

LIMOS D MOYO

Versus

**ESTATE LATE SAKHILE MOYO
& SEVEN OTHERS**

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 24 & 25 JUNE & 2 SEPTEMBER 2004

Dhalmini for plaintiff
G Nyoni for 3rd to 8th defendants

Civil Trial

CHIWESHE J: In this action the plaintiff seeks the following relief:

- “(a) an order declaring null and void the purported will of Sakhile Moyo (nee Ndlovu) dated 20 November 2001, executed at Bulawayo.
- (b) an order declaring that the said Sakhile Moyo died intestate, and
- (c) costs only as against such of the defendants as oppose this action.”

The factual basis upon which the action is premised is outlined in the plaintiff’s declaration wherein he states as follows:

- “6. On 20th day of November 2001, the late Sakhile Moyo signed a certain document copy whereof is hereunto marked “B” which purports to be her last will and testament.
- 7. The said document has been and still is accepted by the second defendant as the valid will of the late Sakhile Moyo.
- 8. At the time of signing of such document the said Sakhile Moyo was not in her sound and sober senses but was mentally incapable of making any testamentary disposition whatever and was not capable of appreciating the nature and contents of the document to which she affixed her signature.
- 9. In terms of the purported will of the late Sakhile Moyo, plaintiff will be dispossessed of almost all the movable matrimonial assets.
- 10. Plaintiff considers that his contribution to the acquisition of the matrimonial assets is slightly above fifty per centum (50%) of the value of the estate and that had the marriage between them been terminated by divorce rather than death, he would have expected to receive fifty per centum (50%) of the parties’ movable matrimonial assets.

11. Plaintiff and his late wife Sakhile Moyo had excellent relations. It was plaintiff who looked after and nursed her throughout her last days.
12. Plaintiff contends that the failure by her late wife to bequeath him any of the parties' movable matrimonial assets was simply because her late wife was no longer of sound mind when she signed the purported will. Further plaintiff has serious doubts as to whether on 20 November 2001 his wife in fact signed the aforesaid document purporting to be her last will and testament.
13. In the premises, the said purported will is null and void."

The defendants entered appearance to defend the action. The first defendant neither opposes nor supports the application – it has indicated its willingness to abide by the court's decision. The second defendant has been cited in his official capacity and will in the absence of any indication to the contrary abide by the court's decision.

The 3rd – 8th defendants are all beneficiaries in terms of the will. In their joint plea they state that when the deceased signed the will she was in her sound and sober senses. They aver that the deceased was mentally sound and never suffered any mental derangement or diminishing responsibility. Further they aver that the property distributed in terms of the will belonged to the deceased and not the plaintiff – in other words the deceased distributed her own property and in any event, the plaintiff was left with some property, including the house. They also state that the relationship between the plaintiff and the deceased was far from cordial owing to the former's tendency to sleep out of the matrimonial home on numerous occasions especially during weekends. They aver that the plaintiff's persistent inquiries with the deceased as to when the latter's pension benefits were to be at hand was another source of friction between the two. They state that the plaintiff continually abandoned and ignored the deceased in her hour of need and that the burden of looking after the deceased was left entirely to the deceased's mother, her sisters and daughters.

The plaintiff gave evidence on oath. His main contention appears to be based on two averments, namely that at the time the will was signed he was on sick leave having been plastered on one of his fingers. He says that his wife was so ill that she was unable to move around on her own. She certainly could not have proceeded on her own to her lawyers Coghlan and Welsh to execute the will. In any event he was at home throughout and if she had left home for any reason he would have known about it. The will therefore must have been forged. However, it must be noted that throughout the pleadings forgery was never made an issue although the plaintiff raises it in his evidence in chief. The second rung of his evidence is the contention that the deceased at the time she made the will was not in her sound and sober senses. She must have suffered from some mental derangement and therefore lacked the mental capacity to make the will. Further, he had observed that the deceased at the time suffered hallucinations indicating a defective mental capacity.

Looking at the evidence as a whole I do not think that the plaintiff has in that regard proved on a balance of probabilities that the deceased lacked mental capacity to execute the will. Both the deceased's mother, sister and daughter testified to the fact that although she was ill the deceased did not suffer any mental defect. Her problems emanated from a running stomach. She certainly knew what she was doing. At the time she made the will she physically visited her sister in Cowdray Park and appraised her of this fact. She had previously advised her daughter Charity Sibanda and another sibling that she had made a will and that same was kept at Coghlan and Welsh offices. On the face of it, the will meets the criteria outlined in the Wills Act [Chapter 6:06]. The plaintiff has not seriously challenged the authenticity of the deceased's signature nor has the plaintiff sought to admit any evidence from Coghlan

and Welsh shedding light on the circumstances under which the will was made. It is unlikely that a reputable firm of lawyers could take instructions to draw up a will from a person of dubious mental capacity. I have no doubt that the deceased was in good mental health at the time she made the will. I would therefore in the absence of medical evidence reject any contention to the contrary. As for the alleged forgery of the will there is not an iota of evidence that such was the case.

I would therefore hold that there is no legal basis upon which the validity of the will can be challenged. The plaintiff has argued that should the will be held *prima facie* valid then the court should nonetheless set it aside as it purports to distribute what is matrimonial and therefore jointly owned property to his exclusion or alternatively that certain clauses be declared null and void for that reason.

It is however, common cause that the property bequeathed to the 3rd to the 8th defendants is essentially movable property consisting of the usual household effects (save for the pension benefits amounting to a total of \$60 000,00 bequeathed to the deceased's father and mother in equal shares). The parties owned a house. This house has not been distributed by the will. It remains the plaintiff's exclusive property. Although its current market value has not been given, it is likely that such value far exceeds the value of the movable property bequeathed to the defendants. For that reason it cannot in all conscience be held that the plaintiff has been unduly prejudiced by the contents of this will. I see no reason why the intention of the testator should be frustrated on the mere grounds that the distribution of the movable assets does not meet the plaintiff's expectations. By retaining the house the plaintiff is more than adequately compensated for any prejudice he may have suffered by way of his exclusion from the movable property.

HB 100/04

However, I agree that the deceased did not have the right to decide the custody of the plaintiff's biological daughter Amkelentombiyabazali Moyo without the plaintiff's consent as she purports to do under paragraph 15 of the will. The relevant portion of that paragraph must be and is hereby set aside.

In the main therefore it is ordered that the plaintiff's claim be and is hereby dismissed with costs.

Lazarus & Sarif plaintiff's legal practitioners
Messrs Majoko & Majoko defedandant's legal practitioners