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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 37080/2013

Date: 17 June 2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

17/6/2015 Pretoria
DATE SIGNATURE

In the matter between:

MARGARET CATHERINE BARNARD

APPLICANT

And

THE MASTER OF THE HIGH COURT PRETORIA

1ST RESPONDENT

MARTHINUS JOHANNES FERREIRA N.O.

2ND RESPONDENT

SUSANNA MARIA DE MEILLON N.O.
(as Curator Bonis of Albert James De Meillon)

3RD RESPONDENT

ANDREW ARTHUR DE MEILLON

4TH RESPONDENT

JUDGMENT

PRETORIUS J,

[1] In this application the court is requested to make an order in terms of section 2(3) of the Wills Act, 7 of 1953, that the document purported to be the will of the late Christina Gezina De Meillon, dated 15 December 2012 to be declared to be her last will and testament.

[2] The applicant is the daughter of the late Mrs De Meillon, the second respondent is the executor of the estate and the third respondent is the *curatrix* of the applicant's brother, Albert James De Meillon. The fourth respondent is Andrew Arthur De Meillon, the brother of the applicant.

[3] The application is opposed by the fourth respondent. The fourth respondent argued that the application is premature as the document, purported to be the last will and testament of the deceased, had not been lodged at the Master of the High Court before the present application was launched. There is also no indication that the disputed document was refused by the Master, according to the fourth respondent.

[4] In **Logue and Another v The Master and Others 1995(1) SA 199 N** at p204 the court found:

> *"By refusing to accept documents purporting to be the will of a testator, the Master would cause an application to be made by one or more interested parties, in which event all other interested parties would have to be joined."*

[5] It is common cause that the deceased had executed a valid will on 3 June 2010. In terms of the will MacRobert Incorporated was appointed as the executor of the estate. Mr MJ Ferreira, the second respondent, was appointed as the executor by the Master of the High Court on 27 February 2013. This will was accepted by the Master as the last will and testament of the deceased.

Background:

[6] The second will was signed on 15 December 2012 by the deceased in the presence of the applicant. The second will and testament was drafted by Mr Voyiatzakis, an attorney, at the behest of the deceased. This was done after he had had a consultation with the deceased on 12 December 2012. This consultation with the deceased was in the presence of Ms Stroh, the caregiver of the deceased, who also signed the document as a witness on 15 December 2012.

[7] The difference between the first will and the purported will is that the third respondent would inherit a further property, which had originally been bequeathed to the fourth respondent. The applicant's evidence, as supported by the evidence of what the deceased had told the psychologist, is that her mother wanted to make adequate provision for her son, Albert James De Meillon, as he had been injured in a motor vehicle accident and could not take care of himself.

[8] On instructions of the deceased, the attorney, Mr Voyiatzakis redrafted the testament on 12 December 2012 and delivered it to the deceased on 13 December 2012. This document was signed by the deceased and two witnesses, of which one was Ms Stroh, on 15 December 2012,

in the presence of the applicant. The second witness signed the document in the presence of the applicant and the deceased, but was not present when the deceased had signed the purported will.

[9] On 12 December 2012 Mrs De Meillon, the deceased, consulted a psychologist, Ms van Eeden. The reason for this was set out as:

> *"Mev de Meillon wou my professionele opinie hê oor haar geestesgesondheid en haar vermoë om rasionele besluite te neem."*

She further indicated:

> *"Mev de Meillon het gesê dat die onlangse gebeure haar geweldig ontstel het en sy nou met 'n "tammeletjie" sit:*
>
> - *Haar vorige testament het gelui dat elkeen van haar kinders twee (2) huise by haar afsterwe sou erf.*
> - *Sy voel nou egter dat Cliffie as gevolg van sy gebrek meer versorging en finansiële ondersteuning as the ander kinders nodig het.*
> - *Margaret is alleenlopend en moet ook versorg word.*
> - *Andrew is werkloos, betaal nie sy huur aan haar nie en hou ook nie die plek in stand nie. Ten spyte daarvan wil hy beheer neem van haar en haar bates.*
> - *Dit het haar tot nadenke gestem en sy wil nou 'n verandering aan haar testament maak.*
> - ***Sy weet egter dat Andrew nie gelukkig met die verandering sal wees nie en wil seker maak dat haar***

kinders moet weet dat sy goed oor die saak nagedink het en dat sy by haar volle positiewe is toe sy haar besluit geneem het om veranderings aan haar testament te maak." (Court's emphasis)

[10] It is important to note that Mrs De Meillon went to Ms van Eeden, the psychologist, of her own volition and had requested Mr Erasmus to take her to Ms van Eeden's office. None of her children had taken her to Ms van Eeden, neither were any of them present at this consultation.

[11] Ms van Eeden had an in-depth consultation with Mrs De Meillon for sixty minutes and she noted that her observations and conclusions were based on her professional opinion and experience as a psychologist who had been in practice for twenty-eight years.

[12] Mrs van Eeden's conclusions were:

- *"Mev de Mellion was onder geen dwang om met my te praat nie – sy was hier uit haar eie vrye wil.*
- *Sy het my kom sien om 'n professionele opinie oor haar geestesgesondheid te kry.*
- *Sy wou haar voorneme om haar testament te verander met 'n onpartydige, buitestander bespreek en 'n onpartydige opinie hê.*
- *Ek het haar op geen manier na enige kant beinvloed nie. Sy is met die wete hier weg dat dit haar keuse is om te maak.*
- *In my professionele opinie was sy by haar volle*

positiewe, het sy samehangend gepraat en geredeneer, het sy logiese denke getoon en kon sy na my mening haar eie opinies formuleer, haar eie gevolgtrekkings maak en haar eie besluite neem. Sy het geen ooglopende tekens van diffuse gedrag getoon nie. Sy het goeie oriëntasie ten opsigte van tyd en plek getoon en het logies en beredenereerd opgetree.

- *Na my mening was daar geen ooglopende tekens van delirium, demensia of amnesia sigbaar wat op ernstige kognitiewe disfunksie gedui het en dus verdere ondersoek genoodsaak het nie."*

[13] On 15 December 2012 Mrs De Meillon took ill. She had to be admitted to hospital, but insisted on signing the new will and testament before leaving for the hospital. Ms Stroh was present and signed the will after Mrs De Meillon had signed it in her presence. Ms D Matjida, the domestic worker, arrived at the house and was requested by the applicant and Mrs De Meillon to sign the will as a witness, which she did in the presence of the applicant and the deceased. Mrs De Meillon passed away on 31 December 2012.

[14] The applicant was present throughout this time and saw Mrs De Meillon and the two witnesses sign the purported will as set out above. The document was not signed on the first two pages, but the third and last page was properly dated and signed as set out.

[15] The fourth respondent does not deny that the deceased had instructed Mr Voyiatzakis, her attorney, to draw up a new will and that it was

signed in the presence of the applicant and Ms Stroh, her caregiver and thereafter signed, in the presence of the applicant and the deceased by Ms Matjida. There is no indication from the fourth respondent that the will is fraudulent. The opposition is based on the contention by the fourth respondent that the deceased was not in a mental position to execute a will. The contents of the purported will is not in dispute.

[16] Mr Voyiatzakis, the attorney who drafted the document on instructions from the deceased set out in his supporting affidavit:

> *"I specifically confirm that the late Ms De Meillon, the Testatrix signed Annexure "B" at a time when she was fully capable to make a valid will. She gave clear instructions to me in regard to the drafting of the will and I thereafter delivered it to her, left it there for her own consideration and subsequently she signed the will. She was obviously satisfied with the content of the will as the will was in accordance with what we discussed and in accordance with her instructions to me."*

The Law:

[17] The formalities required in the execution of a will are set out in Section 2(1) of the **Wills Act, 7 of 1953** which provides, inter alia:

> *"(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 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."

Section 2(3) provides:

> ***"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 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 subsection (1).*** " (Court's emphasis)

[18] In **Van der Merwe v The Master 2010(6) SA 544 (SCA)** Navsa JA held at paragraph 14:

> *"By enacting s 2(3) of the Act, the legislator was intent on ensuring that failure to comply with the formalities prescribed by*

the Act should not frustrate or defeat the genuine intention of testators. It has rightly and repeatedly been said, that, once a court is satisfied that the document concerned meets the requirements of the subsection, ***a court has no discretion whether or not to grant an order as envisaged therein. In other words, the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.***" (Court's emphasis)

[19] In **Olivier v Die Meester en Andere: in re boedel wyle Olivier 1997(1) SA 836 (TPA)** it was found that there must be a document which the deceased had compiled or executed. In the present matter it is common cause that the attorney had compiled the document on instructions from the deceased, when according to him she was fully capable at the time to do so. The deceased had executed the disputed document.

[20] This court has to establish whether the deceased had the requisite intention when drafting and signing the document that the document would be her final will and testament.

[21] In **De Reszke v Marais and Others 2006(2) SA 277 (SCA)** Mlambo JA explained the legal position:

"Section 2(3) lays down the requirements which a document which does not comply with the formalities for the execution of a will has to meet before a court will order the Master to accept it as a will. The effect of an order under s 2(3) is that a document

which is not a will for want of compliance with certain prescribed formalities but purports to be a will is given effect to if the requirements of the section have been met. ***For the grant of relief under s 2(3) a court must be satisfied that the deceased person who drafted or executed the document intended it to be his will.*** *"* (Court's emphasis)

[22] In **Van Wetten and Another v Boch and Others 2004(1) SA 348(SCA)** Lewis JA held at paragraph 16

"In my view, however, the real question to be addressed at this stage is not what the document means, ***but whether the deceased intended it to be his will at all****. That enquiry if necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances."* (Court's emphasis)

[23] The court has to be satisfied that the disputed document was drafted by the deceased and that it was the deceased's intent that it was to be her last will and testament. The surrounding circumstances in this instance have to be examined and considered for this court to make a decision.

[24] It is clear that the applicant will not benefit if the disputed document is declared the last will and testament of the deceased. Her intention in launching the application was to give effect to her mother, Ms De Meillon's, intention by having this document executed on 15 December 2012 declared her mother's last will and testament.

[25] The fourth respondent relied in his opposing papers on a doctor's report which set out the deceased's condition during July and August 2012. However, this report cannot be regarded as evidence as it was not under oath, neither is a confirmatory affidavit attached. The report is not dated.

[26] The further report by SU Wright, a clinical psychologist, dated 7 September 2012, is similarly not under oath and the court cannot regard this report as evidence. In any event, the report by SU Wright is only a note consisting of four lines giving an opinion on the deceased's cognitive condition at the time.

[27] Mrs De Meillon was aware that the fourth respondent and his daughter had her mandate to take care of her affairs whilst she had been hospitalized in September 2012. This mandate she withdrew at the end of November 2012 due to the fourth respondent's conduct as told to Ms van Eeden by the deceased. She then decided to consult with a psychologist regarding her mental capacity. Ms van Eeden's report, which was confirmed under oath, was the result of this consultation.

[28] The fourth respondent did not submit any evidence to counter Ms van Eeden's evidence.

[29] The court has, in addition, the evidence of the applicant and Mr Voyiatzakis, the attorney, confirming that the deceased knew exactly what she was doing when she signed the second document, the purported will and that it was her intention on 15 December 2012 that this document would be her last will and testament.

[30] The only defence the fourth respondent has is that the fourth respondent is not inheriting the house that he has been living in for many years, but will inherit a different house. He requests the court to draw the inference that this behaviour of the deceased should be regarded as proof that she was not mentally able at the time to execute a new will.

[31] I cannot find that the deceased did not have the mental capacity to deal with her property in her last will and testament as she saw fit.

[32] The point *in limine* that the will was not lodged at the Master of the High Court and therefor this application is premature is cured by the report from the Master dated 18 September 2013 which sets out:

> *"Although the Master is bound to register every will properly lodged with him in terms of section 8 of the Act, the said will in question as mentioned in the Notice of Motion was never brought to the attention of the Master for consideration.* ***Even if the will has been lodged the master is going to reject it based on the fact that it does not comply with section 2[1][a][IV] of the Will Act.***" (Court's emphasis)

The Master indicated in the report that the Master will abide by the decision of the court.

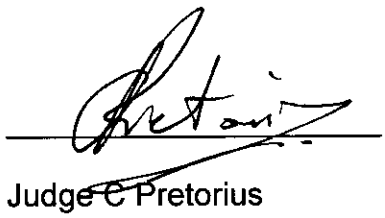
[33] I have considered the document itself and the surrounding circumstances, including Ms van Eeden's report, as well as all the arguments. It is quite clear that the deceased wanted to favour Albert James De Meillon and she supplied good and cogent reasons to Ms van Eeden for doing so. She had indicated her reasons for not

favouring the fourth respondent in a similar manner to Ms van Eeden. I can find no fault with her decision in this regard, as the houses belonged to her. She could deal with the properties as she saw fit. In this instance where not only the applicant, but the attorney, Mr Voyiatzakis, and the psychologist, Ms van Eeden, testified that the deceased had intended the document signed on 15 December 2012 to be her last will and testament, I find that the document is the valid last will and testament of the deceased. I find that she was *compos mentis* when she executed the will on 15 December 2012.

[34] I have applied the principles set out in the abovementioned authorities and I find that Mrs De Meillon, the deceased, intended this document to be her last will and testament.

[35] In these circumstances I make the following order:

1. It is declared that the document attached as annexure "A" to the Notice of Motion, signed on 15 December 2012 is the last will and testament of Mrs Christina Gezina De Meillon (hereinafter the Testator);
2. The first respondent is ordered to accept the 15 December 2012 will as the testator's will for the purposes of the Administration of Estates Act, Act 66 of 1965.
3. The costs of this application to be paid from the estate of the late CG De Meillon.



Judge C Pretorius

Case number	: 37080/2013
Appeal heard on	: 2 June 2015
For the Applicant	: Adv. AJH Bosman SC
Instructed by	: WF BOUWER ATTORNEYS
For the Respondent	: Adv. E Janse van Rensburg
Instructed by	: BAARTMAN & DU PLESSIS
Date of Judgment	: 17 June 2015