

SOUTH AFRICA / JUDGMENT

Yokwana v Yokwana (9438/2011)

[2013] ZAWCHC 22 (13 February 2013)

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COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

9438/2011

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 9438/2011 Before: The Hon Mr Justice Binns-Ward

In the matter between:

ZANOXOLO STUDENT YOKWANA

.....Applicant

And

NOPINKI YOKWANAFirst Respondent

THE MASTER OF THE HIGH COURT, CAPE TOWNSecond Respondent

JUDGMENT DELIVERED: 13 FEBRUARY 2013

BINNS-WARD J:

- [1] The applicant applied for an order in terms of s 2(3) of the Wills Act 7 of 1953, alternatively, under the common law, directing the Master to accept a document purporting to have been signed by his late mother, Ms. Fete, as testatrix, as her will. It was accepted by the applicant's counsel, quite correctly, that relief under s 2(3) of the Wills Act was not available because the document in question was not the original allegedly signed by her, and thus did not qualify as the document allegedly executed by her; cf. *Ex Parte: Porter and Another* 2010 (5) SA 546 (WCC), at para. 11. The court does, however, have jurisdiction under the common law to direct the Master to accept a reconstruction

of a will that has become lost provided it is satisfied that the reconstruction is both accurate and complete: see Corbett et al, *The Law of Succession in South Africa*, 2nd edition, (Juta, 2001) at pp. 116-117: Ex pane Gowree 1915 CPD 108: Ex parte Ntuli 1970 (2) SA 278 (W) and *Nell v Talbot* 1972 (1) SA 207 (D).

[2] The last-mentioned three judgments concerned draft wills, or in Talbot's case, a prior will which had been superseded by a lost will which contained an additional provision which, because its operation was predicated on the simultaneous demise of the co-testators, did not have any effect in the particular factual circumstances. The governing principle applied in all these cases, however, is that the court may direct the Master to accept as a will any document

containing testamentary dispositions if it is satisfied that the contents accurately and completely reflect the intending testator's

testamentary intentions. That a document that is proven to be a true copy of one actually executed as a will should fall within the embrace of the common law power is thus axiomatic in my judgment. It matters not that the original might not have complied with the formalities prescribed in terms of the Wills Act.

[4] According to the tenor of the document in issue two immovable properties belonging to the late Ms Fete, one in Gugulethu and the other in Alice in the Eastern Cape, are bequeathed to the applicant. A third property, also in Alice, is bequeathed to the respondent. All the movable property in Ms Fete's estate, except for a fridge and a stove, is left to the respondent in terms of the document.

[5] The Gugulethu property is the place where Ms Fete lived for many years up until very shortly before her death in hospital in June

2008. It was also the place where the applicant lived with his wife and children in an outbuilding, or 'granny flat' as it was called. The respondent lived together with Ms Fete and a younger woman in the main dwelling on the property. It was alleged in one of the supporting affidavits that the younger woman, Somikazi Ndamane (rendered as Damani), who was related to the family, had been formally adopted by Ms Fete, but there is no proof of any such adoption. The respondent denied that Ms Ndamane had been adopted by Ms Fete.

[6] The effect of the possible status of the young woman, who now lives in Port Elizabeth apparently, was not considered by either side during argument. In the course of preparing judgment, however, it struck me that she had a direct and substantial interest in the case and should have been cited as a respondent. This is so because, if she is indeed an adopted child of the alleged testatrix, judgment in the current matter will have a material effect on her proprietary interests; for if the application is dismissed - there being no suggestion that Ms Fete had an earlier unrenounced will - she will be an heir to the intestate estate: aliter if the case is decided the other way. The legal representatives of the applicant and the respondent were therefore informed in chambers that I would find myself unable to give judgment on

the merits of the case unless Ms Ndamane filed a notice of waiver of her right to be joined and a willingness to abide the judgment of the court. I was thereafter furnished with a statement by Ms Ndamane, which on its face was signed before two witnesses, in which she consented to judgment being given without the need for her to be joined as a party to the proceedings. Ms Ndamane's surname is misspelled as Ndamabe in the statement. From the context of the other documentation furnished to me together with the signed statement it would appear that the statement was made after service of at least the founding papers had been on Ms Ndamane by the sheriff. I was also provided with a certified copy of an extract of Ms Ndamane's identity document. I am satisfied in the circumstances that judgment can be given in this case without the need for Ms Ndamane to be joined as party in the proceedings.

- [7] It is common cause that the applicant and the respondent historically were not on good terms with one another. After their mother's death the respondent excluded the applicant from access to the main dwelling house and sought a domestic violence interdict against him on the grounds of his alleged attempts to gain entry by banging on the door. The applicant on his part instituted proceedings for the eviction of the respondent from the property. This happened after he became aware of the existence of the will allegedly executed by his mother.
- [8] The disputes between the two protagonists were submitted to the local street community, apparently at the instance of the respondent. This must have been before the disclosure of the will. According to an executive member of the committee, one Nisipho Susan Bhunu, three meetings were held in this connection. The respondent failed to arrive at the first two meetings. At the third of these meetings, in the presence of both the applicant and the respondent, one Zama Yokwana, Ms Fete's nephew, announced that Ms Fete had executed a will. This was the first that the respondent came to hear of the allegation. According to the applicant he too had previously been unaware of the fact. Ms Bhunu of the street committee testified that indeed both of them had manifested surprise at the information. As a consequence of Zama Yokwana's intimation a delegation, including representatives of the street committee, visited the offices of the firm of attorneys where the will had allegedly been executed. According to the applicant, whose evidence is supported in this respect by Ms Bhunu, and also by Mr Dimon of attorneys Dimon, Molete and Associates of Mitchell's Plain, they were there shown by Mr Dimon the original of the testamentary document allegedly executed by Ms Fete.
- [9] Zama Yokwana testified in the affidavit he made in support of the application that he had been contacted by Ms Fete, to whom he referred as his 'grandmother' - I assume as a term of respect, for there is nothing to suggest he is the offspring of either the applicant or the respondent: the applicant referred to Zama as his nephew - in April 2008. She had expressed her unhappiness at the manner in which she was being treated by the respondent and indicated her wish to make a will disposing of her property. The implication was that Ms Fete wished to dispose of her estate upon her demise in a way that would give preference to the applicant over the respondent. Yokwana was due to leave on a business trip to

Johannesburg at the time and thus arranged to take Ms Fete to Dimon Molete and Associates attorneys on his return three weeks later.

[10] Yokwana says that he and Ms Fete saw a certain Ms Nomonde Scott at the offices of the attorney. Ms Scott advised Ms Fete to return the following day, which was the 23rd of April 2008, with money for her R1500 fee. as well as two persons who could act as witnesses. Yokwana duly returned with Ms Fete the following day, as instructed. They were accompanied on this occasion by one Nceba Leslie Ngesi, who is an uncle of the applicant and the respondent. Ms Scott then took instructions from Ms Fete as to the content of the will. After the document had been typed up by a secretary . Ms Scott read the document to Ms Fete in the presence of Zama Yokwana and Mr Ngesi. Yokwana says that Ms Fete expressed herself to be satisfied with the document and then signed it in the presence of himself and Ngesi. who witnessed it by initialling the first and second pages and signing the last page. Ngesi made an affidavit confirming Yokwana's evidence. (Ms Scott was no longer employed at Dimon, Molete and Associates when the delegation including members of the street committee visited the offices to see the will in the circumstances described earlier.)

[11] Mr Dimon's affidavit confirms that Ms Fete made a will at his firm's offices on 23 April 2008. It is not explained in the affidavit on what basis he was able to do so. There is no indication in the evidence of Messrs Yokwana and Ngesi that Mr Dimon was present during their attendance on Ms Scott that day. It may be that Mr Dimon's evidence is based on inference drawn from the fact that the original of the dated document was retained on file at his offices. Nevertheless, I do not consider it to have been satisfactorily

established that Mr Dimon is qualified to give direct evidence as to the events that allegedly occurred at his firm's offices on 23 April 2008.

[12] Ms Scott is obviously a witness who could have, and ordinarily would have been expected to have, testified on the issue. It is apparent that the applicant's legal representatives made concerted efforts to obtain an affidavit from Ms Scott in the matter. These efforts are substantiated in email correspondence annexed to the affidavit of a candidate attorney at the applicant's current firm of attorneys who was engaged in dealing with this aspect of the case. According to the candidate attorney. Ms Scott was initially co-operative and willing to be of assistance, but changed her attitude and failed to return messages after she was made astute to the fact that the document allegedly drafted by her did not comply with the requirements of the Wills Act.

[14] The applicant came to court on the first occasion the matter was called on 22 October 2012 under the apprehension that the respondent bore the onus of disproving the authenticity of the signature. The respondent's attorney was not present in court on that occasion and because of the unsatisfactory circumstances of his filing a notice of withdrawal on that date only after I had directed that enquiries be made as to his whereabouts the matter had to be postponed. Reportedly because of the tenor of remarks from the Bench during my exchanges in court with the applicant's counsel on that day, the applicant then engaged the

services of a handwriting expert to analyse and report on the disputed signature. At the resumption, on 27 November 2012, the applicant sought and was granted leave to introduce a fourth set of affidavits dealing with the expert's report. In order to facilitate how the respondent would wish to deal with the belatedly introduced evidence a ruling was sought from me on the incidence of the onus of proof in respect of the authenticity of the signature. In a judgment given *ex tempore* on 27 November 2012 I held that the applicant bore the onus of proving that the signature on the document was that of Ms Fete.

- [15] The respondent's attorney then applied to cross-examine the expert. There was no application by the respondent to call her own handwriting expert, this despite the indication in her answering papers that such evidence was indicated. The hearing was postponed by agreement to 28 January 2013 for the purposes of the cross-examination of Ms Yvette Palm.
- [16] Ms Palm confirmed the content of her written report in her oral evidence. With the assistance of a large screen and a laser cursor she took the court in detail through the various points of correspondence and dissimilarity between the copy of the signature on the questioned document and eight specimen signatures confirmed to have been those of Ms Fete. The matters that were covered in this exercise are graphically depicted on a document prepared by Ms Palm that was accepted in evidence as exhibit A. Ms Palm made it clear that she was disabled by not having the original of the disputed document to compare with original specimen signatures from giving an absolute assurance that the disputed signature was that of Ms Fete. Nevertheless, for the reasons she explained, she was of the opinion that the signature was probably that of Ms Fete. Ms Palm stated that the quality of the photocopies of the documents that she had been provided with was good enough to enable a determinative comparison on the probabilities. This was because the signatures in question were letter-based and not form-based. (An example of a form based signature would be one comprising merely of a series of squiggles.)
- [17] I do not find it necessary to rehearse Ms Palm's evidence in detail. I am satisfied that she had approached forming the opinion she expressed objectively. Her analysis was explained in great detail and clearly demonstrated in the blow-up pictorials of the specimen and questioned signatures to which she referred to illustrate all the points she made in her report including the formation, orientation in relation to the signature line and spacing of the letters making up the components of the specimen and questioned signatures. For the purposes of comparison the witness used only the names that were common to both the specimen signatures and the questioned one. In this regard it needs to be mentioned that the signature on the questioned document ended with her husband's surname, Yokwana, which was not included in any of the specimen signatures and which, it appeared to be common cause, had not ordinarily been used by Ms Fete in executing her signature. Judging by the nine specimen signatures that were made available Ms Fete variously signed her name as 'Regina Fete' or 'Regina Dames Fete' ('Dames' in the signature despite spelling the name 'Damse' in handwriting in the body of some of the documents).

- [18] The signature on the questioned document comprises the names 'Regina Fete Yokwana'. Ms Palm therefore compared only the execution of the names 'Regina' and 'Fete' in the specimens and the questioned document, although she did have regard to the composite signatures in each case for certain purposes such as the orientation of the last name used in the signature to the signature line and a consistent tendency by Ms Fete to break up with a hand lift the execution of the last word used in her signature. So 'Yokwana' was broken up in the signature in the questioned document in a manner comparable to the manner in which she was accustomed to breaking up the word 'Fete'.
- [19] Ms Palm's demonstrations and the conclusions she drew from them, which are all evident in the graphics included in her report dated 1 November 2012 and cross- referenced in the document put in during her oral evidence as exhibit A. were not impugned in cross-examination. The suggestion put to her by the respondent's attorney that she should have sought specimen documents from the respondent and that her failure to have done so showed bias was misplaced. Ms Palm candidly stated that she took her instructions from the party briefing her and made her requirements known to that party. It was up to that party to provide her with what she needed. In my view Ms Palm's conduct in this respect was entirely correct. There was no issue between the parties that the specimen signatures used for purposes of comparison with the questioned signature were genuine.
- [20] It was evident that Ms Palm had indicated that she considered that the five specimen signatures initially provided to her with her instructions to be inadequate. In response the plaintiffs attorneys provided her with four additional specimens.¹ Ms Palm was candid and forthright about the disability that the absence of the original of the questioned signature placed her under. It meant that she was not able to compare pen pressure and 'point load', which are two important factors that she would have wished to take into consideration. She also made it clear that it was unfortunate that the comparative signatures were not of the same vintage as the questioned signature. Ms Palm explained in this regard that writing quality was affected by things such as the infirmity attendant on encroaching old age and poor health. One of the features of the questioned signature that the witness remarked upon about the questioned signature was that it evidenced a manifestly greater indication of tremor in its execution than the specimen signatures.
- [21] Ms Palm found several points of correspondence between the questioned signature and the specimen signatures. She listed these as follows:

The artistic ability in the two sets of signatures was consistent.

The poor line quality with erratic movements in the writing in the questioned signature was consistent with the later-dated (i.e. post

2004) specimen signatures.

The placing of the signature on the signature line at the beginning as well as the height of the signature above the signature line was consistent.

The downward sloping of the signature beyond the signature line was consistent.

The inter-letter spacing (i.e. the spacing relationship between separate letters in a word) was consistent.

The inter-word spacing was consistent.

The construction of the signature of the name 'Regina' was consistent in all respects

The construction of the 'F' in 'Fete' was consistent.

The execution of the bar of the 'F' in 'Fete' was consistent.

The placing of the first 'e' in 'Fete' in relation to the 'F' was consistent.

The construction of the and placing of the second 'e' in 'Fete' in relation to the 't' was consistent.

[22] The handwriting expert also identified several points of dissimilarity between the questioned signature and the specimen

signatures. They were: That the name Yokwana was not used in any of the specimen signatures.

The construction of the letters 'Fe' in 'Fete' in one movement in the questioned signature differs from the specimen signatures.

The construction of the letters 'ef' in 'Fete' in one movement in the questioned signature differs from the specimen signatures (although the spacing between the letters was consistent).

The construction of the letter 'f' in 'Fete' in the questioned signature differs from the specimen signatures. [23] Ms Palm regarded the points of dissimilarity as conspicuous. They were not the sort of differences that a forger was likely to perpetrate. As she put it in her written report, 'Forgers naturally want to pass off a signature as an authentic signature and thus rely on the more conspicuous detail to achieve this. Therefore one finds that the capital letters and the more prominent letters (like the "f" in this instance) would conform to the specimens more closely. The inconspicuous detail is what sets a genuine signature apart from a forgery as forgers don't know, or have the ability always to accurately copy this/ I understood by this that Ms Palm meant that it would take an exceptional forger to produce the mix of correspondence of inconspicuous detail and conspicuous dissimilarity that she found in the questioned signature compared with the specimens. Ms Palm demonstrated that the questioned signature exhibited strong corresponding characteristics in the inconspicuous detail (i.e. size of letters in relation to each other in a word and the placing of individual letters in relation to others in a word). She also regarded it as significant that the word 'Yokwana' which was the last word in the questioned signature was executed in a manner that Ms Fete was accustomed to executing the word 'Fete', which was ordinarily the last word used in her signature as evidenced in the specimen signatures, thus whereas there was a break (or hand lift) between the 'Fe' and the 'te' in Fete in the specimen signatures, there was a comparable break between the 'Yo' and the 'kwana' in 'Yokwana' in the questioned signature. This was an executive similarity that the witness considered it unlikely that a forger would achieve. Ms Palm concluded that the questioned signature was probably executed

by the same person who executed the specimen signatures. [24] The only criticism I have of Ms Palm's evidence is that she ventured an opinion on two points outside what I regard as her field of expertise. The first was that it was unlikely that a forger would have used the name Yokwana in the signature because it is unlikely that it would have been on any specimen they used to base a forgery. The point is quite logical, and indeed is one to which I shall have regard in determining the overall probabilities of the case, but it was not for the witness to seek to make as a handwriting expert. The second was her evidence that in formal situations such as the execution of wills in an attorney's office isiXhosa-speaking persons sometimes used names which they would not ordinarily include in their signature. No basis was laid for the admissibility of this ventured opinion, which has nothing to do with handwriting analysis. These criticisms could have supported an argument that the witness was affected by partisanship in favour of the applicant. I have weighed that possibility and discounted it. It was quite evident from other parts of her evidence elicited under cross-examination that the witness had not sought to make herself au fait with the issues between the parties and had, quite professionally, limited the information that she had sought from the plaintiff's attorneys to that which she needed for the purposes of her handwriting analysis. She had shown no interest in the merits of the case, or the respective positions of the disputants. [25] My acceptance of Ms Palm's admissible opinion evidence would have afforded sufficient basis, on its own, to hold that the document purporting to be the will of the late Ms Fete was indeed signed by her. That the deceased did indeed sign the document is, however, also supported by the direct evidence of two witnesses who stood nothing to gain by falsifying the facts. It is also inherently improbable that the original of the document would have been maintained on file at a firm of attorneys if Ms Fete had not executed the will at the attorneys' offices as described by Zama Yokwana and Nceba Ngesi. I also consider that it is unlikely that any person wishing to favour the applicant would have forged the signature in question using the name Yokwana. The handwriting and form of executing the signature bears a resemblance to the manner in which Ms Fete signed a number of other documents which is notable even to the non-expert eye. This indicates that if the disputed signature had been a forgery, as contended by the respondent, its maker must have had access to and copied from an example of a signature actually executed by Ms Fete. The evidence suggests that a specimen signature including the use by Ms Fete of her 'Yokwana' married surname would not have been available. It is improbable that a forger would have gratuitously used the additional name because to do so would only have served to create an incongruity that could be seized upon to question the authenticity of the signature. All these considerations, taken together, establish strongly, as a matter of probability, that the document in issue was indeed signed by Ms Fete. [26] It follows that the evidence also establishes on the probabilities that Ms Fete intended the content of the document signed by her to set out her testamentary wishes. The document by its tenor describes itself as her last will and testament and but for the non-compliance with the formalities prescribed in terms of the Wills Act would have qualified as such. There was no allegation that Ms Fete was not in possession of her mental faculties at the time the signature of the questioned document was alleged to have been effected. [27] I do not consider it to be of any consequence that one of the immovable properties which Ms Fete purported to bequeath in terms of the document appears not to have been registered in her name. Whether or not Ms Fete had any

claim on the property is an issue with which the court does not have to concern itself in these proceedings. If Ms Fete did not enjoy a claim to have the property registered in her name the bequest in question will be ineffectual. An ineffectual bequest does not negate the testatrix's testamentary intention, nor does it render invalid any effectual bequests reflected in the record of such intention.

[28] In all the circumstances I am satisfied that a case has been made out for the relief sought by the applicant under the common law.

[29] In the result the following order is made:

1. The Master of the High Court, Cape Town, is hereby authorised and directed to accept a true copy of the document annexed as annexure 'ZY5' to the founding affidavit (which purports to be a copy of the last will and testament of Regina Nodani Fete drafted by Dimon Malete & Associates) as the last will and testament of the late DAMSE REGINA FETE (ID No. 281119 0169 08 4).
2. The respondent is ordered to pay the applicant's costs of suit in the application, including the qualifying fees of Ms. Yvette Palm. (This paragraph pertains to the costs not already disposed of in terms of the costs order made on 27 November 2012.) A. G. BINNS-WARD
Judge of the High Court

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signatures. They were:

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- [24] The only criticism I have of Ms Palm's evidence is that she ventured an opinion on two points outside what I regard as her field of expertise. The first was that it was unlikely that a forger would have used the name Yokwana in the signature because it is unlikely that it would have been on any specimen they used to base a forgery. The point is quite logical, and indeed is one to which I shall have regard in determining the overall probabilities of the case, but it was not for the witness to seek to make as a handwriting expert. The second was her evidence that in formal situations such as the execution of wills in an attorney's office isiXhosa-speaking persons sometimes used names which they would not ordinarily include in their signature. No basis was laid for the admissibility of this ventured opinion, which has nothing to do with handwriting analysis. These criticisms could have supported an argument that the witness was affected by partisanship in favour of the applicant. I have weighed that possibility and discounted it. It was quite evident from other parts of her evidence elicited under cross-examination that the witness had not sought to make herself au fait with the issues between the parties and had, quite professionally, limited the information that she had sought from the plaintiff's attorneys to that which she needed for the purposes of her handwriting analysis. She had shown no interest in the merits of the case, or the respective positions of the disputants.
- [25] My acceptance of Ms Palm's admissible opinion evidence would have afforded sufficient basis, on its own, to hold that the document purporting to be the will of the late Ms Fete was indeed signed by her. That the deceased did indeed sign the document is, however, also supported by the direct evidence of two witnesses who stood nothing to gain by falsifying the facts. It is also inherently improbable that the original of the document would have been maintained on file at a firm of attorneys if Ms Fete had not executed the will at the attorneys' offices as described by Zama Yokwana and Nceba Ngesi. I also consider that it is unlikely that any person wishing to favour the applicant would have forged the signature in question using the name Yokwana. The handwriting and form of executing the signature bears a resemblance to the manner in which Ms Fete signed a number of other documents which is notable even to the non-expert eye. This indicates that if the disputed signature had been a forgery, as contended by the respondent, its maker must have had access to and copied from

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- [26] It follows that the evidence also establishes on the probabilities that Ms Fete intended the content of the document signed by her to set out her testamentary wishes. The document by its tenor describes itself as her last will and testament and but for the non-compliance with the formalities prescribed in terms of the Wills Act would have qualified as such. There was no allegation that Ms Fete was not in possession of her mental faculties at the time the signature of the questioned document was alleged to have been effected.
- [27] I do not consider it to be of any consequence that one of the immovable properties which Ms Fete purported to bequeath in terms of the document appears not to have been registered in her name. Whether or not Ms Fete had any claim on the property is an issue with which the court does not have to concern itself in these proceedings. If Ms Fete did not enjoy a claim to have the property registered in her name the bequest in question will be ineffectual. An ineffectual bequest does not negate the testatrix's testamentary intention, nor does it render invalid any effectual bequests reflected in the record of such intention.
- [28] In all the circumstances I am satisfied that a case has been made out for the relief sought by the applicant under the common law.
- [29] In the result the following order is made:
1. The Master of the High Court, Cape Town, is hereby authorised and directed to accept a true copy of the document annexed as annexure 'ZY5' to the founding affidavit (which purports to be a copy of the last will and testament of Regina Nodani Fete drafted by Dimon Maleté & Associates) as the last will and testament of the late DAMSE REGINA FETE (ID No. 281119 0169 08 4).
 2. The respondent is ordered to pay the applicant's costs of suit in the application, including the qualifying fees of Ms. Yvette Palm. (This paragraph pertains to the costs not already disposed of in terms of the costs order made on 27 November 2012.)

A. G. BINNS-WARD

Judge of the High Court

¹The four additional specimens were referred to in the report as S6 to S9. S9 was not annexed to the report or referred to in the analysis, but nothing was made of this omission in cross-examination of the

witness.

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