IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO (2) OF INTEREST OF OTHER JUDGES: NO (3) REVISED 5/11/2021. DATE SIGNITURE

CASE NUMBER: 22496/2020

In the matter of

SHANTEL DLAMINI **APPLICANT**
SOPHIE NTEBALENG NCHUPETSANG N.O. **FIRST RESPONDENT**
DINTLE MOEKETSI JR NTOOELE **SECOND RESPONDENT**
MINSTER OF HOME AFFAIRS **THIRD RESPONDENT**
MASTER OF THE HIGH COURT JOHANNESBURG **FOURTH RESPONDENT**

In Re

SOPHIE NTEBALENG NCHUPETSANG N.O. **APPLICANT**

And

SHANTEL DLAMINI **FIRST RESPONDENT**
THABISO MATEE **SECOND RESPONDENT**
CARTRACK HOLDING LTD **THIRD RESPONDENT**
MASTER OF THE HIGH COURT JOHANNESBURG **FOURTH RESPONDENT**

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an application in terms of the common law for the rescission of the judgment
granted against the applicant on the 08 September 2020 under case number 22496/2020 be set aside. The grounds upon which the application for rescissions are;

1. Fraud and/or Error, and
2. New documents discovered.

[2] The applicant further seeks the following order:

1) That the Third Respondent be directed to recognize and register the customary marriage entered into and between Shantel Dlamini and the late Moeketsi Russel Moletsane be recognized as valid marriage in terms of Section 3(1) of the Recognition of the Customary Marriages Act no 120 of 1998.
2) That the Fourth Respondent be directed to accept the copy of the Will of the deceased as his valid and last will and testament for the purposes of the Administration of Estates Act 66 of 1965 and Section 2(3) of the Will Act 7 of 1953;
3) That the First Respondent be removed from her position as Executrix/person responsible to administer the estate of the deceased with immediate effect
4) That the Applicant be appointed as the Executor of the deceased's estate
5) That the First Respondent pay the cost of this application and the cost of the main application.

[3] The first respondent opposed the application on behalf of the deceased estate and in her official capacity as its executrix. She was duly appointed as such by the Master of the High Court in terms of the Administration of Estates Act 66 of 1965 on 31 July 2020.

Background of relevant facts

[4] The applicant met the late Moeketsi Russel Moletsane ("the deceased") in 2007. In 2009 they moved in together and resided in the deceased's house in Mulbarton, Johannesburg until his passing on 27 July 2020. The applicant and the deceased lived as husband and wife. One child, a daughter, Tshimologo Gugulethu Dlamini was born out of the relationship on 1 September 2014. The minor child resided with the applicant's mother in Rockville, Soweto. The applicant and the minor child were dependant on the deceased for maintenance, care and support.

[5] According to the applicant she and the deceased were married in terms of customary traditions and laws. The marriage negotiations begun on 13 April 2019 when the deceased sent his representatives to her family to negotiate and to pay lobola. Following the negotiations an amount of R10 000 was paid as lobola and a lobola agreement was signed between the Moletsane and Dlamini families.

[6] Following the amount of lobola being paid the marriage was accordingly celebrated by the two families on 13 April 2019. Since the applicant and the deceased were already living together, her family did not have a problem in handing her over to the groom's family and therefore she was handed over to the deceased's family on the same day of the wedding celebrations.

[7] During February 2020 the deceased's health started to deteriorate and he was admitted to hospital for nearly a month due to kidney problems. The deceased was discharged after some time and recuperated at home. However on 27 July 2020, while at home the deceased collapsed and on arrival of the emergency services the applicant was informed that the deceased has passed on.

[8] The applicant thereafter via WhatsApp informed colleagues and friends of the deceased passing. The deceased WhatsApp status was changed with the following words, "*Russel is no more*". Shortly after the status update was posted the applicant

received a phone call from Sebola Nchupetsang, the first respondent, offering to assist the applicant with all the necessary paperwork required to *fast track* all procedures relating to the burial of the deceased. The applicant was provided with the office address and invited to attend a meeting with the first respondent in order to assist her with the formalities.

[9] On 28 July 2020 the applicant proceeded to the address provided and on arrival at the offices she met the first respondent, who introduced herself as an attorney. The applicant was given forms to sign and she was requested to provide certain documents to the first respondent. Whereafter the first respondent was appointed as Executor to the deceased's estate.

[10] The funeral was arranged for 7 August 2020, a day prior to the funeral the applicant received a phone call from her cousin informing her that the funeral would not proceed as a court order gave burial rights to Phomolo Justice Letho and Dintle Moeketsi JR, the son of the deceased.

[11] On 13 August 2020 Dintle, the second respondent signed a Power of Attorney with the first respondent, appointing the first respondent as his representative in the estate of the deceased. Following the appointment a urgent application was launched for a declaration that the second respondent was the rightful person to bury the deceased.

[12] On 19 August 2020 the above mentioned order was granted in case number 18376/2020 on an urgent basis by Wepener, J. The order stated:
"For the purpose of the burial of the deceased, it is declared that the deceased Russel Moeketsi Moletsane, was not married to the First Respondent.
2. The Respondents or any other person are interdicted from removing the corpse of the deceased Moeketsi Russell from any mortuary where it is currently placed without the consent of the Applicant and the intervening Applicant.

3. It is declared that the burial of the deceased Is to be held by his son, the intervening Applicant
4. The First Respondent is to pay the costs the applications by the Applicant and the intervening Applicant."

[13] The applicant was refused entrance to the funeral of the deceased by his family members.

[14] On 8 September 2020 an urgent application was launched by the first respondent requesting a court order to take possession of immovable property, namely vehicles which formed part of the deceased's estate. The order was granted by Molahlehi J, see case number 22496/2020.

[15] On 10 October 2020 the applicant found a document purported to be a copy of a will of the deceased in a room he used as an office at their residence in Mulbarton. The document was signed on 12 December 2019. In terms of the document the applicant was appointed as the sole beneficiary and Executor of the deceased's estate.

[16] On 12 October 2020 the applicant received a phone call from the Sheriff enquiring about her whereabouts. She informed the Sheriff that she was at the residence where she and the deceased resided. On 14 October 2020 a court order mention in paragraph [14] was served on the applicant to the effect that she was not allowed to remove anything from the property where she and the deceased was residing.

[17] Furthermore, she was instructed to hand over items mentioned in the annexure to the court order to the first respondent. The items included all motor vehicles and ownership documents of the vehicles belonging to the deceased.

[18] On 21 October 2020 the applicant proceeded and lodged the copy of the will and the lobola letter at the Master's office with the intention to approach the court with this application.

Submissions by the Applicant
Point in limine- Res Judicata

[19] The applicant do not dispute the fact that facts pertaining to the same issue before me had been adjudicated by the court on 19 August 2020, see case number 18376/2020. In the latter application a burial order was granted in favour of the cousin to the deceased and the second respondent. However, counsel for the applicant argued that the wording of the order should be kept in mind when deciding on *res judicata*. The judgement on the marriage determination read as follows,
"*For the purpose of the burial of the deceased, it is declared that the deceased Russel Moeketsi Moletsane was not married to the first respondent"*.

[20] Counsel for the applicant argued that the court used the above wording because the matter was brought on an urgent basis, therefore not affording the respondents enough opportunity to consult extensively and prepare proper answering documentation on the matter. Therefore, the judgement was made in order for deceased person to be buried giving respondents a second opportunity to have this matter properly ventilated.

[21] It was argued that the cause of action and the relief sought in the urgent application was different than the relief sought in this application and as such *res judicata* cannot succeed and therefore the *point in limine* should be dismissed with costs.

Rescission of judgment under case number 22496/2020

[22] The applicant argued that a case has been made out for rescission of the judgment under case 22496/2020 based on the common law grounds, namely the discovery of a

new document and that the judgment was obtained by fraud and/or error. It was further contended that an application for rescission of judgment based on a common law grounds have no time limit, and the only requirement is that it has to be brought within a reasonable time. It was argued that the applicant brought the application as soon as she became aware of the fraud /error and soon after she found the new document.

[23] The argument was raised by the applicant that the first respondent did not properly obtain her position as executor of the estate of the deceased. The mere fact the copy of the will of the deceased was only found after the order was granted and as such was not available at the time of the application being heard is an *exceptional circumstance* and therefore the judgment should be rescinded.

[24] Counsel for the applicant argued that the judgment was granted due to fraud and/or error, and the applicant uncovered the intentions of the first respondent in that she had nothing but malicious intentions to defraud the applicant and her minor child of their lawful inheritance. The assertion was made that the first respondent obtained her appointment as executrix in a fraudulent manner by taking advantage of a grieving widow at a time when the applicant was desperate.

No competent application filed for prayers sought in paragraphs 2,3,4, and 5 of the Notice of Motion

[25] It was argued by the applicant that the prayers 2, 3, 4 and 5 were brought in terms of Rule 6(1) of the Uniform Rules of court which states that :
"*save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief*".

[26] Therefore according to the applicant the application set out a competent application and there was no need to apply for a new case number to bring the application relating to prayers 2, 3, 4 and 5.

Customary marriage

[27] Counsel for the applicant argued that the applicant's marriage has complied with the requirements of a valid customary marriage in terms of section 3(1) of the Recognition of the Customary Marriages Act 120 of 1998, and therefore should be accepted as such.[1]

Acceptance of the copy of the will for purpose of the administration of the estate

[28] The applicant argued that section 2(3) of the Wills Act, provides that if a court is satisfied that a document or the amendment of a document drafted or executed by a person who had died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of the Estates Act 66 of 1965, as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in section (1).

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[1] For a customary marriage entered into after- the commencement of this Act to be valid-

(a) the prospective spouses-

(i) must both be above the age of I8 years; and

(ii) must both consent to be married to each other under customary law: and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[29] The argument was therefore that on this basis the Master of the High Court should be ordered to accept the copy of the will for the purpose of the administration of the estate of the deceased.

Removal of the first respondent from the position of executor

[30] Counsel for the applicant argued that section 54 (1) (a)(iii) of the Administration of Estate Act, Act 66 of 1966 states that the court may at any time remove an executor from his office, if he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation. Therefore on this basis the first respondent should be removed as the executor of the deceased estate in terms of section 54 (1) (a)(iii) of the Administration of Estate Act.

Submissions by the respondent
Point in limine- Res Judicata and the customary marriage

[31] The first respondent argued that the issue as to whether a customary marriage was concluded is *res judicata* because of the earlier judgement, dated 19 August 2020 by Wepener J. It was argued that there has already been the prior judgement on the issue;
(a) by a competent court,
(b) in which the parties were the same; and
(c) in which the same point was in issue.

[32] It was argued that it is a fundamental principle that there must be an end to litigation, and from this flows the rule that legal proceedings can be stayed if it can be shown that the point at issue has already been adjudicated upon between the parties.

[33] Therefore counsel for the first respondent argued the application should be dismissed on the ground of *res judicata.*

Rescission of judgment under case number 22496/2020

[34] The first respondent argued that the judgment was obtained on 8 September 2020 and the applicant acquired knowledge of the judgment on the date of delivery. The Sheriff also served such judgment on the applicant as stated in her affidavit at paragraph 5.27. Therefore the applicant did not apply for rescission within a reasonable time or within 20 days after the knowledge so acquired.

[35] It was argued by counsel for the first respondent that the judgment in the matter was not erroneously sought, and not erroneously granted because,

1. The application was properly served on the applicant,
2. It was therefore competent for the court to make the order,
3. There was no irregularity in the proceedings,
4. There were no unknown facts which would have precluded the court from a procedural point of view from making the order, and
5. The order or judgment was not granted as the result of the mistake common to the parties.

[36] Counsel for the first respondent argued that a court cannot sit as a court of appeal on its own judgment and it cannot review its own judgment. In the light of the arguments above the first respondent stated that the judgment obtained was validly obtained and is therefore not rescindable and the application falls to be dismissed with punitive costs.

[37] The first respondent argued that the contention by the applicant that the judgment was obtained by fraud and/or error and that new documents were discovered, which she was not aware of prior to 8 October 2020 have no merit. At the time of the application the applicant was fully aware of the proceedings and during the

application no evidence was placed on record that the applicant was married to the deceased.

No competent application filed for prayers sought in paragraphs 2,3,4, and 5of the Notice of Motion

[38] It was argued by the first respondent that save having used case number 22496/2020 of the prior urgent motion proceedings brought by the first respondent on 8 September 2020, the applicant did not apply to the Registrar of the court to be allocated a new case number for her new application. Put differently, the applicant did not deliver a competent application under her own case number allocated to her by the Registrar of the court. It was argued that in the circumstances, her application is fatally defective.

[39] Counsel for the first respondent argued that prayer 2 where the applicant sought the court to order the third respondent to recognize and register the customary marriage entered into between the applicant and the late Moeketsi Russel Moletsane in terms of section 3 (1) of Act 120 of 1998 [2] was unfounded and should be dismissed. The reason for the argument was that the applicant gave various destructive versions as the when and how the marriage was concluded.

[40] In her founding affidavit she stated that they married on 13 April 2019, while on the other hand she stated that they planned to get married by April 2020. She further stated that the marriage could not take place in April 2020 due the deceased's deteriorating health.

[41] However, on 19 October 2020 the applicant's version changed in that she claimed that they were married in terms of civil rights. This was clearly stated in correspondence from her attorney of record in which it was stated that the applicant

[2] Recognition of the Customary Marriages Act, Act 120 of 1998.

averred that she was married to the deceased in terms of civil rights. The civil marriage certificate was never produced on request of the first respondent.

[42] Regarding prayer 3 in that the fourth respondent should accept the copy of the will of the deceased as his valid last will and testament counsel for the first respondent argued that the payer cannot be granted because there is no valid last will as alleged by the applicant.

[43] The basis for the argument by the first respondent is that a forensic expert document examiner conclusively found that the signatures on the purported will allegedly sighed and co-signed by unidentified witnesses on 12 December 2019 are forgeries. In the absence of the applicant's replying affidavit in rebuttal, it follows that the forensic expert document examiner evidence establishes conclusively that the signatures on the purported will is a forgery.

[44] It was argued that the purported will was not drafted or executed by the deceased and as such prayer 3 should be dismissed.

[45] The first respondent argued that the arguments by the applicant to the effect that the applicant never gave the first respondent the mandate to assume responsibilities of an executor of the deceased estate or that the mandate was given *under duress and misrepresentation* have to be rejected on the following basis;

1. The applicant in her own statement stated that she signed the documents presented to her by the first respondent under the auspices that she gave a power of attorney to the first respondent to act on her behalf. According to the first respondent the applicant approached her on the basis that the applicant was representing the interest of her minor child, no proof was provided that a customary marriage exited between her and the deceased at that stage, no lobola letter/s were mentioned by the applicant to exist.
2. It is evident that the first respondent's appointment as an executrix of the deceased's estate has the support of the second respondent, who is the son and heir of the deceased.

3. The first respondent is a fit and proper person to have been appointed as executrix, and therefore there was no obstacle, legal or otherwise to the Master not appointing the first respondent as executrix. Section 18 of the Administration of Estates Act, Act 66 of 1965 empowers the Master of the High Court to appoint an executor to ensure that the legal and financial interests of those affected in the administration of an estate are taken care of in a compassionate manner, and that the financial and legal interests of all those who may be vulnerable will be protected.

[46] Counsel for the first respondent argued that the applicant has no basis for her request to be appointed as executrix of the deceased's estate because firstly, she was not lawfully married to the deceased and secondly, the forensic expert document examiner established conclusively that the signatures on the purported will are forgeries.

Case law and evaluation
Res Judicata

[47] The principle of *res judicata* is well-established in our law: essentially it means that parties to a dispute have only one metaphorical "bite at the cherry". The "bite" can entail appealing through the hierarchy of courts, but once the parties have exhausted their appeals, they cannot re-litigate the same dispute.[3] The underlying rationale of the principle of *res judicata* is[4];
(a) to give effect to the finality of judgements,
(b) to limit needless litigation, and
(c) to promote certainty.

[48] It is an interest of justice to prevent litigants from re-litigating the same dispute. However, the rule can be relaxed in certain circumstances. The requirements of res judicata are:

1. Different causes of action;

[3] http://www.saflii.org/za/journals/PER/2016/33.html: accessed 23 November 2019.
[4] Molaudzi v S 2015 2 SACR 341 (CC) at paragraph [16].

2. The relief is different;
3. One of the parties is different.

[49] In *Boshoff v Union Government*[5] the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed.

[50] Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank BPK*[6], this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis.[7]

[51] I my view the argument of *rei judicata* is applicable in this matter before me with reference to prayer 2 in the Notice of Motion and the reason thereof are the following;

1. At the time of the first urgent application which was heard on 19 August 2020 in case number 18376/2020 the parties cited were;
    i. Phomolo Justice Letho – cousin of the deceased (Applicant),
    ii. Dintle Moeketsi JR Ntooele (Intervening Applicant),

[5] 1932 TPD 345.
[6] 1995 (1) SA 653 (A) on page 669 at paragraph D and on page 670J to 671B.
[7] Smith v Porritt 2008 6 SA 303 (SCA) at paragraph [10].

iii. **Shantell Dlamini (First Respondent)**
iv. AVBOB (Second Respondent)
v. **Ntebaleng Nchupetsang N.O (Third Respondent)**

2. The nature of the urgent application was one where the applicant sought an order declaring that the deceased ***was not married*** and consequential relief in relation to the burial and other issues regarding the deceased.

[52] In the matter before me, case number 22496/2020 there is a similarity as to not only the parties sited in the matter but also regarding the relief sought in some of the prayers. The parties in this matter are:

i. **Shantell Dlamini (Applicant),**
ii. **Ntebaleng Nchupetsang N.O (First Respondent)**
iii. **Dintle Moeketsi JR Ntooele (Second Respondent),**
iv. Minister of Home Affairs (Third Respondent),
v. Master of the High Court Johannesburg (Fourth Respondent).

[53] The nature of the application with reference to prayer 2;
Prayer 2: *"That the Third Respondent be directed to recognize and register the customary marriage entered into and between Shantel Dlamini and the late Moeketsi Russel Moletsane be recognized as valid marriage in terms of Section 3(1) of the Recognition of the Customary Marriages Act no 120 of 1998."*

[54] The applicant opposed the urgent application brought by the Phomolo Justice Letho (Applicant) in case number 18376/2020 and a answering affidavit was filed on her behalf. However, her opposition was unsuccessful and Wepener J gave a written reason for his decision.

[55] In paragraph [4] to [9] of the judgment Wepener J said:
"[4] The first respondent alleges that she is the wife of the deceased by customary marriage and that she has the right to bury the deceased, She furnishes some evidence which is disputed and controverted by the applicants. The applicants did not make any

issue regarding the status of the first respondent as wife in the founding papers because, as they say, they had no knowledge of such a claim by the first respondent,

[5] When they learnt of this claim the applicants embarked on some research. They found that the first respondent had completed certain forms after the death of the deceased. The first was a declaration made by the first respondent under oath in which she said that she knows 'that the deceased was a single person and that the deceased did not enter into any Customary Union'.

[6] The second is a document wherein the first respondent reported the death of the deceased and at the space where it is required to insert the particulars of a surviving spouse, the first respondent indicated that the information is 'not applicable'.

[7] The third is a death's notice. At para 13 the question is 'if married, place where married. The answer is 'not applicable'. At the para 14 of the same document the question reads 'Full names of surviving spouse'. The first respondent filled in that it is 'not applicable'.

[8] These documents were completed by the first respondent after the death of the deceased and wholly contradicts the version that she now proffered that she had married the deceased by customary law and her version of a customary marriage in 2019 should be rejected out of hand.

[9] The document so completed by the first respondent completely supports the evidence of the applicant as supported by the intervening applicant that no such customary union was ever entered into. However, this matter comes before me as a matter of urgency and I will decide it on these papers only."

[56] What I find peculiar in the applicant's quest for an order to declare the customary marriage a valid marriage, is the fact that at the time of the urgent application mentioned above, where the applicant had legal counsel, no mention was made of the

existence of the called *"lobola- letters"* and such were not brought under the attention of the court. The question has to be raised as to why the existence of the documents were not mentioned in the applicant's opposing affidavit.

[57] I therefore find that the order sought by the applicant in prayer 2 is *res judicata* and therefore bars continued litigation of the same case, on the same issue

Rescission of judgment- case number 22496/2020

[58] The requirements that an application for rescission in terms of rule 31(2) (b) are well established in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[8] which states.

"The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospectus success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement".

[59] In terms of Rule 42(1) the court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected, rescind or vary:

1. an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby:
2. an order or judgement in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
3. an order or judgement granted as the result of a mistake common to the parties.

[60] For a rescission of an order in terms of the common law, sufficient cause must be shown, which means that:

1. there must be a reasonable explanation for the default;
2. the applicant must show that the application was made bona fide; and

[8] 2003 (6) SA 1 (SCA), (2003) 2 ALL SA 113, at paragraph 1.

3. the applicant must show he has a bona fide defence which prima facie has some prospect of success.

[61] In the current application, the application for rescission of judgment was made by the applicant on basis of the common law grounds, namely,

1. discovery of a new document, and
2. fraud and/or error.

Discovery of a new document

[62] In *Childerley Estates Stores v Standard Bank of SA Ltd*[9], De Villiers JP concluded that a judgment could be set aside on the ground of the discovery of new documents after the judgment has been given in certain ***exceptional circumstances*** only. These include:

i. testamentary suits in which judgment has been given on the will and subsequently a later will/codicil has been discovered,
ii. cases in which it was inconsequence of the fraud of the opposite party that the relevant document was not found or produced at the trial,
iii. cases in which it was without the slightest fault on the part of the applicant seeking to introduce the new document or his legal representative that the document was not found and produced before judgment, and
iv. cases in which the judgment was founded on a presumption of law, on the opinion of a *juris consult* or on expert evidence.

[63] The applicant's case is based on the discovery of new documents. The application which the applicant seeks to be rescinded was granted on 8 September 2020 against her. On 10 October 2020 while the applicant was going through property of the deceased in a office at their residence, she found a copy of a document purported to be the will of the deceased. After consultation with a friend the applicant

[9] 1924 OPD 163 on page 168.

confirmed the fact the copy of the document she found was indeed a copy of the deceased will.

[64] The applicant proceeded and filed the copy of the will and the lobola letters at the office of the Master of the High Court Johannesburg. She also informed the Master of her intention in bringing an application for rescission.

[65] The discovery of the copy of the will and the existence of the lobola letters caused the first respondent to doubt the veracity of the documents found by the applicant.

[66] Therefore, the first respondent forwarded the documents to a forensic expert document examiner. The expert compiled a report and conclusively found that the signatures on the purported will allegedly signed and co-signed by unidentified witnesses on 12 December 2019 are forgeries.

[67] A further document on which the applicant relies was the *lobola letters.* The applicant is of the view that the copy of the will read with the *lobola letters* are exceptional circumstances under which the judgment dated 8 September 2020 in case number 22496/2020 should be rescinded.

[68] It is a common fact that the copy of the will and the *lobola letters* only came into play in the matter following the order being granted in case number 22496/2020 dated 8 September 2020. Therefore I have to evaluate the second leg of the applicant's argument that the order was granted on the basis of fraud and/or error.

[69] In the matter of *Childerley*[10] our courts have repeatedly stated that a judgment induced by fraud to which one of the parties was privy, cannot stand. It was held that in order to succeed on this ground there are three requirements that the applicant must prove;

1. the first respondent gave incorrect evidence at the initial trial,

[10] Ibid

2. that the first respondent did so fraudulently with the intention to mislead the court, and
3. that such false evidence diverged from the true facts to such an extent that the court, had it been aware thereof, would have given a different judgment.

[70] The above mentioned requirements have been watered down in the matter of *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others*[11] and it was stated that the successful litigant need not have committed fraud itself but merely be a party to the fraud. However the court categorically stated that only when there is fraud, usually in the form of concealed or perjured evidence to which the successful litigant was party, can a judgment be set aside. The court went on to say that a wrong judgment as a result of perjured evidence is insufficient ground for setting aside a judgment.

[71] I cannot find that the first respondent was aware of the *new documents* found or that she was aware of the existence and validity thereof. The first respondent stated that she became aware of the documents at the time the application was served on her. Therefore the first respondent took the contents of the documents at face value and acted by sending the documents through to be investigated by an expert.

[72] The document were not available prior to the judgment being granted. The judgment was not erroneously sought nor granted. The applicant had proper notice of the application, the application was legally competent for the court to have made the order and there were clearly no irregularity in the proceedings.

[73] Furthermore the documents relied upon by the applicant at the very least should be of such significance that it would materially alter the outcome of the case. The documents referred to in this case cannot be categorised as such. The movable property, the vehicles, belonging to the estate of the deceased would have in any event be placed under the supervision and of care of the executrix appointed by the Master

[11] [2017] ZASCA 54.

of the High Court Johannesburg. The executrix will proceeded with the distributions of the property of the deceased's estate in accordance with the duties imposed to act in this regard. The interests of all parties will be dealt with in accordance with law.

[74] Therefore I am of the view that the applicant has not made out a case for the rescission of the judgment granted on 8 September 2020 in case number 22496/2020.

Copy of the will

[75] The formalities required in the execution of a will are set out in s 2(1) of the Wills Act[12] ("the Act"). The relevant parts of section 2(1)*(a)* provides:

"(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) (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 anywhere on the page; and . . ."

[76] Section 2(3) the Act provides that;

"If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to

[12] Wills Act, Act 7 of 1953.

accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1)".

[77] Section 2(3) has three requirements which have to be complied with before the court can condone a document as the last will and testament of the deceased. These are:

1. there must be a document;
2. that has been drafted or executed by a person who has died since the drafting or execution thereof;
3. with the intention that the document must be the person's will.

[78] Section 2(1) of the Act was designed to ensure authenticity and guard against false or forged wills by setting out requirements for a valid will, however on the other hand section 2(3) creates an exception to these requirements by empowering a court to instruct the Master to accept a document as constituting the last will and testament of a deceased for the purposes of administering the estate in question should it be satisfied that the document which was drafted or executed by a person who has since died is intended to be the deceased will. If the document do not pass the munster as a will in terms of section 2(1), section 2(3) allows for the said document to validated by the court.[13]

[79] However the court must be satisfied on a preponderance of probabilities that the deceased intended it to be his will[14] and the first question to consider is whether the will was drafted by the deceased. Once it has been established that the document meets the requirements of section 2(3) the court is obliged to order the Master to accept it as the deceased's will.

[13] Van der Merwe v The Master & Another *2010 (6) SA 544 (SCA)*
[14] Letsekga v The Master and Another 1995 (4) SA 731 SA (W)

[80] The applicant in the matter argued that the first respondent have made no other suggestion that the copy of the disputed will does not comply with all the formalities of the Act. That may be true, however the court has to decide on the facts placed before me whether the copy of the will was indeed drafted by the deceased and furthermore can the court find, on a preponderance of probabilities that the deceased intended it to be his will.

[81] The document was investigated by a forensic expert document examiner who found the signatures on the copy of the will to be forgeries. The applicant did not file a replying affidavit to rebut the contentions in this regard, therefore the court cannot find on the papers before me that the will was indeed drafted by the deceased and therefore it was not intended to be his last will and testament.

Appointment of an Executor

[82] The first respondent was appointed on 31 July 2020 by the Master as executrix of the estate of the deceased. The appointment was done in terms of section 18(1) of the Administration of Estates Act, Act 66 of 1965. Section 18 (1)(a) provides:

"The Master shall, subject to the provisions of subsections (3), (5) and (6)-

(a) if any person has died without having by will nominated any person to be his executor; or .."

[83] It is not disputed that the applicant, on 30 July 2020 after the deceased passing, approached the first respondent and the first respondent was duly appointed by the Master. The applicant argued that the appointment of the first respondent was obtained by misrepresentations by the first respondent. Furthermore, it was stated that the applicant was vulnerable and grieving at the stage that she singed the relevant documents to be submitted to the Master for the appointment of the first respondent as executrix.

[84] It is evident that the first respondent informed the applicant about her role as executrix in that she is representing the interests of the estate and in reply the applicant stated that she was acting in the interest of her minor child born from the

relationship between her and the deceased. This is a clear indication that the applicant at that stage did not object to the first respondent's nomination and appointment, in fact the applicant supported the appointment.

[85] Furthermore the first respondent's appointment is also supported by the second respondent, the son of the deceased.

[86] As already indicated there was no valid customary/civil marriage concluded between the applicant and the deceased, this fact was confirmed in the judgment by Wepener J delivered on 19 August 2020. Therefore the applicant is not the surviving spouse as indicated in section 19 of the Administration of Estates Act[15]. The applicant as the mother of the minor child born from the relationship between her and the deceased has a claim against the estate of the deceased for their maintenance, care and support. As executrix of the deceased estate the first respondent is legally obliged to ensure the estate will take care of the interests of the minor heir of the deceased.

[87] It is evident that the first respondent is a fit and proper person as required by legislation. In my view the appointment of the first respondent as executrix of the deceased's estate is valid and therefore I can find no valid reason in order to remove her from the said position.

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[15] If more than one person is nominated for recommendation to the Master, the Master shall, in making any appointment, give preference to-

(a) the surviving spouse or his nominee; or

(b) if no surviving spouse is so nominated or the surviving spouse has not nominated any person, an heir or his nominee; or

(c) if no heir is so nominated or no heir has nominated any person, a creditor or his nominee; or

(d) he tutor or curator of any heir or creditor so nominated who is a minor or a person under curatorship, in the place of such heir or creditor:

Provided that the Master may-

(i) join any of the said persons as executor with any other of them; or

(ii) if there is any good reason therefor, pass by any or all of the said persons.

Costs

[88] Counsel for the first respondent requests the court to order the applicant to pay costs on attorney and client scale. The awarding of costs is in the discretion of the court and the discretion should be exercised judicially. The general rule is that the cost will follow the cause/event, in other words the successful party should be awarded costs.

[89] A new principle has been adopted in recent years in the Constitutional Court, that a person should not be deterred from enforcing her rights in a court of law, because she will have to pay the opponent's costs, as well as her own, if she does not succeed.

[90] Courts therefore must give weight to the constitutional obligation to promote the fundamental right to access to courts in such a way that the legitimate litigants will not be deterred from approaching the court to have their disputes settled for fear of an adverse cost order.[16]

[91] The principle that the loser must pay the winners' cost will still apply in most cases. There exists no circumstance in the present matter that warrants deviation from the norm. The applicant has a fundamental right to access the court, and therefore, this court cannot penalize the applicant with a punitive cost order for enforcing her rights.

[92] Thus, there is no indication that the first respondent should be able to recover more than what she is entitled to.

Order

[93] In the premises I make the following order:
Prayer 1, 2, 3, 4 and 5 are dismissed.
The applicant is order to pay the cost of the application on a party and party scale.

[16] Hlatswayo and Another v Hein 1998 (1) BCLR 123 (CC).

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CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	05 October 2021
Date of judgment:	05 November 2021
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