other impossibilities in carrying out the wishes of the testator as expressed in his will. Even in his report to the Court the Master of the High Court has not indicated any difficulty in carrying out the wishes if this Court were to direct him to accept the document as the valid will of the testator despite its deficiencies.

[24] Therefore the following order is made:

1. The first respondent is directed to accept the Will of Jimmy Gqibani Bodoza dated 20 March 2006 as a valid Will.
2. That costs shall be costs in the estate.

M.S. JOLWANA

JUDGE OF THE HIGH COURT (ACTING)

I agree:

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

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Respondents' Attorneys

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Matter heard on: 04 May 2017

Judgment

delivered on: 07 May 2017

- [1] PLASCON – EVANS PAINTS LTD. V VAN RIEBEECK PAINTS(PTY)LTD.[1984] (3)SA 632 (A) at 634
- [2] NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA [2009] ZASCA 1; 2009 (2) SA 277 (SCA) par [26].
- [3] Minutes of the meeting held on 15/12/2006.
- [4] Paragraph 24.1 of the first respondent's Answering Affidavit.
- [5] Act No 81 of 1987.....
- [6] BoE Trust LTD NO and Another (in their capacities as co-trustees of the Jean Pierre De Villiers Trust 2013 (3) SA 236 SCA
- [7] F.Du Toit 'The impact of social and economic factors on freedom of testation in roman and roman dutch law' 1999 Stell LR 232;F Du Toit 'The limits.imposed upon freedom of testation by the boni mores: Lessons from common law -and civil (continental) legal systems 2000 Stell LR 358

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