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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

18/3/2016

CASE NO: 26021/2014

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

.....
SIGNATURE

...18/3/2016.....
DATE

VAN NIEKERK, W

Applicant

and

VAN NIEKERK S N.O.

First Respondent

VAN NIEKERK S

Second Respondent

VAN NIEKERK S M

Third Respondent

VAN NIEKERK W S

Fourth Respondent

VAN NIEKERK R G

Fifth Respondent

MASTER OF THE HIGH COURT NELSPRUIT

Sixth Respondent

WYNAND PRINSLOO & VAN EEDEN INGELYF

Seventh Respondent

JUDGMENT

AC BASSON, J

[1] The applicant in this matter brought an application in terms of section 2(3) of the Wills Act¹ (hereinafter referred to as “the Act”) seeking an order declaring that the will annexed to the papers as “Annexure A” (hereinafter referred to as “the contested will”) is the last will of the deceased. The applicant further seeks an order declaring that the deceased’s previous will attached to the papers as “Annexure C” and dated 11 February 2008 (hereinafter referred to as the “2008 will”) has been revoked. Certain other ancillary relief is also sought.

[2] The applicant in this matter is the mother of the late Mr Gert Willem van Niekerk (herein referred to as “the deceased”). The applicant is also the grandmother of the three beneficiaries (the third, fourth and fifth respondents) named by the deceased in the contested will as the sole beneficiaries of his entire estate. The three beneficiaries were born from the

¹ Act 7 of 1953.

marriage between the deceased and the second respondent (Mrs S van Niekerk). The applicant is also the nominated executrix in terms of the contested will.

[3] The first respondent is Mrs Sharon van Niekerk. She is the nominated executrix in terms of the 2008 will. She is cited as such as the first respondent. Mrs Van Niekerk is also cited as the second respondent in this application and is the deponent to the affidavits filed on behalf of the first and second respondents. (I will refer to the first and second respondents collectively as “the respondents” where applicable.)

[4] On 13 May 2013 the second respondent issued summons against the deceased for a decree of divorce. The reasons for the irreparable breakdown of the marriage listed in the summons are the following: "9.1 Die partye kan nie sinvol kommunikeer nie, en breek daar gereeld rusies uit oor onbenullighede; 9.2 Die verweerder het 'n buite egtelike verhouding aangeknoop met ene Veronica Wessels...;9.3 Die verweerder het ook gedurende die huwelik ander buite egtelike verhoudings gehad, onder andere met die eiseres se suster...; 9.4 Die verweerder is emosioneel onstabiel en gebruik tans medikasie in die behandeling van bipolêre gemoedsversteuring; 9.5 Die verweerder tree aggresief teenoor die eiseres op en het haar gedurende die betaan van die huwelik op gereelde basis aangerand, deur haar rond te ruk, te stamp, haar te verwurg, en te dreig om haar te skiet....; 9.6 Die eiseres het sy (sic) liefde agting en respek vir die verweerder verloor en stel nie belang in die voorsetting van die huwelik nie."

- [5] During July 2013 the second respondent also obtained a protection order against the deceased and effectively prohibited him from seeing his children, compelling visitation under supervision of social workers. On the second respondent's own version it was a stormy marital relationship.
- [6] The third, fourth and fifth respondents are the children born from the marriage between the deceased and the second respondent. The court was informed that two of the three children are presently still minors. They are not opposing this application.
- [7] During May 2013 the deceased moved in with the applicant, her husband and his sister (Ms Louise Van Niekerk) and resided there until his death. The deceased committed suicide on 21 August 2013 by hanging himself after the second respondent confirmed to the deceased on 20 August 2013 that she was not interested in reconciling with him and that she had met someone else.
- [8] On 7 October 2013 the first respondent was appointed as the executrix of the deceased's estate in terms of the 2008 will.
- [9] The contested will was discovered in a box under the deceased's bed on or about 1 September 2013 by the deceased's sister. The applicant explains in her affidavit that she had requested the deceased's sister (her daughter) to

pack up the deceased's belongings in his room. It was then that she discovered the box with documentation including the contested will.

[10] The contested will dated 10 August 2013 reads as follows:

“Hiermee verklaar ek, die ondergetekende, Gert Willem van Niekerk, op die [...] Augustus 2013, Identiteits Nr: [...] dat ek my 3 kinders, Sherise Michell van Niekerk, Wilichia Sharlize van Niekerk en Reynard Gerrie van Niekerk, benoem as my enigste erfgename.

Ek herroep hiermee my vorige testament en verklaar hierdie as my laaste en enigste testament.

Ek benoem my Ma, Wilma van Niekerk as Ekekteur van my boedel, besigheid: Gencoal, al my vaste bates en persoonlike besittings.

Ek bepaal hiermee dat die Meester van die Hooggeregshof nie sal aandrang op die lewering an sekuriteit deur my genoemde Eksekuteur nie.

(Signed)

Gert Willem van Niekerk

10.08.2013”

[11] Section 2 of the Act sets out the formalities required in the execution of a will. In this instance the contested will was signed by the deceased. The will was, however, not signed by or in the presence of two or more competent witnesses present at the time of signature as required by the Act. A

handwriting expert, Mr J Bester (“Bester”) confirmed his report under oath and concluded that the signature appearing on the contested will is the same as the signature of the deceased on other documents handed to him for his consideration. (I will revert to the dispute regarding the authenticity of the signature hereinbelow.)

Allegations of fraudulent conduct.

[12] The second respondent vehemently disputes the validity of the contested will and has gone as far as to suggest that the contested will is a fraudulent document and that the signature of the deceased has been forged. In fact, council on behalf of the respondents went as far as to accuse the deceased's mother (the applicant), the deceased's sister and a one Ms Lowe in court of being collaborators in the forging of the (contested) will in circumstances where not one of these individuals stands to inherit even one cent in terms of the contested will. The respondents also deposed to a supplementary affidavit accusing the sister of the deceased and the aforementioned Lowe of forging cheques torn from the deceased's check book a day after the deceased's passing and effecting payment in the amount of R 200 000.00 to an entity identified as Easy Flow Diesel CC. In her affidavit Lowe denies that she was party to any forgery and states that the amounts paid out was paid in respect of real expenses incurred by the deceased's closed corporation.

[13] When confronted by these allegations, which is strongly denied by the applicant, she declined her nomination as executrix of her late son's estate

and proposed that an independent third person be appointed. I will return to this point herein below and my reasons for appointing an independent third person as the executor of the deceased's estate.

[14] I repeatedly pointed out to counsel on behalf of the respondents that these allegations of fraud are not pertinent to the question before this court. The issue before the court is the validity of the contested will. Moreover, it is clear from the papers that the alleged fraud was perpetrated (on the respondents' own version) after the death of the deceased. I should, however, make it clear that this court is not dismissing the allegations regarding the cheques as without any foundation whatsoever. These allegations should be investigated by the executor of the deceased's estate and it is for this reason that I intend making it part of my order that the executor/executrix of the deceased's estate be furnished with a copy of the court file in order to make an informed decision regarding the allegations of fraud allegedly perpetrated after the death of the deceased. I gained the impression from a reading of the papers that the sole purpose of presenting these allegations pertaining to alleged fraud to the court is to attempt to discredit the deceased's sister and the applicant and to invite this court to draw a negative inference from the alleged fraud and to conclude that the signature of the deceased was forged by (at least) the sister of the deceased.

[15] What the respondents, however, overlook in making these allegations is the evidence of Bezuidenhout (a family friend of the deceased) who clearly confirms in her affidavit that she had discussions with the deceased prior to him drafting the contested will. She also confirms that she had personally

seen the signed (contested) will a day before the deceased had passed away. (I will return to her evidence in more detail herein below.)

Authenticity of the signature.

[16] I have already referred to the report of the Forensic Document Examiner confirming that he had been placed in possession of several documents and that after examination thereof, he is of the opinion that the signature appearing on the contested will is indeed the signature of the deceased. I have also already referred to the fact that the respondents strongly dispute the authenticity of the signature of the deceased on the contested will.

[17] There is no merit in these allegations. These allegations should be seen in light of the following: Although the respondents complain that they have never seen the original contested will, counsel on behalf of the respondents was unable to refer the court to a single letter demanding to be granted access to the contested will. Furthermore, although a formal tender was made in the replying affidavit as far back as June 2014, no attempts have been made by the respondents to arrange for an inspection of the contested will nor to appoint their own forensic examiner. Moreover, as will be pointed out hereinbelow, Bezuidenhout's clear evidence is that the deceased had personally shown her the signed (contested) will a day prior to his death.

State of mind of the deceased.

[18] The respondents also attempted to persuade the court that the deceased was emotionally unstable at the time of his death and that as a result thereof

contended that he could never have formed the intention that the document (herein identified as the contested will) was intended to be his last will. In this regard a letter was written by the attorneys acting on behalf of the respondents recording the following:

“Ons opdrag is verder dat die oorledene ten tye van die sogenaamde ondertekening van die document by u skrywe aangeheg [the contested will] geestesongesteld en onstabiel was en selfmoord gepleeg het.

Ons is van mening dat die oorledene se optrede vandat die partye uitmekaar is, en kort voor hy selfmoord gepleeg het duidelik dui dat hy nie (sic) nooit die bedoeling kon gehad het dat die document bedoel was om ‘n testament te wees nie.”

[19] I have also referred to the divorce summons wherein similar allegations are made regarding the mental stability of the deceased. In fact, the allegation that the deceased suffered from a bipolar mood disorder is specifically made in the summons.

[20] The applicant also confirms that the second respondent regularly accused the deceased of being bipolar. She states that the deceased had tried his utmost to persuade the second respondent that he was not unstable and to this end voluntarily admitted himself into the Denmar Clinic for psychological evaluation. In a clinical report dated 4 July 2013 (which is little more than a month before the deceased's death) Mr Beck (a psychologist) recorded that

the deceased was “depressed, sad and gloomy” but that his emotional profile was within normal parameters. He concluded that there was no indication of the deceased was an unfit caregiver for his children. The deceased was again psychologically evaluated on 24 July 2013, 1 August 2013 and 6 August 2013 by Ms Lusane du Plessis (Clinical Psychologist). In her report dated 8 August 2013 (two days before the contested will was signed and 13 days before the death of the deceased), she concluded as follows:

“In light of the above Gerrie would not be considered a danger for his children. He is currently emotional stable. There are no signs of pathology. Negative emotions present would be considered normal for the situation. Gerrie is willing to continue with therapy to help him come to terms with the loss of his marriage and to adjust to a new lifestyle.

He is currently staying with his parents. He reports them to be supported. They would also mostly be present if the children to visit. The children are reported to have a good relationship with their grandparents and especially with their grandmother.”

[21] The second respondent, on the other hand, was unable to refer this court to any evidence which gainsays the two reports from the psychologists. I am therefore in light of the detailed psychiatric reports satisfied that the deceased was emotionally stable when he drafted and signed the contested

will and that he was therefore able to form the intention to revoke the 2008 will.

The contested will dated 10 August 2013

[22] In terms of the will dated 11th August 2008, the second respondent was the beneficiary of a substantial portion of the deceased's estate: She was the beneficiary of all his fixed assets (buildings and houses) as well as of 70% of all cash in his estate. The remainder of 30% cash was bequeathed to his three children. The second respondent was also the beneficiary of all the deceased's moving assets as well as his personal belongings. As already pointed out she was also appointed as the executrix in terms of the 2008 will. In terms of the contested will the applicant is appointed as the executrix of the deceased's estate and the three children of the deceased are named as the sole beneficiaries of his entire estate.

[23] I have already referred to section 2(1) of the Wills Act ² where the formalities required for a valid will are set out. In terms of section 2(3) of the Act, a court has the power to direct the Master to accept a document as the will of a person who has died although it does not comply with all the formalities as set out in section 2(1) of the Act in the following circumstances:

“(3) 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*

² No. 7 of 1953.

amendment of his will,³ 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 referred to in subsection (1).”

Further in terms of section 2A of the Act a court has the power, if it is satisfied that the testator has “drafted another document or before his death caused such document to be drafted, by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked”.

[24] It is therefore necessary to determine what the true intention of the deceased was when he drafted and signed the contested will or put differently whether it was his intention to revoke the 2008 will, disinherit the second respondent and bequeath his entire estate to his three children. The legal position is succinctly summarised in *Smith v Parsons NO and others*:⁴

“[8] In order to ascertain whether the deceased intended the suicide note to be an amendment to his will, the document itself must be examined and the surrounding circumstances must be taken into account – see *Van Wetten* paragraphs 15–16.”

³ The court’s emphasis.

⁴ [2010] 4 All SA 74 (SCA).

[25] I have already referred to the fact that the contested will was discovered in a box in the deceased's room. The applicant states that during 2013 the deceased obtained a pro forma will from Nedbank with the intention of drafting a new will. She states that the deceased had requested her to assist him. The applicant was unable to assist him as she had no knowledge of the deceased's business affairs. This form was found by the deceased's sister together with the contested will.

[26] Bezuidenhout confirms that the deceased visited her on 9 August 2013 and that he told her that he suspected that the second respondent had probably met someone else. Bezuidenhout asked the deceased whether he had amended his will to which he responded that he did obtain documentation from the bank in order to draft a new will. She confirmed that the deceased went to his car and that he returned with a paper ostensibly torn from the form that he had obtained from Nedbank. On this document the deceased had scribbled the following in his own handwriting:

“Ek Gert Willem van Niekerk beteken my alles wat ek besit property huis in die UK laat ek in my seun Reynard Gerrie van Niekerk en Sherise van Niekerk, Willicha plus Property + besigheid in hull.
Gencoal Ma + Pa die kuraator (sic) vir dit”.

Upon seeing this document Bezuidenhout informed the deceased that this document would not suffice as a valid will. She then handed the deceased an example of a will that she had in her possession.

- [27] On 10 August 2013 the deceased again visited Bezuidenhout. The deceased then showed her the contested will (attached to the papers as Annexure “A”). The document had already been drafted and had already been signed by the deceased. The applicant confirms that Bezuidenhout had told her that the deceased had shown her (Bezuidenhout) the contested will.
- [28] The applicant further confirms that Bezuidenhout had perused the contested will in her presence and that she had confirmed that Annexure “A” was the will that the deceased had showed her on 10 August 2013.
- [29] The contested will in the present case was typed and signed by the deceased. He only did so after Bezuidenhout had given him an example of a will that she had in her possession. After the deceased had drafted and signed will he showed it to Bezuidenhout.
- [30] The contents of the will are clear and unambiguous as far as the intentions of the deceased went. The deceased clearly and unequivocally revoked his previous will and named his three children as the sole beneficiaries of his entire estate. The deceased therefore also had the clear intention to disinherit the second respondent who was the main beneficiary in terms of the 2008 will.
- [31] It is in my view clear from the document and the surrounding circumstances that the deceased intended to change his will and that he intended to

bequeath his entire estate to his three children and to appoint his mother as the executrix of his estate. The deceased had signed his will and if regard is had to the report of the handwriting expert (Mr Bester), there is no doubt that the signature appearing on the contested will is that of the deceased. Furthermore, if regard is had to the surrounding circumstances and the wording of the will, it is clear that it was the intention of the deceased to revoke his previous will and to replace it with the document attached to the papers as "Annexure A".

[32] Bezuidenhout has no interest in the contested will and has no reason to lie. The same can also be said about the mother of the deceased. It is therefore the conclusion that it was the deceased's clear and unambiguous intention to revoke his previous will, to disinherit the second respondent and to nominate his three minor children as the sole beneficiaries of his estate.

[33] Lastly, I have already referred to the fact that the applicant has declined her nomination as executrix in light of the serious allegations levelled against her (and others) by the respondents. I indicated to counsel on behalf of the applicant that I am in agreement with the suggestion that an independent third party be appointed as the executor/executrix of the estate in light of these serious allegations. The executor/executrix must be placed in possession of all the documents contained in the court file in this application in order to decide whether there exists any reason to investigate the allegations of fraud allegedly perpetrated against the estate of the deceased. There is also a further reason for appointing an independent third person as

executor/ executrix and that is the fact that two of the three beneficiaries of the will are still minors. I have therefore made it part of my order that the Law Society of the Northern Provinces nominate a suitable person for consideration by the Master of the High Court for appointment as executor/executrix.

[34] In the event the following order is made:

1. The Master of the High Court is directed to accept the document annexed to the Notice of Motion as “Annexure A” to be the will of the late Gert Willem van Niekerk (Identity number [...]) for the purposes of the Administration of Estates Act 66 of 1965.
2. The Master of the High Court is directed to withdraw the Letter of Executorship dated 7 October 2013 appointing the first respondent as the executrix of the estate of the late Gert Willem van Niekerk in terms of the will dated 11 February 2008.
3. The Law Society of the Northern Provinces is directed to nominate a suitable person to act as the executor/executrix of the estate of the late Gert Willem van Niekerk and to forward the said nomination to the Master of the High Court for consideration for appointment as the executor/executrix of the estate of the late Gert Willem van Niekerk.

4. The applicant is ordered to furnish the appointed executor/executrix with a copy of all the documents that served before this court in this application.
5. The first and second respondents are ordered to pay the cost, jointly and severally the one paying the other to be absolved.

AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Adv JJ Greeff
Instructed by	:	Brauckmann Auret

For the Respondent

: Adv JC Prinsloo

Instructed by

: Wynand Prinsloo & Van Eeden Inc.