IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: EL382/2015
ECD782/2015
Date heard: 12 November 2015
Date delivered: 17 November 2015

In the matter between

NTOMBOMZI JACQUELINA MLANDA	**Applicant**
vs	
NCUMISA GLORIA MHLABA	**First Respondent**
MASTER OF THE HIGH COURT, BHISHO	**Second Respondent**
THE REGISTRAR OF DEEDS, KING WILLIAM'S TOWN	**Third Respondent**

JUDGMENT

PICKERING J:

[1] Applicant seeks an order in the following terms:

> "*1. Declaring the last will and testament of Philomena Buyiswa Tupeni dated 5 November 2010 to be invalid and or no force and/or effect.*
> *2. Declaring that she is the sole beneficiary of the intestate estate of the late Philomena Buyiswa Tupeni.*
> 3. *Directing the Third Respondent to transfer erf [.....], East London otherwise known as [.....], Amalinda, East London into her name.*"

[2] Applicant avers that she is the stepdaughter of the said Philomena Buyiswa Tupeni. The application is opposed by the first respondent, who was a niece of the said Philomena Buyiswa Tupeni (hereafter referred to "*the*

deceased") and who is named in the said will as the sole beneficiary of the deceased's estate. For her part applicant avers that the said will of the deceased is invalid, that the deceased accordingly died intestate, and that she is the sole beneficiary of the deceased's intestate estate.

[3] The applicant assails the validity of the will on two grounds. The first such ground relates to the mental state of the deceased at the time of the execution of the will. Applicant alleges that the deceased was, at such time, suffering not only from dementia, but was also diagnosed as being aphasic and therefore unable to understand or produce speech as a result of brain damage and further that the deceased was not orientated to person, place and time.

[4] Applicant avers accordingly that the deceased's mental state, as at 5 November 2010, when the will was purportedly executed, was so compromised that she did not have the necessary "*disposing mind and memory*" in order properly to comprehend the consequences of executing the will.

[5] In this regard applicant relies on certain medical records ostensibly obtained from Frere Hospital, East London, where the deceased received medical treatment during 2010.

[6] Applicant avers further that the fact that the deceased, who had been a school teacher, signed the will by affixing what appears to be her thumbprint thereto, provides corroboration of the decline in the deceased's cognitive disabilities.

[7] The averments concerning the mental capacity of the deceased as at the date of signature of the will are disputed by the first respondent.

[8] The second ground relied on by the applicant relates to the allegation that the will is invalid for lack of compliance with the formalities required in the execution of a will which is signed by a testatrix by the making of a mark.

Strangely, the first respondent does not deal with these allegations at all in her answering affidavit nor did Mr. Nzuzo, who appeared for first respondent at the hearing of this application, deal with them in his heads of argument.

[9] In my view, the second ground is decisive of the matter and it is accordingly neither necessary nor desirable to express any view of the merits of the first ground.

[10] Section 2(1)(a)(v) of the Wills Act 7 of 1953 ("*the Act*") provides that no will shall be valid unless:

> "*If the will is signed by the testator by the making of a mark ... 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 the certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies it ...*"

[11] In the matter of In Re Jennett N.O. 1976 (1) SA 580 (AD) it was stated that the primary object of the formalities prescribed by s 2(1)(a)(v) was to secure evidence to establish the identity of the testator and to ensure that the document signed by the making of a mark is indeed the will of the testator. It was stated that this object can be achieved without using the *ipsissima verba* of the section. At page 583 F – H Galgut AJA stated as follows:

> "*In Ex parte Suknanan and Another, 1959 (2) SA 189 (N) at p 191, Broome JP said:*
>
> > 'The reason for the certificate required by para (v) is, because a testator who signs by making the mark is probably illiterate, to ensure that he is the person who, by making the mark, he purports to be, and that the document is his will.'
>
> *In the present case the testator was not an illiterate person. However, that fact cannot affect the interpretation to be given to the section.*

In Ex parte Sookoo: In re Estate Dularie, 1960 (4) SA 249 (D), Caney J, followed Soobramoney's case, supra *cit. At p 252 he is reported as saying:*

> 'The object of the legislation must include the avoidance of fraud by impersonation of testators and by misrepresentation to them of the nature of the documents put before them.'

I am in respectful agreement with the above dicta *by the learned Judges. The object of the section is to ensure that the document, signed by the making of a mark, is the will of the testator.*"

[12] Section 2(4) of the Act provides, *inter alia,* that the certificate of a commissioner of oaths referred to in subsection 1(a)(v) may be in the form set out in Schedule 1 of the Act. The said form reiterates the wording of section 2(1))(a)(v). As was held in O'Connor v The Master 1999(4) SA 614 (NC) at 619B – C with regard to the use of the word "*may*" in s 2(4), it is not peremptory to follow the format set out in the Schedule. In this regard what is stated by Corbett et al The Law of Succession, 2nd Ed at p 53 is relevant. The learned authors, with reference to Oldfield v The Master 1971 (3) SA 445 (N) state that "*where the commissioner's notation in substance certifies that which the section requires him or her to certify, the certificate will be a valid certificate even if it is not preceded by the words* 'I certify'."

[13] In the present matter the commissioner of oaths has merely stated as follows:

> "*The testator signed in my presence and of two witnesses.*"

[14] On the face of it the certificate does not comply with the requirement that the commissioner must satisfy himself as to the identity of the testatrix. Mr. Nzuzo submitted, however, that the commissioner was a very senior and experienced attorney and that it was utterly improbable that he would not have so satisfied himself before appending his certificate to the will. He

submitted therefore that it could be implied from his reference to the "testator" that he had in fact done so.

[15] It is so that in view of the fact that the commissioner of oaths is not required to use the *ipsissima verba* of the section the validity of the certificate may be implied from its wording. As was stated in Soonaram v The Master and Others 1971 (3) SA 598 (NPD) at 603D – E that implication would, however, have to be certain, in the sense that it leaves no room for doubt. In the present case it cannot, in my view, be implied from the wording of the certificate that the commissioner had satisfied himself as to the identity of the testator. The fact that the commissioner is a very senior and experienced attorney does not avail the first respondent. If, by virtue of his seniority and experience he was au fait with the requirements set out in the subsection the question may well be asked as to why he did not then simply certify that he had satisfied himself in that regard.

[16] There can be no doubt that the commissioner was satisfied that the person appearing before him was the "*testator*" but there is nothing in the wording of the certificate from which it can be inferred that such testator was indeed the deceased. The certificate, at its best for first respondent, means no more than that a woman said to be Philomena Buyiswa Tupeni made the mark in the commissioner's presence. Compare Soobramoney and Others v Moothoo and Others 1957 (3) SA 707 (D) at 709 E–F. In these circumstances the very purpose of the requirement, namely to obviate the possibility of a fraud being committed by some-one impersonating the testatrix, has been defeated.

[17] In my view therefore, in all the circumstances, the purported will is clearly invalid.

[18] As set out above applicant seeks further an order declaring that she is the sole beneficiary of the intestate estate of the deceased as well as an order that the deceased's immovable property be transferred to her. This Court cannot make such an order. These are matters for the Master of the High

Court, Bhisho, to determine. I should mention that although the Master was cited as second respondent and the papers served on him he has furnished no report to this Court setting out his views. His failure to do so is regrettable.

[19] Although applicant did not include a prayer for costs in the notice of motion she did submit in her replying affidavit that first respondent should pay the costs of the application. In my view there is in the circumstances of this case no reason why the costs should not follow the result save in respect of certain costs which were previously reserved for decision.

[20] Those previously reserved costs relate to certain proceedings in the East London Circuit Local Division. The application was initially set down for hearing in that Division on 21 July 2015 by applicant's attorney. It appears that applicant's attorney thereafter neglected to ensure that the matter had indeed been placed on the roll for that day in consequence whereof wasted costs were incurred by first respondent in attending court. In my view applicant must bear those wasted costs.

[21] The matter was then placed on the roll again by applicant's attorney for hearing on 15 October 2015, despite the clear provisions of The Rules of Practice of this Court, namely Rule 18(c) read with Rule 19(b)(iv) to the effect that no application may be enrolled for hearing in the East London Circuit Division where a quorum of two or more judges will be required. In the circumstances such wasted costs as were incurred on 15 October 2015 were occasioned by applicant's conduct in enrolling the matter on that day and applicant must pay those costs.

[20] Accordingly the following order will issue:

1. It is declared that the last will and testament of Philomena Buyiswa Tupeni, dated 5 November 2010, is invalid and of no force or effect.
2. The first respondent is ordered to pay the costs of the application, save for the wasted costs of 21 July 2015 and 15 October 2015 which shall be paid by the applicant.

_____
J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

_____
J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. Poswa
Instructed by:

Appearing on behalf of Respondent: Adv. Nzuzo
Instructed by: