SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE

CASE NO: 2011/10308

DATE:08/09/2011

In the matter between:

SINDISIWE MABIKA First Applicant
(ID NUMBER: …)

THATO MABIKA Second Applicant
(ID NUMBER:...)

S M Third Applicant
(ID NUMBER: ... DULY REPRESENTED
HEREIN BY THE FIRST APPLICANT AS HIS GUARDIAN)

N M Fourth Applicant
(ID NUMBER: …DULY REPRESENTED
HEREBIN BY THE FIRST APPLICANT AS HIS GUARDIAN)

and

KING NICHOLAS MABIKA First Respondent

MASTER OF THE HIGH COURT Second Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This application came before me in the unopposed motion court.

RELIEF CLAIMED

[2] The applicants seek three orders. First, that the Master of the High Court ("*the second respondent*") be ordered to accept certain documents executed by Monica Tembisile Mabika ("*the deceased*") as her will for the purposes of the Administration of Estates Act 66 of 1965. The documents are contained in Annexure "SM2" to the founding papers. Second, the applicants seek an order that the first respondent forfeit his share of the house situated at No. 30 Sable Street, Dawn Park Extension 2. Thirdly, the first applicant seeks an order for the care, custody and guardianship of the third applicant, allowing the first respondent to have reasonable contact with the third applicant.

THE PARTIES

[3] The first applicant is the first daughter of the deceased. The deceased was married to the first respondent in community of property. The second applicant is the major son of the deceased. He is 19 years old. The third applicant is an 11 years old minor born of the relationship between the deceased and the first respondent. He is represented in these proceedings by the first applicant. The fourth applicant is a 2 years old minor son of the first applicant, and also represented by the first applicant in this application. The first respondent is the husband of the deceased and also the stepfather of the first and second applicants. The second respondent has elected to abide by the decision of this Court. All the applicants currently occupy the immovable property of the deceased situated at No. 30 Sable Street, Dawn Park Extension 2, Boksburg ("*the immovable property*"). The first respondent resides elsewhere.

[4] The essence of the relief sought by the applicants is a *mandamus* in terms of which the second respondent be ordered to accept the documents executed by the deceased during September 2010, as contained in Annexure "SM2", as the will of the deceased, and other ancillary relief. I deal later herein with the details of Annexure "SM2", as well as the applicable law.

[5] As the matter came before me in the unopposed motion court, I was extremely reluctant to grant an order summarily in favour of the applicants without any detailed heads of argument from the applicants' counsel on the applicable legal principles and on the discretion of the court in matters of this nature. I was also concerned about what consequences such order would

have on the rights of the first respondent. The first respondent neglected to file opposing papers although he filed a notice to oppose. The notice of set down was also served on him. I therefore reserved judgment briefly.

[6] Counsel for the applicants promptly filed heads of argument which I found extremely helpful and for which I am grateful.

THE BACKGROUND TO THE APPLICATION

[7] Some background is indispensible. The applicants' case is based mainly on the founding affidavit of the first applicant, as supported by the second applicant and some confirmatory affidavits of certain independent persons.

7.1 The deceased and the first respondent married in community of property on 15 October 1997. At the time, the first and the second applicants were already born. The first respondent is not their biological father, although he adopted them as his children, and allowed them to use his surname.

7.2 During 1998, the deceased, through her employer, Metrorail, purchased the immovable property over which a mortgage bond was registered in favour of Absa Bank. The immovable property was also registered in the names of the deceased and the first respondent by virtue of their marriage in community of property.

The deceased was liable for the monthly bond repayments which were deducted from her salary, as confirmed by Annexure "SM14" to the founding papers.

7.3 The first respondent was unemployed since 2006, which apparently also led to the breakdown of his marriage relationship with the deceased. As a result, the first respondent left the common home at the immovable property pursuant to an assault perpetrated on the deceased. He never returned. During December 2006, the deceased obtained against the respondent an interim protection order in terms of section 5(2) of the Domestic Violence Act 116 of 1998. In terms of the order, which was returnable on 19 January 2007, the first respondent was interdicted from assaulting the deceased. The deceased was intent on dissolving the marriage but was threatened with death by the first respondent.

7.4 During 2007 the deceased was hospitalised for approximately one year as a result of the continuous assaults on her by the first respondent. She suffered from brain tumour and bipolar depression. The first applicant was present at hospital after the nursing staff had summoned the first respondent and told him of the deceased's condition. Instead, the first respondent enquired from the hospital staff if the deceased was not dead yet.

7.5 From the founding papers, the deceased was again hospitalised during November 2010 after she gave instructions to the first applicant to look after and care for the second, third and the fourth applicants. The deceased was discharged from hospital during the first week of December 2010. However, on or about 16 December 2010, the deceased was again hospitalised. At all times of her hospitalisation, the first respondent showed no interest in her health and well-being or that of the applicants. He did not visit the deceased in hospital and instead wished for her demise.

7.6 The founding papers are replete with allegations which show that the first respondent treated both the deceased and the applicants with vicious cruelty. For example:

7.6.1 he violated a maintenance order obtained by the deceased against him for her family;

7.6.2 he stayed elsewhere with various girlfriends. In December 2010, he telephoned his son, the third applicant, and informed him that he had a new lover whom he was getting married to. This was at a time when the deceased was terminally ill;

7.6.3 the deceased, after the admission to hospital on 16 December 2010, remained hospitalised until her death on 24 January 2011. Three days before her burial, the first respondent, in a drunken state, went to the immovable property and attempted to evict all the applicants therefrom;

7.6.4 during February 2011, the first respondent proceeded to the deceased's employer and demanded to be paid all the death benefits due to the deceased;

7.6.5 during February 2011, the first respondent instructed his son, the third applicant, not to attend school. He threatened to remove the third applicant to his village in the Province of KwaZulu-Natal and to raise him there;

7.6.6 prior to her demise, the deceased gave specific instructions to the first applicant to assume responsibility for her burial, and, once more, to look after the other applicants, especially as the first respondent had made his intentions clear to lay his hands on the inheritance of the third applicant.

[8] The deceased had also informally appointed the first applicant as guardian of the third applicant, and to care for the other applicants in the light of the first respondent's cruel behaviour. The first applicant contends that the

other applicants will be better off in her care than in that of the irresponsible and unemployed first respondent. In this regard, the first applicant has approached the Office of the Family Advocate, Johannesburg, to prepare a report on the best interests of the third applicant. The report was, however, not available at the time of the hearing of this application.

[9] From the above, all indications are persuasively that the marriage relationship between the deceased and the first respondent had broken down irretrievably at the time of her death on 24 January 2011.

[10] On 9 February 2011 the second respondent appointed the first applicant as executrix of the estate of the deceased, seemingly in preference to the first respondent. Prior to that, and on 27 January 2011, the second respondent also addressed a letter to the bankers of the deceased, First National Bank, and requested certain funds from the account of the deceased to be released to the first applicant for the purposes of the reasonable funeral expenses of the deceased. The request was honoured.

THE PURPORTED WILL

[11] I now turn to the purported will of the deceased. Prior to her death, and during September 2010, whilst not in hospital, the deceased approached her bankers, First National Bank, where she executed Annexure “SM2”, an instruction to draft her will. The document, on an FNB logo, consists of some five pages. It is entitled, “*Application For the Drafting of a Will*”. The deceased

supplied all her personal details, financial position and marital status. Under the heading "*Children*" the deceased inserted the names of all the four applicants. Under the column "*Special Needs*", the deceased wrote, "*Miss Sindisiwe Mabika ID Number: 850918 0837 08 2 will be the children's guardian if I pass away*". Again under the heading, "*Guardians*", the deceased inserted the name of Miss Sindisiwe Mabika and ID Number. The latter is the first applicant. The deceased proceeded to appoint FNB Trust Services as trustees. On page 4 of Annexure "SM2", and under the heading, "*Terms and Conditions*", the following printed words appear: "*First National Bank Trust Services and Firstrand Bank Holding Ltd (hereinafter referred to the 'Company) will endeavour to prepare the 'Last Will and Testament' (hereinafter referred to as the 'Will') compatible with the Client's instructions as indicated on this application form*". Paragraph 1 under the Terms and Conditions states that the application was completed based on information provided by the client. Paragraph 5 thereof provides that:

> "*The Will is only valid once the completed document has been signed in terms of s (2)(a)(i) of the Wills Act of 1953, as amended.*"

The deceased wrote in her full names and ID Number and also signed the Terms and Conditions on page 4. On the last page, page 5, the deceased also completed and signed a debit order in favour of FNB in respect of the fee payable for the drafting of the will. The debit order, the amount, the bank and branch, the account holder and the date (1/9/2010), were completed by the deceased in her own handwriting. On the document entitled "*Client Information*", Annexure "SM4", the deceased completed the information

therein required. At the end of the document, and in the handwriting of the deceased, appears the following note:

> "*If I pass away my child Miss Sindisiwe Mabika will arrange for my burial, I want the children to own the property and not to be sold as a family property. The other policies and Investments to be shared equally 25 percent each.*"

Once more, "*Miss Sindisiwe Mabika*" is clearly the first applicant, "*the children*" the applicants, and "*the property*" the immovable property. The deceased was interviewed by FNB Financial Planner, Mr A Mkatshwa ("*Mkatshwa*"), who has attached his confirmatory affidavits to the founding papers. Mkatshwa confirms that at the time of the interview, the deceased fully comprehended the nature and effect of her actions; was capable of understanding the nature and extent of her properties and liabilities; and was capable of forming the requisite intention of bequeathing each of the shares granted to the individual beneficiaries. After the interview, the arrangement with Mkatshwa was that the deceased would return to the bank to sign the will. However, in the meantime the deceased became sick, underwent chemotherapy, and was hospitalised.

[12] On 20 January 2011, a colleague of the deceased, Ms N Khanyile, was present at the Rand Clinic where the deceased was hospitalised after the deceased was diagnosed with cancer. The deceased signed a form changing the beneficiaries in her pension fund by deleting therefrom the first respondent, and leaving the applicants as the only beneficiaries. There is attached to the founding papers a confirmatory affidavit of Ms Khanyile.

SOME APPLICABLE LEGAL PRINCIPLES

[13] Having regard to all the above background, I now turn to some applicable legal principles. The issue of the deceased's testamentary capacity is not in question. She completed in her own handwriting the instructions given to the bank. Neither is the absence of a signature, in issue, for in, inter alia, *Hendrik van der Merwe v Master of the High Court and Another* [2011] 1 All SA 298 (SCA), at para [16], Navsa JA said:

> "*A lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of section 2(3)*."

[14] The crisp question is whether this Court is satisfied that Annexure "SM2" executed by the deceased was intended to be her will. Section 2(3) of the Wills Act 7 of 1953 ("*the Act*"), provides that:

> "*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).*"

It appears to be obligatory for the Court to order the Master to accept a will or document or amendment thereof once the Court is satisfied that it was

intended to be the will of a deceased person. In *Ex Parte Maurice* 1995 (2) SA 713 (C), at 715G, Selikowitz J said:

> "*As appears from the terms of s 2(3) of the Wills Act, before a Court can make an order pursuant thereto, that Court must be satisfied – in a case such as the present where a will is in issue, as opposed to an amendment – that it has before it a document:*
>
> *(a) which was drafted or executed by a person;*
>
> *(b) who has since died; and*
>
> (c) *who intended that document to be his/her will.*"

In the present matter, counsel for the applicants referred me to *McDonald and Others v The Master and Others* 2002 (5) SA 64 (O) at 69, and as well as *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA). In the latter case, the Court had to decide whether the deceased, Bosch, intended a document that he had written before his death to be his final will or merely instructions to an attorney to draft a will. If he had intended the document to be his final will, then in terms of section 2(3) of the Wills Act of 1953 the Master of the High Court must be ordered to accept the document as a will. In eventually ordering the Master of the High Court to accept the document as the will of the deceased, Bosch, the Court at para [14] said:

> "*Section 2(3) of the Wills Act is clear: The Court must direct the Master to accept the document in issue as a will once certain requirements are satisfied. First, the document must have been drafted or executed by a person who has subsequently died. Second, the document must have been intended by the deceased to have been his or her will …*"

At para [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 of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.*"

CONCLUSION

[15] I have already sketched extensively the family background, and the circumstances leading to the present application. I have also examined closely the purported will, Annexure "SM2". It is plain that the deceased died on 24 January 2011 engulfed in miserable circumstances after she executed, in her own handwriting Annexure "SM2". She clearly intended the document to be her final will but did not survive to sign it. This is so despite the fact that the document is styled "*Application for the Drafting of a Will*". It contained full personal details which the deceased intended to appear in her will. The surrounding circumstances are that the deceased and the first respondent, due to his cruelty towards her, were estranged. They were on the verge of a divorce, but for her illness and eventual death. They no longer lived together since 2006. The deceased clearly intended to disinherit the irresponsible and unemployed first respondent from her estate. She took him to the maintenance court in order to compel him to comply with his fatherly responsibilities, including that of his own son. She even obtained an interim protection order to put an end to the persistent assaults on her. She was also hugely scared of the first respondent. That is why she never ventured to mention to him the word '*divorce*'**.** **U**nder these circumstances, it will be greatly unjust not to accept Annexure "SM2" as the deceased's final will, and

the first respondent will unfairly benefit from her estate when it is clear that such was not her intention. In *Van der Merwe, supra*, Navsa JA at para [14] said:

> "*By enacting section 2(3) of the Act the legislature 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 …*"

Once this Court accepts that the deceased intended Annexure "SM2" to be her final will, the issue of discretion does not come into play at all. The decision to declare that the first respondent should forfeit his share of the immovable property, although drastic in nature, will be justified in the circumstances of this matter.

OTHER RELIEF CLAIMED

[16] In regard to the other relief claimed by the first applicant, namely that she should be granted full and exclusive parental rights and responsibilities (care and custody) in respect of the third applicant, and that the first respondent be accorded the right to reasonable contact (see prayers 3 and 4), I have some difficulty. The difficulty is caused by the absence of a full and professional investigation into the present circumstances of the third applicant in order to properly consider the relief claimed. Although by all accounts, the third applicant is presently better off in the care and custody of the first applicant, there is currently insufficient information or evidence to make a definitive finding. In her founding papers, the first applicant herself undertook to approach the Office of the Family Advocate, Johannesburg, to prepare a

report which may assist the Court in determining what will be in the best interests of the third applicant. Such report was not available or handed up at the hearing of this application. It plainly is a matter to be pursued. On the other hand, I have no hesitation at all in granting to the first applicant interim relief on these issues, including guardianship, as formulated in the Notice of Motion, and pending the report of the Office of the Family Advocate. She has already been appointed as executrix in the estate of the deceased.

COSTS

[17] I deal briefly with the question of costs. The applicants have asked for the first respondent to pay the costs of the application. I think not. Although he has filed a notice to oppose, the first respondent did not file opposing papers, and was in default of appearance after the notice of set down was also served on him. In any event, the first respondent is unemployed currently. In my view, an appropriate order would be that the costs should come out of the estate of the deceased.

ORDER

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

(1) The second respondent (the Master of the High Court), is directed to accept the documents executed by the deceased in the form of Annexure “SM2” during September 2010, as the will

of Monica Thembisile Mabika for the purposes of the Administration of Estates Act 66 of 1965.

(2) The first respondent has forfeited his share of the immovable property situated at No. 30 Sable Street, Dawn Park Extension 2, Boksburg.

(3) The Office of the Family Advocate, Johannesburg, is requested to investigate and compile a report on the present circumstances of the third applicant (S M) and report to this Court as soon as possible.

(4) Pending the outcome of the report of the Family Advocate as in order (3) above, the first applicant is hereby granted the care, custody and guardianship of the third applicant (S M).

(5) The costs of this application shall be paid by the estate of the deceased, Monica Thembisile Mabika.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING 21 JULY 2011

DATE OF JUDGMENT 8 SEPTEMBER 2011