

SOUTH AFRICA / JUDGMENT

Tilayi and Another v Master Of The High Court, Mthatha Eastern Cape and Others (3588/2021) [2023] ZAECMHC 26 (10 May 2023) [2023] ZAECMHC 26

COURT

Eastern Cape High Court, Mthatha

BEFORE

Laing, Rusi

CASE / FILE NUMBER

3588/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO. 3588/2021

In the matter between:

SIVIWE TILAYI 1st Applicant

TEMBEKILE SOBANTU 2nd Applicant

and

MASTER OF THE HIGH COURT, MTHATHA

EASTERN CAPE

1st Respondent

NONKUTHAZO KUMBACA 2nd Respondent

VUKILE TILAYI

3rd Respondent

KWANDA TILAYI

4th Respondent

NQABA TILAYI

5th Respondent

ZUKO TILAYI

6th Respondent

ZUKISANI TILAYI 7th Respondent

MONWABISI TILAYI 8th Respondent

ANDISWA TILAYI 9th Respondent

BABALWA TILAYI 10th Respondent

SIBONGISENI VOYI

11th Respondent

SIKHUMBULE MQOMBOTI 12th Respondent

KHOLEKA KUTSHWA 13th Respondent

HLELA MQUQO

14th Respondent

ZOLEKA VANGILE on behalf of IZIBELE VANGILE 15th Respondent

SGAGA VANGILE 16th Respondent

YONELA DUBE 17th Respondent

NALEDI NQABISA 18th Respondent

ETHEL NOFUMA 19th Respondent

ZOLILE NOGANTSHO 20th Respondent

NONTLE TILAYI 21st Respondent

ZUKISWA TILAYI 22nd Respondent

UNATHI TILAYI 23rd Respondent

VUYOKAZI TILAYI 24th Respondent

BONGINKOSI TILAYI 25th Respondent

LULAMA SOMDAKA 26th Respondent

MNCEDISI NOFUMA 27th Respondent

EVELYN GCULE 28th Respondent

SIBONGILE TILAYI 29th Respondent

REASONS

FOR JUDGMENT

LAING J

- [1] This was an application for an order directing the first respondent to accept the codicil of the late Mr Samuel Sonwabo Tilayi ('the deceased') as his last will and testament, under section 2(3)

of the Wills Act 7 of 1953 ('the Act'). The court previously dismissed the application. The reasons for judgment follow, pursuant to the applicants' request.

Background

- [2] The applicants alleged that the deceased prepared a codicil to his will on 28 July 2020, while undergoing medical treatment for COVID-19 at St Anne's Hospital in Pietermaritzburg. He commenced drafting the document in manuscript, but fatigue prevented him from completing the process. Consequently, alleged the applicants, he dictated the remainder of the codicil to his wife, the second respondent, who recorded his wishes in her own handwriting. The deceased confirmed the contents after the second respondent had read them back to him. He signed the document, to which the second respondent and a nurse, Ms Raindree Sewran, then added their signatures.
- [3] The deceased subsequently passed away on 2 August 2020. The first respondent issued letters of executorship to the applicants on 30 August 2020. They are the deceased's son and nephew, respectively.
- [4] The applicants averred that the deceased intended the codicil to be his last will and testament. They admitted that the document did not comply with the formalities of the Act because it was not prepared entirely by the deceased and had not been properly signed. Nevertheless, said the applicants, the codicil should be treated as the deceased's last will and testament and the first respondent should be directed to accept it as such.
- [5] The supporting affidavits of two nurses and a unit manager accompanied the application. To that effect, all three individuals indicated that they had seen the deceased 'draft a document in the presence of his wife'. Both nurses were in attendance when the deceased and his wife had signed it. One of the nurses, Ms Sewran, confirmed that she had signed the document as a witness.

Issue to have been decided

- [6] The main issue was whether the deceased had intended the codicil described by the applicants and attached to the application as indeed his will or an amendment thereof. This arose from the provisions of section 2(3) of the Act.
- [7] None of the respondents opposed the application.

Legal framework

[8] The formalities to be observed in the drafting and completion of a will are contained in section 2(1) of the Act:

‘...(1) Subject to the provisions of section 3bis–

(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 of 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 signed by the testator or by such other person anywhere on the page; and

(v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies: Provided that–

(aa) the will is signed in the presence of the commissioner of oaths in terms of sub-paragraphs (i), (iii) and (iv) and the certificate concerned is made as soon as possible after the will has been so signed; and

(bb) if the testator dies after the will has been signed in terms of sub-paragraphs (i), (iii) and (iv) but before the commissioner of oaths has made the certificate concerned, the commissioner of oaths shall as soon as possible thereafter make or complete his certificate, and sign each page of the will, excluding the page on which his certificate appears;

(b) ...’

[9] Sections 2(1)(b) and 2(2) deal with amendments made in a will. For the sake of completion, section 2(3) provides as follows:

‘(3) 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 No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in sub-section (1).’

[10] The Law of Succession Amendment Act 43 of 1992 added section 2(3) to avoid the problems experienced and hardships caused by the strict formalistic approach that had been adopted by the courts in the past.[1] The purpose of the provision was to provide legality to a document that was not, *ex facie*, a valid will.[2] It is apparent from the case law, however, that the formalities prescribed under section 2(1) have certainly not been rendered superfluous and are still required to guarantee the authenticity of a will and to minimise the risk of fraud.[3]

[11] It is necessary to mention that the formalities apply equally to a codicil. In terms of section 1 of the Act, a will ‘includes a codicil and any other testamentary writing’.

[12] The application of the law to the circumstances of the present matter will be considered below.

Application to the facts

[13] The codicil to which the applicants referred was comprised of two parts. The first, in manuscript, read as follows:

‘Cover page

Addendum to my will of 28 July 2020 and signed at Pietermaritzburg. My current will will be covered and dealt with principal by my wife. It will be read after burial.

By me in the present of my wife.’[4]

[14] It was important to note that the contents of the first part, as depicted above, were taken directly from a typed version attached to the applicants’ founding affidavit. The identity of the author of the typed version was not disclosed. Of some concern was that, in the absence of an explanatory affidavit from the author, it was difficult to match the contents of the typed version with the barely legible handwriting of the first part of the codicil.

[15] The latter bore what may (or may not) have been the deceased’s signature. It also reflected the signatures of the second respondent and Ms Sewran, respectively.

[16] The second part of the codicil was completed in entirely different handwriting and ran to some four pages in length. A separate typed version was also attached, but, as with the other typed version, the author remained unidentified. It indicated that the applicants and second respondent were appointed as executors, set out the powers and duties of the second respondent, and the way the estate was to have been administered.

[17] A signature appeared at the foot of each page of the second part, but it was impossible to discern whether it was that of the deceased. Similarly, the initials of a single witness had been added, but these read 'NZ', which did not correspond with those of Ms Sewran.

[18] The codicil was not, *ex facie*, a valid will since it did not comply with the formalities contained in section 2(1) of the Act. This much was conceded by the applicants, who nevertheless contended that it would be proper for the first respondent to be ordered to accept the codicil.

[19] Erasmus (et al) observed that:

'By far the most important requirement which has to be satisfied before a court will grant an order in terms of section 2(3) is the requirement that the court has to be satisfied that the testator intended the document to be his or her will.'[5]

[20] In the present matter, the most difficult hurdle for the applicants to have overcome was the interpretation to have been given to the first part of the codicil. It suggested that the codicil was merely an addendum to an existing will. This was reinforced by the reference to a 'current will', intimating that there had been a prior will, which may (or may not) have remained of application. To compound the confusion, the second part of the codicil contained no revocation clause. If the second part indeed expressed the dying wishes of the deceased, then it was, nevertheless, far from clear whether it was to have been interpreted as his final will or whether it was to have been understood in conjunction with an existing will, prepared prior to his admission to hospital.

[21] The above problems must be viewed within the context of the overall uncertainty about whether the deceased truly intended the second part of the codicil to have been his will. It could not have been said, without hesitation, that it was his signature at the foot of each page. The initials of the witness were not those of Ms Sewran. They differed from her signature on the first part of the codicil. Whereas the two nurses and the unit manager stated that they saw the deceased 'draft a document in the presence of his wife', they failed to identify it as having been either the first or second part, or both. Furthermore, Ms Sewran's affidavit did not clarify which document she signed.

[22] The only reliable witness to the alleged drafting and signing of the first and second parts was the second respondent. As the deceased's wife, however, she stood to benefit from the will and consequently her reliability had to be called into question.

Relief and order

[23] There were, ultimately, too many uncertainties to have permitted me to have been satisfied that the codicil was intended as the deceased's will. I was unable to hold, on a balance of probabilities, that either the first or the second part, or both, expressed his final wishes.

[24] I pause to observe that the second respondent's drafting of the second part attracted the implementation of section 4A(1) of the Act, which would have disqualified her from benefitting from the will.[6] The provisions of section 4A(2) create exceptions to this, including authority for a court to declare that a person in the position of the second respondent would indeed be competent to benefit if the court was satisfied that the person did not defraud or unduly influence the testator in the execution of the will. Such an issue was, however, not before the court.

[25] Overall, I was not persuaded that the requirements of section 2(3) of the Act had been met. The application was not opposed, there was no need to have directed the applicants to pay the costs thereof.

[26] The application was dismissed.

JGA LAING

JUDGE OF THE HIGH COURT

I agree.

L RUSI

APPEARANCE

For the applicants: Adv Nabela, instructed by Polo Attorneys, Mthatha.

For the respondents: No appearance.

Date of request for reasons: 15

February 2023.

Date of delivery of reasons for judgment: 10 May 2023.

[1] HJ Erasmus (et al), 'Wills and Succession, Administration of Deceased Estates', in LAWSA (vol 31, 2ed, 2011), at paragraph 265. See, for example, *Kidwell v The Master* 1983 (1) SA 509 (E).

[2] *Ibid.*

[3] This is evident from a trio of cases decided shortly after the amendment of the Act. See *Horn v Horn* 1995

(1) SA 48 (W); *Logue v The Master* 1995 (1) SA 199 (N); and *Ex parte Maurice* 1995 (2) SA 713 (C).

[4] *Sic.*

[5] HJ Erasmus (et al), *op cit* (n 1).

[6] The provisions of section 4A(1) state that: ‘...Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.’

[6] The provisions of section 4A(1) state that:

‘...Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.’

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Prepared on 9 October 2026 · Esheria