BASIL MATANGA
versus
FIROMINA DENHURE
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 11 September 2008

**Opposed Application**

Mr *Hungwe*, for the applicant
Mr *Nyaupfuke*, for the 1st respondent

GUVAVA J: The applicant and the first respondent are brother and sister. The deceased was their sister. She died on 24 July 2004 at the age of 61. The deceased was single and did not have any children of her own. Following her death a will was duly filed with the master on 24 September 2004 and was duly accepted as the will of the deceased. The first respondent was appointed executor in accordance with the will. In terms of the will the first respondent was appointed the sole beneficiary of the deceased estate. The applicant has filed this application seeking an order for the setting aside of the will. He submits in his founding affidavit that at the time the deceased made the will she was mentally incapable of doing so. He further submits that the will is a forgery instigated by the first respondent and her daughter in order to divest him of his inheritance. He further challenges the use by the deceased of the name Egnias Denhere in the will when her real name was Fungai Agnes Denhere. He also states that the deceased and the first respondent were not in good books and as such she would not have left her property to her. It is on this basis that he seeks an order that the will be declared null and void.

The first respondent opposed the application. She states in her opposing affidavit that at the time that the will was drafted she was at her rural home in Gutu. The deceased came to visit her and it was at that meeting that she advised her that in the event of her death she should approach the Masters office. She denied that the deceased did not have the mental capacity to make the will as she was hospitalized because she had suffered a broken leg and this did not affect her mental capacity. She also stated that although the deceased's full names

were Fungai Agnes Denhere she was commonly called by everyone as Egnias and she signed her name in that way. She produced as proof the deceased's Barclays Bank card which shows the deceased's signature as Egnias. Emily Matanga the first respondent's daughter also filed a supporting affidavit. She states that she was asked by the deceased during her lifetime to obtain a form for her so that she could write her will. She then purchased a form from Kingstones Bookshop. She says after deceased had filled it out she asked her to have it typed out. Thereafter the deceased signed the typed will in her presence and that of one, Jacob Chininga.

Jacob Chininga also filed an affidavit in support of the first respondent. He states in his affidavit that he is a tenant of the deceased and she considered him like a son. Sometime in 2003 the deceased asked him to ascertain on her behalf how she could make a will. Following some advise he purchased an affidavit form which she subsequently completed. The affidavit she wrote was produced by the applicant as an annexure to his papers. She subsequently informed him that she had ascertained that the form he bought was not correct and asked him to witness her will.

The second respondent filed a report in terms of Rule 248 of the High Court Rules, as amended. In the report the Master confirms that he accepted the will of the late Egnas Denhere as a valid will as it complied with the Wills Act.

In my view the issues for determination in this matter are as follows:

1. Whether the deceased, at the time of executing the will had the mental capacity to do so.
2. Whether the will was forged

Section 4 of the Wills Act [*Cap 6:06*] provides that any person over the age of 16 years may make a will provided that at the time of making the will he is mentally capable of appreciating the nature and effect of his act. It is a general principle of our law that there is a presumption that a will which is complete and regular on the face of it is a valid will. (See *Thaker & Ors v Naran & Ors* 1993 (4) SA 665) It is also trite that the onus of proving the capacity of a testator rests on the person who alleges it. It is common cause that the deceased executed her will on 6 January 2004. Although the will was not part of the record I caused the Masters office to provide me with a copy which had been accepted by the Master. At the hearing both parties confirmed the document and indicated that they had no objections to my having caused it to be part of the record. It is also common cause that at the time that the will

was executed the deceased was admitted at Harare Central Hospital. The evidence by the respondent which is confirmed by the applicant is to the effect that the deceased was hospitalized because she had suffered a broken leg. There is no evidence to show that other than the broken leg she suffered from any other debilitating illness. The applicant did not produce any evidence from the doctor who was attending to her which may show that her mental state was affected during that period. There was no evidence from the applicant himself that the deceased at the time suffered from any mental incapacity. The applicant produced a letter from the Chief Executive Officer of the Hospital stating that it is hospital policy that they do not allow persons to draft wills whist in hospital because they will be ill. In my view the letter does not take the applicants case any further. The Chief Executive Officer did not attend to the deceased whilst she was in hospital. He does not even state the nature of her illness. In the case of *Ngwenya v Ngwenya & Ors* 2000 (1) ZLR 117 the court stressed the need for medical evidence in cases where a will is being challenged on the basis of mental incapacity. This evidence is imperative as it shows the state of mind of the deceased, based on a report from an expert, at the time when the will was executed. In cases of this nature it is necessary for the applicant to place evidence before the court to show that the deceased was not mentally sound when they executed the will. Medical evidence from the attending practitioner as well as evidence from close relatives who were with the deceased at the time she was ill would no doubt assist the court in making a finding on the deceased's state of mind at the time of making the will.

The applicant further submitted that in considering the deceased state of mind, the court should take into account that the cause of death as stated on the death certificate which was cerebral vascular accident. However this averment is not supported by the evidence. Firstly the deceased died on 27 July 2004 which was 6 months after making the will. Secondly the death certificate certifies that the duration of this illness was two months i.e. four months after executing the will. Even if the court were to accept, with no medical evidence proferred that the cause of death related to a mental illness, at the time she executed her will she was not suffering from that illness at all.

In my view therefore the applicant has failed to establish that at the time that the deceased executed the will she was mentally incapable of appreciating the nature of her actions.

The applicant has also alleged that the will was not made by the deceased and that it is a forged document. It is not in dispute that the deceased used the name Eginas on a daily bases

and that she was known by that name. It is telling that even in his founding affidavit the applicant states "I am the blood brother of the late Eginas Denhere as well as first respondent." These words show that the parties are not confused about identity of the person they are referring to and to that extent it is my view that the use of the name Eginas would not cause any confusion in this matter. The issue of the forged signature is in my view not supported by any evidence. The applicant has not provided any evidence to show that the signature on the will was not that of the deceased. In fact he has left it to the first respondent to provide proof of the similarity in the signatures by providing the deceased's bank card. Ideally the court should have been provided with expert evidence to show that it was not the deceased's signature. A cursory examination of the signature on the will in my view shows that it is similar to the signature on the bank card. In the absence of any other evidence I can make no finding as to whether or not the will was indeed forged as alleged by the applicant.

In the result I find that the will of the late Fungai Agnes Denhere (also known as Eginas Denhere) dated 6 January 2004 was properly accepted by the second respondent in terms of the Wills Act and the application is hereby dismissed with costs.

*Hungwe & Partners*, applicant's legal practitioners
*Messers Phiri & Associates*, 1st respondent's legal practitioners