WINIFRED HOLLINGTON
and
STEPHANIE HOLLINGTON
and
CHURCHILL HOLLINGTON
and
LAUREN HOLLINGTON
versus
LAWRENCE HOLLINGTON
and
BENJAMIN HOLLINGTON
and
CHRISTINE HOLLINGTON
and
MONALISA HOLLINGTON
and
THE MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 5 October 2017 and 29 November 2017

Opposed Application

Applicants in person
CM Tandwa, for the respondents

MWAYERA J: The applicants approached the court with a review application seeking to have the decision of the Master (5th respondent) of accepting the last Will and Testament of the late Bidoff Hollington set aside and that the Will be declared null and void. The issue that falls for determination in this review is whether the fifth respondent's determination is in accordance with law or not. The applicant relied on two grounds of review as follows:-

1. Gross irregularity in the proceedings as the fifth respondent failed to conduct a proper inquiry into the authenticity or otherwise of the signature appearing on the last Will and testament.

2. Illegality as the will which forms the subject of the review did not comply with provisions of the Wills Act [*Chapter 6:06*].

The determination of this matter hinges on the import of s 8 of the Wills Act [*Chapter 6:06*] (hereafter referred as the Act). Section 8 provides for the formalities of making Wills, it states

> 1. "Subject to subsections 3 and 5, a will shall not be valid unless –
>
> a) It is in writing; and
> b) The testator, or some other person in his presence and at his direction, signs each page of the Will as closely as maybe to the end of the writing on the page concerned; and
> c) Each signature referred to in paragraph (b) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time, and
> d) Each competent witness either
>
> i. Signs each page at the will, or
> ii. Acknowledges his signature on each page of the Will, in the presence of the testator and of other witness.
>
> (5) Where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his Will or an amendment of his Will, the Master may accept that document, or that document as amended as a will for purposes of administration of estates Act [Chapter 6:01]even though it does not comply with all formalities for
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> a) The execution of Wills referred to in subsection (1) or (2) or
> b) The amendment of Wills referred to in subsection (2) (3) or (4) of section 9."

It is worth noting that by introducing subsection (5), the legislative intention in bringing in the subsection, in my view should not be misconstrued to mean that formalities of writing a Will were no longer necessary. The subsection was introduced as a balance and check to rigid adherence to compliance with formalities to the extent of infringing on freedom of testation. The proviso gave the Master latitude to exercise his discretion where there was substantial compliance with the formalities, such that the document so presented on the face of it does not give an ambiguous impression of it being the deceased or benefactor's intention in disposal and distribution of his or her estate. Once the document so presented substantially complied with the formalities and the Master is satisfied that the document was indeed intended to be the last Will and testatement, the Master can exercise his discretion on whether to accept the Will for purposes of administration of the estate. See *Filon and Anor* v *Sibanda and Others* HH 89/11 *Gunda* v *Gunda* SC 39/05 *Mujuru NO and Ors* v *Master of High Court and another* HH 112/08.

In Mujuru case supra Guvava J as she then was emphasized the purpose of the subsection (5) of the Act in giving the Master discretion to decide on whether substantial compliance with formalities of making a Will warranting its acceptance for administration of an estate. The position introduced by section 5 is not to dispense with formalities of making a Will but compliments such requirements by allowing judicious exercise of discretion in a bid to give effect to the genuine Will of a deceased expressed in a document. The formalities are to ensure authenticity of a Will while introduction of section 5 is to allow latitude on adherence to formalities in a situation where there is substantial compliance which does not negate the clear picture of the document being a will. In short section 5 came in just like the amendment to the South African Wills Act. The requirements of formalities have to be adhered to but note should be taken not to frustrate the testator's genuine intention.

See *Polokwane and Ors* (21381/11) [2013] ZAGPP HC 5. The court in reference to similar provisions to our s 8 of the Act quoted with approval *Horn* v *Horn* 1995 (1) SA 199. It stated that the provisions of section 2.3 of the Wills Act 7 of 1953 as amended by Act 43 of 1991 are peremptory rather than directory. At para 25 of the judgment the court made a crucial observation which recognizes the import or equivalent section (8) of the Wills Act. It stated

> "It is apparent from s 2 (3) of the Act that the legislature while still providing for formalities to ensure authenticity and eliminate false or forged wills nevertheless intended that failure to comply with formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators. The Wills Act as now amended by the Law of succession amendment Act 43 of 1992, shows the importance of giving effect to the genuine will of a deceased expressed in a document [Underlining my emphasis].

It is apparent from the foregoing that the document in issue has to be considered on a case by case basis. The master has to exercise his discretion in a holistic manner and not in the abstract, consideration of s 8 (5) should not be in isolation of the whole of s 8 because for a document to be accepted as a will there has to substantial compliance with formalities and that the master has to be satisfied that the person who executed it intended it to be his will.

The applicant raised two grounds for review in relation to gross irregularity. It is important to understand what gross irregularity means. In the case of *Tekordial Technologies Inc* v *Tekom* SA 2006 139 SCA (RSA) para 71 – 75 the Supreme Court defined gross irregularity as follows:

> "The term encompasses the case where a decision maker misconceives the whole nature of the inquiry or his duties in connection therewith an irregularity in proceedings does not mean an incorrect judgment, it refers not to the result, but to the methods of a trial such as for example,

> some high handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.
> --- The crucial question is whether it prevented a fair trial of the issues if it did prevent a fair trial of the issues then it will amount to gross irregularity."

In this case given the prevailing legislation, the master, in performing the quasi-judicial function is empowered to accept as a will for purposes of estate administration where he is satisfied that a document was drafted or executed by the deceased person who intended it to be his will even though it does not comply with all the formalities for execution of wills. [Underlining my emphasis]. The master has to be satisfied in the exercise of his discretion for him to accept the document as a will.

The document which falls for scrutiny here did not comply with formalities laid out in s 8 (1) (b-d) of the Act. The document was only signed on the last page which is not dated. The other 5 pages of the document are not signed by the testator and witnesses. The document which was only produced after the funeral by the one appointed as executor Lawrence Hollington, the first respondent, has clauses missing. This is apparent when one goes by the sequence on the document. The executor indicated that the will is not the deceased's. This coupled with the insinuations that the signature on only one page out of 6 was not that of the deceased as stated by the applicant and first respondent who produced the document. The testator's signature on every page was not verified and no witnesses signed on every page. Given the obvious defects on the document, and the first respondent's position that it was not the deceased's will and the querying of signature by the applicant, the question that begs an answer, is how was the master satisfied himself that the document was a Will as intended by the testator. The document on the face of it does not comply with formalities of a will and further even when one seeks recurse to subs 8 (5) the document cannot be accepted as a Will, given that there is nothing to show how the master was satisfied it is the intended last will and testament of the deceased. It is my considered view that s 8 (5) was brought in to assist giving effect to a testator's wishes where there is substantial compliance. It would be misconstruing the legislature's intention to hold that s 8 (5) was enacted oust the need for formalities in wills. This would obviously open uncontrollable floodgates to fraudulent manipulation of wills due to the human weaknesses of insatiable desire to inherit.

In the absence of substantial compliance the master could not have properly and judiciously exercised his discretion in accepting the document as the last will and testament. As was clearly

spelt out in *ex parte* administration of Estate Shirley 1951 (2) SA 277 when the testator's wishes are clear then it ought to be taken as the last will and testament. In *ex parte* Administration it was stated

> "If one looks at the codicile alone, the wishes of the testator are clear the court is bound to give effect to them unless (a) prevented by some rule or law from doing so"

Also *Roberston* v *Robertson* 1914 AD 503.

In this case given the obvious irregularities and intimation that the document was not the last will of the deceased and that there was concern the deceased did not sign, to accept the document as a will simply because it's a document is an anomaly. The acceptance in the face of non-compliance with formalities and argument as to whether or not it was the testator's intention even by the appointed executor in the Will was irregular. To accept such a document oblivious to the irregularities in the circumstances would render the decision of the master irregular as such was not in terms of the law. The import of s 8 (5) is not to defeat the purpose of the Act but to complement in allowing the Master not to be hamstrung by technicalities and procedural issues when the wishes of the testator are clear. In this case the unsigned document with no names of witness was produced after the funeral by an appointed executor. The appointed executor (first respondent) also gave the impression it was not the deceased's last Will. Given the non-compliance and argument it was not clear it was the deceased's last Will and intended wish. It would not be a proper exercise of discretion to accept such a document as a will where there is a danger that it is not the deceased's wish.

I am alive to the Master's report filed of record at p 111. I have already dealt with the spirit of the Act and the import of s 8 (5) of the Act. I don't agree with the Master's opinion that in circumstances of this case given there was no substantial compliance, it was proper without further investigation to accept the document as a last Will and testament of the deceased Bidoff Hollington. The Master in para 2 of the report accepts the will has to be examined by a handwriting expert to verify not only the applicant but the first respondent's argument that the deceased did not sign the Will. This therefore, shows that the master entertained doubt as to the veracity or otherwise of the document. This then goes to the centre of the impropriety of the exercise of discretion in accepting the Will where he doubted if that was the last Will and intention of the deceased. There was no clarity on whether or not that was the deceased, Bidoff Hollington's Will. As correctly

observed by the Master, in terms of s 5 (2) of the Act a will cannot be declared invalid based on the fact that one child was disinherited. This was not the issue for determination by the Master. The Master was to make a decision on whether or not to accept the document as a will based on the holistic application of s 8. In the circumstances, the document fell short of showing it was a Will as envisaged by the law. To that extent therefore, it was irregular for the Master to ignore flaws and issues which were contrary to whether or not he should accept the document as a Will. There is no basis upon which the master concluded that the document was the deceased's Will. In the absence of substantial compliance there is a danger of not giving into the deceased's wishes. The latter is contrary to law and thus renders irregular proceedings by the Master.

I must in brief mention that the applicant initiated the proceedings as a self-actor. She roped in second and fourth applicants and in the founding affidavit alluded to the third and fourth applicants filing supporting affidavits. Such were not filed. The respondent raised issue about them and sought to have the other applicants struck off the proceedings. I must mention that the non-joinder of the third and fourth applicant was not fatal to the proceedings. The court proceeded with just the parties before it.

The respondent pursued other point *in limine* that the applicant did not paginate the record. That again in my considered view did not go to the root of the matter. In any event at the time of hearing the respondent's counsel had attended to pagination of the record. I commended counsel for attending to the important aspect for ease of flow of the record. Again this aspect did not go to the root of the matter given the applicant was a self-actor. The stance I took on the point raised on non-compliance with rules of this court was anchored on the fact that other than the inconvenience occasioned by the omission no real prejudice was occasioned. To this end I align myself with the reasoning in *Protent Zimbabwe (Pvt) Ltd* v *Macdom Investments (Private) Ltd* HB 83-16 where it was held:

> "As was stated by VAN WINSEN AJA in Federated Trust Ltd v *Botha* 1978 (3) SA 645 albeit in different circumstances; 'Rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the court …."

The respondent further alluded to there being material disputes of facts which cannot be resolved on paper. It is settled material disputes of facts exist where if the respondent raises opposition the court is not left with a ready answer. In this case the issues for determination as

perceived are whether or not there is an irregularity and illegality in the manner the Master, that is the fifth respondent, accepted a document as a Will. As discussed above on the issues that fell for determination there is no material dispute of fact which would warrant dismissal of the application see *Masukusa* v *National Foods Ltd and Anor* 1983 (1) ZLR 232, *Room Hire and Co (Pty) Ltd* v *Jeppe Monsioy (Pty) Ltd* 1949 (3) SA 1155.

I must also mention that although the applicant was a self-actor the heads she adopted during oral submissions were compiled by Adv *T. Mpofu* and just like the respondent's head they were quite helpful to the court. Ordinarily costs follow the cause however, in this case given the fact that the respondents ended up paginating and arranging the record for the applicant. I am of the view that it will be appropriate for each part to bear its costs.

Accordingly it is ordered that:

1. The decision of the fifth respondent of accepting the document filed as the last will and testament of the late Bidoff Hollington made on 20 July 2016 be and is hereby set aside.
2. The letters of Administration issued by the fifth respondent appointing the first respondent as executor dative of the Estate of the late Bidoff Hollington are hereby revoked.
3. Each party is to bear its own costs.

Machinga and Partners, 2nd , 3rd, and 4th respondent's legal practitioners