In the High Court of Swaziland

Civ. Case No. 1352/93

In the matter between:

Phumzile Manyatsi	1st Applicant
Thulie Manyatsi	2nd Applicant
Nompumelelo Manyatsi	3rd Applicant

and

Jameson Gudu Vilakati N.O.	1st Respondent
Fikile Hlatshwako	2nd Respondent
James Manyatsi	3rd Respondent
The Master of the High Court	4th Respondent

CORAM:	Hull, C.J.
FOR THE APPLICANTS	Mr. S. Dlamini
FOR THE RESPONDENTS	Mr. Fine

Judgment
(14/12/93)

The applicants seek an order setting aside as null and void, and of no legal effect, a will made by the late Ben Babili Manyatsi.

It is not in dispute that the document, consisting of two pages, was in fact made by Mr. Manyatsi as a will. The ground on which the applicants seek to set it aside is that the two attesting witnesses did not sign both pages.

It is not in dispute that Mr. Manyatsi himself did append his full signature to both pages.

In an opposing affidavit, Mr. Nkosinathi Nkonyane, who is an articled clerk with the legal firm of Douglas Lukhele and

Company, deposed that at Mr. Lukhele's offices, he the deponent and Sinethemba Edna Khumalo signed both pages too, as witnesses, in the presence of Mr. Manyatsi and of each other. It is apparent from the document, consisting of two separate sheets, however, that whereas they appended their full signatures as witnesses on the second page, they only put their initials on the first page; and Mr. Nkonyane confirmed this. It also appears, incidentally, that in addition to their full signatures on the second page, the witnesses also added their initials again, at the foot of that page.

For the applicants, Mr. Dlamini therefore submits that the will does not comply with section 3(1) of the Wills Act No. 12 of 1955, which provides as follows:

"3.(1) Subject to this Act no will executed on or after the first day of March, 1955, shall be valid unless -

" (d) if the will consists of more than one page, each page is...signed by the testator ... and by such witnesses...".

In support of his submission, Mr. Dlamini cites Mellvill and Another NNO v. The Master and Others (1984)3 SA 387, a decision of the Cape Provincial Division in which it was held that for the purposes of section 2(a)(iv) of the Wills Act, (7 of 1953), the initials of a witness did not constitute a signature and that an instrument thus initialled was not a valid will for the purposes of the Act.

As the court itself in Mellvill noted, in a detailed consideration of the South African authorities, there has been an apparent divergence of opinion over the years in the cases decided there.

Thus in Van Vuuren v. Van Vuuren (1854) 2 Searle 116, the majority held that initials did not constitute a signature. Bell J., dissenting, thought otherwise. He took the view that if (as it had been held in England in respect of the

Wills Act of 1837, on which the Ordinance in question was based) a mark would suffice as a signature, then he could see no reason why initials would not also be enough.

In two subsequent cases, referred to in the judgment in Mellvill, i.e. in Troost v. Ross, Executrix of Hohenstein (1863) 4 Searle 211 and in Re Le Roux (1884) 3 SC 56, it was held that the marks of a testator and a witness respectively sufficed as signatures. Then in In re Trollip (1895) 12 SC 243, the court overruled Van Vuuren, holding that if a mark sufficed, initials were a fortiori sufficient. In reaching its decision, the court referred to English decisions to the same effect.

Having referred to these cases on pre-Union enactments in South Africa, the Court in Mellvill then turned to consider the reported decisions on the Act of 1953.

In Ex parte Goldman and Kalmer NNO 1965 (1) SA 464 (W), it was held that the mark of a testatrix constituted her signature and in Jhajbhai and Others v. The Master and Another 1971 2SA 370(D) that the printing by a witness of his full name also did so.

However in Dempers and Others v. The Master and Others (1) 1977 4 SA 44 (SWA), the court decided that the initials of witnesses could not be held to be signatures as such and held that the will in issue was accordingly invalid.

This decision was not followed in Ex Parte Singh 1981 (1) SA 793 (W). In that case it was held that a testator's initials, being intended to constitute his signature, did comply with the requirements of the Act.

In preferring Dempers to Ex Parte Singh, the court in Mellvill took the view that the 1953 Act drew a clear distinction between a signature and a mark. In the definition section,

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it provided that the word "sign" included in the case of a testator, but not in the case of a witness, the making of a mark. The Act further provided that certain other formalities were to be observed when a testator signed by making a mark.

Both of these requirements are also found in the Swaziland Act.

The court in Mellvill, applying the approach that to the extent that an Act does not define a word, and its context does not make it clear that it is being used in a different sense, and it has not acquired a different meaning in legal nomenclature, the word is to be given its ordinary meaning, came to the view that in ordinary language initials do not amount to a signature.

It then considered the purpose of the 1953 Act in stipulating that wills must as a matter of formality be signed by testators and witnesses, observing that (to put it shortly) this was to identify them and to eliminate as far as practicable the perpetration of fraud. It noted that it is normally easier to identify a testator or a witness by his full signature rather than by his initials. It also attached weight to the introduction of special provisions in the 1953 Act for the signing by a testator by means of a mark, and rejected as not material the views expressed in Ex Parte and Jhajbhai to the effect that it was the intention as such, of the testator (or the witness) that was the governing factor (i.e. if on the evidence, it was his intention by affixing his initials to signify that he was making or attesting the will).

As far as the purposes of section 3(1)(d), read with the definition "sign" in section 2, of the Wills Act 1955 of Swaziland are concerned, I adopt with respect the statement of those purposes given in Mellvill in relation to the South African Act of 1953 (which is substantially the same in that regard as Swaziland's statute).

However, I am unable, with respect, to agree with the court in Mellvill as to the ordinary meaning of the words "sign" and "signature". In ordinary language, I would myself understand a signature to consist, at the choice of the person giving it, of his name in full, his Christian initials and his surname, or simply his initials.

The Concise Oxford Dictionary, 7th Edition, to which I have access, supports this understanding. "Signature" is there defined as meaning "1. Act of signing document etc. 2. person's name or initials or mark used in signing....", and "sign" has a corresponding definition.

I think myself that in ordinary usage it in fact goes further than that. There is an element of personal idiosyncrasy in a signature. A man may see fit to sign by using his surname alone or even, I think, in the royal manner by his Christian name alone.

Ordinarily therefore, I consider that a signature may consist at least of a conventional signature, or initials alone, or a mark alone. Under the Wills Act 1955 a mark alone is not however sufficient in the case of a witness. That is a statutory modification of the ordinary meaning of "to sign" and its cognate expressions. No doubt a reason for that is that while the legislature acknowledges the need to facilitate the making of wills by testators, it considers that stricter requirements are reasonable and desirable for persons acting as witnesses. I do not think it follows at all, however, that because the statute precludes the signature of a witness by means of a mark, it also precludes his signature by means of initials alone. If a mark is a sufficient signature, then I agree that a fortiori initials must be so. The converse, however, is not true.

For myself, I do not attach any significance, in the context of the sufficiency of initials as a signature, to the fact

that the 1955 Act (as does the 1953 South African Act) makes special provisions for marks. With respect, the expression "special provision" in the context of the South African Act, seems to me to mean, and only to mean, first that as a matter of legislative policy a mark will not do as a signature for a witness and, secondly, that where a testator himself signs by means of a mark, certain additional formalities must also be observed. I do not think it means anything more than that, and I do not think it has any real implications as to the adequacy of initials, per se, as a method of signature.

I am also not persuaded myself that the courts in Ex Parte Singh and in Jhajbhai were wrong in identifying the intention of the signatory as relevant. With respect, I think it is very relevant. If a person signs a will with what in ordinary parlance amounts to a signature, and that form of signing is not precluded (as in the case of a mark, in respect of a witness) by the terms of the Act, and in so signing he intends to signify that he is making or attesting the will, then it seems to me that he complies fully with the letter and the underlying purposes of section 3(1)(d).

I therefore conclude that this application fails and it is accordingly dismissed, with costs to the respondents.

D. Hull.

DAVID HULL
CHIEF JUSTICE