CASE NR.: A 324/2004

TJAKAZENGA KAMUHANGA HOVEKA N.O and TWO OTHERS –vs- THE MASTER OF THE HIGH COURT and ANOTHER

HANNAH, J

11/10/2005

SUMMARY

COSTS

Circumstances in which a costs order should be made against a public official such as the Master of the High Court considered. Costs order made against the Master.

CASE NO.: A 324/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TJAKAZENGA KAMUHANGA HOVEKA N.O **FIRST APPLICANT**
EDWARD TJIKUUA **SECOND APPLICANT**
IMMS TJIUONGUA N.O **THIRD APPLICANT**

and

THE MASTER OF THE HIGH COURT **FIRST RESPONDENT**
JOHAN NDJARONGURU **SECOND RESPONDENT**

CORAM: HANNAH, J

HEARD ON: 27.09.2005
DELIVERED ON: 11.10.2005

JUDGMENT

HANNAH,J.: This application and counter-application, which were referred to oral evidence, concern the validity of the will of the late Erastus John Ndjaronguru dated 9th October, 2001. I shall refer to him as "the testator". The second respondent's case is that the will does not comply with the formalities required by section 2(1) (a) of the Wills Act, No 7 of 1953, the material provisions whereof read:

> "(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….; 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
>
> (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… and by such witnesses anywhere on the page."

The second respondent's case is that the two witnesses did not sign the will in the presence of the testator and accordingly it is invalid. The case of the applicants is that it was signed by the two witnesses in the presence of the testator and in the presence of each other and accordingly it is valid. Mr Heathcote, who appeared for the second respondent, accepted that the onus of proof lies on the second respondent.

Before turning to the evidence I should mention that the Master, who has been cited as first respondent, only opposes the costs order which is sought against her. I will set out the circumstances in which that costs order is sought later.

The first witness was Tjakazenga Kamuhanga Hoveka who is the first applicant. He is a legal practitioner and the executor in the estate of the testator. He testified that in October, 2001 he was contacted by the testator's former bank manager and asked to draw up a will for the testator. He did not know the testator prior to being introduced to him by the bank manager at Katutura State Hospital. The testator had

been admitted to the hospital with severe burns. Hoveka drew up the will and returned to the hospital on 9th October, 2001. In his affidavit he stated that he took instructions on the 8th whereas in oral evidence he said it was on the 9th. He admitted under cross-examination that he could have made a mistake. In my view, nothing of any importance turns on this discrepancy.

Hoveka said that when he returned on the 9th he found the testator together with his common law wife and another person in his room and he asked the wife and the other person to leave. He then fetched two nurses to witness the testator's signature and returned with them to the testator's room. The testator then signed each page of the will in the presence of the two nurses and they, in turn, appended their signatures.

Hoveka was cross-examined at some length. He accepted that on 9th October the testator was very ill and that it appeared as if he had difficulty signing. He was reclining in bed with his back against a pillow but with his head tilted forward he was able to sign. It was put to Hoveka that one of the nurses would testify that the testator was only able to make one mark on one page. This he rejected completely as reflecting what occurred. If that was to be her testimony he would be shocked and amazed. Hoveka was asked to describe the signing in detail. He said that he stood to the right of the testator's bed and held the will and turned the pages while the testator signed. The will was placed on an hospital tray. As for the two nurses, he said that they signed while at the foot of the bed.

Hoveka agreed that the testator died in January, 2002. The second respondent visited him at his office and informed him of the death and asked whether his father had a will. He said that by then the testator's

family appeared to have divided into two camps and he handed over two copies of the will each in an envelope.

Hoveka was questioned about a letter dated 29th May, 2002 written by Dr Weder, Kruger & Hartman to his firm and his firm's response thereto. The letter reads:

> "*We have instructions from certain clients to make an enquiry as to how John Ndjaronguru's will dated 9 October 2001 (his last will) came to be. We attach a copy of the said will hereto. Would you be so kind as to furnish us with the answers to the following questions:*
>
> 1. *Can you confirm that you were the drafter of the said will?*
> 2. *Who gave you instructions to draft the said will?*
> 3. *Under what circumstances did you receive instructions, since Mr Ndjaronguru was permanently in hospital?*
> 4. *Who was present at the signing of the will?*
>
> *We hope to hear from you at your earliest convenience."*

The reply dated 30th May reads:

> "*Your letter of 29th instant from certain clients, refers.*
>
> *Ms Botha we are surprised and bewildered by tone and insinuations, contained in your letter of the 29th instant, to us,"*

The copy of this letter annexed to the founding affidavit is unsigned. It simply ends "per: P U Kauta." P.U Kauta is one of Hoveka's partners.

When asked about the reply, Hoveka first said it was drafted by Kauta but later, when shown the original with his own signature, accepted that he was the author. As more than three years had elapsed since

the letter was written this mistake is understandable. It was put to him that his failure to disclose the information requested showed a guilty mind. This he denied. He took exception to the letter from Dr Weder, Kruger & Hartmann because it did not identify the "certain clients" for whom they were acting and, in any event, he had no duty to provide the information sought. As for the reply I can well understand that the letter of 29th May could be construed as questioning the professional integrity of Hoveka's firm.

What it comes to is that despite extensive cross-examination Hoveka's testimony remained unshaken.

The other witness who testified on behalf of the applicants was Constancia Uazena. She was one of the two nurses referred to by Hoveka. On the afternoon of 9th October, 2001 she was at a nursing station near the testator's room at Katutura Hospital together with Thusnelde Garises. They were approached by Hoveka and asked to witness the testator's will. They asked if they were competent and Hoveka said that they had to be over 18 years of age and mentally fit. I pause here to mention that Hoveka was asked about this in cross-examination and he said that the word "competent" was not specifically used and he thought that he had said 14 years not 18 years. He also recalled one of the nurses asking whether they were going to get into trouble and he reassured them saying that they did not need to know the contents of the will.

To continue, Uazena said that she and Garises accompanied Hoveka to the testator's room and the testator signed in their presence. She then signed as first witness and Garises signed as second witness.

Uazena was also cross-examined at some length. She was asked in what position the testator was on his bed when he signed and how he was able
to sign. Eventually, the Court asked her to demonstrate using an armchair and it was clear that although it may have been awkward the testator could indeed have signed while lying back propped up by a pillow. In her affidavit Uazena deposed that the will was placed on the bed when it was signed. She was asked about this and said that that was how she remembered it although she was not 100% sure whether it was on the bed or on the tray as testified to by Hoveka. I should have thought it more likely that it was signed on the tray although this is a minor detail.

It was put to Uazena that Garises would say that the testator only made some sort of mark. Uazena said although it could have been difficult for him the fact was that he signed. The witness was also asked about her use of the word “competent” and she said that she was not sure whether she used that word or “legal”. Uazena agreed that at some later stage a person telephoned her seeking information about the circumstances in which the will was signed. She thought the caller was female. She told the caller that she signed in the presence of Hoveka, the testator and Garises. When it was put to her that there would be evidence that she was asked whether the testator signed and that she replied that she could not recall she said that she did not say that.

Coming now to the evidence adduced on behalf of the second respondent, the first witness was Gysbert Joubert. His evidence was brief and to the point. In 2002 he was an articled clerk at Dr. Weder, Kruger & Hartman. On 21st June, 2002 he telephoned Uazena and asked her where she and Garises had signed the will. Her answer was

in Ndjaronguru room in his presence. He asked her whether Ndjaronguru had also signed in their presence and she said she could not remember. Joubert said that he made a contemporaneous note of the conversation and he referred to this note when testifying. Mr Heathcote set great store by the last answer in final submissions. I will come to that later.

The other witness called on behalf of the second respondent was Garises. Her evidence-in-chief may be summarised as follows. On 9th October, 2001 Hoveka approached her and Uazena at or near the nursing station. He said that the old man, referring to the testator, had drawn up a will and he wanted two witnesses. She asked him why they should sign- didn't he have family members? Hoveka said it wasn't necessary for the family. They, the nurses, were working with him. They then entered the testator's room. He was lying on the bed with a pillow under his head. Hoveka gave him a pen and asked him to sign. The testator drew a line. Garises then said why not offer him a stamp so that he can put his thumbprint. Hoveka said it didn't matter. They then went back to the nursing station where she and Uazera signed all the pages of the will including the one where the testator had drawn a line.

Under cross-examination Garises said that the first person to approach her concerning the will was the second respondent. He was, she said, accompanied by a detective. At first she was a little confused about the date saying that this happened on the night of 9th October, 2001. Eventually, it emerged that it was in about July or August, 2002. Garises said that she told the second respondent that she and her supervisor, Uazena, had signed and when asked if the testator had signed she told him that the testator had drawn a line because of his

wounds. She also told him that she had suggested that a thumbprint be used.

The next to happen was that she was contacted by Ms Botha of Dr. Weder, Kruger & Hartman. This was in early September, 2002. She had an interview with Ms Botha and swore to an affidavit dealing with what had occurred.

The main thrust of the cross-examination of Ms Vivier, who appeared on behalf of the applicants, concerned the disparity between the witness's account in the witness-box and the account which she had given in her affidavit dated 6th September, 2002. Her affidavit omits any mention of entering the testator's room on 9th October or of the testator only being able to draw a line. In her affidavit she describes the encounter with Hoveka at the nursing station and then continues:

> "My colleague, Constantia Uazena, then first signed the testament and after she was finished I signed the testament.
>
> We were both standing at the nurses station when we signed the testament.
>
> While I was busy signing the testament I stood with my back to the door of Erastus' room and I believe it would for this reason have been impossible for him (Erastus) to see me sign the testament.
>
> I can recall that when I signed the testament the signature of the testator was not on the testament.
>
> I also did not see Erastus sign the testament."

This account is deafening in its silence about going into the testator's room, watching him struggle without success to append his signature and only drawing a line. Also, the lack of mention of the thumbprint suggestion.

When questioned, Garises at first said that she mentioned these matters to Ms Botha. Then she said that she might have left something out. Then, when it was put to her that she had first told this additional story to the second respondent's lawyers the day before the hearing, she started to become evasive. Eventually, she agreed that that was indeed the case.

Garises also confirmed that Hoveka told them that they should go into the testator's room to see him sign. She was asked why, in that case, did she sign when the testator had not signed. She said, rather weakly, that they signed because they were instructed.

In re-examination Mr Heathcote made an attempt to redeem the situation by asking who, of himself and the attorney, had asked the most questions of her. She replied that most were asked by the attorney. One would therefore have expected the fuller account to have been set out in the affidavit. Counsel's final question was: "Did you tell her (the attorney) that he could not sign? "The answer was "Yes". Again, a contradiction of her affidavit evidence.

In final submissions Mr Heathcote did his best to make the most of what I regard as poor material. He described Hoveka as arrogant and his evidence as not being positive. In my view, such criticism is not justified. I found Hoveka to be an impressive witness. Counsel sought to make the most of a couple of minor discrepancies in Hoveka's

evidence. Such discrepancies as there were were minor and understandable. As for Uazena, Mr Heathcote submitted that in all probability she was informed as to what to say. That does not accord with my assessment of the witness. My impression was that she was giving a straightforward factual account of what happened on 9th October, 2001. Contrary to counsel's submission I thought that she gave a very sound demonstration of how the testator signed the will.

As I have said earlier, Mr Heathcote set great store by the evidence of Joubert. His evidence can, in my view, be satisfactorily explained without impugning the testimony of Uazena. She received a telephone call out of the blue concerning some event which had taken place 9 months before. When asked, she said that she could not remember whether the testator had signed. That was probably her true state of mind at the time. With a little more probing or digging her memory would probably have come back. However, Joubert was content to leave matters there. It was the answer which he wanted to hear.

Looking at the matter generally, it is highly unlikely that a disinterested legal practitioner, and that is what Hoveka undoubtedly was, would behave in the wholly unprofessional manner described by Garises. Why should he? There is simply no answer to that question. Looking at Garises' evidence I cannot escape the conclusion that pressure was exerted upon her by the second respondent to give her original version of events and that further pressure was exerted more recently upon her to embroider. I reject her account and accept the evidence of Hoveka and Uazena. The testator's will was properly executed in accordance with the requirements of section 2(1)(a) of the Wills Act, No.7 of 1953, and I will make a declaration that it is valid. The counter-application will be dismissed.

I now turn to the question of costs. Mr Heathcote submitted that the second respondent cannot be held liable for the applicant's costs incurred before the counter-application was launched. I do not understand the logic behind this submission. The second respondent unsuccessfully opposed the relief sought by the applicants and I see no reason why the general rule that an unsuccessful party should pay costs should not apply.

Mr Heathcote also submitted that the costs should come out of the estate. Such order is often made where the litigation was caused by the testator: *Lewin vs Lewin* 1949(4) SA 241(T) at 282. That is not the position in the present case. I will order that the second respondent pays the applicants' costs of both application and counter-application.

The applicants also seek a costs order against the Master on the basis that it was her grossly negligent conduct which made it necessary for the applicants to litigate. The facts relied upon are briefly as follows. The Master registered and accepted the testator's will on 11th March, 2002. By letter dated 30th September, 2002 the Master wrote to Hoveka's firm stating:

> "I would like to inform you that, the Will which you have lodged with me was only admitted on a prima facie basis. Affidavits were lodged by Dr. Weder, Kruger & Hartmann dated 19th September 2002, which shows that the Will did not comply with section 2(1)(b)(ii) of Act 7 of 1953.
>
> Thus I hereby request you to return the letter of executorship which was issued to you, as the estate has to be treated as interstate."

I suppose one has to read the word “interstate” as meaning “intestate”.

According to the evidence, this letter dated 30th September, 2002 was delivered by hand to Hoveka’s firm on 9th December, 2002 accompanied by a letter containing a stamp to the effect that the testator’s will which had been registered on 11th March, 2002 was not accepted.

Hoveka replied by letter dated 11th December correctly pointing out that section 2(1)(b)(ii) of Act 7 of 1953 deals with amendments to a will and that the will which was submitted was never amended. He also pointed out that it was not for the Master to decide that the will was invalid and that the testator died intestate. That was a matter to be decided by a court should an interested party wish to challenge the validity of the will. He even referred the Master to the relevant pages in a text book on the law of succession. He refused to return the letter of executorship.

Hoveka’s letter received no response. By letter dated 17th Janaury, 2003 he wrote again. He stated that if no reply was received by 28th January he would advertise the Liquidation Account. As no reply was received the Account was advertised on 4th March, 2003.

On 6th March Hoveka received a letter from the Master dated 26th February. It attached a letter from the second respondent and asked for Hoveka’s comments on certain marked paragraphs. Hoveka replied on 7th March setting out his comments.

By letter dated 7th April, 2003 Hoveka wrote to the Master seeking "feedback" as the 21 days allowed for the lying of the Liquidation and Distribution Account had expired.

On 9th April, 2003 Hoveka received a letter from the Master dated 24th March. It referred to Hoveka's letters dated 15th November, 2002 and 7th March, 2003 but not to his letters dated 11th December, 2002 and 17th January, 2003. In this letter the Master stated:

> "Your account is returned herewith. Please amend your account, as the estate must devolve according to the intestate succession since the will was rejected."

The Master also asked Hoveka for comment on the issues raised in her letter dated 26th February, comments which Hoveka had already made.

Hoveka replied by letter dated 16th April. He pointed out once again that the Master cannot appoint an executor and then attempt to remove him without court proceedings. He stated that the comment that "the estate must devolve according to the intestate succession since the will was rejected" was incomprehensible.

The next to happen of any significance was a letter from the Master dated 11th June, 2003 headed "FINAL DEMAND". Despite the fact that a liquidation and distribution account had been lodged and had lain for inspection for the requisite period without objection the letter required Hoveka immediately to frame and file a liquidation account and plan of distribution. The letter concluded:

> "Unless the required inventory/ account, is lodged at this office within 37 days from date hereof you will be called upon to show

> cause before the High Court why you shall not forthwith be ordered to file the same and to pay the costs of the application *de bonis propriis* in terms of section 36/85 or be removed from office as executor in terms of section 54 of the said Act.

Under cover of a letter dated 17th July, 2003 Hoveka submitted an amended First and Final Liquidation and Distribution Account.

The response to this was a letter dated 10th August, 2003, It states:

> "Your account is returned herewith as the necessary amendments are not made. The estate must be distributed in terms of the intestate succession as the will was rejected. You were informed about this decision and an amended account was requested.
>
> You furthermore did not give me proper answers on my queries as per my letter dated 24 March 2003.
>
> It seems as if you deliberately ignored my instructions and are you delaying the finalization of the estate. If a proper account (as per my instructions) is not lodged before 5 September 2003, I will remove you as executor."

Following receipt of this letter Hoveka visited the Master's Office and asked for a copy of the affidavits referred to in the Master's letter dated 30th September, 2002. His request was refused. The present application was launched on 4th September, 2003 in order to counter the Master's threat to remove Hoveka as executor.

Mr Swanepoel, who appeared on behalf of the first respondent, resisted the application for costs. He referred the Court to a number of cases where the courts have considered whether or not to award costs against a public officer. It is unnecessary to mention all these cases. One will suffice. In *Coetzeestroom and Co. vs Registrar of Deeds* 1902 TS 216 Innes CJ said at 223:

> "With respect to the question of costs, the Court should lay down a general rule in regard to all applications against the Registrar arising on matters of practice. To mulct that official in costs where his action or his attitude, though mistaken, was *bona fide* would in my opinion be inequitable."

The learned Chief Justice continued at 224:

> "This general rule we shall follow for the future; but the Court will reserve to itself the right to order costs against the Registrar if his action has been *mala fide* or grossly irregular…"

In the present case I am of the view that the conduct of the Master was indeed grossly irregular. Having accepted the testator's will it was not for her to reverse her decision and decide that the estate should be treated as an intestate estate. That is a matter for the Court to decide on proper application being brought.

What troubles me more is that despite the fact the that the Master's attention was drawn to her mistaken view she did absolutely nothing to correct it. She wrote again in March, 2003 baldly asserting that the estate must devolve according to intestate succession. Once again her error was pointed out. Once again the advice was ignored resulting in a threat to remove the executor and causing the executor to bring the

present application in order to restrain the Master from carrying out her threat.

In my opinion, the Master's conduct can only be described as obdurate and grossly irregular. An order for costs will be made. However, such costs will not include the costs relating to the hearing of oral evidence. The Master was not really party to that aspect of the case.

Accordingly, the following orders are made:

1) The last will and testament of the Late Erastus John Ndjaronguru dated 9th October, 2001 is declared valid;
2) The second respondent's counter-application is dismissed;
3) The second respondent is ordered to pay the applicants' costs of the application and counter-application;
4) The first respondent is ordered to pay the applicants' costs of the application, excluding costs relating to the hearing of oral evidence, jointly and severally.

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HANNAH, J

ON BEHALF OF THE APPLICANTS: **ADV S VIVIER**

INSTRUCTED BY LORENTZ & BONE

ON BEHALF OF THE FIRST RESPONDENT **MR SWANEPOEL**

INSTRUCTED BY GOVERNMENT-ATTORNEY

ON BEHALF OF THE RESPONDENTS **ADV R HEATHCOTE**

INSTRUCTED BY P F KOEP & CO