IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 2994/2006

SAMUEL MASEKO Applicant

And

MANDLA MAHLALELA AND 8 OTHERS Respondent

Coram S.B. MAPHALALA - J
For the Applicant MR. L. GAMA

For the Respondent MR. T. NDLOVU

JUDGMENT
19th March 2009

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[1] Before court is an application on Notice of Motion in the long form for an order declaring the Will purportedly signed by Freda Maseko under Estate No. EH 277/2005 invalid.

[2] The Founding Affidavit of the Applicant is filed with pertinent annexures including the Last Will and Testament

marked annexure “A”.

[3] The Respondents have filed the Answering Affidavit of the First Respondent Mandla Mahlalela who has raised therein a point of law *in limine* of non-joinder. The point is that one of the beneficiaries of the estate, Phumaphi Magagula has not been cited herein whereas she obviously has a direct and substantial interest too in matters relating to the Estate. However, the Respondent stated in arguments that in order that the matter is decided expediently on the merits he abandoned the point *in limine* raised in the Answering Affidavit.

[4] The brief background of the matter is that the Applicant is the only living sibling of the late Freda Maseko who died on the 1st October 2005. When the late Freda Maseko passed away she was not married and had no children, natural nor adopted. The estate of the Late Freda Maseko has been

reported to the Master and a Will purportedly made by the late Freda registered with the Master of the High Court. (see annexure “B”).

[5] The Applicant contends that he has reason to believe that the Will was not signed by the late Freda Maseko for the following reasons:

1. Although Freda Maseko had no children, James Simon Mvubu and Fikile Dube are described as her children.

The said Freda Maseko was not in a position to communicate her intention at the time that she is alleged to have signed the Will because she had been in severe paralysis due to a stroke since year 2000 up till her death.

[6] The Applicant contends that the said Freda Maseko was mentally incapable of appreciating the nature and effect of her act at the time that the said Will is said to have been made. Further that the Will is invalid in that although the testator purportedly signed by making a mark, the provisions

of Section 3 (e) of the Will Act were not followed. That because the provisions of Section 3 (e) of the Will's Act were not satisfied, the court should declare the purported Will invalid and that the estate be treated as intestate.

[7] It is the Applicant's contention that the purported Will is invalid for the reason that it does not comply with Section 3 (e) of the Wills Act No. 12 of 1955.

[8] The Applicant contends that although the Respondents deny that they did not comply with Section 3 (e) of the Wills Act it is apparent on the purported Will itself that although it was signed by the making of a mark there is no certificate on any of the pages as required by Section 3 (e) of the Wills Act.

[9] The Applicant argues that the affidavit of Mr. Mahlalela does not cure the defect therefore Section 3 (e) of the Wills Act was not complied with.

The provisions of Section 3 (e) are a statutory requirement that should be complied with for a Will to be held to be valid.

[10] The object of the legislation is clearly an attempt to avoid instances of fraud by impersonation of testators – see *Ex parte Sookoo in Restate Dularie 1960 (4) SA 249 (D)* at page *252, Ex parte Suknanan and Another 1959 (2) SA 189 (N)* at page *191.*

[11] Applicant further argues that as the purpose of Section 3 (e) of the Wills Act is for the authentification of the Will, such authentification must conform with the provisions of The Authentification of Document Act No. 20 of 1965. It is therefore submitted that the certification required by Section 3 (e) must be as near as possible with the certification as envisaged by the Authentification of Document Act. It is submitted that no such certification was done in relation to the purported Will.

[12] Applicant argues that the affidavit of Mandla Mahlalela does not amount to the certification provided for in Section 3 (e) of the Will, as such certification is required to be on each page of the Will. That being a statutory requirement cannot be diverted from.

[13] It is argued further by the Applicant that Mandla Mahlalela was not competent to certify the Will because he is actually the author of the purported Will and in terms of which he was appointed the executor.

[14] It is submitted for the Applicant that looking at the spirit of the Wills Act, most particularly Section 11 and 12 thereof, which does not allow a witness to the signing of a Will to be appointed executor or beneficiary, that it would be proper that the certification be done by a person other than the author of the Will, more so in the present case as he has been appointed executor.

[15] Furthermore, it is contended for the Applicant that Applicant has shown sufficiently that the Will, was either not signed by the purported testator or that it was signed by her when she was not of sound mind. The Applicant says so for the following reasons:

(i) Mr. Mahlalela fails to inform the court who the witnesses to the signature are;

(ii) Although Mahlalela does not dispute that the late Freda Maseko had no children, one of the people mentioned in the Will is described as her granddaughter.

(iii) The explanation by Mr. Mahlalela that the late Maseko chose to describe the others as children is ridiculous and should be rejected;

(iv) There is no explanation as to why the testator would have used a mark instead of her signature as she was literate, if in fact she was in stable health, as stated by

Mr. Mahlalela in paragraph [8].

[16] On these arguments the Applicant contends that this court should declare the Will as invalid, and costs to be awarded against the Respondents except for Second and Third Respondents.

[17] The Respondents on the other hand has advanced a formidable argument in his Heads of Arguments and for the sake of completeness these arguments are reproduced in the following paragraphs.

[18] The Respondents contend that the Applicant's Founding Affidavit will be basically assailed on only two grounds, *viz* that the said Will does not comply with the requirements of Section 3 (e) of the Wills Act and secondly that the testator could not have been in a rightful state of mind to execute a Will.

[19] The said provision is quoted verbatim as follows:

> "If the Will is signed by the testator by making a mark …, an administrative officer, justice of the peace, commissioner of oaths, or notary public certifies at the end thereof that the testator is known to him and that he has satisfied himself that the Will so signed is the Will of the testator, and if the Will consists of more than one page, each page is signed by the administrative officer …".

[20] From the above, it is clear that what is required is certification by the Commissioner.

[21] *In casu* the said certification does not appear *ex facie* the Will. However, and by letter written and directed to the Second Respondent dated the 11th September 2006, and delivered upon the said Second Respondent on the 22nd September 2006, such certification was duly furnished to the Second Respondent. It is worthy of mention too that the said Second Respondent duly accepted the same. In his

letter addressed to the Second Respondent, the First Respondent duly explained that the said certification had been present from the date the Will was made, however due to the negligence of his filing clerks, their submission to the Second Respondent was mistakenly omitted. In fact this is the very same reason the First Respondent denies at its paragraph 9 in the Answering Affidavit (page 40 of Book of Pleadings) that it has failed to comply with the Act.

[22] Notwithstanding the date of the certification, it is contended for the Respondent that such dating, the First Respondent and in law would clearly have been at liberty to file and/or append such certification *post mortem testatoris.* That is after the death of the testator.

[23] The Respondent further argue that it should be noted that our Wills Act in this regard was at all fours with Section 2 (1) (a) (v) the Wills Act of 1953 of South Africa and which

section has been accorded considerable academic and legal scrutiny over the years. The section has only seen one slight amendment, being the amendment of the phrase:

> "That the testator is known to him and that he has satisfied himself …".
>
> "He has satisfied himself as to the identity of the testator …".

[24] The former, to which ours law still conforms, however was felt to have carried with it the necessary implication that the certifier should know the testator personally, or least know of his own knowledge that the person signing the Will was indeed the testator. This was felt to place too high a standard.

[25] The Respondents contend, however, that this slight variance does little to alter the application of South African interpretations *in casu*, or of the entire subsection itself and even more because the case law cited was based on the pre-amended version which fell on all fours with our own.

[26] Respondents argue that a clear and in-depth analysis of the section could not, even in years to come, be better expounded than by Baker AJ in *Arendse v The Master and*

Others 1973 (3) SA 333 who after a comprehensive review of all Roman-Dutch authorities held at page 355 (a) that:

> "In my opinion there can be no doubt that in later Dutch practice a Will could be authenticated post mortem testatoris".

At paragraph (e) *supra* the learned Judge states:

> "Huber allows a will t be held good even though signed by witnesses after the death of the testator, as where the testator dies during the signing of the Will, before he has signed it, or while busy doing so, as long as the witnesses had heard him utter his Will orally".

[27] At page 356 (H) he continues:

> "These authorities support the submission that verification of a Will post mortem testatoris is not a strange notion in out law, but an accepted practice ..."

At page 357 (D) he notes:

> "I think it is desirable in the first instance, to refer to what I believe to

be a correct statement by Murray, that in cases dealing with Wills signed by marks, statutes laying down formalities should be benevolently interpred".

[28] At page 359 (G) the learned Judge states:

"... that there is no logical reason why the certificate should be given at any particular time; the Act lays down no rule in this regard. The section contemplates that the certification need not be done contemporaneously with the execution of the Will".

[29] At page 360 (A) and (H) he continues:

" ... this is correct and there is no onus contextus rule in our statute law, leaving aside the common law, then it makes no difference whether certification is part of the execution process or not ... I agree with his further conclusion that the certificate required in terms if Sec. 2 (a) (v) need not be appended at the same time as the signatures required by sub paras (i) to (iv)".

[30] At page 361 (E to G) the learned Judge continues:

'They point out further, that the purpose of the certificate is to guarantee the

authentification of the testators mark or the signature of the amenuensis; that the reliability of the certifier does not die with the testator; and ask, with reason, why the reliability of the former should be removed by reason of the death of the latter … The certificate was designed merely to afford proof of genuineness of the Will; that it had to be done by a selected person of standing; and that it made no difference whether the certificate was appended before or after the death of the testator". (my emphasis)

[31] At page 363 (G) he continues:

"Parliament did not and could not have intended a will to become invalid merely because an officer over whom the testator has no control does not complete his enquiries – his bona fides and expedition being unquestioned – within a time sufficient to allow him to certify before the testator dies".

[32] At page 364 to 365 (A) the learned Judge concludes:

"I have endeavoured to point out that the certification is in its very nature an Act which must necessarily be performed by someone other than the testator, and furthermore, someone over whom he has no control. To this extent Parliament itself has ordained that a "marked" Will in one having conditional validity – the validity of the Will being conditional upon performance of an act of validation by

someone other than the testator. I conclude, therefore that the certification required by sec. 2 (1) (a) (v) can effectively be put upon a Will at any time after the testator or anyone else has satisfied the certifying official contemplated by that sub paragraph that the ostensible testator is indeed the testator and that the document involved is indeed the Will of the testator. It can be appended, in my view, at any time after the Will has been "marked" by the testator and signed by the witnesses".

[33] Similarly Moll J in *Roberts and Another vs The Master 1975 (4) 377* at *378 (E)* held:

"That the prescribed certificate can be appended at any time after the Will has been "marked" by testator and signed by the witnesses and this even *post mortem testatoris*".

[34] Again Banks J in *Frylinck and Others vs The Master and others 1976 (2) SA 151* states:

"After an exhaustive review of the authorities decided … the prescribed certificate can be appended *post mortem testatoris*".

[35] It is therefore submitted that even *in casu* the First Respondent was entitled to submit these certificates, and mind you, executed on the same day as the Will, *post mortem testatoris*.

[36] It is argued further on behalf of the Applicant that the said First Respondent is not a competent executioner of the required certification in that the same Will also appoints him as executor. To this end the Applicant makes reference to Sections 11 and 12 of the Wills Act. These are quoted as follows:

Section 11 provides:

> "A person who attests to the execution of any Will or who signs a Will in the presence and by direction of the testator or the person who is the spouse of such person at the time of attestation or signing of such Will or any person claiming under such person or his spouse, shall be incapable of taking any benefit whatsoever thereunder".

[37] Section 12 provides:

> "If any person attests the execution of a Will of signs in the presence and by direction of the testator under which such person or his spouse is nominated as executor, administrator, trustee or guardian such nomination shall be null and void.

[38] It is upon the said sections that the Applicant seeks to have the Will nullified. This is, with respect based on a misreading and interpretation of the sections. While it is submitted that the First Respondent is appointed as an executor by the said Will, however the capacity in which he executes the prerequisite certification is clearly none of the capacities envisaged by Section 11 and 12 as stated above. He is neither a witness, a spouse nor does he sign it on behalf of the testator. In fact he only executes a certificate by virtue of the high office that he holds, i.e. as attorney and officer of the this Court and as an *ex officio* Commissioner of Oaths.

[39] In fact the said Section 12 makes it abundantly clear

that if in fact a witness that has been nominated as executor should attest, it is not the Will that is invalidated thereby but such nomination as executor.

[40] The Applicant's second ground for invalidation is that the testator at the said time could not have been able to execute a Will since it is alleged at paragraph 16 of Applicant's Founding Affidavit (page 10) that:

> "… Freda Maseko was mental incapable of appreciating the native and effect of her act at the time that the said Will is said to have been made".

The Applicant's Founding Affidavit merely leaves it at that. He files no doctor's report or supporting affidavits to this end.

[41] Accordingly, the said allegation is denied by the First Respondent in its paragraphs 8 to 9 in the Answering

Affidavit (page 39 to 40 of Book of Pleadings). The First Respondent further goes on to dismiss the allegations as hearsay/ speculation in that the Applicant is not a medical doctor and/or psychiatrist and is therefore not in a position to give an opinion on a person's mental state.

[42] The Respondent's further contend that the Applicant in this regard has sought to build its case in attaching supporting affidavits in reply, wherein the Respondents have no chance at buttressing the same in support of his allegations concerning the testator's mental status. The said affidavits should be struck off as such.

[43] In any event, it is therefore abundantly clear that this is an aspect of the matter that gives rise to a serious, real and substantial dispute of fact which cannot be resolved on paper and which will invariably require oral evidence. Applicant should have approached court by way of action.

This must have been totally clear to the Applicant at inception hereof but he wilfully chose to reconcile himself with the same at the obvious hope of gaining an advantage of other litigants that have approached court by way of action. This warrants a dismissal of the application and with costs.

[44] In *Elmon Masilela vs Wrenning Investment (Pty) Ltd and Another unreported High Court Civil Case No. 1768/2002 Masuku J* at page *6* held:

> "It is becoming a habit to bring applications to court on controversial issues and then to endeavour to turn then into trial actions. Applicants thereby obtain a great advantage over litigants who have proceeded by way of action and who may have to wait for many months to get their cases before court. Such applications – sum trials interpose themselves, occupying the time of the judges and still further delaying the hearing of legitimate trials ... In view of the foregoing, the proper order to make would be that the application be and is hereby dismissed with costs.

[45] Respondents further add that in this regard one would do no more than echo the words of Banda CJ in *Samuel Mfanufikile Malaza vs Swaziland Royal Insurance Co-operation – Supreme Court of Appeal Case No. 19/2007* at paragraph *10* wherein the Judge states:

> "This is an extraordinary allegation to make against professional colleagues especially so when it is made in their absence … Fraud is a serious allegation to make and it should not lightly be made unless there is evidence to substantiate it".

[46] Having considered the arguments of the parties it would appear to me that the position adopted by the Respondents is correct. It appears to me that the entire subsection itself and even more because the case law cited by the Respondents including the case of *Arendse* was based on the pre-amended version which fell on all fours with our own.

[47] A clear and in-depth analysis of the section could not be

better expounded than by Baker AJ in the above-cited case who after a comprehensive review of all Roman-Dutch authorities held at page 355 (a) that:

> "In my opinion there can be no doubt that in later Dutch practice a Will could be authenticated *post mortem testatoris*".

[48] I refer further to paragraphs [26] up to para [34] of this judgment to the proposition that certification can be appended *post mortem testatoris*.

[49] In this regard Section 11 and 12 of the Wills Act would apply on the facts of the case.

[50] On the issue of the mental condition of the testator it appears to me that the Respondents are correct that the Applicant's supporting affidavits should be struck off. The Applicant seeks to build its case in attaching supporting affidavits in reply, wherein the Respondents have no chance at buttressing the same in support of his allegations concerning the testator's mental status.

[51] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

PRINCIPAL JUDGE