REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

24/05/2018
DATE

SIGNATURE

Case Number: **07039/2016**

In the matter between:

NELISIWE ANNACLETTA NTULI	Plaintiff
And	
DORCAS MALULEKE	First Defendant
JACO DU PLESSIS	Second Defendant
MASTER OF THE HIGH COURT	Third Defendant

JUDGMENT

FISHER J:

INTRODUCTION

[1] This is an action relating to the validity of the last will of the late Mr Jeffrey Fanie Ntuli ("the deceased"). The plaintiff, Mrs Ntuli who is the wife by civil marriage of the deceased, seeks a declaration that the will filed with the Master is void. The will seeks to bequeath the entire estate of the deceased to the first defendant, Ms Maluleke, who is referred to in the will as the "wife" of the deceased. It is common cause that she and the deceased were not validly married.

[2] The contention of the plaintiff is that the deceased was so sick at the time that the will was executed, that he was unable to make a valid will. The will is, on the face of it reflected as having been executed on 02 March 2015 which was the day before the deceased died at the Unitas Hospital in Alberton. There is a further contention to the effect that the will did not comply with the formalities of the Wills Act in that it was not signed in the presence of the people who are reflected as having signed as witnesses.

[3] The plaintiff also sought a declaration that the customary union between the deceased and the first defendant be declared null and void. It was a not necessary for the plaintiff to persist with this relief as it was conceded by Ms Maluleke, that such customary union was rendered invalid on the basis that the plaintiff was married to the deceased by way of a civil marriage. Ms Maluleke counterclaimed for damages but this claim was also not persisted with.

DISCUSSION ON EVIDENCE

[4] The plaintiff and the deceased had a long relationship. In 1991 they had a son, Nkululeko and in 1995 a daughter, Yandiswa. They were married in 1998 in community of property. The family set up home in Durban. The plaintiff was employed as a factory worker at the time which employment she maintained until about 2003. The deceased had studied Video Technology and he got a job as a studio manager for the SABC in Johannesburg shortly after the marriage. In the first years of the marriage the plaintiff and their children would visit the deceased in Johannesburg from time to time and he would visit the family in Durban. As the time

wore on he began to visit Durban less frequently and in the last years of his life, he would travel to Durban only once a year to see the plaintiff during his annual leave in December. The family stopped spending time with him in Johannesburg. In 2012 the house situated at 8253 Cyrus McCormick Crescent, Roodekop extension 25 ("the property") was purchased. This property is specifically mentioned in the will and it seems by all accounts that the deceased's half share in this property is the main asset in his deceased estate. The plaintiff came to Johannesburg to sign the transfer documents. The plaintiff and the deceased would, at this stage, have some telephone contact with one another, although it appears from the evidence of the plaintiff that this grew ever more perfunctory and that they hardly communicated in the last year of his life. In fact, at the time of his death the plaintiff had not had telephonic contact with the deceased from about July 2014 (i.e. some nine months before his death on 03 March 2015) and the last time he visited her in Durban was in December 2013. He, however, regularly paid money into her bank account for her maintenance and maintained their children, including paying for their tertiary studies. It appears that the deceased did have more regular contact with their children. Yandiswa testified that she would speak to him regularly on the telephone and that their relationship was close and this was confirmed by Ms Maluleke.

[5] The deceased succumbed to HIV/AIDS related illnesses. He was 49 years of age at the time of his death. He and Ms Maluleke lived together in the property and had done since its purchase in 2012. They had previously lived together at another residence from approximately 2008.

[6] The main thrust of the case of the plaintiff was that the medical records showed the deceased at such an advanced stage of the ravages of his illness that he was not able to exercise the necessary *animus* to make the will. This is the onus of the plaintiff.

[7] The plaintiff introduced into evidence, the contemporaneous nursing records made by the nursing staff during the last weeks of the deceased life and a note by the attending doctor, Dr Botha made some weeks after death. Dr Botha was not called to testify. Two members of the nursing staff that attended to the deceased were called – Nurse Carol Steyn and Nurse Charlene Joubert.

[8] The contemporaneous nursing records are such that, although they show that the deceased was indeed very weak and direly ill in the days preceding his death, there is no direct evidence that he was demented or mentally disturbed. Such records show that he was awake at times and that, although weak, was able to communicate with the medical staff and was orientated. He was receiving regular dialysis which assisted in alleviating his symptoms but which would not have had any lasting effect on his condition.

[9] The plaintiff called Dr John Morite, who gave evidence of an expert nature. He practises as an independent medical practitioner and has specialization in the management and treatment of HIV/AIDS. He was only able to give a speculative account based on the nursing notes and the brief synopsis given by Dr Botha some weeks after the fact. He could put it at no more than a possibility that the deceased would not have had the capacity to execute the will.

[10] The plaintiff placed further reliance on the fact that it was improbable that the deceased, given that he had such a good relationship with his children of their marriage, would ever have disinherited them in favour of Ms Maluleke and her son.

[11] This second aspect was in some contention in that no evidence was initially led by Ms Maluleke in relation to the nature of her relationship with the deceased. She relied initially only on the direct evidence of the second defendant, Mr du Plessis the attorney who drew the will and who oversaw its execution at the hospital bed of the deceased. His evidence was to the effect that the deceased was able to give him proper instructions and that, although he was clearly ill, wasted, and weak there was no indication that he was mentally impaired.

[12] During argument it emerged that the failure to call any evidence as to the status of Ms Maluleke and her son in the life of the deceased could impact from an inferential point of view on the determination of the matter. The Ms Maluleke thus made application for a reopening of the case which, I granted in a separate judgment.

[13] In the case as reopened Ms Maluleke testified that she met the deceased when she was working as a security guard at the SABC. They commenced a romantic relationship in approximately 2008, and in 2009 he asked that she marry him. They underwent the ceremonies in relation to the entering into a traditional marriage including the negotiation and payment of lobola. As stated above it was ultimately conceded that this traditional union would not have validity by reason of the existing civil marriage between the plaintiff and the deceased. Ms Maluleke and the deceased had one child, Simangaliso Fidel Ntuli who was born during 2009. This child is also mentioned in the impugned will, as a beneficiary.

[14] Ms Maluleke testified that she was aware from early on in their relationship that the deceased had yet another customary wife and that two children had been born from this union. She testified that she also later learnt that the deceased was married to Ms Maluleke and that he also had children from this marriage. She got to know Nkululeko as he stayed with her and the deceased whilst he was working in Johannesburg with the deceased. Yandiswa confirmed that her brother had studied journalism and that he had stayed with the deceased for a time whilst he got some work experience at the SABC.

[15] The portrait which emerges is of a man who maintained this family with the plaintiff and had close contact with the children of his marriage to the plaintiff, but who had taken at least two other women as customary wives during his life. That Ms Maluleke was his partner for the last years of his life is clear. She nursed him during his illness until the end of his life. She accompanied him to the hospital and was at his bedside for most days whilst he was there. She testified that he was *compos mentis* to the last. She stated that she witnessed him sign the will and that he had told her on numerous occasions in the past that he wanted to see that she and Simangaliso, were looked after when he died.

[16] A close friend of the deceased, Mr Ezekiel Mojapele, also testified. He confirmed that the he and the deceased had been friends for many years. They started as interns at the SABC together in 1998 when the deceased came to

Johannesburg from Durban. He accompanied the deceased to the hospital with Ms Maluleke on the day of his admission, being 18 February 2015. He witnessed the signing of the will and testified that the deceased was in his view, in no way mentally challenged at the signature. He furthermore testified that the deceased had, some months before his death, expressed to him that he wished to draw a will so that Ms Maluleke and his young son could be taken care of. He testified further that he visited the deceased and Ms Maluleke and their son often in the months preceding his death. As he and the deceased worked together at the SABC on the same project, they had regular contact – and he would often have to cover for the deceased in his work absences due to ilness. He was able to testify that Ms Maluleke was a devoted 'wife' to the deceased and to confirm that she had nursed him and stayed with him throughout his illness.

[17] That there was a galvanization to attend to the will and other financial affairs of the deceased in the days leading to his death is clear. Mr du Plessis was brought to the deathbed for the purpose of attending to his last will. There was also testimony from Ms Maluleke and Mr Mojapele that the deceased had filled out other documents before he went to hospital and that he asked Ms Maluleke to bring these from home and he then gave them to Mr Mojapele to take to the SABC to change the beneficiaries to his pension fund from the plaintiff to Ms Maluleke. Mr Mojapele testified that he took these documents to the Human Resources Department of SABC that same day. Ms Maluleke also testified that an attempt was made on the same day – i.e. the day before his death to change the beneficiaries to his life insurance policy – but that this was rejected by the insurer on the basis that insufficient notice was given prior to death. It thus appears likely that the plaintiff and her family benefited from that policy. This evidence was however never led. Furthermore, the evidence of the change to the beneficiaries to the pension fund and the attempted change to the insurance beneficiaries came late in the trial and with no warning. The focal point of the matter until that point had been the signature of the will and the legality of this change. Why the other documents were not subjected to the same scrutiny and enquiry was never explained by the plaintiff.

[18] There were some unsatisfactory elements to the evidence led by the defendants. Of concern was that the evidence of Mr Mojapele and Mr du Plessis and

Ms Maluleke differed in respect of salient details – such as the time of the signature of the will and how and when details such as the identity numbers were obtained for insertion into the will. Mr du Plessis testified that he got the details of the deceased from the identity document of the deceased and the details of Ms Maluleke and her son from a medical aid card; Ms Maluleke on the other hand said that her details were obtained from her identity documents. Mr Mojapele said that he believed these details had been obtained previously and that the will was brought by Mr du Plessis to the hospital already drafted and ready for signature. Mr du Plessis explained that he typed it on his laptop at the bedside with information provided by both the deceased and Ms Maluleke and that he used the hospital reception's printing facilities to produce the document.

[19] On an assessment of the conspectus of the evidence, it seems clear that ,although the deceased acknowledged and maintained the family that he and the plaintiff had created together, he also had other children and that in the last years of his life he formed a new and dominant family relationship with Ms Maluleke and their son. That she looked after him and cared for him into his last months – which by all accounts were not always easy because he was very ill - was not seriously in contention. Ms Maluleke accompanied him to hospital with the assistance of Mr Mojopele – whom she had called to persuade him to go to hospital – he having expressed reluctance to do so. That he should want to provide for Ms Maluleke and his youngest child is not improbable. The children of his marriage are adults and it is not disputed that he has maintained them into adulthood. The plaintiff and he were married in community of property and thus she has and will share in the joint estate – which includes her having joint ownership of the property and any other assets belonging to the estate.

[20] I accept the evidence of Mr du Plessis that he took proper instructions from the deceased and that he was satisfied that the deceased was fully able to give instructions and take advice in relation to the will. Indeed, his credibility was not brought into question – it was only questioned whether he was able to determine the extent of the disability from which the deceased was suffering. He was emphatic that he would never have drawn the will and overseen its execution were he in any doubt as to the capacity of the deceased to execute the will. I am satisfied also with the

evidence of Mr Mojapele that he and a stranger who was found in the corridor outside the deceased's hospital room, duly witnessed the will

[21] The conclusion that is thus inescapable is that the will is valid.

COSTS

[22] The matter was dealt with by counsel for the plaintiff and the first defendant *pro bono* – which was properly disclosed. I have no knowledge as to the status of further services to the parties. Mr du Plessis was cited as a party. Such citation was obviously for his professional interest in the matter and no relief was sought against him. Mr du Plessis, however, briefed counsel, Mr Botha to represent him in the proceedings. This was notwithstanding that Mr du Plessis saw fit to be present for all the proceedings. I was informed, through my clerk, that costs would be argued on behalf of Mr du Plessis. There was however no appearance for him on the final hearing date for the arguing of these costs.

[23] I thus make the following order:

1. The plaintiff's claim is dismissed.

2. The plaintiff is to pay the costs of the first defendant.

FISHER J
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION

Date of Hearing: 16-20 April 2018.

Judgment Delivered: 24 May 2018.

APPEARANCES:

For the Plaintiff: Adv E Masonbuka Instructed by Phaleng-Podile Attorneys.

For the First Defendant: Adv J Cordier Instructed by Dev Maharaj and Associates.