

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2017/00299

In the matter between:

GINA NELAO WETUTALA MWOOMBOLA
LA-TOYA LUCILLE TWEUFI MWOOMBOLA

FIRST APPLICANT
SECOND APPLICANT

and

THE MASTER OF THE HIGH COURT

RESPONDENT

Neutral citation: *Mwoombola vs The Master of the High Court* (HC-MD-CIV-MOT-GEN-2017/00299) [2018] NAHCMD 103 (20 April 2018)

Coram: UEITELE J

Heard: 19 December 2017

Delivered: 20 April 2018

Flynote: *Will* - Execution – executrix and witnesses initialing the first three pages of a four paged will and only signing the fourth page - Requirements of sec. 2 (1) (a) (iii) and (iv) of the Wills Act 7 of 1953.

Constitutional Law – Article 16 of the Namibian Constitution conferring freedom of testation on all persons – Invalidating Will for non-compliance with sec. 2 (1) (a) (iii) and (iv) of the Wills Act 7 of 1953, may in certain circumstances amount to a violation of the right to freedom of testation.

Summary: The applicants in this matter approached this court for an order in the following terms: (a) That the testamentary document executed on 02 February 2017 by the late Linea Peneyambeko Nuugwedha who died on 03 February 2017, a copy of which is appended to the Affidavit of Gina Nelao Wetutala Mwoombola as Annexure A, is declared to have been intended by the deceased to be her last Will; (b) That the respondent is directed to accept the aforementioned testamentary document as a Will for purposes of the Administration of Estates Act 66 of 1965; (c) That the administrative oversight by not signing on pages 1-3 of the testamentary document by the testator and two witnesses as contemplated by Section 2 (1)(a)(iv) of the Wills Act 7 of 1953 be condoned; (d) That the party who is appointed as the executor by the testamentary document shall so remain.

The respondent opposed the application launched by the applicants, arguing that the late Nuugwedha's document purporting to be her last will and testament in terms of the Wills Act, 1953 was not a valid will, as that document was not in compliance with the formalities required for the execution of a valid will.

Held that it is no longer appropriate for courts to simply defer to what parliament or the legislature says, but to 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 amount to a violation of a fundamental human right.

Held that the court is of the view that the first principle of the law of wills is freedom of testation. Although the legislature limits the power of testation in various ways, within the province that remains to the testamentary power, virtually the entire law of wills derives from the premise that a person has the fundamental right to dispose of his or her property as he or she pleases in death as in life.

Held further that the rules governing testamentary capacity and the construction of wills must, therefore, not result in interfering with or depriving a testator or testatrix his or her freedom of testation.

Held that taking into consideration that; the right to dispose of her property as she pleases in death as in life is a fundamental right, the late Nuugwedha substantially complied with the formalities prescribed by s 2 (1) (a)(iii) and (iv) of the Wills Act, and

the purposes, of the signature to a will and the fact that in this case the dangers which the Wills Act aims to prevent or eliminate are not present in this case, the court is of the view that invalidating the will amounts to the violation of the fundamental right of the late Nuugwedha to freedom of testation.

Held finally that the testamentary document executed on 02 February 2017 by the late Linea Peneyambeko Nuugwedha who died on 03 February 2017, a copy of which is attached to the affidavit of Gina Nelao Wetutala Mwoombola as Annexure A, is a valid Will and the court directs the Master to accept it as such.

ORDER

1 The testamentary document executed on 02 February 2017 by the late Linea Peneyambeko Nuugwedha who died on 03 February 2017, a copy of which is appended to the affidavit of Gina Nelao Wetutala Mwoombola as Annexure A, is declared to be her valid Will.

2 The Master of the High Court of Namibia is directed to accept and register the testamentary document referred to in paragraph 1 of this order as the valid Will and last Testament of the late Linea Peneyambeko Nuugwedha for purposes of the Administration of Estates Act 66 of 1965.

3 The Chief Registrar must provide a copy of this judgment for the personal attention of the Chairperson of Law Reform and Development Commission for her to investigate the issues raised in this judgment.

4 Each party must pay its own costs.

JUDGMENT

UEITELE J:

Introduction

[1] Lord Campbell LC is reported to have observed, in the matter of *Hindmarsh v Charlton*¹, that:

'My Lords, these are very distressing cases for Judges to determine. I may honestly say that we have a strong inclination in our minds to support the validity of the will in dispute, which the parties *bona fide* made, as they believed, according to law, and where there is not the smallest suspicion in the circumstances of the case. But we must obey the directions of the Legislature, and we are not at liberty to introduce nice distinctions which may bring about great uncertainty and confusion'.

[2] This matter is one such distressing case where, on the facts before me, I can honestly say that I have a strong inclination in my mind to support the validity of the will in dispute, which the late Linea Peneyambeko Kandalindishiwo Nuugwedha *bona fide* made, as she believed, according to law, and there is not the smallest suspicion in the circumstances of this case that any fraud is involved. Yet the Master of the High Court, and I must add, rightly so in the current state of the law, rejected a document that purports to be the last Will and Testament of the late Linea Peneyambeko Kandalindishiwo Nuugwedha and she (the Master) implores me to confirm the invalidity of the Will.

[3] The two applicants in this matter are the only biological children and living heirs of the late Nuugwedha. The respondent is the master of the High Court of Namibia. (I will in this judgment refer to her as 'the Master').

Background events

[4] The events preceding the signing of the will by the deceased are undisputed

¹ (1861) 8 HL Cas 160 (11 ER 388).

and those events are these: During 2016, the late Linea Peneyambeko Kandalindishiwo Nuugwedha, (I will, in this judgment, refer to her as the 'late Nuugwedha') was diagnosed with Stage 4 Cancer. As a result of her diagnosis she became very sick and weak. She was hospitalised and when it became apparent that she might not recover from her ailment she gave instructions for her last Will and Testament to be prepared and drafted. Her last Will and Testament was, as per her instructions and wishes, prepared, drafted and presented to her, on 2 February 2017, for her signature.

[5] The court was informed that at the time (i.e. on 2 February 2017) when the draft Will and Testament (which consisted of four typed pages) was presented to her for her signature, the late Nuugwedha's health had deteriorated to such an extent that she only had enough energy to initial the first three pages of the Will and Testament and to sign on the last page. The witnesses who witnessed the execution of the will similarly only initialled the first three pages and signed the last page of the will. On the 3rd of February 2017, the late Nuugwedha passed on.

[6] In terms of that document that purports to be the last Will and Testament of the late Nuugwedha, a certain Ms Foibe Namene (I will refer to her as Ms Namene) was nominated as executrix of the estate of late Nuugwedha. Ms Namene then appointed the law firm AngulaCo Incorporated to act as her agent, who proceeded to register the estate of the late Nuugwedha and also to, in terms of the Wills Act 7 of 1953, lodge the last Will and Testament. On 24 March 2017, the Master informed AngulaCo Incorporated that the late Nuugwedha's last Will and Testament was rejected. The reason provided by the Master for the rejection of the Will was that *'only the last page of the Will is signed by the testator and witnesses, the rest are only initialled'*.

[7] The first and second applicants are aggrieved by the decision of the Master to reject their late mother's last Will and Testament. Desirous to honour their mother's last wishes, the applicants approached this Court seeking an order in the following terms:

'1 That the testamentary document executed on 02 February 2017 by the late Linea Peneyambeko Nuugwedha who died on 03 February 2017, a copy of which is appended to the Affidavit of Gina Nelao Wetutala Mwoombola as Annexure A, is declared to have been intended by the deceased to be her last Will.

2 That the respondent is directed to accept the aforementioned testamentary document

as a Will for purposes of the Administration of Estates Act 66 of 1965.

3 That the administrative oversight by not signing on pages 1-3 of the testamentary document by the testator and two witnesses as contemplated by Section 2 (1)(a)(iv) of the Wills Act 7 of 1953 be condoned.

4 That the party who is appointed as the executor by the testamentary document shall so remain.’

[8] The Master opposed the application launched by the applicants. In her opposing affidavit, she states that the death of the late Nuugwedha was, in terms of s 7 of the Administration of Estates Act No 66 of 1965, as amended, reported to her office and as Master, her office considered and studied the late Nuugwedha’s document purporting to be her will in terms the Wills Act, 1953² and it was established that the document was not a valid will, as that document was not in compliance with the formalities required for the execution of a valid will. She accordingly rejected the document purporting to be the will, as an invalid will in terms of s 2 of the Wills Act.

[9] In her affidavit in support of the opposition to the relief sought by the applicants, the Master raised a point *in limine* relating to the non-joinder of certain persons. She states that the following persons namely, Foibe Namene, Petrus Nalimanguluke Uusiku, Barnabas Ephraim, Linea Kandali Iyambo and Paulina Ndinelago Gabriel (herein referred to as the legatees) are reflected as beneficiaries in the invalid will, they thus have an interest in the dissolution of the deceased’s estate and ought to have been joined as parties. Before I consider the merits of this case, I will briefly deal with the point *in limine* raised by the Master.

The point *in limine* on non-joinder

[10] Mr Tibinyane, who appeared for the Master, argued that this Court has held that where any person has direct and substantial interest in issues raised before any Court and which interest may be prejudicially affected by such judgment, it is essential that such person is joined as a party to such proceedings, either as an applicant or as a respondent. He referred me to a number of authorities emanating from this Court.³

² The Wills Act, 1953 (Act No. 7 of 1953).

³ *Demenkov and Another v Minister of Home Affairs and Immigration and Another*: an unreported

[11] I have no qualms with the correctness of the legal position as argued and put forward by Mr Tibinyane. What Mr Tibinyane has overlooked is the case of *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*⁴ where it was held that for the purposes of *locus standi* a person must have a direct interest and not derivative rights. In the present matter the rights and interests of the persons mentioned by the Master are dependent on the acceptance of the late Nuugwedha's will being accepted as valid and to that extent their rights are derivative rights. There is in my view therefore no need to join them as parties to this case. I will now proceed to consider the legal principles applicable to this case.

The legal principles

[12] I find it appropriate to mention that in an article published in the *SALJ*⁵ Professor Beinart stated that the 1953 Wills Act was the culmination of a long process of development. He said:

'Our law relating to the execution of wills has retained many forms which are relics of its Roman and Dutch past. Legislation in the various Provinces has added or partly substituted the English forms of will.'

[13] The Cape Ordinance, on which the 1953 Wills Act was equally modelled on s 9 of the English Wills Act, 1837, originated in the Statute of Frauds of 1677,'. The first Wills Act which provided "No will shall be valid unless it shall be in writing and executed in the manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe to the will in the presence of the testator, but no form of attestation shall be necessary."

judgment of this Court, Case No. A 263/2015) [2015] NAHCMD Also see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), *Namibia Grape Growers and Exporters v Minister of Mines & Energy* 2002 NR 328, *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 and *Independence Catering (Pty) Ltd and Others v Minister of Defence and Others* 2014 (4) NR 1085 (HC).

⁴ *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC).

⁵ B Beinart: 'Testamentary Form and Capacity and the Wills Act, 1953'. 1953 (70) SALJ 159.

[14] The English Courts have thus required literal compliance with the Wills Act formalities, automatically invalidating defectively executed wills. A good example is the case of *Marley v Rawlings*.⁶ The brief facts of that case are that in 1999 Mr and Mrs Rawlings saw their solicitor (legal practitioner) to execute mutual wills. The entire estate was to pass to the surviving spouse. When the survivor died the property was to be inherited not by the couple's natural and legitimate sons, but by Terry Marley, who was unrelated to them but had been informally adopted by them. Mr and Mrs Rawlings regarded Mr Marley as their son. Unfortunately, the Rawlings signed each other's wills by mistake; the respective signatures were attested by the solicitor and secretary but the error was not noticed. When Mrs Rawlings died in 2003 the mistake went unseen and the will was proved. Mr Rawlings then died in August 2006. A dispute arose between Mr Marley and Mr Rawlings' two sons. The validity of the will was contested as Mr Rawlings' will did not comply with the necessary formalities under the 1837 Act. If the will was thus invalid Mr Rawlings would have died intestate. The statutory rules of intestacy would then apply, allowing the sons to inherit but not Mr Marley, never having formally been adopted. The High Court rejected Mr Marley's claim: the will did not comply with the requirements of the 1837 Act as it was not *his* will.

[15] Mr. Marley was unhappy and appealed the decision to the Court of Appeal. The Court of Appeal considered the case. Their Lordships were satisfied that Mr Rawlings had genuinely intended Mr Marley to be the sole beneficiary of his estate. Black LJ made clear the Court's position when he said:

'There can be no doubt as to what Mr and Mrs Rawlings wanted to achieve when they made their wills and that was that Mr Marley should have the entirety of their estate and their sons should have nothing'. However, this 'certain knowledge is not what determines the outcome of this appeal. The answer is contained in the law relating to the making and rectification of wills.'

[16] The Court felt strictly bound by the 1837 Wills Act and 1982 legislation and that its powers of interpretation could not render Mr Rawlings' will valid. On giving his judgment, Kitchin LJ stated that:

⁶ [2012] EWCA Civ 61.

‘... this is a conclusion I have reached with great regret, but Parliament made very limited changes to the law in 1982 and it would not be right for a court to go beyond what Parliament then decided’.

Their Lordships could not give effect to Mr Rawlings’ intentions. The English Courts thus insisted on strict compliance with the statute until such time as a change was enacted by statute.

[17] I now return to our legal position. Section 2(1)(a) of the Wills Act, 1953 provides as follows –

‘2 Formalities required in the execution of a will:

- (1) Subject to the provisions of sections *three* and *three bis*-
- (a) no will executed on or after the first day of January, 1954, shall be valid unless-
 - (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and
 - (ii) such signature is made by the testator 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; and
 - (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and
 - (iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person and by such witnesses anywhere on the page; and
 - (v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a magistrate, justice of the peace, commissioner of oaths or notary public certifies at the end thereof that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and if the will consists of more than one page, each page other than the page on which it ends, is also signed, anywhere on

the page, by the magistrate, justice of the peace, commissioner of oaths or notary public who so certifies.'

[18] Section 2(1) (a) of the Wills Act thus sets out requirements that must be met for a will to be regarded as valid. In the matter of *Ex parte Goldman and Kalmer NNO*⁷ a will consisted of several pages. At the foot of each page of the testatrix's will there appeared the signature of two witnesses and a sign or symbol made by the testatrix. Underneath this sign there appeared, in the handwriting of the attorney, who was also the notary, the words 'her mark', and the signature of the attorney. The Master had rejected the will because on the face of it the sign did not appear to be a signature but a mark. In an application to have this will declared valid, the court held, that in terms of the Wills Act, as amended, 'signature' included the making of a 'mark' and that the words 'sign' and 'signature' in section 2 (1) (a) (iv) and (v) of the Act should be given a wide meaning. The Court, further held, that the Legislature did not intend that a full signature was required from the testatrix.

[19] In the matter of *Jhajibhai and Others v The Master and Another*⁸ the will in that matter was a two-page document which had been duly signed by both the testator and two witnesses at the foot of the first page. At the end of the will, on the second page, the testator signed his name but each witness wrote his name and address in capital letters without actually signing. The question to be decided was whether the writing or printing by the witnesses of their names on the second page of the will constituted a valid signature as required by s 2 (1) (a) (iii) of the Act. The Court held that 'sign' for the purposes of the Act "includes the accustomed mode of signature of a witness, as well as any other mode adopted by him (not being a mark) to write or sign his name. It may or may not be his full name. The intention of the witness in writing or signing his name is the criterion. If he intends his mode of writing or signing his name to represent his signature, it is effective as such". The will was accordingly held to have been duly attested by the witnesses.

[20] In *Dempers and Others v The Master and Others (1)*⁹ a will consisting of four pages had been signed by the testator at the end thereof and at the foot of each page

⁷ *Ex parte Goldman and Kalmer NNO* 1965 (1) SA 464 (W).

⁸ *Jhajibhai and Others v The Master and Another* 1971 (2) SA 370 (D).

⁹ *Dempers and Others v The Master and Others (1)* 1977 (4) SA 44 (SWA).

but the witnesses had signed the last page only and had placed their initials at the foot of each page. The Court held that the will did not comply with the requirements of section 2 (1) (a) (iii) of the Wills Act of 1953, and was thus invalid.

[21] In *Mellvill and Another NNO v The Master, and Others*¹⁰ the witnesses only signed the will by writing their initials thereon. The Court held that mere initials do not constitute a signature for the purposes of s 2 (a) (iv) of the Wills Act of 1953, and that an instrument thus initialled will not be a valid will for the purposes of the Act.

[22] From the above cases, the legal position in Namibia appears to be that the formalities set out in s 2(1)(a) must be strictly complied with for a will to be considered a valid will.¹¹

Is the document created by the late Nuugwedha a valid will?

[23] Ms Angula, who appeared on behalf of the applicants, implored to, (in view of the allegation that the late Nuugwedha signed the will when her health had deteriorated, the applicants are desirous to honour their late mother's wishes, the applicants are unable to attend to the estate in the event that the estate is to devolve in terms of intestate succession, there is no fraud involved and the witnesses who attested to the signing of the will confirmed their presence at the execution of the will), adopt a liberal approach and place an interpretation on s 2 (1) (a)(iii) and (iv) to the effect that signature includes an initial.

[24] Mr Tibinyane who appeared for the Master, argued that it will not be right for the Court to go beyond what the legislature has decided even if it means frustrating the testatrix's intention. He argued that this '(i.e. the frustration of the testatrix's intention) is the result of a failure to observe a statutory requirement for the validity of wills which is peremptory'. He thus implored me to confirm the Master's rejection of the will.

¹⁰ *Mellvill and Another NNO v The Master, and Others* 1984 (3) SA 387 (C).

¹¹ Compare the unreported case of *Afrikaner v The Master of the High Court of Namibia* (A 330/2011) [2013] NAHCMD 224 (29 July 2013).

[25] I have looked at all the authorities to which the parties referred me. In most, if not all those cases, the courts concerned themselves with the interpretation that must be placed on the word 'signature'. Does the meaning of the word 'signature' include 'initials' was the main question. I do not intend to resolve the question that confronts me by following the route of deciding whether or not the meaning of the word 'signature' includes initials.

[26] In my view the question 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. Lord Atkins encouraged courts to discard precedents which hamper the delivery of justice in the following words:

'When these ghosts of the past stand in the path of justice clinking their medieval chains the proper course for the judge is to pass through them undeterred.'¹²

[27] The Namibian Constitution in Article 16 (which is part of the chapter on Fundamental Rights and Freedoms) provides that:

'Article 16 Property

- (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.' (Italicised and underlined for emphasis)

[28] I am therefore of the view that the first principle of the law of wills enshrined in our Constitution is the freedom of testation. Although the legislature limits the power

¹² In the case of United Australia, Ltd v Barclays Bank Ltd [1941] AC1 at 29.

of testation in various ways within the province that remains to the testamentary power, virtually the entire law of wills derives from the premise that a person has the fundamental right to dispose of his or her property as he pleases in death as in life. The rules governing testamentary capacity and the construction of wills must, therefore, not result in interfering with or depriving a testator or testatrix of his or her freedom of testation.

[29] What is peculiar about the interpretation of wills is not the prominence of the formalities, but the judicial insistence that any defect regardless of how minuet, in complying with the statutory requirements for validity, inevitably voids the will. In other areas of the law where legislation imposes formal requirements, the courts have taken a purposive approach to formal defects. The common example is the judicial doctrine which sustains transactions despite non-compliance with the statutory provisions namely, the main purpose and part performance rules. The essential *rationale* of these rules is that when the purposes of the formal requirements are proved to have been served, literal and exact compliance with the formalities themselves may be excused. The courts have boasted that they do not permit formal safeguards to be turned into instruments of injustice in cases where the purposes of the formalities are substantially satisfied. Why has the Wills Act not been interpreted with a similar level of purposiveness? In my view there is no justification why in deserving cases, the rule relating to 'substantial compliance' cannot be equally applied to the interpretation of the Wills Act.

[30] In *Mellvill and Another NNO v The Master, and Others*¹³ 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

¹³ Supra footnote 5.

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.

[31] In *The Leprosy Mission and Others v The Master of the Supreme Court and Another NO*,¹⁴ the court said:

‘Because the Act is designed, as far as possible, to prevent the perpetration of frauds, uncertainty and speculation, strict compliance with the formalities prescribed by the Legislature are required, particularly as the testator is no longer alive when the validity of his will is challenged, and the witnesses may no longer be alive to say what happened when the will was executed’.

[32] Taking into consideration that; the right to dispose of her property as she pleases in death as in life is a fundamental right, the late Nuugwedha substantially complied with the formalities prescribed by s 2 (1) (a)(iii) and (iv) of the Wills Act, and the purposes, (namely to identify the persons who were present at the execution of the document in compliance with the statutory formalities and that the Wills 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) of the signature to a will and the fact that in this case the dangers which the Wills Act aim to eliminate are not present in this case. I am of the view that invalidating the will amounts to a violation of the fundamental right of the late Nuugwedha to freedom of testation.

[33] For the reasons that I have set out in the preceding paragraphs, I hold the view that the testamentary document executed on 02 February 2017 by the late Linea Peneyambeko Nuugwedha, who died on 03 February 2017, a copy of which is attached to the affidavit of Gina Nelao Wetutala Mwoombola as Annexure A, is a valid Will and Testamant and I direct the Master to accept it as such.

¹⁴ *The Leprosy Mission and Others v The Master of the Supreme Court and Another NO*: 1972 (4) SA 173 (C) at 184 – 185.

[34] The conclusion that I have reached above would ordinarily mean that this is the end of the matter. I am acutely alive to the fact that another Court may come to a different conclusion. I therefore make the following observation. Lord Langdale MR is reported to, some 181 years ago, on 23 February 1837, have told¹⁵ the House of Lords that –

‘It is so important to the welfare of families, and to the general interests of the community, that men should be able to dispose of their property by will, and that their lawful intentions should be faithfully carried into execution after their deaths, and the laws under which these objects are to be effected are now attended with so much doubt and perplexity, that I am induced to hope that an attempt to introduce some improvement will not be considered to require any apology.’¹⁶

[35] Even today where the Constitution endorses that the recognition of the inalienable rights of all members of the human family is indispensable for freedom, justice and peace, our succession laws, particularly the 1953 Wills Act, continue to frustrate the ‘*lawful intentions*’ of testators, thus violating some of the fundamental human rights guaranteed by the Constitution.

[36] This case therefore brings to the fore the need to reform the 1953 Wills Act. South Africa and Zimbabwe, whose Wills Acts were also modelled on the English Wills Act of 1837 have, in 1992 and 1998 respectively, addressed the evil of frustrating a testator’s or testatrix’s true wishes. This they have done by introducing a ‘dispensing power’ where a court would have the discretion to admit a document claiming to be a will, even if the 1837 Act formalities had not been complied with.

[37] I therefore strongly recommend that the Law Reform and Development Commission investigate the possibility of revising the Wills Act, 1953 so as to address the violation of the fundamental human rights that may be caused by the strict and unyielding interpretation of the 1953 Wills Act.

[38] The only issue that remains for determination is the question of costs. The first general rule is that the question of costs is in the discretion of the Court and the other

¹⁵ When he was introducing the Second Reading of what was to become the *Wills Act 1837*.

¹⁶ Hansard (House of Lords), 1837, Vol. 36, col. 963.

general rule is that costs follow the cause. I am of the view that the Master did not act vexatiously or frivolously when she opposed this matter she was actually applying the law as it stands. I am therefore of the view that it will be unfair to mulct the Master with the costs of this application.

[39] I therefore make the following order:

1 The testamentary document executed on 02 February 2017 by the late Linea Peneyambeko Nuugwedha who died on 03 February 2017, a copy of which is appended to the affidavit of Gina Nelao Wetutala Mwoombola as Annexure A, is declared to be her valid Will.

2 The Master of the High Court of Namibia is directed to accept and register the testamentary document referred to in paragraph 1 of this order as the valid Will and last Testament of the late Linea Peneyambeko Nuugwedha for purposes of the Administration of Estates Act 66 of 1965.

3 The Chief Registrar must provide a copy of this judgment for the personal attention of the Chairperson of Law Reform and Development Commission for her to investigate the issues raised in this judgment.

4 The Master of the High Court of Namibia must pay the applicants' costs of this application.

S F I Ueitele
Judge

APPEARANCES:**APPLICANTS:**

E M Angula
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RESPONDENT:

L Tibinyane
Government Attorneys, Windhoek