REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 226/2012

In the matter between:

JOHANNES FRANCOIS MARITZ **APPLICANT**

and

MASTER OF THE HIGH COURT (WINDHOEK, NAMIBIA) **RESPONDENT**

Neutral citation: *Maritz v Master of the High Court (Windhoek, Namibia (A 226/2012) [2012] NAHCMD 6 (16 January 2013)*

Coram: Smuts, J
Heard: 23 November 2012
Delivered: 16 January 2013

Flynote: Application to compel the Master to accept a will – non joinder of intestate heirs raised mero motu by court with the applicant – further affidavits filed – despite the need to identify the intestate heirs, the application as amplified failed to do so – application refused by reason of non joinder.

ORDER

The application is refused

JUDGMENT

SMUTS, J

[1] This is an application to compel the Master to accept the will signed by the late Frans Albertus Maritz (the deceased) on 21 March 2010 as his last will alternatively to accept the first five pages of the will as his will.

[2] The Master had not accepted the will on grounds that "the spacing between the body of the will and the signature of the testator was not as close as required by law".

[3] The applicant, a son of the deceased nominated as executor and as a beneficiary in the will, then brought this application, citing the master as respondent. The master does not oppose the application. In view of authority in South Africa[1] on the issue raised by the application, I requested that argument be addressed on the issues raised by the application. The applicant's counsel, Mr Van der Berg, presented oral argument, preceded by thorough written argument at the hearing and I reserved judgment.

[4] After doing so, I noted that the intestate heirs were not identified in the application and had not been cited, joined or served. They would plainly have a direct and substantial interest in the relief sought. I accordingly caused a letter to be sent to the applicant's legal practitioners on 26 November 2012 in the

[1] Kidwell v The Master 1983 (1) SA 509 (E)

following terms:

"Following the reservation of judgment, the Honourable Judge has requested me to address the following issue:

'Insofar as the Master has not accepted the will, it would appear that those who would be intestate heirs would have a direct and substantial interest in the relief sought. They are not referred to in the application. Nor was there service of it upon them. The applicant is invited to make submissions on the non joinder of the intestate heirs or to address the issue by way of a supplementary affidavit identifying them and securing affidavits from them in support of the application and waiving formal service of it upon them. In the absence of the receipt of such submissions or affidavits or applications for joinder by 12 December 2012, the application will be dealt with on the papers currently filed of record."

[5] Following this letter, seven further affidavits were filed on 12 December 2012. They were deposed to by another son of the deceased (other than the applicant), a daughter of the deceased, four grandchildren of the deceased and the guardian of two further grandchildren of the deceased. All of the deponents expressed their support for the application and waived formal service upon them. But despite the terms of the letter pointing out the need to identify the intestate heirs, in none of the affidavits is it stated who the intestate heirs are. Nor is it even stated if the deponents are in fact interstate heirs. As the deceased was referred to in the will as a widower, his children would then be intestate heirs. But this status, set out in the will, was some time before he died. There are three children referred to in the will. But the will does not state how many children the deceased had or that the three children referred to were his only children. This despite the statement in clause 5.1.5 of the will in which he made the following bequests:

"5.1 I bequeath –

5.1.1 my shares in Maritz Boerdery (Proprietary) Limited to my children Johannes Francois Maritz and Ferans Albertus Maritz (JNR) in such proportions that the shares in the said company shall henceforth be held in equal shares of one half each by the aforementioned heirs;

5.1.2 all my motor vehicles to Maritz Boerdery (Proprietary) Limited;

5.1.3 N$800 00 (eight hundred thousand Namibia Dollars) to my

daughter, Magdelena Nel;

5.1.4 all my furniture and the contents of my house to my children Magdelena Nel and Frans Albertus Maritz (JNR)

5.1.5 the entire residue of my estate to my children Johannes Francois Maritz, Magdelena Nel, and Frans Albertus Maritz (JNR) in equal in equal shares, share and share alike."

[6] The fact that 4 grandchildren and the guardian of two others deposed to affidavits in the context of the letter addressed to the applicant's legal practitioner may indicate that at least one child may have predeceased the deceased. Although the deceased is referred to as a widower in the will, it was signed on 21 March 2010, more than 2 years before the date of death on 6 June 2012. There is no statement in any of the numerous affidavits filed as to who the intestate heirs are. I find this all inexplicable in the context of the letter and the issue of joinder raised by it. A court cannot engage in conjecture on the issue, particularly given the fact that the letter expressly states that the intestate heirs were not referred to in the application and expressly referred to the need to identify them.

[7] On that fundamental issue as to who the intestate heirs are, the question of their non joinder remains. This question can (and should) be raised by a court *mero motu* [2]when parties directly affected by litigation are not cited or served. The applicant was explicitly alerted to this, yet failed to properly address this fundamental issue. The intestate heirs in my view have a direct and substantial interest in the relief sought in this application as I have said. They should have been joined or at least waived that right and/or supported the application. In the circumstances, it is not necessary to deal with the interesting legal question raised by this application. Nor do I need to consider whether a curator *ad litem* would need to be appointed in respect of the minor children as it is not clear to me whether they are intestate heirs or not.

[8] In the circumstances, the application is refused. In making this order, I

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[2] Amalgamated Engineering Union v Minster of Labour 1949 (3) SA 637 (A)

wish to make it clear that the merits have not been addressed.

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DF SMUTS

Judge