

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-ACT-DEL-2021/0428

In the matter between:

ANNA ELIZABETH BLOM (BORN IZAAKS)

PLAINTIFF

and

MASTER OF THE HIGH COURT

1ST DEFENDANT

SAUL DANIEL IZAAKS

2ND DEFENDANT

ARRIE IZAAKS

3RD DEFENDANT

JOHANNA KATRIENA STEYN (BORN IZAAKS)

4TH DEFENDANT

MARTHA JOHANNA APRIL (BORN IZAAKS)

5TH DEFENDANT

CHRISTINA WILHELMINA VAN WYK (BORN IZAAKS)

6TH DEFENDANT

SUSANNA JARVIS (BORN IZAAKS)

7TH DEFENDANT

CORNELIUS IZAAKS

8TH DEFENDANT

JOHN ROBERT IZAAKS

9TH DEFENDANT

JACOBUS IZAAKS

10TH DEFENDANT

Neutral citation: *Blom v Master of the High Court* (HC-MD-CIV-ACT-CON-2021/00428) [2023] NAHCMD 576 (19 September 2023)

Coram: UEITELE J
Heard: 22 – 23 January 2023
Delivered: 19 September 2023

Flynote: Estates – Last Will and Testament – Validity thereof – Signing of Wills – Non-compliance with s 2 (1) of the Wills Act 7 of 1953 – Each page must be signed in full by both the testator and the testatrix, together with the witnesses as mandated by s 2(1)(a)(iv) – Where allegations and accusations of chicanery, fraud and manipulation are rife the formalities prescribed by the Wills Act 7 of 1953 must be strictly complied with.

Summary: The plaintiff instituted action against the defendants challenging the decision of the Master of the High Court (hereafter referred to as the Master) who accepted two Wills, that being a '2012 Will' and a 'undated Will', as valid Wills. The plaintiff, in her amended particulars of claim, sought an order from this court in terms whereof the Master's decision be set aside and 2012 Will be declared invalid by virtue of it not complying with the formalities as set out in s 2(1)(a)(iv) of the Wills Act 7 of 1953. The plaintiff also sought an order where the court declares that the undated Will is the only Will left by the testator and testatrix.

The third, fourth, ninth, and tenth defendants opposed the action. The ninth and tenth defendants, in addition to opposing the plaintiff's claim, filed a counterclaim wherein they sought that the decision of the Master to accept the 2012 will, with reference to the undated will, be declared irregular and invalid, and that the estate of the testator and testatrix be devolved in terms of the 2012 will.

Held that: allegations and accusations of chicanery, fraud and manipulation are rife in this matter, which were not traversed or dealt with.

Held that: when a party to litigation elects not to answer the allegations made by its opponent, it follows that the facts alleged by the first party were not placed in dispute and must be accepted.

Held further that: the circumstances of this case demand that the formalities prescribed by the Wills Act must be strictly complied with and that the 2012 Will does not comply with the formalities prescribed by the Wills Act.

Held: the 2012 Will is invalid for want of compliance with s 2(1)(a)(iv) of the Wills Act and the Master exceeded her authority when she declared the 2012 Will valid.

Held that: a Will, which is regular and complete on the face of it, is presumed to be valid until its invalidity has been established and the *onus* is on the person alleging invalidity to prove such allegation.

Held that: the standard of proof is the same as that which applies in all civil cases, proof on a balance of probabilities.

Held further that: the opposing defendants have failed to discharge the *onus* resting on them.

ORDER

1. It is declared that the Will dated 27 November 2012 is invalid by virtue of it not complying with the formalities as set out in s 2(1)(a)(iv) of the Wills Act 7 of 1953.
2. The Master of the High Court of Namibia's decision of 2 November 2017 to accept the 27 November 2012 Will as being valid is reviewed and set aside.
3. It is further declared that the undated handwritten Will is the only last will and testament left by the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks.
4. The third, fourth, ninth and tenth defendants' counterclaim is dismissed.

5. It is declared that the joint estate of the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks must be administered in terms of the undated handwritten Will.

6. The third, fourth, ninth and tenth defendants' must pay the costs of the action and the dismissed counterclaim. The costs to include the costs of one instructing and one instructed legal practitioner.

7. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] Disputes regarding the validity of a Will can arise only after the death of a testator or testatrix, which may occur many years after it was executed. Ordinarily the only persons other than the testator who are likely to have knowledge of the circumstances of the execution of a Will are the witnesses who, being present, personally saw or perceived it, and can testify in that regard.¹ In the present matter, the validity of one or more of the Wills of the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks who died more than six years ago, that is on 1 May 2017 and 21 June 2017, respectively, is in dispute.

[2] All the parties to the dispute in this matter, with the exception of the Master of the High Court of Namibia (who did not participate in the matter), are siblings. They are the biological children of the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks. During their lifetimes, the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks (I will, for ease of reference, in this judgment, refer to them

¹ Per Nicholas AJA in *Harpur No v Govindamall and Another* 1993 (4) SA 751 (A) at p 760A-B.

jointly as the late Izaaks couple) were married to each other in community and executed three versions of their joint last Will and testament.

[3] The one version was dated 27 November 2012 (a copy of this document is attached to the plaintiff's particulars of claim as annexure 'POC 1' and was admitted into evidence as exhibit A), an undated handwritten version (a copy of this document is attached to the plaintiff's particulars of claim as annexure 'POC 2' and was admitted into evidence as exhibit B), and a version dated 21 April 2014 (a copy of this document is attached to the plaintiff's particulars of claim as annexure 'POC 3' and was admitted into evidence as exhibit C). I will for ease of reference, in this judgment refer to the version of the Will dated 27 November 2012 as the '2012 Will', the undated handwritten version as 'the undated Will', and the version of the Will dated 21 April 2014 as the '2014 Will'.

[4] As I indicated earlier, the marriage between the late Izaaks couple was dissolved by the death of the late Saul Daniel Izaaks on 1 May 2017. His spouse did not survive him for a significant period as she also died on 21 June 2017. In her report in terms of s 96(2) of the Administration of Estates Act, 66 of 1965 and rule 65(7)(a) of this court's rules, the Master reported that four Wills were lodged with her office. The first Will that was lodged with her office was the handwritten and undated Will which she endorsed as 'accepted'. The second Will lodged was typed and dated 27 November 2012 which she endorsed as 'accepted and to be read together with the first undated Will'. The third Will lodged was typed and dated 21 April 2014 and she endorsed it as 'not accepted as no original was lodged'. The fourth and final Will lodged with her office was hand written and dated 8 January 2017 also endorsed as 'not accepted as no original was lodged'.

[5] Ms Anna Elizabeth Blom, one of two executors in the joint estate of the late Izaaks couple, was aggrieved by the Master's decision to accept both the '2012 Will' and the 'undated Will' as valid Wills. Ms Blom (I will for ease of reference, refer to her as the plaintiff) acting in her official capacity as one of the executors, accordingly approached this court on 10 February 2021 and caused summons to be issued out of this court against the Master of the High Court of Namibia and against nine defendants.

[6] In her particulars of claim the plaintiff sought the following relief:

(a) An order declaring that the copy of the joint last will and testament of the late Saul Daniel Izaaks and late Johanna Katriena Izaaks, which was executed on 21 April 2014, to constitute the joint last will and testament of the couple. This will have the consequence of revoking the joint last will and testament of the late Saul Daniel Izaaks and late Johanna Katriena Izaaks, dated 27 November 2012 and all other wills and codicils executed prior to 21 April 2014.

(b) An order directing the first defendant to accept the copy of the last page of the joint last will and testament of the late Saul Daniel Izaaks and late Johanna Katriena Izaaks, which was executed on 21 April 2014, to constitute the joint last will and testament of the couple.

(c) Costs of this action to be paid out of the estate of the couple and in the event that any of the defendants elect to defend this action, the person(s) defending the action shall be liable to pay the costs of the action.'

[7] Of the ten defendants who are cited in this matter, four defendants namely; the third, fourth, ninth, and tenth defendants filed notices to defend the plaintiff's claim (I will refer to these defendants as the 'opposing defendants'). The parties exchanged pleadings and after the close of pleadings the matter was set down for trial on the action floating roll for the week commencing 7 February 2022. The trial commenced as scheduled on 7 February 2022.

[8] The plaintiff called two witnesses and thereafter closed her case. After the plaintiff closed her case, the opposing defendants indicated that they intend to bring an application for absolution from the instance. I directed that the opposing defendants file their application for absolution from the instance, which they did and I set down the matter for 17 March 2022 to hear the application for absolution from the instance.

[9] At the end of hearing arguments in respect of the opposing defendants' application for absolution from the instance, the plaintiff's counsel indicated that he

wants to apply for an amendment of the plaintiff's particulars of claim. The plaintiff filed her application to amend her particulars of claim and after I heard the application, granted the plaintiff leave to amend her particulars of claim.² In her amended particulars of claim the plaintiff sought the following relief:

- '1 Reviewing and setting aside the first defendant's decision of 2 November 2017 where the first defendant accepted the 27 November 2012 will as being valid.
2. Declaring that the will of 27 November 2012 is invalid by virtue of it not complying with the formalities as set out in section 2(1)(a)(iv) of the Wills Act, Act 7 of 1953.
3. Declaring further that the undated handwritten will is the only last will and testament left by Saul Daniel Izaaks and late Johanna Katriena Izaaks.
4. Declaring further that the joint estate of late Saul Daniel Izaaks number 1306/2017 and late Johanna Katriena Izaaks be administered in terms of the undated handwritten will.
5. Costs of this action to be paid out of the estate of the couple and in the event that any of the defendants elect to defend this action, the person(s) defending the action shall be liable to pay the costs of the action.'

[10] Only the ninth and tenth defendants replied to the plaintiff's amended particulars of claim. In the reply to the plaintiff's amended particulars of claim, the ninth and tenth defendants took a point in *limine* that the third defendant who is a co-executor was not joined as a party to this proceeding but was simply joined as an interested heir, this point in *limine* was later abandoned. The ninth and tenth defendants, in addition to opposing the plaintiff's claim, also instituted a counterclaim where they sought an order:

'(a) Declaring the decision of the first defendant [the Master] in accepting the 27 November 2012 (POC1) joint last will and testament "with reference to the undated document (POC 2 [the undated will])" irregular and invalid, and setting same aside.

² *Blom v The Master of the High Court* (HC-MD-CIV-ACT-CON-2021/00428) [2022] NAHCMD NC 422 (19 August 2022).

(b) Directing the estate of the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks devolve in terms of Annexure "POC1" [the 2012 Will].

(c) Costs to be borne out of the estate in the event of non-opposition. In the event of opposition then such person opposing to be personally liable for the defendants' costs, including the costs of one instructing and one instructed counsel.'

Issues for determination

[11] In view of the pleadings, there are three main questions that this court is called upon to determine. The first is whether the Master was correct in law to accept that the 2012 Will is a valid Will. The second question is whether the Master was correct in law to accept that the undated Will as valid Will. The third question is whether the Master was correct in her directions that the '2012 Will' and the 'undated Will' must be read in conjunction with one another.

[12] Before I deal with the issues for determination, I will briefly set out the basis on which the parties' cases are premised.

The plaintiff's case

[13] The plaintiff's case is anchored on her allegations that the 2012 Will, which consists of four typed pages, was not signed in full by both the testator and the testatrix together with the witnesses on all the four pages. The plaintiff alleges that only the testatrix fully signed all the four pages of the Will, the testator and the two witnesses only initialed the first three pages and again signed the last page of the Will.

[14] The plaintiff accordingly contends that the 2012 Will does not comply with s 2(1)(a)(iv) of the Wills Act 7 of 1953 ('the Wills Act'). The plaintiff furthermore contends that the Master acted *ultra vires* s 2 (1)(a)(iv) of the Wills Act when she accepted the 2012 Will to be a valid joint Will of the late Izaaks couple.

[15] The opposing defendants impugn the Master's decision (to accept the undated Will as a valid Will) on a principal and alternative basis. They contend that the undated handwritten Will does not comply or alternatively substantial comply with s 2(1)(a) and (b) of the Wills Act. Secondly, they contend that the document purporting to constitute the undated Will did not revoke the 2012 Will.

[16] In support of their contentions the parties called witnesses to testify. I will in the next paragraphs briefly set out only those portions of the parties' evidence that is relevant to the present dispute.

The evidence on behalf of the plaintiff

[17] The plaintiff called three people to testify in support of her case; the first person to testify was the plaintiff herself. She testified that during their lifetime, the late Izaaks couple informed the sixth and seventh defendants that their 2012 Will disappeared from the common home. She continued and testified that she is aware that after informing the sixth and seventh defendants about the Will that disappeared from their common home, her late parents, during their lifetimes, drafted the unsigned handwritten Will and took it to Mr Levy Mbaeva for him to type it for them.

[18] She further testified that while the late couple was waiting for Mr Mbaeva to type up the handwritten version of the undated Will, the late couple signed the version of the undated Will. The plaintiff continued and testified that the Sunday following the funeral of their mother, the late Johanna Katriena Izaaks, both the original 'undated Will' and the version of the '2014 Will' were read to all ten children.

[19] The plaintiff further testified that at the time the undated Will was read to the children, it was complete and no pages were missing and that it was quite evident that the 'undated Will' was in fact dated the 21st of April 2014 and signed by both the testator and testatrix and two witnesses. After the reading of the undated Will and the 2014 Will, those two original versions of the Wills were placed in the possession of Arrie Izaaks, who is the third defendant in this matter and who is also a co-executor with the plaintiff. The plaintiff furthermore testified that the third defendant and his agent or both of them

lost the last page (which signifies the dated and place of signature) to the original undated Will and also lost the original copy of the 2014 Will.

[20] The plaintiff further testified that approximately three months after the passing of their mother, the ninth defendant (under circumstances which she terms 'suspicious'), produced the original 2012 Will.

[21] The second person to testify on behalf of the plaintiff was Ms Christina Wilhelmina Van Wyk. She, in her testimony, basically corroborated the plaintiff's testimony and specifically testified that her late parents, during their lifetime, informed her that their joint Will disappeared from their common home.

[22] The third person to testify on behalf of the plaintiff was Ms Martha Johanna April (Ms April). She testified that she lives in Oudtshoorn, Republic of South Africa, but she is the daughter of the late Izaaks couple and that she is the sister to the plaintiff and the eight defendants. She further testified that she arrived in Namibia from South Africa on 1 May 2017, about an hour after her father had passed on.

[23] Ms April further testified that on 2 May 2017, her brothers, Arrie Izaaks (the third defendant) and Cornelius Izaaks (the eighth defendant), and their late mother had to run some errands in Rehoboth in preparation of their late father's funeral. She testified that later that day, she and their late mother went back to the farm in the company of her brother, John Robert Izaaks (the ninth defendant), who also lives on the farm, but at his own house. On that same day she was the only person with their mother at the family house as the rest of her siblings were in Windhoek, while Cornelius Izaaks (the eighth defendant) had gone to South Africa to fetch his wife and children for them to attend the funeral of their late father.

[24] The witness continued and testified that the following day, 3 May 2017, she started cleaning her parents' house, specifically their mother's room and found no document in the form of a Will in the house. She and her mother started looking for the car keys because her mother wanted to take the handwritten Will of 21 April 2014 and the original typed version of the handwritten Will to the nearest police station, which is in Schlip for safe keeping. She testified that her mother felt and expressed

concern that the handwritten Will of 21 April 2014 and the original typed version thereof were not safe in the house.

[25] Ms April continued and testified that on the evening of 3 May 2017, her brother, John Robert Izaaks, asked her if she had seen their parents' Will and if she knew what was stipulated in the Will. She testified that at that moment she had not seen the Will and was not aware what was contained in the Will and she answered him accordingly. She continued and testified that he replied to her that he had heard that he and Jakobus Izaaks (the tenth defendant) were disinherited. She testified that she asked him where he had heard this, and he replied that he was told by the farmworkers who were looking after the goats on the farm at that time.

[26] Ms April furthermore testified that about one week after their father's funeral, everyone had left to their respective houses. She stayed at their childhood home with her mother. During that week she visited her brother, John Robert Izaaks who had asked her to take a picture of the handwritten Will dated 21 April 2014, which she did. She testified that at that point she was not aware of his motives when he asked her to take a picture of the handwritten Will dated 21 April 2014.

[27] Ms April further testified that during that week, when she remained with her mother on the farm, she and her brother, the ninth defendant, had numerous conversations. In one of the conversations, her brother and his wife had both expressed that their late father had told them to stop renovating and restoring the house on the farm property which they currently live in. She testified that at that point she was not aware of the inside story and did not know what to think of the situation. She continued and testified that her late mother also told her that they needed to get the handwritten Will dated 21 April 2014 and the typed version thereof, to safety as there was a previous Will which just disappeared from the house.

[28] Ms April further testified that on 23 May 2017, she, her late mother and the ninth defendant went to Rehoboth to run some errands. She continued and testified that while they were in Rehoboth, the ninth defendant asked her to print out the pictures she took of the handwritten Will dated 21 April 2014. She continued and testified that the ninth defendant took her to the place where they printed out the

copies and he paid for the copies that were printed and took it to his car. This was the complete copy of the handwritten Will of their late father dated 21 April 2014. She further stated that at that time the handwritten Will was not in her possession and that she only had the pictures of the Will.

[29] Ms April furthermore testified that after the ninth defendant had the hard copy of the complete handwritten Will dated 21 April 2014 in his hands, he went to his car and said that he will show 'THEM' with the document he had in his possession together with the pictures of the Will he got from her. His direct words in Afrikaans were 'EK SAL HULLE WYS'.

[30] During cross-examination, Ms April was asked whether she was present when the Will dated, 21 April 2014 was read. She, in reply, testified that she was present when the Will was read to all ten children of the late Izaaks couple. She further confirmed that there was a handwritten and typed Will and both documents bore the date of 21 April 2014 and they were both read once. She further confirmed that after the documents were read, the complete original copies of the handwritten and typed versions of the Will dated 21 April 2014 were handed over to the third defendant, Arrie Izaaks.

[31] Ms April was then asked when it was that she saw the handwritten Will for the first time and how she saw the handwritten Will. Her reply to these questions were that she, for the first time, saw the handwritten Will during the week of 12 May 2017 when she remained with her mother on the farm. She further testified that after her conversation with her brother, the ninth defendant, during which he informed her that he was disinherited, she asked her mother for the Will and her mother showed her both the handwritten and typed last Will dated 21 April 2014.

Evidence on behalf of the defendants

[32] The opposing defendants called three witnesses to testify in support of their defence and counterclaim. The first witness to testify on behalf of the opposing defendants was Mr Levy Mbaeva, who testified that he is a male teacher by

profession, presently residing with his wife (Jennifer Mbaeva) and children at Erf 95, Extension 1, Block G, Rehoboth, Republic of Namibia.

[33] Mr Mbaeva further testified that on Sunday 28 June 2015 at about 20:10 he typed a document titled 'Laaste Wil en Testament van Saul Daniel Izaaks ID 3504270200091 en Johanna Katriena Izaaks (Gebore Platt) ID 43050200119.' He continued and testified that on Monday 27 July 2015 at 14h49, he was requested to change the surnames of their children on the document that he typed on 28 June 2015. He further testified that both he and his wife signed the 28 June 2015 and 27 July 2015 documents. He continued and testified that on 31 May 2020, he gave a statement under oath to the police in respect of the documents that he typed for the late Izaaks couple. He stated that no names were scratched out of the handwritten document that was given to him to type and he also did not scratch out any names on the document that he typed.

[34] He testified that the late Izaaks couple visited his place of residence which at the time was in Schlip and requested him to type their last Will and testament. He testified that they had with them a handwritten document and requested that he type their last Will and testament on the basis of their handwritten document. He testified that he on his laptop personally typed the last Will and testament, using the handwritten document as a template, and printed that document out while the late Izaaks couple was still there in his house.

[35] He further testified that on 27 July 2015, he typed the handwritten document, printed it out and thereafter he and his wife signed it in the presence of the late Izaaks couple as witnesses on the printed document, but the late Izaaks couple did not sign the printed last Will and testament on that day in their residence, and they also did not sign the handwritten document on that day. He testified that that the late Izaaks couple also never came back after he and his wife had signed the typed version on 27 July 2015. He testified that, to the best of his recollection, neither he nor his wife signed the handwritten document as there was no need to do so. He further testified that he has never been to Attes, although he knows where it is and he was adamant that neither he nor his wife signed a last Will and testament of the late

Izaaks couple at Attes on 21 April 2014. He testified that the instruction to prepare the last Will and testament was only given in June 2015.

[36] In cross-examination, it was pointed out that the version of his sworn declaration of 31 May 2020 slightly differed from the version of his testimony in court. He agreed and he attributed the slight difference was only due to the fact that in the sworn declaration, he only testified to what he was requested to state by Mr Arrie Izaaks, the third defendant, while his statement under oath in court was based on the telephonic consultation between him and the lawyer. When asked about the two dates, which were not mentioned in his statement to the police, he explained that his wife is the one who remembered that the Izaaks couple actually came to their residence on two occasions. He was then asked whether he had discussed his testimony with his wife. His reply was that he did. During cross-examination, he further testified that when the Izaaks couple left their residence, they took with them the handwritten version of the last Will and testament dated 21 April 2014, and that neither he or his wife or the late Izaaks couple sign that document.

[37] On a question from court whether the signatures of the witnesses on the handwritten Will dated 21 April 2014 are those of him and his wife, he answered in the affirmative that it is indeed his and his wife's signature, but he could not clarify to court how the signatures appeared on the handwritten Will dated 21 April 2014, if the Izaaks couple took the unsigned document with them when they left on 27 July 2015 and had not to return again. The court also asked him whether when he typed the handwritten Will dated 21 April 2014 and when he signed the typed version of the handwritten Will, whether it stated, 'signed at Attes on 21 April 2014'. Mr Mbaeva could not answer the question.

[38] The second witness to testify on behalf of the opposing defendants was Ms Jennifer Mbaeva (Ms Jennifer) who testified that when the late Izaaks couple came to their house in Schlip, it was on Sunday the 28th day of June 2015. She testified that she was pregnant at the time, which is why she remembered the date. When the late Izaaks couple came to their house, they requested her husband to type a document, which was their last Will and testament and that this the document presented to her husband was handwritten.

[39] Ms Jennifer further testified that while the late Izaaks couple were seated in their house, her husband typed and printed the last Will and testament, using the handwritten document and thereafter, she and her husband signed the typed last Will and testament. She further testified that the late Izaaks couple never signed the typed document in their presence and left with the typed document signed by her and her husband without them (the late Izaaks couple) having signed it. She further testified that on 27 July 2015, the late Izaaks couple came back for the correction of the children's names and her husband corrected the names, printed the document and she and her husband were again requested to sign as witness, which they did. She also testified that when she signed as a witness there were no names deleted on the typed document and she does not recall having signed the handwritten document.

[40] She also testified that she has never been to Attes and has not signed any last Will and testament of the late Izaaks couple on a day other than on 27 July 2015 and has not witnessed the signatures of the late Izaaks couple on the last Will and testament.

[41] In cross-examination, Ms Jenifer was asked how she became involved in deposing to the witness statement and the statement, which she made to the police on 27 May 2021. Her reply was that the late Izaaks couple's son (during her testimony it became clear that she was referring to the third defendant, Arrie Izaaks) came to the Mbaeva couple's house in Schlip and asked that they depose to a statement under oath stating that the late Izaaks couple did not sign their last Will and testament in the presence of the Mbaeva couple. She was also asked how she and her husband's signatures got on the handwritten last Will and testament of the late Izaaks couple, to which she responded that she cannot recall.

[42] The third and last witness to testify on behalf of the opposing defendants was Ms Susanna Mouton. She testified that she is presently residing at Erf 2455, Matutura, Swakopmund, but during the year 2012, she and her late husband, who passed on during 2021, resided in Schlip. She further testified that a few days before 27 November 2012, the late Izaaks couple visited their house and requested her late

husband to prepare a last Will and testament for them. They were discussing in one part of the house and she was in a different part of the house at the time.

[43] She proceeded and testified that on 27 November 2012, the late Izaaks couple returned to the Mouton couple's house in Schlip. By that time, the document which is attached to her witness statement and marked Annexure 'A' (the 2012 Will) was already prepared and printed by her late husband. They all, she, her late husband, and the late Izaaks couple, sat at the table in their house. The late Izaaks couple read Annexure 'A' and thereafter signed each page. She testified that she personally witnessed late Izaaks couple placing their signatures on Annexure 'A'.

[44] In cross-examination, Ms Mouton conceded that it was only the late Johanna Katriena Izaaks' signature which appears on all the pages of the 2012 Will and that her, her late husband and the late Saul Daniel Izaaks' signatures appear as initials on the first three pages and as full signatures on the last page of the 2012 Will. She also did not explain why she, her late husband and the late Saul Daniel Izaaks only initialled the first three pages of the 2012 Will.

Discussion

[45] I indicated earlier that the question in this matter is whether the wills accepted by the Master as being valid comply with the formalities prescribed under the Wills Act. Counsel for the plaintiff argued that the primary source to be consulted on the validity of the Will is the Wills Act, which stipulates in mandatory terms what a valid Will must contain. In that respect, s 2 of the Wills Act provides that no will, executed on or after the first day of January 1954, shall be valid unless the Will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and 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. If the Will consists of more than one page, each page other than the page on which it ends, must also be so signed by the testator or by such other person and by such witnesses anywhere on the page.

[46] In the definition section, the Wills Act provides that 'sign' includes in the case of a testator the making of a mark but does not include the making of a mark in the case of a witness, and 'signature' has a corresponding meaning. Based on these provisions, counsel for the plaintiff argued that the 2012 Will does not comply with s 2(1)(a)(iv) of the Wills Act and is therefore invalid. The Master thus exceeded her authority when she accepted the 2012 Will as valid, argued counsel for the plaintiff.

[47] Counsel for the opposing defendants, on the other hand, argued that the alleged deficiencies in the signature of the 2012 Will do not, pursuant to s 2(1)(a)(iv) of the Wills Act, invalidate the Will. In support of that submission, counsel relied on this court's unreported judgment in *Mwoombola v The Master of the High Court*³, *Ex Parte Singh*⁴ and *Ex Parte Jackson NO: In Re Estate Miller*.⁵

[48] Counsel for the opposing defendants further argued that there are at least two principal bases upon which the opposing defendants' counterclaim must be upheld. He submitted that first; the plaintiff says the 21 April 2014 Will expressly revoke all previous Wills (Amended POC, para 14). He submitted that by sheer logic, this must include having revoked the undated handwritten Will and that should be the end of the matter. He argued that in the alternative, the undated handwritten Will was not signed in the presence of the two witnesses by the late Izaaks couple. The evidence of the two witnesses on that score stands manifestly uncontroverted.

[49] In *Harpur No v Govindamall and Another*⁶ Nicholas AJA who delivered the majority judgment, with reference to an article by Professor Beinart⁷ reasoned that the Wills Act of 1953 was the culmination of a long process of development. The Wills Act, according to its long title, consolidated the laws regarding the execution of Wills in South Africa and was by s 8 made applicable to Namibia. The Act abolished the diverse prescripts in respect of formalities for the execution and amendment of Wills that theretofore were in force in South Africa's provinces, and replaced them with a

³ *Mwoombola v The Master of the High Court* (HC-MD-CIV-MOT-GEN-2017/00299) [2018] NAHCMD 103 (20 April 2018);

⁴ *Ex parte Singh* 1981 (1) SA 793 (W).

⁵ *Ex Parte Jackson NO: In Re Estate Miller* 1991 (2) SA 586 (W).

⁶ *Harpur No v Govindamall and Another* 1993 (4) SA 751 (A).

⁷ B Beinart: 'Testamentary form and capacity and the Wills Act' (1953) 70 SALJ 159.

set of uniform prescripts that apply throughout the Republic of South Africa and Namibia.

[50] Academic writers have argued that the Wills Act consolidative and systematic approach to testamentary formalities, posed a number of interpretation and application challenges about the execution and amendment of Wills. Legislative amendments sought to clarify some of the Act's words and phrases, but as this case demonstrates the interpretation and application problems persist. Unsurprisingly, legal scholars and practitioners and this court have called for reforms⁸.

[51] In *Campbell v Master of the High Court*⁹ Masuku J reasoned that in order to resolve the question of whether or not a Will that does not strictly comply with s 2(1)(a)(iv) may still be declared valid, it is important to answer that question from the point of view of the mischief the legislature had in mind when it legislated the formal requirements. The learned judge continued and reasoned that there is no contestation that prime in the legislature's mind, was the prevention of fraud during and after execution of the Will or the codicil thereto; to ensure that testamentary dispositions are made freely and voluntarily; to secure the validity of testator's final dispositions and to prevent uncertainty and speculation regarding the intentions of the testator.

[52] In *Harpur No v Govindamall and Another*¹⁰ Nicholas AJA held that:

'The requirement for signatures of witnesses to a will provides a main safeguard against the perpetration of frauds, uncertainty and speculation. Disputes regarding the validity of a will can arise only after the death of a testator, which may occur many years after it was executed. Ordinarily the only persons other than the testator who are likely to have knowledge of the circumstances of the execution of a will are the witnesses who, being present, personally saw or perceived it, and can testify in that regard. That purpose fails when the witnesses cannot be identified. It may be impossible to identify a witness who has signed by initials only.'

⁸ *Mwoombola v The Master of the High Court* (supra), and *Campbell v Master of the High Court* (HC-MD-CIV-MOT-GEN-2020/00289 [2021] NAHCMD 25 (04 February 2021).

⁹ *Ibid* para 40.

¹⁰ *Supra* footnote 6 at p 760 A-C..

[53] In *Mellvill and Another NNO v The Master, and Others*¹¹ the court said:

‘The purpose of requiring a signature to a will is to identify, in the case of the testator, the document as being the will of the testator himself, and in the case of the witnesses, to identify the persons who were present at the execution of the document in compliance with the statutory formalities. The Act is intended to eliminate as far as possible, the perpetration of fraud by, for example, the substitution of a page from an earlier will for that of a later will or the addition to a will of provisions not made by the testator. Cf *Ex parte Suknanan and Another* 1959 (2) SA 189 (D) at 191A - B. It is easier for initials to be forged than it is for a signature. Proof that a will was in fact signed by the testator and the witnesses is also facilitated when the document contains signatures in the normal sense of that term, as opposed to mere initials, as signatures would normally be more readily identifiable by comparison with other signatures of the testator or the witnesses, than initials would be. Having regard to the manifest purpose of the Act, there is accordingly no reason to construe the word "signature" contrary to its popular and normal meaning so as to incorporate unnaturally within its ambit initials which do not normally constitute a signature.’

[54] Taking into consideration the purposes why the legislature introduced the requirement that, testators, testatrixes and witnesses must sign the documents purporting to be a Will, the courts in *Dempers and Others v The Master and Others (1)*¹² *Mellvill and Another NNO v The Master and Others*¹³ and *Harpur No v Govindamall and Another*¹⁴ found that initials do not amount to a signature and that where the witnesses simply initialled the pages of a Will, such a Will is invalid for want of complying with the formalities prescribed under s 2(1)(a)(iv) of the Wills Act.

[55] I indicated earlier that Mr Diedericks, counsel for the opposing defendants, relying on my decision in the *Mwoombola* matter and the decisions in the *Ex parte Singh* and *Ex parte Jackson NO: In Re Estate Miller* matters argued that non-compliance with the formalities prescribed by s 2 of the Wills Act would no longer invalidate a Will. My reading of both the *Ex parte Singh* and *Ex parte Jackson NO: In*

¹¹ *Mellvill and Another NNO v The Master, and Others* 1984 (3) SA 387 (C).

¹² *Dempers and Others v The Master and Others* (1)9.

¹³ *Mellvill and Another NNO v The Master, and Others* 1984 (3) SA 387 (C).

¹⁴ *Harpur No v Govindamall and Another* (730/91) [1993] ZASCA 110; 1993 (4) SA 751 (AD); [1993] 2 All SA 582 (A) (6 September 1993).

*Re Estate Miller*¹⁵ matters are that the court in those two matters held that one must consider the intention of the person or party who made the initials. If the person or party who made the initials' intention was to make the initials his signature then the formalities required by s 2 of the Wills Act are complied with and the Will is valid. Those two cases are therefore not authority for the proposition advanced by Mr Diedericks that strict compliance with the requirements of s 2 of the Wills Act is no longer required.

[56] In any event, the decisions in the aforesaid cases are contradicted by the Supreme Court of Appeal's decision of *Harpur No v Govindamall and Another*¹⁶ where the Supreme Court of Appeal found that initials do not amount to a signature. The court went further and held that if a witness initialled a Will as opposed to signing it, the witness did not comply with the formalities required by the Wills Act and the Will is thus invalid.

[57] In the present matter there is no dispute that the first three pages of the 2012 Will were not signed by the testator and the two witnesses who allegedly witnessed the signing of that Will only initialled it. It is only the testatrix who signed all the four pages of the 2012 Will. What can therefore not be disputed is the fact that the 2012 Will does not comply with the requirements of the Wills Act. Whether such non-compliance will lead to nullity, is a different question.

[58] I now turn to Mr Diedericks' reliance on the *Mwoombola* decision. My reading of the decision in the *Mwoombola* matter is that the decision is not authority for the proposition that every non-compliance with the requirements of the formalities required under the Wills Act may, without more, be excused. The *Mwoombola*¹⁷ decision makes it clear that 'the legal position in Namibia appears to be that the formalities set out in s 2(1)(a) of the Wills Act must be strictly complied with for a Will to be considered a valid Will.' The court further stated that:

¹⁵ *Supra*.

¹⁶ *Supra*.

¹⁷ *Supra* para 22.

'... the question [namely whether a will that does not comply with s 2(1)(a) of the Wills Act, 1953 is valid or not] that confronts me has arisen at a different historical period in our development. The issue has arisen at a period where Namibia as a Nation became a constitutional state and where constitutional supremacy has replaced parliamentary supremacy or sovereignty. It is therefore no longer appropriate for courts to simply defer to what parliament or the legislature says, but to go further and ask the question whether the statutory provisions, in question, promote the spirit of the Constitution and whether the strict application of the statutory provision will or will not amount to the violation or negation of a fundamental human right.'

[59] The facts and circumstances in the present matter markedly differ from the facts and the circumstances that existed in the *Mwoombola* matter. In the *Mwoombola* matter, the testatrix prepared a testamentary document on 2 February 2017 and she died the following day, 3 February 2017. The document was lodged with the Master during March 2017. No other document purporting to be the last Will and testament of the testatrix was presented to the Master. The witnesses who were present during the execution of the document were identified and testified as to the fact that the document was executed in their presence by the testatrix. On those facts, the court concluded that the mischief, which the legislator aimed at addressing, was eliminated. The court accordingly found that in those circumstances the constitutional right of the testator must prevail over the formalities prescribed by the legislature.

[60] In the present matter the facts are vastly different. From the four people who were alleged to have been present when the testamentary document that was executed in November 2012 only one, Ms Mouton, was traced and testified. This 2012 Will was, on the undisputed evidence placed before court, lodged with the Master more than a year after the death of the last dying testators, and certainly the circumstances of its production are of so remarkable nature as to throw grave doubt upon its authenticity. Allegations and accusations of chicanery, fraud and manipulation are rife in this matter. The Master's report indicated that in addition to the 2012 Will, three other Wills were lodged with her office that being; one purportedly executed during 2014, one during 2017 and one on a date unknown to the Master.

[61] The allegations of chicanery and fraud were levelled against two of the opposing defendants namely Mr Arrie Izaaks, the third defendant, and Mr John Robert Izaaks, the ninth defendant. These two defendants participated in these proceedings by opposing the plaintiff's claim and filling witness statements and were present in court when the testimony on behalf of the plaintiff was presented. However, they elected not to testify and traverse or deal with the allegations against them.

[62] In *O'Linn v Minister of Agriculture, Water and Forestry and Others*,¹⁸ this court held that when a party to litigation elects not to answer the allegations made by its opponent, it follows that the facts alleged by the opponent were not placed in dispute and must be accepted. I thus accept that Mr Arrie Izaaks and John Roberts Izaaks attempted to manipulate and temper with the testamentary documents to suit them. In these circumstances, strict compliance with the formalities prescribed by the Wills Act is mandatory otherwise, the constitutional right of the testator and testatrix to dispose of their property as they please in death as in life will be interfered with.

[63] Having found that the circumstances of this case demand that the formalities prescribed by the Wills Act must be strictly complied with and that the 2012 Will does not comply with the formalities prescribed by the Wills Act, I do not deem it necessary to deal with the question of whether or not 'signature' includes initials. I thus find that the 2012 Will is invalid for want of compliance with s 2(1)(a)(iv) of the Wills Act and that the Master exceeded her authority when she declared the 2012 Will valid. The Master's decision is accordingly reviewed and set aside.

[64] Having found that the 2012 Will is invalid, the next question that needs to be answered is whether the undated handwritten Will is also invalid. What is now common cause between the parties is the fact that the late Izaaks couple, in their own handwriting, drafted the undated Will and it was completed, and signed by the late Izaaks couple and witnessed by the Mbaeva couple. It is also not in dispute that the page evidencing the date and place of signature was either lost or destroyed by the third defendant (for reasons only known to him).

¹⁸ *O'Linn v Minister of Agriculture, Water and Forestry and Others* 2008 (2) NR 792 (HC).

[65] Given that a Will, which is regular and complete on the face of it, is presumed to be valid until its invalidity has been established,¹⁹ the *onus* is on the person alleging invalidity to prove such allegation.²⁰ The standard of proof is the same as that which applies in all civil cases, proof on a balance of probabilities.

[66] The *onus*, in this case, was on the opposing defendants to prove the invalidity of the undated handwritten Will. Before I consider the question of whether or not the opposing defendants discharged the *onus* resting on them, I pause here to comment on the opposing defendants counterclaim. The relevant part of the counterclaim reads as follows:

‘4. The first defendant [the Master], when acting in the manner evidenced by Annexure "P005" [the Master's Report in terms of s 96 and rule 65 to Court] on or about 22 August 2017 did so irregularly to the extent that —

4.1 Whilst the first defendant correctly registered and accepted POC1 [the 2012 Will] as the valid joint last will and testament of the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks, she irregularly,

4.2 accepted the undated document (Annexure "POC2") [the undated Will] as constituting a valid last will and testament to be read in conjunction with Annexure "POC1"[the 2012 Will], in that:

4.3 Annexure POC2 does not evidence compliance, alternatively substantial compliance with the provisions of section 2(1)(a) and (b) of the Wills Act 7 of 1953 for the purposes of a valid will with valid alterations I deletions, and in any event did not revoke POC1.’

[67] Rule 45 (5) of this court's rules provides that:

‘(5) Every pleading must be divided into paragraphs, including sub-paragraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or

¹⁹ See s 8 of the Administration of Estates Act 66 of 1965.

²⁰ See *Kunzs v Swart and Others* 1924 AD 618.

answer to any pleading, with sufficient particularity to enable the opposite party to reply and in particular set out –

(a) the nature of the claim, including the cause of action; or

(b) the nature of the defence; and

(c) such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet. (Underlined and italicised for emphasis).

[68] From the onset, it is quite clear that the opposing defendants counterclaim is so vague that it amounts to an embarrassment. I was actually surprised that the plaintiff did not except to the counterclaim. In argument, it became clear that the opposing defendants rely on the Mbaeva couple's testimony to the effect that the late Izaaks couple did not sign the document purporting to be their last Will and testament in their (Mbaeva couple) presence.

[69] I now return to consider whether the opposing defendants discharged the *onus* resting on them. It must be remembered that both Mr and Ms Mbaeva testified that the late Izaaks couple came to their house in Schlip on 28 June 2015, with a handwritten testamentary document and requested Mr Mbaeva to type it for them. After Mr Mbaeva typed the document, he and his wife signed the document but the late Izaaks couple did not sign the document. They denied having signed the handwritten testamentary document, which is now the undated Will. When the court asked both Mr and Ms Mbaeva whether the witnesses' signatures on the undated Will is theirs, they both readily admitted that it is their signatures but they cannot explain how their signatures appear on that document. Ms Mbaeva, however, stated that she could not remember having signed the document because it happened such a long time ago and stated that there is a possibility that she signed the document.

[70] The Mbaeva couple's evidence to account for their signatures on the undated Will and their signatures on the 2104 Will is highly unsatisfactory and unreliable. What is very strange to this court is the testimony relating to the date on which the 2014 Will was signed. The Mbaeva couple stated that they signed the 2014 Will

twice, first on the 28 June 2015 and then again on the 27 July 2015, however, Mr Mbaeva could not proffer any explanation as to why he would sign (as he alleges, at Schlip on 27 July 2015) a document that indicates that it was signed at Attes on 21 April 2014.

[71] Further strange are the circumstances which led to the Mbaeva couple to depose to declarations to the police on 31 May 2020 and 27 May 2021 respectively and to the witness statements in this matter. Ms Mbaeva's testimony was that Mr Arrie Izaaks approached them and asked them to depose to statements that his parents did not sign the 2014 Will and the undated handwritten Will in their presence. This indicates that Mr Arrie suggested the type of testimony the Mbaeva couple must give. Mr Arrie, however, elected not to testify and to clarify some of these strange testimonies. Another disturbing issue is the concession by Mr Mbaeva that he and his wife discussed the nature of the testimony that they had to give and that him and his wife's testimony was according with 'the needs' of Mr Arrie Izaaks and his lawyers.

[72] In the circumstance, I find that the evidence of both Mr and Ms Mbaeva as it relates to the signing of the undated Will is either mistaken or false and I therefore reject it. As regards the contention that the handwritten undated Will fails to revoke the 2012 Will, I must confess that I do not understand that submission because the handwritten 'undated' Will clearly states that it revokes all prior Wills, codicil and testamentary documents by the testator and testatrix. However, having found that the 2012 Will is invalid, there is nothing to revoke. It follows that the opposing defendants have failed to discharge the *onus* resting on them. The Master's finding that the undated Will is valid is confirmed, but her direction that the Will be read in conjunction with the 2012 Will is set aside.

Costs

[73] What remains is the question of costs. At the hearing of this matter both Mr. Jones and Mr Diedericks asked that all the costs be paid out of the testator's estate. The basic rule is that, except in certain instances where legislation otherwise

provides, all awards of costs are in the discretion of the court.²¹ In the matter of *Cuming v Cuming*²² the court held that in a suit relating to the interpretation of a Will, costs are ordered to come out of the estate except where there are special considerations.

[74] In the present matter, allegations of chicanery and fraud have been levelled against the third and ninth defendants, none of which have denied or testified to dispel or contradict these allegations against them. I therefore find that special considerations exists namely, the chicanery and fraud allegations warranting the court to depart from the general rule that the costs of proceedings of this character, when incurred because of obscurities in the Will must be paid out of the testator's estate. I therefore order that the opposing defendants must pay the cost of the plaintiff's claim and the cost of the failure of the counterclaim.

[75] I accordingly make the following order:

1. It is declared that the Will dated 27 November 2012 is invalid by virtue of it not complying with the formalities as set out in s 2(1)(a)(iv) of the Wills Act 7 of 1953.
2. The Master of the High Court of Namibia's decision of 2 November 2017 to accept the 27 November 2012 Will as being valid is reviewed and set aside.
3. It is further declared that the undated handwritten Will is the only last will and testament left by the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks.
4. The third, fourth, ninth and tenth defendants' counterclaim is dismissed.
5. It is declared that the joint estate of the late Saul Daniel Izaaks and the late Johanna Katriena Izaaks must be administered in terms of the undated handwritten Will.

²¹ *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC); *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

²² *Cuming v Cuming* 1945 AD 201 at 216.

6. The third, fourth, ninth and tenth defendants' must pay the costs of the action and the dismissed counterclaim. The costs to include the costs of one instructing and one instructed legal practitioner.
7. The matter is regarded as finalised and is removed from the roll.

UEITELE S F I
Judge

APPEARANCES

PLAINTIFF:

J P Jones

Instructed by Fisher Quambry & Pfeifer,
Windhoek1st, 2nd, 5th, 6th, 7th, and 8th DEFENDANTS:

No appearance

3rd, 4th, 9th and 10th DEFENDANTS:

J Diedericks

Instructed by FB Law Chambers,
Windhoek