Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 3727/2012

In the matter between:

SANDRA JANE WREN	First Applicant
YOLANDI MYNHARDT	Second Applicant

and

THE MASTER OF THE EASTERN CAPE HIGH COURT, POR ELIZABETH	First Respondent
IAN DAVID MITCHELL NO	Second Respondent

JUDGMENT

REVELAS J

[1] The applicants seek a declaratory order in terms of section 2(3) of the Wills Act, 7 of 1953 ("the Act"), to the effect that the original of a note written by the late Carolynn Ellen de Villiers ("the deceased") was intended to be an amendment of her pre-existing will executed on 8 July 2011. The note and will were respectively referred to as Annexures "A" and "C" in the notice of motion.

[2] The deceased's will, Annexure C, was drawn up by attorneys in Port Elizabeth and contained seven legacies. The deceased's father (the second respondent) and her brother were named as the residual heirs therein.

[3] The deceased was a well-educated person and earned a salary of R1 286 400.00 per annum. At the time of her death her assets included:

[3.1] cash on hand of approximately R2 million;

[3.2] a share portfolio worth more than R5 million;

[3.3] immovable property valued at R850 000.00;

[3.4] vehicles and movable property worth approximately R595 000.00.

The deceased had no substantial debts apart from the outstanding balance of approximately R90 000.00 in respect of the mortgage bond registered over the immovable property referred to. Her estate was worth approximately R8.5 million.

[4] On or about 9 June 2012 deceased wrote two notes (Annexure A and Annexure B to the notice of motion) which contained testamentary dispositions in favour of the two applicants. In Annexure A the deceased bequeathed R1 million to each of the applicants. In Annexure B, she bequeathed R1 million to the second applicant. In both notes the first applicant was the heir to the contents of the common home at 5

Wodehouse Street, Mount Pleasant, Port Elizabeth. The first applicant and the deceased had been living together as life partners at 5 Wodehouse Street for a year prior to the deceased's death, both having undertaken duties of reciprocal support. The second applicant had been a close friend of the deceased for approximately twelve years.

[5] It was common cause between the parties that the two notes were written by the deceased during the early hours of 9 June 2012. Thereafter, she committed suicide by hanging herself, while the first applicant was asleep upstairs. Shortly before her suicide, the deceased and the second applicant exchanged electronic messages which revealed that the deceased was unhappy and that the second respondent had tried to cheer her up. The last message sent by the deceased to the second applicant was at 01h00.

[6] It is not clear when these two notes were written by the deceased, but it was common cause that they were probably written shortly before the deceased took her own life.

[7] The result of an analysis of a blood sample taken from the deceased was that the concentration of alcohol in the blood sample was 0,15 grams per 100 millilitres. One can therefore accept that the deceased was

probably to some extent, under the influence of alcohol when she wrote one or both of the notes in question.

[8] The second respondent, who is also the executor of the deceased estate, opposed the granting of the relief sought by the applicants on the ground that if, as the applicants contend, Annexure A was a valid will, Annexure B must also be regarded as a valid will on the applicants' approach. It was submitted on behalf of the second respondent that the two wills are incompatible and contradictory, because Annexure A contains a bequest of R1 million to the first applicant whereas Annexure B does not, and it cannot be established which of the two was written last. The second respondent, however, did not persist with his initial challenge to the deceased's testamentary capacity, which was on the basis that she was so intoxicated when she wrote the notes, that she was mentally incapable of appreciating the nature and effect of her act.

[9] When the matter was argued, both parties were *ad idem* that the deceased regarded Annexure A and B as embodying an expression of her final wishes as to the devolution of the assets referred to in them, upon her death. The only remaining question is whether the two notes are incompatible, or contradictory, in which case neither of them can be regarded as valid.

[10] It is necessary to cite the contents of both notes in full:

[11] Annexure "A" reads as follows:

"My Last Will & Testament.

I want all goods in this house to ~~be lon~~ belong to Sandy Jane Wren & she gets R1m from my estate. Yolande "Zozi" also gets R1m from my estate.

Dad & Barry there will be enogh for you please grant my dieing wish.

Sorry to do this to you all but time to be with mom.

Love y all

Life is too oo hard.

Take care I will be watching you.

Love love.

Lots"

[12] Annexure "B", which has notations in the top left hand and right hand corners unrelated to this application, but otherwise reads as follows:

"Sands you are a good wife.

Please thank Margie.

~~I also want~~

Writneness _____

Sand Jane Wrem

My wish C. De Villierss

My Larst will & testemonemt".

This is my wish & if you ewer loved me you will make sure it is seen through

I want Sandy to have legal rights of everything in 5 Wodehouses

I want Zozi to get R1m.

They are the best the riest, more than enough is for u dad and Barry.

Applicable Principles

[13] Section 2(3) of the Act reads as follows:

> "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 . . . ."

[14] The applicants bear the onus of establishing the intention of the deceased in writing the notes. Read together, Annexures A and B constitute an addendum or supplement to the deceased's previously executed will, for the purposes of adding to, or varying the provisions of her will. They thus constitute a codicil.[1] In order to be valid, a codicil, which is a species of a will, must have been drafted with the intention of executing a testamentary document, and evidence is admissible to show whether or not the testator had the requisite intention.[2]

[1] *Kleyn v Estate Kleyn* 1915 AD 527 at 537 and *Corbett, Hofmeyr and Kahn*: The Law of Succession in South Africa, Second Edition at 34.

[2] *Corbett, Hofmeyr and Kahn*: Chapter 1X (Invalidity of Wills Generally); *Burton-Moore v The Master* 1983(4) SA 419 (N) at 420 F-G.

[15] For present purposes, the following relevant principles regarding the interpretation of wills as set out in *Corbett, Hofmeyr and Kahn*[3] are applicable:

> "If a testator leaves more than one will and the later will or wills do not expressly revoke the earlier one or ones, all the wills must be read together and, in as far as possible, reconciled. If, however, reconciliation is impossible, the provisions of the latest will prevail. But where a bequest has been made in an earlier will in clear and unambiguous language, it requires equally clear and unambiguous language in a later will to justify the conclusion that the testator's intention had changed and that the testator had, by application, wholly or partially revoked the earlier bequest. It should be noted, however, that this rule is ancillary to the wider and more fundamental doctrine that the cardinal principle in construing testamentary documents is to ascertain from a consideration of them, in their entirety, the true intention of the testator. If it cannot be established which one of two incompatible wills bearing the same date was made last, both will be invalid".

[16] The applicants and the second respondent also referred to *Voet*[4] who wrote that the position in Roman Law and "modern law" was that if there are two wills of the same date, but it is uncertain which of them were made first, both would be invalid if conflicting different heirs are instituted. As an exception to the aforesaid rule, *Voet* referred to an example given by Ulpian, that in a case where there are two dockets (wills or codicils) "*sealed at the same time*", and bound together with "*a*

[3] At 463.

[4] The Selective Voet: Commentary on the *Pandects*, Volume Four (*Gane's* Translation), 28.3.9.

single thread" and each contains different heirs who would come jointly into the inheritance from the testator, "*neither heir is able to set up that he was named in a later docket*", because such a will "*can, and ought to be considered as one single last will*". The applicant's counsel, *Mr Beyleveld*, relied on the aforesaid exception, since Annexures A and B were found together, having been executed more or less at the same time. He submitted that read together, they are not contradictory.

[17] Neither of the two notes in the present case contain revocation clauses. Read together they introduce three additional bequests and two additional legatees who each inherit a million rand, and the first applicant (or legatee), also inherits the contents of the common home. Significantly, there is R2 million cash on hand in the deceased estate which can make good the two bequests consisting of cash. In so far as these bequests diminish the residual value of the deceased estate, and therefore the inheritance of the residual heirs, it is significant that the deceased assured her residual heirs in both Annexures A and B, that there would still be enough for them to inherit. There is no indication that the deceased intended to exclude the first applicant from inheriting from her.

[18] The notes under consideration could have been drafted in clearer terms and with greater eloquence, but the deceased was clearly under tremendous emotional strain when she drafted them. She was after all

about to hang herself. Furthermore, the deceased's formal will, executed a year before, obviously did not, and could not make provision for any bequest to the first applicant with whom the deceased had been living for only a year. The deceased described her as "a good wife" shortly before her death. Understandably, she would have wanted to include the first applicant in her will. There can also be no doubt about the deceased's intention to make a bequest to the second applicant, if both notes are read together, even superficially.

[19] In addition to Annexures A and B, the deceased also wrote two further notes which were found in the same room as Annexures A and B according to the police docket compiled in the investigation of this matter. The first note read:

"Sorry I let u down my louve don't loose confidence in yourself just let people in".

The second note which was written on the top left hand corner of a typed page, the deceased had written to her father and brother (the residual heirs in her will):

"dad & Barry you will enough get shares. I love you guys".

[20] The apology tendered in the first note addressed to the first applicant was probably for the suicide she was about to commit.

[21] The second note seems to be an apology and explanation to the deceased's father and brother concerning the residue of the deceased

estate which would be diminished by the additional bequests. Therefore, the two residual heirs (her father and brother) are referred to the deceased's very substantial share portfolio (worth over R5 million). These two notes are further indications that Annexures A and B are not incompatable with each other.

[22] Annexure A expresses the deceased's intention in clearer terms than Annexure B, and it retains its meaning even if it is read without Annexure B. For purposes of the order to be made herein, Annexure A is the more appropriate document to be declared as the codicil to the deceased's will.

Costs

[23] Costs fall within the discretion of the court and it is well established that in cases concerning wills, there are exceptions to the general principle that the losing party is ordered to pay the costs. The court may order that the costs be paid from the deceased estate in cases where the testator caused the litigation or the circumstances have reasonably led to an investigation.[5] Both situations find application in the present matter.

[24] Counsel for both parties were in agreement that a special costs order (attorney and client costs) should be made in this case. Where an

[5] *Corbett, Hofmeyr and Kahn* at 643 and *Naidoo v Crowhurst NO* [2010] 2 All SA 579 (WCC) para [89].

executor's costs are ordered to be paid out of the estate such an order would also include attorney and client costs.[6] The second respondent is the executor of the deceased estate in this case. Courts have also frequently exercised their discretion in favour of ordering that all the costs to come out of the estate be paid on an attorney and client basis, sometimes even without justification.[7] In my view, there is justification for such an order.

[25] In the result, the following order is made:

1. Annexure "A" to the notice of motion is hereby declared to be a codicil to the will of the late Carolynn Ellen de Villiers.
2. The first respondent is hereby ordered to accept Annexure "A", for purposes of the provisions of the Administration of Estates Act 66 of 1965, as a codicil.
3. The costs of the application (which in the case of the applicants includes the costs of two counsel), shall be paid from the estate of the late Carolynn Ellen de Villiers on a scale as between attorney and client.

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[6] *Corbett, Hofmeyr and Kahn* at 646.

[7] *Stock v Keren Hayesod, Israel 1978(4) SA 92 (w) at 104.*

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E REVELAS
Judge of the High Court

Eksteen J: I agree.

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JW EKSTEEN
Judge of the High Court

Counsel for the applicants', Adv A Beyleveld SC, instructed by BLC Attorneys.
Counsel for the second respondent, Adv AM Breitenbach SC, instructed by Joyzel L Obbs.
Date heard: 23 October 2014
Date Delivered: 11 December 2014