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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 5663/2016

In the matter between:

LOGANATHAN PILLAY **APPLICANT**

and

THE MASTER OF HIGH COURT, DURBAN **1ST RESPONDENT**

PERUMAL PILLAY **2ND RESPONDENT**

JUDGMENT

CHETTY J

[1] The applicant, the son of the late Sheila Pillay, brought an application against his brother, the second respondent and the Master of the High Court, Durban for the following relief:

a. that the document headed "Last Will and Testament of Sheila Pillay" dated at Durban on 8th of September 2006, and attached to the applicant's founding affidavit as annexure "LP7" is declared to be the Last Will of the

Late Sheila Pillay under the estate number: 772/2010 DBN and whose identity number was [5...] and who died on 22 January 2009.

b. That the first respondent (Master of the High Court of South Africa, Durban) is directed to accept the original of the said an Annexure 'LP7' as described in paragraph 1 above as the Last Will of the Late Sheila Pillay under estate number 772/2010 DBN for the purposes of the Administration of estates act, 66 of 1965.

c. That the costs of the application on an attorney-client scale shall be borne by the estate of the Late Sheila Pillay under the estate number 772/2010 DBN but in the event of this application being unsuccessfully opposed by any one of the respondents then the respondent so opposing the application shall pay, jointly and severally the one paying the other to be absolved, the applicant's costs of this application on the scale as between attorney and client."

[2] The application is opposed by the second respondent, whilst the Master has filed a notice to abide by the decision of the Court.

[3] The facts of the matter are largely common cause, and revolve around the requirements of s 2(1)(a)(i) to (v) of the Wills Act 7 of 1953 (the Act). Section 2 of the Act provides for the following:

> '2 Formalities required in the execution of a will - (1) Subject to the provisions of section 3*bis*-
>
> *(a)* no will executed on or after the first day of January, 1954, shall be valid unless-
>
> (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and
>
> (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other

person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

(iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and

(iv) if the will consists of more than one page, each page other than the page on which it ends, is also signed by the testator or by such other person anywhere on the page; and

(v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies: Provided that-

(aa) the will is signed in the presence of the commissioner of oaths in terms of subparagraphs (i), (iii) and (iv) and the certificate concerned is made as soon as possible after the will has been so signed; and

(bb) if the testator dies after the will has been signed in terms of subparagraphs (i), (iii) and (iv) but before the commissioner of oaths has made the certificate concerned, the commissioner of oaths shall as soon as possible thereafter make or complete his certificate, and sign each page of the will, excluding the page on which his certificate appears;

…' (My emphasis)

[4] Sheila Pillay executed a document purporting to be a will on 8 September 2006. Her husband pre-deceased her in May 2001. She died on 22 January 2009. The only asset in the deceased estate is the immovable property being Section 11 in the Sectional Title Scheme known as Rainforest Gardens, situated at [...] R. P., Rainham, Phoenix, Durban. The applicant currently resides at the same premises.

[5] After the death of the deceased, a Mr Naidoo found a document purporting to be her will and read it out on 25 January 2009 in the presence of the applicant, the second respondent and his wife. The applicant contends that in terms of the document attached marked 'LP7' to the founding affidavit; his mother bequeathed her entire estate to him and nominated him as the executor of the estate. The disputed document in question contains the heading "*Last Will and Testament*", with the same wording appearing on a cover page to the document. The document contains the foreword that "*Sheila Pillay, presently residing at [...] R. P., Rainham, Phoenix Durban declares this to be my last Will and testament.*"

[6] According to the applicant the will was signed by his mother affixing her right thumb print (RTP) above the word 'testatrix', on each page of the document. Each page was witnessed by two persons who were well known to her. As the testatrix was unable to sign her name, at the foot of each page and below the signatures of two witnesses, provision was made for the signature of the Commissioner of Oaths, P Jungbahadur, who signed each page of the disputed document. It is not disputed that Jungbahadur drew up the document in accordance with the instructions of the testatrix.

[7] On 14 January 2010 the applicant reported the estate of the deceased to the Master, and an estate number was duly allocated. The applicant had furnished the Master with the original of the disputed document.

[8] On 20 January 2010 the Master rejected the will of the deceased due to non-compliance with s 2(1)(a)(v) of the Act. The founding affidavit does not contain a letter from the Master to this effect. The second respondent does not dispute the initial reason tendered for the rejection of the will. It is not in dispute that the certificate contemplated in terms of s 2(1)(a)(v) of the Act was not filed at the time of the lodging of the will.

[9] The applicant submits that his late mother regarded 'LP7' as being her last will and testament, and expressed no intention of revoking it. In so far as the rejection by

the Master of the will, the applicant submits that Jungbahadur omitted to certify on the original 'LP7' that he had satisfied himself as to the identity of the testatrix and that she signed the will in his presence. This omission, it was submitted, constituted non-compliance with s 2(1)(a)(v) of the Act.

[10] Subsequent to the Master's rejection, a certificate signed by Jungbahadur was submitted to the Master on 8 May 2015. The Master rejected the certificate on 12 May 2015 citing the following reasons:

> 'The certificate lodged by the Commissioner has been lodged on 8 May 2015, section 2(1)(a)(v)(aa) and (bb) provides that the certificate by the Commissioner must be lodged a as soon as possible.'

[11] The applicant accordingly approaches this Court to exercise its discretion in terms of s 2(3) of the Act to declare the will to be valid. Prior to 1992 our Courts strictly interpreted the provisions of the Act, and where the formalities had not been complied with, the Court had no discretion in the matter. See *Ashe v Robertson & Walker* 1911 TPD 198*; In re Lloyd* (1895) 12 S.C. 117 at 118 and *Soobramoney and others v Moothoo & others* 1957 (3) SA 707 (N). In *Ex parte Nel* 1955 (2) SA 133 (C) the view was expressed that an invalid will at a testator's death cannot be validated by adding to it the prescribed certificate after his death. This was contrary to the view expressed in *Arendse v The Master & others* 1973 (3) SA 333 (C) where the court held that the certificate required by s 2(1)(a)(v) of the Act can effectively be put upon a will at any time after the testator or anyone else has satisfied the certifying official that the ostensible testator is indeed the testator and that the document involved is indeed the will of the testator. It can be appended at any time after the will has been 'marked' by the testator and signed by the witnesses.

[12] The Act was amended in 1992 with the Law of Succession Amendment Act 43 of 1992 which has altered the position by introducing provisions that allow for a Court to recognise as valid a will that does not comply with all the formalities by the addition, *inter alia*, of sub-section 2(3) in terms of which the formerly strict compliance

with the formalities regarding the execution of wills were somewhat relaxed. The sub-section reads as follows:

> '(3) If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).'

[13] In light of the Master's rejection of the will for non-compliance with s 2(1)(a)(v) of the Act, the second respondent contends that the will is invalid as the Jungbahadur only filed his certificate years later, and his opposition is fortified by the rejection of the will on two occasions by the Master. The second respondent dwells at length on the issue of the valuation of the property, and the consequences of the will being set aside would entail that he would then become entitled to a 50% share in the value of the immovable property. These matters are not relevant to the determination before me, which is circumscribed to a consideration of whether I am satisfied that the document which was executed by Sheila Pillay was intended by her to be her last will and testament.

[14] It is important to note that whilst the second respondent takes issue with the validity of the will for compliance by reason of the certification provisions as contemplated in s 2(1)(a)(v), it is not disputed by him that the will was properly witnessed and signed by Jungbahadur. According to him, when he approached Jungbahadur regarding the will, the latter informed him that the applicant failed to collect the certificate and pay a R200 fee. As a result, the certificate contemplated in section 2(1)(a)(v) had not been filed 'in time'. Mr Naidu, who appeared for the applicant offered no excuses for the delay. In his submission, the applicant simply neglected to collect the certificate from the commissioner. There is no hint of impropriety in the conduct of the commissioner or witnesses. Ms Mhlongo, who appeared for the second applicant, persisted however in her submission that the contents of the will do not accord with the true intentions of the testatrix. The

foundation for this argument lay in the allegation by the sister of the testatrix, Mrs Rani Balraj, who informed the second respondent that his mother had been "*forced into doing a will and appointing him (the applicant) as a beneficiary of her estate*". On this ground, it was submitted that the will cannot be declared as valid, and to the extent that a dispute of fact emerges from the papers, it must be referred to oral evidence. Neither the heads of argument nor the practice note filed by the second respondent avert to the potential for a dispute of fact. Courts must be cautious about deciding probabilities in the face of conflicts of fact in affidavits. On the other hand, in my view this is a matter in which a "robust common-sense approach" to the resolution of disputed facts can be adopted. See *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154E-H. The averment by Mrs. Balraj, relied on by the second respondent, does not say when she divulged this information to the second applicant, under what circumstances and whether it was her view that the applicant wished for the second respondent to be excluded from benefitting at all. I am of the view that to the extent that a dispute of fact exists, this can be determined on the affidavits. The alternative is that justice would be defeated by adopting an over-fastidious approach to a dispute raised on affidavit. See Essential Judicial Reasoning, *BR Southwood*, 2015, p.26.

[15] Ms Mhlongo further submitted that I should take into account the circumstances of the matter to determine whether the will reflected the true intentions of the testatrix. The undisputed facts before me are that the will came about as a result of a request from the deceased to the commissioner of oaths, who is a pastor, to draft a will on her behalf. The will was drafted on the instructions of the deceased, and signed in the presence of two witnesses and the commissioner of oaths on 8 September 2006. The testatrix died almost 25 months after the signing of her will. Mr Naidu pointed out that if the testatrix had been forced into signing a will, she had ample opportunity to draw up a new will or even a letter indicating the change of her intentions. She did not do so.

[16] The high water mark of the second respondent's case, on the papers before me, is the delay in the filing of Jungbahadur's certificate. He takes no issue with the

fact that the will was properly witnessed and that the testatrix affixed her right thumb print in the presence of Jungbahadur. The issue for determination is whether the delay in the submission of the certificate may be condoned by this Court. The starting point is section 2(1)(a)(v*)* which provides that no will shall be valid unless a commissioner of oaths certifies that himself as to the identity of the testator.

[17] In *Mlanda v Mhlaba & others* 2016 (4) SA 311 (ECG) the court had to determine the validity of a will where one of the grounds of contestation was the lack of compliance with the formalities in the execution of a will which is signed by a testatrix by the making of a mark. Pickering J (with Roberson J concurring) referred to the matter of *In re Jennett NO* 1976 (1) SA 580 (A) which held that the primary object of the formalities prescribed by s 2(1)(a)(v) was to secure evidence to establish the identity of the testator and to ensure that the document signed by the making of a mark is indeed the will of the testator. The second respondent takes no issue with the wording of the certificate or the identity of the witnesses to the will. There is no imputation of fraud attributed to either the witnesses or Jungbahadur. He does contend that the applicant pressured his mother into signing the will, in which she left her entire estate to him. Galgut AJA at 583F-H stated as follows in *In re Jennett* (supra):

> 'In *Ex parte Suknanan and Another*, 1959 (2) SA 189 (N) at p 191, BROOME, J.P., said:
>
> > “The reason for the certificate required by para. (v) is, because a testator who signs by making the mark is probably illiterate, to ensure that he is the person who, by making the mark, he purports to be, and that the document is his will.
>
> In the present case the testator was not an illiterate person. However, that fact cannot affect the interpretation to be given to the section.
>
> In *Ex parte Sookoo: In re Estate Dularie*, 1960 (4) SA 249 (D), CANEY J., followed *Soobramoney*'s case, *sup cit.* At p. 252 he is reported as saying:
>
> > "The object of the legislation must include the avoidance of fraud by impersonation of testators and by misrepresentation to them of the nature of the documents put before them.”
>
> I am in respectful agreement with the above *dicta* by the learned Judges. The object of the section is to ensure that the document, signed by the making of a mark, is the will of the testator.'

[18] Neither the Master nor the second respondent takes issue with the contents of Jungbahadur's certificate. It is only the time delay in the submission of his certificate that caused the Master to reject the will as being invalid. Is there anything untoward that can be inferred from the delay? In my view, there is not. The will was signed on 8 September 2006. The certificate is dated on the same date. It was only filed with the Master on 8 May 2015, five (5) years from the date when the original will was filed. The explanation for this delay is to be found in a letter from attorneys Mervyn Gounden and Associates, dated 8 May 2015, addressed to the first respondent. The letter, which was attached to the second respondent's answering affidavit states the following:

> 'We have been instructed to attend to the winding up of the aforesaid the estate. We can also advise that the former attorneys Monica Nagouran and Associates who were instructed in this matter has ceased practising and this firm of attorneys no longer exists.
>
> We have been instructed that the will of the deceased dated 8 September 2006 was rejected as the will did not comply with section 2(1)(a)(v) of the Wills Act. We have canvassed this matter at length with the son of the deceased Loganathan Pillay. We had been instructed that the Commissioner of Oaths, Mr P Jungbahadur had inadvertently omitted to attach the certificate that he had executed at the time the deceased had a fixed her complaint to the will. We now accordingly enclose the original certificate herewith and humbly request that you accept the will.'

[19] The explanation tendered, in my view, is entirely reasonable and plausible. The basis of the Master's rejection is not that he is unsatisfied with the document sent to him on 8 May 2015. The requirement in terms of s 2(1)(a)(v) provides that where a will is signed in the presence of the commissioner of oaths, the certificate must be made *as soon as possible* after the will has been so signed. To the extent that there has been any prejudice suffered by the applicant, such prejudice has not been sketched out at all in the founding affidavit. Any error made by the executor or the attorney winding up the estate, in not filing the certificate at the same time when the will was initially lodged with the Master, should not be allowed to override the testamentary intention of the deceased. The Master performs an administrative act in accepting the will. His decision to accept the will or reject it has no bearing on the

issue of validity as only the Court has the power to pronounce on this. For this reason, section 2(3) provides the High Court with the power to condone the failure to comply with the formalities required for the execution of a valid will.

[20] A perusal of 'LP7' indicates that all the formalities prescribed in the Act have been complied with, except for the delay in sending through the certificate to the Master's Office. As set out above, there is no inkling of fraud on the part of the applicant or Jungbahadur. The second respondent's concern is that an Order declaring the will's validity would be detrimental to his cause – the entire estate including the house will be left to the applicant. That, however, is to honour and uphold the testamentary wishes of the deceased, which is consistent with the rationale of s 2(3).

[21] As regards costs, the applicant was obliged to come to Court as a consequence of the Master's rejection of the will. The second respondent, although opposing the application, merely threw his weight behind the Master's reasons for rejection. In my view, I do not consider it appropriate to saddle the second respondent with costs.

[22] I therefore make the following order:

a. It is declared that the document executed by the late Shelia Pillay on 8 September 2006 is her last will and testament and First Respondent is directed to register and accept it and to give effect thereto;
b. The costs of the application shall be borne by the estate late Shelia Pillay.

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CHETTY J

APPEARANCES

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DATE OF HEARING:	30 MARCH 2017
DATE OF JUDGMENT:	26 APRIL 2017