IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 5461/2007

In the matter between:

RUBY CHARMAINE MARAIS	Applicant

and

JOAGEM HENDRIK BOTHA NO	1ST Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	2nd Respondent
SAREL MARAIS	3rd Respondent
JACQUES MARAIS	4th Respondent
DESERAY MCKIRBY	5th Respondent

JUDGMENT DELIVERED ON THIS 31ST DAY OF OCTOBER 2008

MEER, J:

[1] The applicant is the surviving spouse of the late Jacobus Petrus Marais ("the deceased") with whom she executed a joint will ("the joint will") dated 26 February 1999. She seeks an order in terms of section 2(3) of the Wills Act 7 of 1953 ("the Wills Act"), that The Master of the High Court, Cape Town, the second respondent, be ordered to accept the joint will as the will of the deceased for the purposes of the Administration of Estates Act 66 of 1965,("the Estates Act"). It is common cause that the deceased was murdered and that the applicant has been indicted on a charge of conspiracy to the murder of the deceased.

[2] The third, fourth and fifth respondents ("the opposing respondents") are the children of the deceased. They oppose the application. The first respondent is the executor of the deceased's estate. He was appointed as such by the second respondent at the request of the opposing respondents, after the second respondent, the Master, placed the validity of the joint will in issue. It appears that second respondent's concerns about the joint will flowed from the fact that the signatures appended on the last page of the document are too far removed from the substance of the will. Section 2 (3) of the Wills Act vests this court with authority in a situation like this to direct the second respondent to accept a document as being the valid will of a deceased person, if the court is satisfied that the document was in fact intended to be the deceased person's will, even if all prescribed formalities were not complied with.

[3] The opposing respondents initially took issue with the joint will because of the stance adopted by second respondent. They however subsequently accepted that the joint will executed in 1999 was intended to be the will of the deceased at the time. They concede moreover that in principle there is nothing that precludes this Court from ordering the Master to accept the will, thereby exercising its capacity in terms of Section 2(3) of the Wills Act. This concession is properly made. See **Horn en Andere v Horn en 'n Ander** 1995 (1) SA 48 (W) at 50B and 50B-B/C; **Van Wetten and Another v Bosch and Others** 2004 (1) SA 348 (SCA) at para 27; **Schnetler NO v Die Meester en Andere** 1999 (4) SA 1250 (C) at 1260 A-E.

[4] The opposing respondents however continue to oppose the acceptance of the joint will and applicant's application. They contend that the deceased executed another will after 1999, thereby revoking the joint will. He did so, according to them, as a consequence of marital difficulties and mistrust between the deceased and the applicant. The opposing affidavit of the third respondent indicates that he and his siblings are currently searching for the original and a copy of the deceased's last will.

[5] The third respondent in his opposing affidavit contends that there is clearly a factual dispute concerning which is the last will. He adds that he was informed by the deceased in his last days inter alia:

-that the deceased suspected the applicant was trying to poison him;

-that the deceased could not divorce the applicant as she refused to agree that his assets could be transferred to him;

-that the applicant and her daughter refused to transfer the deceased's flat in Pretoria to him;

-that the deceased intended to disinherit the applicant's daughter.

[6] The affidavit of the third respondent emphasises that the applicant has been charged in connection with the murder of the deceased and that in the event of her being convicted, she will not be allowed to inherit in terms of the joint will. In that instance, should the other will not be found, the third respondent and his siblings will inherit under intestacy. It would be in the best interests of the estate if the independent executor currently appointed, remains in office.

[7] The applicant counters that the respondents have failed to produce the later will and to satisfy the onus upon them to prove that such will exists. Mr van der Merwe, for the applicant, submitted that there was, in the circumstances, no dispute of fact concerning the existence of such later will. Mr van der Merwe moreover characterised the submissions of third respondent pertaining to what the deceased informed him during the latter's last days, as inadmissible hearsay evidence. I do not believe this to be so. I am satisfied that such evidence is admissible under Section 3(1) of the Law of Evidence Amendment Act 45 of 1988. It is also well established that a deceased's statements of his testamentary intentions may in certain circumstances, be admissible. See **R v Basson and Others** 1965 (1) SA 697 CPD at 699C-H and 700 A-G. See also **R v Foreman** 1952 (1) SA 423 (SC).

[8] Nor do I accept there to be no material dispute as contended on behalf of Applicant. On the opposing respondents' version, considered in its totality and even absent the production of the later will, there exists a dispute as to whether there was a later will. The fact that the later will, which the opposing respondents contend for, was not produced or yet found, does not, in my view, detract from such material factual dispute which runs central to this matter.

[9] The applicant elected not to file any replying papers in which she responded significantly to the allegations of third respondent or placed such allegations in any context. Nor did she adduce additional information in the light of such allegations as might have been expected from a litigant in her

position. The fact that she baldly denied the existence of the later will in an opposing affidavit to the joinder application (brought by the opposing respondents) does not detract from her failure to significantly reply in the main application

[10] Having found there to be a material dispute of fact, and applying the general test as formulated in **Plascon-Evans v Van Riebeeck Paints** 1984 (3) SA 623 (A) at 634 (H-I), the application stands to be adjudicated on the opposing respondents' version. In assessing the facts as stated by the opposing respondents, together with those facts by the applicant, which the opposing respondents admit, I am inclined to agree with Mr Möller, for the opposing respondents, that respondents' version, considered within the context of marital strife, animosity and distrust lends itself to the inference that the deceased may well have made another will. It can be said that the opposing respondents have shown, on a preponderance of probabilities, that there may be a new will. The application accordingly cannot succeed.

[11] I note also that a finding for the applicant would indeed be contrary to the recognized Roman-Dutch law maxim of "*de bloedige hand neemt geen erf*". Applicant is nominated as executor in the joint will. A finding in her favour could possibly lead to her being appointed executor of the joint will, and thereby in her capacity as such receiving a benefit under the will. It is so that to be appointed executor of an estate under a will, is tantamount to receiving a benefit under the will. See **Thomas and Another v Clover NO and Others** 2002 (3) SA 85 N at 92C-E. Were applicant to be appointed

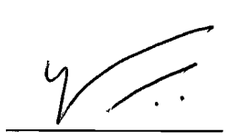
executor, she would benefit. Given that applicant has been charged with conspiracy to the murder of the deceased, this could not be countenanced. In the unreported judgement of **Pu & Others v Ranchod NO and Another** 2005 JOL 15767 (ZH) at p.5 it was held to be repugnant to all notions of justice and public policy for a person to be appointed executor to the estate of a person he has killed or has been accused of killing. The analogy in my view must logically apply to a person charged with conspiracy to murder in respect of the deceased, as is the case with applicant. The office of executor is moreover a fiduciary one, for which a person indicted in connection with the murder of the deceased, is in my view ill equipped to occupy.

[12] The opposing respondents did not seek costs against the applicant personally in the event of the application being dismissed. An appropriate cost order they submitted would be one requiring costs to be borne by the deceased estate

[13] In view of all of the above I grant the following order:

(1) The application is dismissed;

(2) The costs of the application are to be borne by the estate of the late Jacobus Petrus Marais.



MEER, J