THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 644/09

In the matter between:

LEVIN, LARRY IVAN	**First Appellant**
LEVENBERG, STEPHANIE	**Second Appellant**

and

LEVIN, FREIDA	**First Respondent**
MILLER, NORMAN	**Second Respondent**
ZIEGLER, RAYMOND	**Third Respondent**
ZIEGLER, LYNNE	**Fourth Respondent**
STEINGO, LEONARD	**Fifth Respondent**
BRESS, ERNEST	**Sixth Respondent**
WOOD, WENDY	**Seventh Respondent**
BERSANO, ANNA	**Eighth Respondent**
RIASUN, PHILIP	**Ninth Respondent**
WORTELBOER, MONIQUE	**Tenth Respondent**
WORTELBOER, MADELEINE	**Eleventh Respondent**
MASTER OF THE HIGH COURT	**Twelfth Respondent**
ZIEGLER, LEWIS	**Thirteenth Respondent**

Neutral citation: *Levin v Levin* (644/09) [2011] ZASCA 114 (03 June 2011)

Coram: HARMS DP, NUGENT, MAYA, MALAN JJA AND PLASKET AJA
Heard: 09 May 2011
Delivered: 03 June 2011

Summary: Will – validity thereof – whether provisions of s 2(1)(a) of the Wills Act 7 of 1953 complied with.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Pienaar AJ sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

MAYA JA (HARMS DP, NUGENT, MALAN JJA AND PLASKET AJA concurring):

[1] This appeal concerns the validity of a will (the disputed will) allegedly executed on 4 August 2002 by the late Mrs Minnie 'Minna' Breslawsky (born Lom) (the deceased), who died a widow on 19 October 2002 at age 107. The disputed will, in which the second, third and fourth respondents were nominated as the co-executors of the deceased's estate, was lodged with and accepted by the Master of the High Court.

[2] The appellants and the first, third, fourth, sixth to the eleventh and the thirteenth respondents are all members of the deceased's family. The deceased bore five children, the late Nathan, Vera, and Molly and the first and the eight respondents. The appellants are the children of the first respondent who, together with her husband Gerald Levin, worked for the deceased until her death. The third,

fourth and thirteenth respondents are Vera's children. The sixth and seventh respondents are Nathan's surviving children. The ninth, tenth and eleventh respondents are Molly's children. The second respondent, Mr Miller, is the attorney who prepared the disputed will and the fifth respondent was the deceased's cardiologist and one of the beneficiaries under that will.

[3] On 3 March 1999 and 8 August 2001 respectively, the deceased executed two wills which were the last in a series of at least nineteen such documents said to have been made by her during her lifetime. The one dated 3 March 1999 dealt with the deceased's assets within the State of Israel which the deceased bequeathed to the first respondent and the appellants. The one of 8 August 2001 (the 2001 will), related to her assets situate in South Africa and the deceased nominated the first respondent as executor (together with her accountant Ryan Feinberg and the Standard Bank of South Africa Ltd) of her estate and granted the first respondent and the appellants further, substantial bequests. Under the disputed will, on the other hand, in addition to appointing Mr Miller and the third and fourth respondents as executors, the deceased bequeathed her estate as follows – (a) 25 per cent to the first respondent, (b) 25 per cent to the eight respondent, (c) 25 per cent to Vera's three children to be shared equally among them, (d) 25% to Molly's children to be shared equally among them, (e) R500 000 to each of Nathan's two children and (f) R50 000 to Dr Steingo.

[4] The appellants brought an action in the high court challenging the disputed will on a number of grounds. By the time of the trial those grounds had dwindled to the following: (a) that the signature on the will was not that of the deceased, and in the alternative (b) that the signature on the will was not affixed in the presence

of two witnesses who were both required to be present at the signing and placed their signatures on the document in the presence of each other and the deceased.

[5] Only the second, third and fourth respondents defended the action. It was common cause between the parties that if the disputed will was declared invalid, the 2001 and 1999 wills would be accepted as the deceased's last wills in relation to her estates in South Africa and Israel, respectively. After hearing evidence, the court below (Pienaar AJ) dismissed the matter on the finding that the appellants had not discharged, on a preponderance of probabilities, the onus of proving that the disputed will was not the deceased's valid last testamentary disposition duly executed in compliance with the provisions of s 2(1)(a) of the Wills Act 7 of 1953 (the Will Act).[1] The court below further refused to order the costs of the proceedings to be paid from the estate on the basis that the appellants had unreasonably instituted the proceedings at the behest of their mother to thwart the forfeiture provisions contained in clause 11 of the disputed will which divested a legatee or heir of the deceased, who contested the will, of any benefit under it. Thus, the appellants were mulcted with the costs of the suit.

[6] The only question to be determined in this appeal, which is pursued with the leave of this court, is whether the validity of the disputed will has been

1 Section 2(1)(a) of the Wills Act 7 of 1953 reads as follows:
'2 Formalities required in the execution of a will
(1) Subject to the provisions of section 3bis –
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 … 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
if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page;'

established. (Another issue initially raised by the appellants relating to the incidence of the onus of proof was abandoned before us.)

[7] Some background is required. The deceased and her husband, Mr Solomon Max Breslawsky who died in 1966, built a very successful property investment portfolio from a humble furniture shop which they ran in downtown Johannesburg. Although she was illiterate and spoke little English (her mother tongue was Yiddish) she was a very astute and successful businesswoman and personally managed her business and financial affairs until her death, this despite being extremely frail, wheelchair-bound and blind in one eye in the latter phase of her life.

[8] The deceased had a particularly close relationship with the Standard Bank, her banker for over 75 years. She latterly dealt mainly with two of its officials, Ms Bridgette Marais (who had passed away by the time of the trial) who assisted by Ms Melanie Els, managed her investment portfolio and Mr Hendrik Strydom, an attorney enlisted by the bank to assist the deceased with her financial and legal affairs. All her wills but the disputed one were drawn by the Standard Bank and she executed the last few with the assistance of Strydom with whom she had formed a relationship of trust.

[9] Each of the witnesses at the trial who personally knew the deceased, including her daughters, the fourth respondent, the first respondent's husband, Strydom and Els described her as very difficult, domineering, manipulative, tight-fisted and mistrustful, especially of her family whom she believed were interested only in her money. This included the first respondent, who, despite attending to

her daily needs as her personal assistant, she accused of trying to poison her. The deceased sought to control her family with her wealth (which caused conflict among them) and frequently changed her will on a whim as she would increase or decrease bequests and even exclude beneficiaries altogether depending on who pleased or displeased her at the time. She similarly changed her executors and accountants regularly.

[10] According to the Miller, he was introduced to the deceased by a friend, the fourth respondent, and befriended her some years before her death. He is fluent in Hebrew and understood Yiddish in which the deceased preferred to speak. She liked cucumber pickles which he would make for her and she nicknamed him the 'cucumber man' for that reason. He often visited her during weekend afternoons and the deceased would then tell him stories of her past. This friendship was confirmed by the fourth and eight respondents. In July 2002, the deceased requested to see him. They consequently met at her flat, where he was let in by a domestic worker, on the 14th of that month. The deceased expressed her concern about the feuding between her children and grandchildren. She told him that she wished to return to her Jewish roots and wanted him to draw a will for her which would restore peace among her family.

[11] She gave him specific instructions in that regard, which he recorded in manuscript. In the process she revealed personal information, which he also recorded, about the characters and foibles of each of her beneficiaries and her feelings about them. He occasionally had to gently chide and remind her of her objective to treat everyone fairly when she remembered things about them which annoyed her and threatened to reduce their bequests. From these notes, he drafted

the disputed will which the deceased signed, on 4 August 2002 at her flat, after he read it to her, in his presence and in the presence of two witnesses, Mr Barry Tannenbaum, his nephew, and Mr Norman Aaron, his associate, whom he requested to attest the execution of the will. The two men confirmed this version.

[12] Relying on the evidence of the various witnesses who testified on the appellants' behalf, their counsel argued that the court below erred in not finding that the probabilities did not support Mr Miller's evidence. It was submitted that the following factors rendered the validity of the disputed will doubtful:

- it was produced only after the deceased's death and no account had been sent by Miller for his services until then;
- all the deceased's previous wills had been prepared by the Standard Bank, which was appointed as the executor of her estate, and executed with the assistance of its officials whom she trusted, a procedure which was not followed in the case of the disputed will. The disputed will was in a completely different format and made no provision for the various charitable institutions and the maintenance of the tombstone of the deceased and her late husband as the previous wills did;
- the evidence of Mr Miller, Mr Aaron and Mr Tannenbaum differed on a material point as they respectively estimated their visit to the deceased's flat on 4 August 2002 to have occurred between 16h30 and 17h30, 16h00 and 16h30 and 15h00 and 16h00, which was unlikely in the light of the evidence of the first respondent and her husband who were at the deceased's flat during that afternoon and did not see them;
- on 23 August 2002, after the alleged execution of the disputed will, Ms Marais and Ms Els met the deceased to effect changes to the earlier will;

- a handwriting expert, Mr Cecil Greenfield, testified that the disputed will was possibly a forgery;
- the first respondent, who spent a lot of time with the deceased as her personal assistant did not know Mr Miller; and
- Mr Miller, Mr Aaron and Mr Tannenbaum refused to consult with the first respondent's attorneys.

[13] The appellants' attempts to refute Mr Miller's claims to a friendship with the deceased and the execution of the disputed will at the deceased's flat was premised on the evidence of three witnesses. The first respondent said that she did not know him although it came to light in her cross-examination that she had actually heard of him and knew that he had dealings with the third respondent who managed the deceased's properties. She and her husband testified that they routinely spent every Sunday between 10h00 and 17h00 with the deceased at her flat and insisted that they would have seen Mr Miller there on 4 August if his version was true. But according to Ms Tholakele Ntuli, one of two of the deceased's care-givers at the time, they did not adhere to a strict time schedule and usually left anytime between 16h30 and 17h00. She recalled that on 4 August they left at 16h30 because the first respondent was in a hurry to get home to make a telephone call. When her version was put to the first respondent and her husband they were constrained to admit that they left earlier than they previously stated.

[14] Ms Ntuli alleged that she was on daily day-duty in August and worked until 18h00 even on Sundays to assist the deceased's live-in caregiver, Ms Emily Zikalala, as the deceased had become very ill. She saw Mr Miller only once, on a Friday evening in early October 2002, when he visited the flat with the fourth

respondent and unsuccessfully tried to persuade the deceased to sign certain documents against her will. She was adamant that she would have seen the second respondent if he visited or at least heard from Ms Zikalala, with whom she worked shifts, if he had come during her absence. She and Ms Zikalala were both on duty on 4 August and only the first respondent and her husband had visited the deceased.

[15] Ms Ntuli's evidence was contradicted in material respects by a number of witnesses, including the first respondent, according to whom Ms Ntuli was on duty alone and not with Ms Zikalala as she testified, on Sunday 4 August. Contrary to Ms Ntuli's version that the deceased was too ill to receive callers during that month, Ms Els had written records of meetings which she and Ms Marais had with the deceased on 4 and 23 August 2002 and testified about the discussions they had with her at those meetings. Surprisingly, the first respondent, to whom Ms Ntuli said she reported, the second and fourth respondents' October visit was not mentioned in her evidence as would be expected. The eighth respondent who was visiting the deceased and staying with her at the time denied the alleged visit, as did the fourth respondent who, it turned out, was travelling overseas during that month. Even if one accepts that the visit occurred as alleged, it is difficult to imagine what 'documents' Mr Miller would have tried to influence the deceased to sign at that stage when the disputed will had been executed some weeks before.

[16] Interestingly, three days after the deceased's death, the first respondent took Ms Ntuli to the police station to sign an affidavit which she had prepared for her, stating that no one had visited the deceased and caused her to sign any documents

on 4 August 2002. Curiously, on 11 December 2002 the first respondent took Ms Ntuli back to the police station to depose to yet another affidavit prepared by her, ostensibly to confirm what Ms Ntuli had said in the first statement. Ms Ntuli barely spoke English and had worked for the deceased for only a few months before the latter died, apparently having been hired merely to assist Ms Zikalala as she worked only day shifts and lived in separate quarters, on another floor of the deceased's building. But Ms Zikalala, the permanent caregiver and a fluent English speaker who actually lived with the deceased and would, logically, have been a better source of the goings-on in the deceased's lodgings, was puzzlingly not called to testify. I find it most surprising that Ms Ntuli would unerringly remember the fine detail of the events of 4 August 2002 four years later when, by her own account, there was nothing remarkable about the day to jog her memory. These discrepancies and improbabilities in her evidence, in my view, cast serious doubt on her credibility and it seems to me that the court below rightly rejected her evidence.

[17] It was not disputed that both Mr Tannenbaum and Mr Aaron obtained no benefit from witnessing the execution of the disputed will. It is difficult to conceive why these men who knew neither the deceased nor any member of her family would conspire in the forgery of her will and perjure themselves in court as the appellants would have it. This applies equally to Mr Miller, despite his friendship with the fourth respondent, because he refused to accept his nomination as an executor and arranged for another attorney to administer the deceased's estate. Unfairly, no imputation that these witnesses conspired to forge the will and were lying in court was put to them when they testified to afford them an

opportunity to deal with those imputations.[2] And, not unexpectedly, the appellants' counsel could advance no reason before us why any finding of dishonesty should be made against them.

[18] Other than the contradiction relating to the precise moment of the execution of the disputed will during the afternoon of 4 August 2002, no other flaw was identified in the corroborative versions of the second respondent and his two witnesses. To my mind, this difference is not unexpected considering that these witnesses were testifying about events which had occurred some years earlier which they had not recorded. The time frames they gave were merely estimates but the tenor of their evidence was that their meeting with the deceased took place in the middle to late afternoon. It can safely be accepted on this evidence, in view of the Levins' concession regarding the time of their departure from the deceased's flat, that the disputed will was executed after 16h30.

[19] The first respondent conceded that the intimate details about the deceased's children and grandchildren and her personal views about them which are contained in the notes which the Mr Miller said he took during his consultation with the deceased were accurate. But she suggested that Mr Miller probably got the information from the fourth respondent. I find that possibility most unlikely merely from the nature and tone of Mr Miller's recordal which depicted an emotional and deeply personal running commentary. But that apart, it was not put to Mr Miller that his notes were a fabrication. Neither was there any hint that the fourth respondent had been present at or was even aware of the meeting of 14 July 2002.

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2 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

[20] It is clear from the Standard Bank officials' manner towards the deceased (the daily telephone calls to check on her health, the constant social visits, the gifts she was given etc. patently went far beyond the call of normal business relations) that they did not trust that she would not change the bank as her executor and needed to constantly keep her happy. This attitude is, in fact, borne out by Ms Els' evidence that at their meeting of 23 August 2002, Ms Marais pertinently asked the deceased if she had signed another will. That question could only have been prompted by suspicion.

[21] It is not at all odd in view of the deceased's impulsive and distrustful nature that she could have asked Mr Miller to draw a secret will on her behalf. It is plain from the evidence particularly that of the first respondent's husband, Mr Miller and Mr Strydom regarding their relationships with the deceased that she trusted people who understood her home language with whom she could reminisce.

[22] The object of the disputed will was to divide the deceased's estate fairly among her children and end the conflict in her family. It had nothing to do with her previous wills and there is no reason why Mr Miller would have adopted the Standard Bank format which does not appear to have been brought to his attention and from which the deceased wanted to depart in any case. Mr Miller's evidence that the deceased specifically instructed him not to send him a statement of account or a copy of the will until she requested it and that he had gained the impression that she wanted to keep its existence a secret tallies with her character. And I see no reason to draw an adverse inference from his and the other witnesses' refusal to consult with the appellants' attorneys, as we were urged to

do, when it was not disputed that they were advised against such a meeting by their attorney who had already been notified by the Standard Bank that it was contemplating challenging the disputed will.

[23] Regarding the evidence of the handwriting expert, Mr Greenfield, the court below found that it was trumped by the direct testimony given by Mr Miller, Mr Tannenbaum and Mr Aaron and the evidence of the deceased's ophthalmologist, Dr Mark Deist. In reaching this conclusion, the court relied on the judgments of this court in *Kunz v Swart*[3]and *Annama v Chetty*[4] which enjoined courts to apply caution before accepting handwriting expert evidence. I respectfully agree with the finding of the court below in this regard.

[24] In the first of two reports on the authenticity of the testator's signature in the disputed will prepared by Mr Greenfield, he expressed the following view:

'If on 4th August 2002, the late Ms Breslawsky's general health had markedly improved – compared with the state of her muscular control and eyesight, demonstrated in the signatures in the Will written some twelve months earlier, it is my view, that she was, in all probability, the writer of the disputed signatures. If however, it can be proved that her eyesight and muscular control had dramatically deteriorated during the intervening period between the pen-ultimate and the questioned Will; right up to the time of signing, then there is, in my view, a strong possibility that the disputed signatures are very good freehand simulated forgeries.'

[25] What Mr Greenfield had not been told when he prepared his final report (after being furnished with further signatures of the deceased), which concluded that the disputed will was most probably a forgery, was that the deceased had in fact undergone an eye cataract operation after signing the 2001 will. According to

3 *Kunz v Swart* 1924 AD 618.
4 [4] *Annama v Chetty* 1946 AD 142.

Dr Deist, corroborated by the first respondent, this procedure had significantly improved the deceased's vision and hand-eye coordination. Dr Deist opined that it was reasonable in the light of this improvement to expect the deceased's handwriting to be neater. Mr Greenfield conceded that in addition to this operation he was not aware that the deceased was blind in one eye and did not consider the deceased's position when she signed the documents and that all these factors were relevant to his enquiry. Whilst he still nursed some misgivings about the genuineness of the signature in the disputed will, he fairly conceded that he would yield to direct evidence to the effect that the signature was that of the deceased. If the evidence of Mr Miller and his witnesses that the disputed will was signed by the deceased is accepted, as I think it must, then Mr Greenfield's opinion must be rejected.

[26] What is most striking about this case, in my view, is the nature of the disputed will which distributes the deceased's assets among her family far more equitably than any of her previous wills. This is indeed consonant with Mr Miller's account that she wanted peace among her offspring in her final days. I reiterate that it seems to me most unlikely that three individuals, unrelated to the protagonists, would conspire to forge a will which treated the beneficiaries fairly and from which they stand to gain nothing and to perjure themselves in a bid to uphold it.

[27] I have found no reason to doubt Mr Miller's evidence regarding the making of the disputed will. The incidence of the onus does not, therefore, arise. His evidence and that of the witnesses to the signing of the will establishes that it complied with the formalities required by s 2(1)(a) of the Wills Act. The appeal

must, therefore, fail.

[28] There remains the question of costs. It was contended on the appellants' behalf that if the appeal failed the costs of all the parties both on appeal and in the court below should nonetheless be paid from the deceased's estate because there was a reasonable basis to doubt and challenge the authenticity of the disputed will. I do not agree. An order that the costs in a suit must be paid from the estate is not a general rule, even in matters involving the determination of the true meaning of an ambiguous will,[5] which is hardly the issue here.

[29] The manner in which the appellants conducted the litigation left much to be desired. They knew all too well that the deceased remained mentally sound and strong-willed despite her advanced age. But, despite this knowledge, some of the grounds they pleaded as a basis for challenging the disputed will disingenuously sought to cast doubt on her mental capacity and ability to make independent decisions. The appellants also knew of the deceased's mistrustful and impulsive nature and cannot have been surprised by the existence of an undisclosed will. They persisted with the litigation in total disregard of the evidence that her cataract operation had favourably impacted her handwriting.

[30] The submission that if Mr Tannenbaum, Mr Aaron and Mr Miller had not refused to consult with the appellants' attorney the appellants would probably not have launched the action has no merit in view of the fact that the appellants persisted with their claim even after they had testified. I see no reason in these circumstances to burden the deceased's estate with the costs of ill-conceived

5 *Cuming v Cuming* 1945 AD 201 at 216.

litigation and hold that they should follow the result.

[31] Accordingly, the appeal is dismissed with costs including the costs of two counsel.

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MML MAYA

Judge of Appeal

APPEARANCES

APPELLANTS: K.R. Lavine
Instructed by Cranko Karp & Associates, Johannesburg;
Lovius Block Attorneys, Bloemfontein.

RESPONDENT: H. Epstein SC
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