IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE CASE NO. 62/14

In the matter between:

MBONGISENI LEON SIHLONGONYANE AND OTHERS	**APPELLANTS**
v	
THE MASTER OF THE HIGH COURT	**1ST RESPONDENT**
PHIANJANI CLEMENT SIHLONGONYANE	**2ND RESPONDENT**
MINAH SIHLONGONYANE & FOUR OTHERS	**3RD RESPONDENTS**
ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral Citation	:	Mbongiseni Leon Sihlongonyane and Others v The Master of the High Court and Others (62/14) [2015] SZSC 33 (29 JULY 2015)
Coram	:	J.P. ANNANDALE AJA; Q.M. MABUZA AJA; R. CLOETE AJA.
Heard	:	08 JULY 2015
Delivered	:	29 JULY 2015

Summary

Administration of Estates – Original will lost - Master of High Court directs that copy of will be used in winding up estate of deceased – Application to High Court to review and set aside Master's decision – Application dismissed with costs on punitive scale – Appellant appeals – Appeal dismissed with costs on ordinary scale.

JUDGMENT

MABUZA –AJA

[1] This is an appeal emanating from a judgment of Maphalala PJ in the court *a quo* delivered during September 2014.

[2] The grounds of appeal are as follows:

1. **The court *a quo* erred in fact and in law in failing to appreciate that at the time Applicants were challenging the validity of a will under High Court Civil Case No. 4005/2007, Applicants were laboring under the misapprehension that an original will had been read to them during the meeting of the next of kin. It is only after failure to furnish same by the Master of the High Court and subsequent correspondence that it became apparent to Applicants that an original will had never been in existence at the Master's offices.**

2. **The court *a quo* erred in fact and in law in refusing to review and set aside the decision of the Master of the High Court to order that the estate of the deceased be liquidated using a copy of what purports to be the deceased's will without there being an order declaring the alleged copy to be a true copy of the deceased's will.**

3. **The court a quo erred in fact and in law in holding that the Master of the High Court received an original will and copies of same when in actual fact the evidence that was before the court indicated that the Master had never received the original will. The proceedings before Court were in terms of Rule 53 of the High Court Rules and the Master did not file any Answering affidavit refuting the allegations made by the Applicants.**

   3.1 **At the very least the court a quo ought to have realized the existence of a dispute of fact regarding whether or not an original will was filed at the Master's offices and should have referred the matter to oral evidence regarding determination of this issue.**

   3.2 **Furthermore, the court failed to appreciate that it was impossible for applicants to have known that what was being read to them during the meeting of the next of kin was an original or a copy since they never got sight of same.**

4. **The court *a quo* erred in fact and in law in holding that the Appellant's action were a duplicity. The court *a quo* failed to identify that the appellant's application was premised on a new fact that had been discovered after the finalization of the High Court Case No. 4005/2007. This fact being that there was discovery that an original will had never been filed at the Master's offices or that the original will could not be**

furnished by the Master of the High Court thereby creating the impression that there was actually no original will that was ever filed at the Master's offices.

5. **The court *a quo* erred in fact and in law in holding that the court in High Court Case No. 4005/2007 determined the validity of the will. The court a quo failed to note that the Court in Case No. 4005/2007 actually never got to see an original will and therefore could not inspect and determine its authenticity. The court in Case No. 4005/2007 only granted absolution from the instance on the strength that the basis stated by the Applicants then had not been proved thereby warranting the Defendants then to be put to their defence.**

6. **The court a quo erred in fact and in law in accepting as an affidavit the Master's report when such report had not been annexed to any affidavit as per requirements of Rule 53 of the High Court Rules. The report at that stage constituted an opinion as distinct to evidence in the form of an affidavit.**

7. **The court a quo erred in fact and in law in holding that in this specific case the Master accepted an original will. (sic)**

8. **The court a quo erred in fact and in law in holding that Applicants had not disputed the contents of 3rd Respondent's Answering Affidavit.**

9. **The Court a quo erred in fact and in law in holding that the Applicants pay costs at a punitive scale. The court misdirected itself in holding that the Applicant's application was *mala fide*. The court failed to appreciate that there had been new facts that had since arisen in this matter that entitled Applicants to approach the court for redress.**

[3] When the matter was argued before us, Mr. Mzizi indicated that the Appellant was abandoning the sixth ground of appeal.

[4] The deceased Mr. Sibonangaye Mathambo Sihlongonyane (Langwenya) died on the 19th June 2007. Prior to his death, the deceased executed a will on the 26th day of May 2006. The will was lodged and accepted by the Master of the High Court on or about the 1st June 2006.

[5] The Appellants, second, third and fourth Respondents are the children and wives of the deceased.

[6] An extract of the Register of Wills from the offices of the Master of the High Court Annexure "A" (at page 54 of the Book of Pleadings) shows that the deceased deposited his will on the 1st June 2006.

[7] The deceased submitted the original will and three copies as per the report of the Master of the High Court dated 19th February 2014.

[8] After the deceased passed away a meeting of his next-of-kin was held on the 4th October 2007 and the first Respondent states in her report (at page 51 – 52

of the Book of Pleadings) that the original will was read in that meeting and the Appellants indicated that they were going to challenge the contents of the original will and she advised them to approach the High Court for redress.

[9] The Appellants' approached the High Court under Case No. 4005/2007 seeking the following reliefs:

> **(a) An order declaring the Last Will and Testament of Sibonangaye Mathambo Langwenya date 26th May 2006 to be null and void.**
>
> **(b) An order that the said Sibonangaye Mathambo Langwenya died intestate;**
>
> **(c) Costs of suit.**

[10] The result in that case was that absolution from the instance was granted with costs in favour of the Respondents in a judgment delivered on the 28th July 2010 per Agymang J.

[11] The Appellants tried to appeal the aforesaid judgment but never pursued the appeal which was consequently abandoned leaving that High Court judgment valid to date.

[12] The original will which was kept by the Master of the High Court disappeared after the judgment of the court *a quo* under Case No. 4005/2007.

[13] It was only sometime around the 19th August 2011 that the Master per Mr. Dumsane Magagula wrote to their then attorneys Maphanga Howe Masuku Attorneys wherein he stated that the original will could not be found in the Master's safe. He stated that only a copy remained in the safe similar to the one which was in the estate file. He stated that a diligent search was carried out within the Master's office and at the archives of the late attorney Nhlabatsi who acted for the deceased in drawing up and filing the original will. The search proved futile (see page 19 of the Book of Pleadings). Mr. Leon Sihlongonyane states that on or about the 3rd December 2013, the new Master Ms. Masilela called a meeting of the next of kin. At the meeting the Master informed them that she had decided that the distribution of the deceased's estate should proceed in terms of the copy of the will of the deceased.

[14] He says that they objected to the decision that the Master had taken and demanded that they be shown the original will. She failed to produce the original will. They then approached the High Court to review the Master's

decision on the grounds that the Master's decision was unlawful and should be set aside. He advanced the following reasons in which he states:

> **"1. I am advised and humbly submit that it is an original will that should be used to distribute an estate of a deceased person. It is improper and contrary to the dictates of the law that a copy of a document that purports to be a will of a deceased's person should be used to distribute the estate of a deceased person without there being a proper court order being obtained to that effect.**
>
> **2. The distribution of an estate of a deceased person on the basis of a purported copy of a will is prejudicial to the interests of the next of kin in that it can never be known whether the alleged copy is indeed a copy of an original will or a forgery of same. The wish of the deceased person who has reduced same in a will can only be truly said to be genuine if they appear in a document that is original.**
>
> **3. Furthermore, any person that may wish to persue and satisfy himself if indeed the deceased wrote a will can only do so upon perusal and satisfying himself or herself of the original will and not a purported copy thereof.**
>
> **4. In our case we are desirous of challenging the genuineness of the will. It is my belief that the deceased never prepared a will. I can only be able to satisfy myself that indeed the deceased prepared a will if I can have sight of the original will which I would also want to take for verification through the appropriate professionals in South Africa.**
>
> **5. I humbly submit that it is well within my rights to do so since I am the next of kin of the deceased.**

6. **I humbly submit that what further makes me suspicious of the purported copy of the will is the fact that the person who is alleged to have witnessed the signing of the will by the deceased denies ever witnessing same. He has even reduced such assertion through an affidavit.**

7. **I annex and mark annexure "C" being a copy of the Affidavit of Tars Mhlabane.**

[15] The affidavit of Tars Mhlabane (Annexure "C") inter alia states:

> **"3. I have been advised that I was a witness to a will belonging to a certain Sibonangaye Mathambo Langwenya.**
>
> **4. I hereby state that I never witnessed any will that belonged to the said Sibonangaye Mathambo Langwenya let alone the will in question".**

[16] The third Respondent, Minah Sihlongonyane, deposed to an answering affidavit in response to the founding affidavit. She described herself as an adult widow to the deceased, also of Maliyaduma. She states that during the first next of kin meeting the contents of the original will were read and upon realizing that nothing or very little accrued to the Appellants they started questioning the contents of the will.

[17] She says that the Appellants thereafter launched the application in the High Court in which they challenged the validity or authenticity of the will and also sought a declaratory order that the deceased had died intestate. The Court *a*

quo ordered absolution from the instance with costs in favour of the Respondents.

[18] Of importance in the replying affidavit sworn to by Leon Sihlongonyane is the averment to be found at paragraph 7.3 which reads as follows:

> "I am advised and I humbly submit that the procedure in terms of the law where such an event has occurred is for a party who is interested in having the estate of a deceased person liquidated on the strength of a copy of what purports to be a will to make an application before court for an order declaring the purported copy to be the original will of the deceased. What the Master did is not in line with the law hence the application that is before court.

[19] And at paragraph 8.2 where it is said:

> **"I submit that the present application is different from the action proceedings. This application pertains to the decision of the Master to order that the estate of the Master be liquidated on the strength of a copy of what purports to be a will. Our submission is that the Master did not have the powers to make such an order. It is only the above honourable court that has such powers."**

[20] And at paragraph 12.3

> **"It is not in dispute now that there is no original will of the deceased. A fact that requires that an interested party should approach the honourable court for an order declaring the purported copy to be a copy of the original will. That is a requrierment of the law".**

And at paragraph 16.2

> **"It is Applicant's case that this decision of the Master is irregular because it is only a court of law that can make such an order"**

[21] Section 5 of the Administration of Estates Act No. 28 of 1902 provides that:

> **"1. Any person may deposit with the Master, either open or enclosed under a sealed cover, any will, codicil, or testamentary instrument executed by him; and the Master shall keep, or cause to be kept, a register of the names and descriptions of the persons depositing every such deed and the date of depositing the same.**
>
> **2. Every such deed shall be accompanied by a duplicate or fair and true copy thereof, which, together with the original, shall be kept under the charge and custody of the Master until the death of the maker thereof, unless redelivery of the same be demanded by the maker, or in his lifetime by his lawful attorney specially authorized for that purpose, and when any such deed shall be redelivered in such manner the maker or his attorney as the case may be shall sign a receipt for it. (My underlining)**

[22] The evidence before this court shows the following:

Annexure "A" is a page from the Register of Wills kept by the Master of the High Court.

On it is an entry which states:

> **"Langwenya Sibonangaye Mathambo 01-06-2006"**

The entry complies with section 5 (1) supra that:

> **"The Master shall keep or cause to be kept a register of the names and descriptions of the persons depositing the same."**

The entry immediately before that of the deceased is of:

> **"Maziya ... 31-05-2006."**

The entry immediately after that of the deceased is:

> **"Zwane ... 01-06-2006"**

Thereafter there are many entries on various dates during June and July 2006.

It is not possible to have forged this page or the contents thereof.

[23] Annexure "D" is a copy of a will which has the Master's stamp on each page of the will. On the stamp are the following details:

> **"Will No. 71, Folio 63**
> **Registered 01-06-2006"**

The evidence on the stamp corroborates that of Annexure "A" that a will No. 71 was registered on the 01-06-2006 and that will belonged to the deceased.

[24] Annexure "D" is a copy of a will. There is no original. The evidence of the Master Mr. Dumsane Magagula as set out in his letter to the Appellants

attorney on the 19th August 2011 clearly shows that the original went missing and despite a diligent search could not be found.

[25] In my respectful view the presence of a copy indicate that there was an original will that was filed on the 01/06/2006. I draw this inference from the surrounding facts that I have outlined above and below and that the original will (deed) **was accompanied by a duplicate or fair and true copy thereof** in terms of section 5 (2) of the Act. The section I may add makes a peremptory directive by stating that:

> **"Every such deed shall be accompanied by a duplicate or fair and true copy thereof."**

[26] It is the law as set out in section 5 (2) of the Act that provides for the acceptance of a duplicate or fair and true copy which should be filed together with the original. A duplicate or fair and true copy cannot in terms of the Act be filed alone. The only inference to be drawn therefore and I so hold is that the copy, Annexure "D" is a fair and true copy of the original as it has all the necessary hallmarks that comply with section 5 (1) of the Act.

[27] It is therefore incorrect to state that the acceptance of a copy without an order of court is irregular or unlawful because the provisions of section 5 (2) clearly state otherwise and sanction the acceptance of a copy which was already filed as far back as 01-06- 2006 together with the will.

[28] It is further incorrect to say that the issue regarding the existence of an original will creates a dispute of fact in view of the provisions of section 5 (2) of the Act that directs that:

> **"Every deed shall be accompanied by a duplicate or fair and true copy thereof."**

This presupposes that Annexure "D" had to have accompanied an original will of the deceased in order to be stamped the way I have described in paragraph 23 hereinabove.

[29] In the case of Exparte **Arlene Blanche Karamitsos** High Court Case No. 4124/2005 the original will was lost having not been registered with the Master of the High Court prior to the death of the testators. A copy was found with Miss Karamitsos after their death and she sought to have this copy accepted by the Master of the High Court which was contrary to the provisions

of section 5 (1) and (2) of the Act. Instead of seeking a declaratory order of the Court declaring the copy to be the will of the deceased persons she sought an order to make the Master accept the copy. Her application failed.

[30] Mr. Mzizi argued that the provisions of section 19 and 20 of the Civil Evidence Act No. 16 of 1902 apply in this case. The sections provide as follows:

> **"19 – Any original document in the custody or under the control of a government officer by virture of his office shall be produced in any proceeding before any court only upon an order of the court or judicial officer before who the case is pending.**
>
> **20. (1) Except when the original is ordered to be produced as provided in section 19, it shall be sufficient to produce a copy of or extract from such documents, certified as a true copy by the head of the department in whose custody or under whose control such document is.**
>
> **(2) Such certified copy or extract shall be receivable in evidence before any court, and shall be of like value and effect as the original document.**

[31] Mr. Dumisane Magagula and Ms. Masilela, Masters of the High Court respectively, have both stated that the original will cannot be found despite diligent search. In these circumstances section 20 (1) provides a solution that it shall be sufficient to produce a copy of or extract from such document

certified as a true copy by the head of the department in whose custody or under whose control such document is.

I have no doubt that either Mr. Magagula who saw the original copy or even Ms. Masilela would be able to cause the copy to be so certified if necessary.

[32] During the course of submissions by Mr. Mzizi the Court was directed to M.M. Corbett et al, the Law of Succession in South Africa (2nd ed) page 117:

> **"In the event of an original will being lost or destroyed, and if there is no duplicate original, it will, therefore, be necessary for interested parties to apply to court o obtain an order declaring a copy of the will (where such copy is in existence) to be the will of the deceased and authorizing the Master to accept the copy. The application must disclose that the original will was duly executed, the circumstances under which the will was lost, that the copy is a true copy of the original and that the original will was not revoked by the testator ."**

[33] The above quotation is based on section 14 (2) of the South African Act which only provides for the registration of an original will or a duplicate original and not a copy of a will. On the contrary our act provides for the registration of a copy of the will as long as they accompany an original. The effect is that the original, the duplicate and the copy are registered simultaneously in terms of section 5 (2) of our Act.

[34] The circumstances surrounding the loss of the original will have been fully explained and in terms of the law of evidence such explanation is cogent and acceptable to this Court. It is unreasonable for the Appellants to repeatedly demand the production of the original will when it is obvious that its production is an impossible feat.

[35] Mr. Mzizi further made issue of the fact that the contents of the Master's report dated 19th February 2014 should have been deposed to in an affidavit.

[36] The answer thereto is found in Rule 6 (23) which provides that:

> "A copy of every application to Court in connection with the estate of a deceased person … shall, before such application is filed with the Registrar, be submitted to the Master for **consideration** and **report** …" (My empasis)

[37] The rule clearly states that the application shall be submitted to the Master for consideration and report. In *casu* the Master was not opposing the application, there was no need for her to file an affidavit (see Rule 53 (5). Furthermore in terms of the review rule, rule 53 states:

"... all proceedings to bring under review the decision or proceedings of any ... officer performing judicial, *quasi–judicial* or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the ... officer as the case may be, and to all other parties affected. (My emphasis)

(a) Calling upon such persons to show cause why such decisions or proceedings should not be reviewed and corrected or set aside and

(b) Calling upon the officer as the case may be, to dispatch, within fourteen days of the receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(2) ...

(5) Should the officer ... desire to oppose the granting of the order prayed for in the notice of motion, ... he shall within 14 days file a notice to oppose and thereafter deliver his affidavits.

[38] The notice of motion filed in the court a quo did not in my view follow the procedure that I have outlined above. The Appellants cannot be heard to complain at this juncture that the Master did not set out the contents of her report in an affidavit when they did not call upon her to do so and or themselves failed to follow the procedure set out in Rule 53.

[39] For the aforegoing reasons it is therefore the decision of this court that the grounds of appeal as set out and amplified in the Appellants' heads of argument hereby fail except for the ninth ground of appeal. There is with respect substance to this ground of appeal.

[40] The issues for determination in Case 4005/2007 were that the will be declared null and void; and a further declaratory order that the deceased died intestate. In Case 1995/2013, the Appellants seek the orginal will and a review and setting aside of the Masters decision that a copy of the will be used in winding up the estate. These are two different issues, there is not duplicity.

[41] The matter before us is a tragic family dispute. The Appellants and Respondents are children and wives of the deceased. They have a right to expect reasonable bequests from their father and husband. It is clear from the assets in the will that the deceased was a wealthy man. However the sad reality is that the deceased had his reasons for the bequests which he made but his off-spring and wives are understandably hurt and disappointed by the contents of the will. A punitive order as to costs induces a sense of shock to parties who are already shell shocked.

[42] It is our considered view that a costs order to the effect that costs be awarded on the ordinary scale is appropriate in the circumstances of the case and to this extent the appeal succeeds.

[43] In the result the appeal is dismissed and the decision of the court a quo is confirmed except in the matter of costs. The Appellants are hereby ordered to pay costs to the Respondents on the ordinary scale both in the court *a quo* and in this Court.

Q.M. MABUZA
ACTING JUSTICE OF APPEAL

I agree

J.P. ANNANDALE
ACTING JUSTICE OF APPEAL

I agree

R. CLOETE
ACTING JUSTICE OF APPEAL

For the Appellants : Mr. L. Mzizi
For the Respondents : Mr. D. Jele