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IN THE HIGH COURT OF SWAZILAND

CASE NO. 4005/07

HELD AT MBABANE

BETWEEN

MARCELLA SIHLONGONYANE (NEE MOTSA)...	**1ST PLAINTIFF**
THULILE SIHLONGONYANE...	**2ND PLAINTIFF**
ALPHEUS SIHLONGONYANE...	**3RD PLAINTIFF**
DONALD SIHLONGONYANE...	**4TH PLAINTIFF**
PHILIP SIHLONGONYANE...	**5TH PLAINTIFF**
SABELO SIHLONGONYANE...	**6TH PLAINTIFF**
DUMSANE SIHLONGONYANE...	**7TH PLAINTIFF**
NCANE SIHLONGONYANE...	**8TH PLAINTIFF**
ESTHER NTFOMBI SIHLONGONYANE...	**9TH PLAINTIFF**
ZANELE SIHLONGONYANE...	**10TH PLAINTIFF**
MBONGISENI SIHLONGONYANE...	**11TH PLAINTIFF**
VINCENT SIHLONGONYANE...	**12TH PLAINTIFF**
LUNGILE SIHLONGONYANE...	**13TH PLAINTIFF**
NTOMBIFUTHI SIHLONGONYANE...	**14TH PLAINTIFF**
XOLILE SIHLONGONYANE...	**15TH PLAINTIFF**
LOMGIDVO SIHLONGONYANE...	**16TH PLAINTIFF**
SUKULWENKOSI SIHLONGONYANE...	**17TH PLAINTIFF**
LOMKHOSI SIHLONGONYANE...	**18TH PLAINTIFF**
PHINDILE SIHLONGONYANE...	**19TH PLAINTIFF**

NGABISA SIHLONGONYANE... 20TH PLAINTIFF
THEMBENI SIHLONGONYANE... 21ST PLAINTIFF

AND

MINAH SIHLONGONYANE... 1ST DEFENDANT
CELIWE SIHLONGONYANE... 2ND DEFENDANT
THANDI SIHLONGONYANE... 3RD DEFENDANT
PHILANJANI CLEMENT SIHLONGONYANE... 4TH DEFENDANT
WILLIAM SIHLONGONYANE... 5TH DEFENDANT
THEMBISILE SIHLONGONYANE... 6TH DEFENDANT
NJABULISO SIHLONGONYANE... 7TH DEFENDANT
THE MASER OF THE HIGH COURT 8TH DEFENDANT
THE ATTORNEY GENERAL… 9TH DEFENDANT

CORAM
AGYEMANG J
FOR THE PLAINTIFFS:
M.E. SIMELANE
FOR THE FIRST DEFENDANT:
M.Z. MKHWANZI
FOR THE FOURTH DEFENDANT:
B.J. SIMELANE
FOR THE OTHER DEFENDANTS:
NO REPRESENTATION .

DATED THE 28TH DAY OF JULY 2010

JUDGMENT

In this action the plaintiffs seek the following reliefs:

1. An order declaring the Last Will and Testament of Sibonangaye Mathambo Langwenya dated 26th May 2006 to be null and void;

2. An order that the said Sibonangaye Mathambo Langwenya died intestate;
3. Costs of suit;
4. Further and/or alternative relief.

The plaintiffs herein, widows and children of the late Sibonangaye Mathambo Langwenya sued out a combined summons against the defendants herein (widow and children), seeking *interalia*, a setting aside of the Will of the said late gentleman.

In the particulars of claim, the plaintiffs alleged that the said Will was invalid by reason of certain irregularities regarding same. More particularly, the plaintiffs' grounds for asserting that the Will was invalid were the following:

i. That at the time of his execution of the Will the testator was not in a mental state fit to execute a valid Will in that he was rendered incapable of appreciating the nature of his act or the content of the Will. The staid state was allegedly the result of his suffering physical illnesses, being: sugar diabetes and high blood pressure;
ii. That he was illiterate and did not appreciate the contents of the Will, recorded in the English language;
iii. Alternatively, that pages 1, 2, and 3 of the Will are invalid, as they were not properly attested in that the witnesses and the testator did not sign the Will in the presence of each other and at the same time;
iv. Further alternatively, that the Will is invalid, as the legal advisor Felix Nhlabatsi who drafted the Will and registered same was a beneficiary thereof;

v. Furthermore, that the Will is invalid in that contrary to testate laws, it purported to give Felix Nhlabatsi and successors of his practice, the right to nominate an executor;

vi. Alternatively that the Will is unconstitutional as it did not provide equally for the three families and heirs of the deceased;

vii. That the signature of the testator on the Will is not authentic.

The plaintiff called three witnesses in proof of their case.

It was the evidence of the first plaintiff, one of the widows of the testator that she had lived with her husband. She testified that upon his death, she and other members of the family attended a reading of the Will of the testator at some offices at Manzini. She recounted that the testator devised immovable property situate at Maliyaduma to her. This property she said, was comprised of two buildings built by her children. These buildings she alleged, were erected in the place of two rondavels that had been built by the testator and had fallen into disrepair. First plaintiff testified further, that the land on which the houses were erected was Swazi Nation land khontaed by the testator; thus was the homestead referred to as the Sihlongonyane homestead.

The daughter of the testator and the first defendant (sued as the ninth defendant herein) testified on behalf of the plaintiffs. She denied that the testator made out a Will but recounted the circumstances under which she became acquainted with a Will. She alleged that on a certain day in May 2006 while she was in the company of her mother, the latter received a telephone call summoning her to the offices of Nhlabatsi Attorneys. It was her evidence that on the day following the telephone call, she went with her mother, one Moses Dlamini (a driver), and the testator to the said attorney's

offices. At the office, the group was joined by one of the testator's sons, the fourth defendant herein. The witness recounted that the testator asked where they were and what they were doing there. She alleged that the first defendant told him that it was an attorney's office, and one Mr. Fakudze the attorney they found at the office in place of Mr Nhlabatsi (then deceased), informed them that he had come across a draft Will which was unregistered. He allegedly asked the group to read it. According to the witness the fourth defendant read the Will to himself and allegedly instructed the attorney Fakudze to have it registered. The Will in respect of which the witness gave testimony was not put in evidence or identified as the Will of the testator.

The last witness for the plaintiff was the eleventh plaintiff herein, another of the testator's twenty-six children. It was his evidence that the Will did not cater for all the children of the testator and that he was one of those left out. He testified though that his mother the ninth plaintiff, was provided for under the Will.

At the close of the evidence adduced by the plaintiff, learned counsel for the first and fourth defendants have applied for absolution from the instance on behalf of the said parties in accordance with Rule 39 (6) of the High Court Rules.

It is the contention of both counsel that the plaintiffs ought to be granted absolution from the instance as the plaintiffs woefully failed to make a case based upon the matters pleaded by the plaintiffs which placed the burden of proving the invalidity of the Will on the plaintiffs. Relying on the celebrated dictum which sets in the main, the standard to be guided by in the grant or refusal of an application for absolution, see: ***Gascoyne v. Paul Hunter 1917***

TPD 170 at 173 as expatiated in ***Build-A-Brick and Ander v. Eskom 1996 (1) SA 115,*** learned counsel contended that the evidence led by the plaintiffs did not meet the standard of proof of the matters stated in pleading so that at the end of it, to the question whether or not a reasonable court could find for them, the answer is in the negative.

Learned counsel for the plaintiffs in his reply, made a number of arguments based upon evidence that was never adduced before the court. Learned counsel, importing matters into the evidence purported to make the case that the plaintiffs had made out a prima facie case which calls for evidence to be adduced by the defendants. Some of these are the following: that the Will was not read by the testator at all but by his son, showing that there was undue influence. Yet though the evidence of PW2 described such an event, it was not enough to meet the burden assumed by the plaintiffs to prove on the balance of the probabilities that the Will the subject of this suit, was not signed by the testator or was not attested by witnesses signing in the presence of the testator and at the same time as was alleged in pleading. Moreover, it was not the evidence of the plaintiffs that before that meeting of which PW2 testified, the testator had never seen the Will. The evidence of PW2 was that when they went to the attorney's office, they were informed of the existence of a Will. Furthermore, evidence regarding when the Will was prepared, who gave instructions for its drafting, and its circumstances was not adduced.

Learned counsel has urged the court to find from the testimony of PW2 that the testator was not of sound mind at the time. The said piece of evidence was that: on the day of the meeting she spoke of, the testator allegedly asked

where they were and what the group had gone to the office for. Besides the fact that the evidence was not in relation to the events surrounding the preparation and the execution of the Will the subject of this suit, the said piece of evidence did not in any way advance the case pleaded by the plaintiffs that at the time of execution of his Will, the mental faculties of the testator herein were so impaired by diabetes and high blood pressure that he was not in a state fit to execute a valid Will. Regarding the said allegation, no evidence such as the evidence of medical history, a mental health evaluation report, or even evidence from persons close to him was led from which a deduction may be made that the testator was not *compos mentis* at the time of the execution of his Will. It seems to me that the allegation that the testator enquired of his whereabouts and the reason for being taken to the attorney's office without more, was insufficient to establish that matter which was pleaded as fact.

The Will the subject matter of this suit was not placed in evidence at all; nor was the Will read at the Master's office identified by PW2 as the one in respect of which the meeting she testified about was concerned. Thus was the evidence led by the plaintiffs regarding a Will, not made referable to the Will of the testator that was read to his family at the Master's office, the subject matter of this action. Indeed the evidence of PW2 that her father left no Will is hardly surprising given her evidence.

The submission of learned counsel for the plaintiffs urging the court to find the contrary is thus untenable.

A person stands and falls by his pleadings. A case fought on pleadings ensures that the material facts of the case (but not the evidence needed to

prove them), are set out in pleading. Where matters are thus pleaded by a party, the material facts set out therein must be supported by the evidence. The plaintiffs herein, in seeking an order declaring the Will of the testator invalid, set out particulars of the matters that allegedly offended against the formal validity of the Will and furthermore, alleged that incompetency of the testator, but failed to lead evidence on the said matters set out in pleading as material facts of the plaintiffs' case. Learned counsel for the plaintiffs submitted that "the evidence led so far also brought in another dimension to strengthen the plaintiffs' case..." With all due respect, evidence is not adduced to bring other dimensions to a party's case. Evidence is led to prove matters stated in pleading which constitute the party's case. In the present instance, no evidence was adduced regarding the matters relied on in pleading as affecting the validity of the Will. Because a person stands or falls by his pleadings, he cannot in leading evidence, set up a case different from what is contained in his pleadings, see: per Twum JA in ***Swaziland Coalition of Concerned Civic Organisations Trust and Ors v. The Elections and Boundaries Commission Case No. 26/08 (Unreported***), citing with approval ***Young v. Star Omnibus Co. Ltd (1902) 86LT 41 at 43.*** As aforesaid, the submissions of learned counsel sought to cure what was lacking in the evidence adduced in a most reprehensible manner, urging the court to make deductions and inferences from evidence that simply did not merit such, as if to create phantoms from shadows.

Furthermore, learned counsel in his submissions sought to attack the contents of the Will, alleging in effect that what the testator devised to the first plaintiff was not his to give out, nor did he have the right to command

performance of any matter as he purported to do under the Will. Yet this was not the case of the plaintiffs as pleaded, which the defendants were required to answer to, and in respect of which the plaintiff was to lead evidence.

This is besides the fact that the Will, the contents of which learned counsel wrote such a copious treatise was never tendered in evidence.

Further submission of learned counsel sought to attack the contents of the Will to challenge its validity. Learned counsel for the plaintiffs submitted that the property purportedly devised to the first plaintiff was not his to give out so that in effect, he made no provision for the first plaintiff. He relied on the evidence adduced by the first plaintiff that although the land on which the buildings are situate was "khontaed" by the testator and he put up the first buildings thereat, the buildings now obtaining were put up by her children when the rondavels built by the testator fell into disrepair. But that piece of evidence itself is problematic for it was uncorroborated. Although corroboration is not a *sine qua non* for the establishment of one's case (as generally, it is the quality not the quantity of evidence supplied by a multiplicity of witnesses that provides credible evidence), it is my view that the allegation that the buildings devised to her were put up by certain persons other than the testator, required the corroboration of the said persons or other persons to confirm that circumstance. This was so particularly as an acknowledgment was made that the land on which the buildings were situate, were *khontaed* by the testator and that he had put up buildings thereat. Evidence regarding what happened to the buildings put up by the testator which allegedly gave place to the present buildings, and his giving up his claim to the structures found on the land in favour of others thus divesting

himself of his right thereto, had to be adduced. From such evidence the court would be aided in the determination of whether or not the buildings devised were the self-acquired properties of the testator, short of that, properties in which the testator had an interest he could devise under a Will.

Learned counsel's argument that the first plaintiff did not have reasonable provision made for her is not borne out by the evidence, for the first plaintiff who gave evidence and had opportunity to say as much did not complain of not having sufficient provision. It is not for the court to have regard to a man's properties and determine that a beneficiary to the estate deserved more than he/she was given. What a spouse is entitled constitutionally to, is reasonable provision, S.34 (1). A complaint regarding such lack is to be made by a spouse; she must allege that she has been left little to sustain him/her in a reasonable lifestyle. If such, having regard to the estate is found to be so, the case is made out for the Will to be disturbed. The first plaintiff herself made no such case in her evidence, nor was evidence in that behalf adduced. Learned counsel may not in his submissions import matters into the evidence. So the matter must rest.

In the celebrated case of ***Gascoyne v. Paul Hunter 1917 AD 170 at 173,*** guidelines were set out for consideration in an application for absolution from the instance thus *"At the close of the case for the plaintiffs therefore, the question which arises for the consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff? The question therefore is, at the close of the case for the plaintiff, was there a prima facie case against the defendant, in other words, was there such evidence before*

the court upon which a reasonable man might, not should, give judgment against Hunter?"

In my judgment the evidence led by the plaintiff fell far short of making out a *prima facie* case regarding the matters pleaded by the plaintiffs and which required proof for a case to be made against the validity of the Will.

Learned counsel also pleaded in the alternative, that the court set aside the Will as unconstitutional. The evidence given by PW3 in substantiation of this was that he as well as some other children of the deceased were not provided for under the Will. In his submission, the fact of the testator failing to provide for all his twenty-six children sinned against the provisions of Ss. 27(3) 29 (4) and 34 (1) of the Constitution of Swaziland. Learned counsel could not be more wrong. Beyond the fact that the evidence led did not show that some of the surviving spouses of the testator were not provided for, in the evidence of PW3, only some children of the testator including himself lacked such provision. I hesitate at this point to make a pronouncement on the matter since the evidence led in this regard was so sparse that I may fall into the same trap learned counsel for the plaintiffs has found himself in, should I attempt to consider at length whether the Will (which as aforesaid was not tendered in evidence) sinned against the said provisions. It cannot be gainsaid that the requirement of a bequest for children provided for on the Constitution was a requirement for reasonable provision, see: S. 29 (7)(b). It is doubtful if a Will of a testator which is a solemn declaration of how he wants to deal with his self-acquired properties may be declared invalid by reason of a lack of a bequest to adult children not found to be incapable of supporting themselves by reason of physical or mental disability.

The arguments regarding the attorney Nhlabatsi's role must also fail.

S. 11 of the Wills Act No.12 of 1955 reads: *"A person who attests the execution of any Will in the presence and by the direction of the testator or the person who is the spouse of such person at the time of attestation...or any person claiming under such persons or his spouse shall be incapable of taking any benefit whatsoever thereunder"*

S. 12 reads: *"If any person attests the execution of a Will or signs a Will in the presence and by the direction of the testator under which such person or his spouse is nominated as executor, administrator, trustee or guardian, such nomination will be null and void."* A fair reading of these makes it abundantly clear that what is precluded is the nomination as executor et al of an attesting witness to the Will or the spouse of such a person, and a gift to such attesting witness, his spouse or persons claiming under him. In such a case, it is the nomination to that office that is rendered null and void and the gift that must fail. The validity of the Will itself remains unaffected. If Mr. Nhlabatsi was found to be in such a position, then of course his nomination or gift would fail for invalidity. But no such evidence in line with Ss 11 and 12 aforesaid, regarding Mr. Nhlabatsi in relation to the attestation of the Will was led by the plaintiffs which circumstance although not affecting the validity of the Will itself, would have affected his nomination as executor.

It is my view also, that the nomination of Mr. Nhlabatsi or his successors to appoint an executor was not a delegation of the testator's will-making power to a third party. That nomination is in my view proper, and in no way invalidates the Will. The arguments of learned counsel must thus be discountenanced.

I am satisfied that at the close of the plaintiff's case, no *prima facie* case has been made requiring evidence in rebuttal from the defendants. Guided by the dictum contained in *Gascoyne's* case (supra), I go ahead to say that this is a proper case to grant all the defendants absolution from the instance, and I do so accordingly.

Application for absolution from the instance is hereby granted, with costs to the first and fourth defendants.

MABEL AGYEMANG

HIGH COURT JUDGE