

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

.....
DATE
SIGNATURE

Case No. 3767/18

In the matter between:

LLOYD MOEKETSI

1ST PLAINTIFF

COLLEN MOEKETSI

2ND PLAINTIFF

And

JOHANNA CATHARINA SOPHIA HAGEMAN N.O

1ST DEFENDANT

XENOCRATE NKOTOLOANE MOEKETSI

2ND DEFENDANT

MERCIA MANTWANE DENE0 MOEKETSI

3RD DEFENDANT

REGISTRAR DEEDS – JOHANNESBURG

4TH DEFENDANT

MASTER OF THE HIGH COURT – JOHANNESBURG

5TH DEFENDANT

EKURHULENI MUNICIPALITY

6TH DEFENDANT

Coram: Dlamini J

Date of hearing: 25 April 2022 – in a ‘virtual Hearing’ during a videoconference on Microsoft Teams digital platform. Subsequent to that, closing heads of argument were filed on 05 July 2022 for the Judge's attention.

Date of delivery of rJudgment: 20 September 2022

This Judgment is deemed to have been delivered electronically by circulation to the parties’ representative email and same shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

[1] The first Plaintiff seeks an order to declare the Will of his late mother signed on 19 October 2013 (the 2013 Will) to be declared null and void as being noncompliant with the provisions of the Wills Act¹.

[2] The litigation has its origin in an earlier application wherein, the first and second Plaintiffs acting then as Applicants had initially instituted motion proceedings to declare the 2013 Will invalid.

¹ Act 7 of 1953

[3] On 10 October 2018, Van der Schyff AJ as she then was, ordered the matter be referred to trial.

[4] On 22 October 2019, the second Plaintiff withdrew her claim against the first, second and third Defendants.

[5] At the hearing of the trial, the following was not disputed;-

5.1 the first Plaintiff bears the onus of proof.

5.2 the first and second Plaintiff, second and third Defendants are siblings and biological children of the deceased.

5.3 their mother, Mrs. Dorcas Moeketsi, (the deceased) passed away on 15 February 2017

5.4 the deceased concluded a prior Will on 20 August 2008 and a final one on 31 August 2013 (the 2013 Will)

[6] The first Plaintiff testified on his behalf and did not call any witnesses.

[7] The first Defendant called three witnesses, Ms. Hageman, Ms. Schnepel, and Ms. Struwig.

[8] The third Defendant testified and did not call any witnesses.

FIRST PLAINTIFF'S CASE

[8] The first Plaintiff testified that he is the son of the late Mrs. Dorcas Moeketsi, (the deceased). His mother passed away on 15 February 2017 due to natural causes.

[9] He avers that he only became aware of the existence of the 2013 Will on 4 March 2017 when it was brought to his attention during a family meeting.

[10] He alleges that the 2013 Will has material discrepancies and different terms. According to him, the 2013 Will was not signed by the deceased in the

presence of both witnesses, who must both sign in the presence of the testatrix.

- [11] He avers that the Will was typed by the office of the first Defendant and the same was collected by the third Defendant who then proceeded to get the deceased to sign the Will at home, as the deceased could not come to the bank due to ill health. The first Plaintiff, alleges that the third Defendant then took the signed will back to the office the first Defendant, where the witnesses signed the Will in the absence of the deceased. He insists that the 2013 Will was never signed by the deceased in the presents of the two witnesses. His testimony is that the deceased was unduly influenced into signing the 2013 Will by the second and third Defendants.
- [12] Finally, the first Plaintiff says that he feels aggrieved to have been left out of the 2013 Will. His view is that the 2013 Will should be declared invalid and all his siblings should inherit intestate.
- [13] Under cross-examination, the first Plaintiff conceded that in the Death Notice signed by him on 10 March 2017, he misrepresented to the Master of the High Court (the Master) that the deceased had left no Will. That the form incorrectly reflects the deceased was never married. He further conceded that in the Next of Kin affidavit signed by him on 10 March 2017 he misrepresented that the deceased was survived by two children himself and the second Plaintiff and not four children.
- [14] The first Plaintiff further conceded that he was able to notice that his name was incorrectly spelled in the Next of Kin affidavit and had this corrected. However, he was unable to explain why he failed to correct the wrong information that he provided in this Next of Kin form. He acknowledge that it was incorrect that he stated in the same form that he resided at 1035 Phila Street.

[15] He acknowledged that it was only during cross-examination that he mentioned that the form was completed by his erstwhile attorneys, who made him sign a blank form and then took the form and submitted it to the Master.

[16] The first plaintiff then closed his case.

FIRST RESPONDENT'S CASE

[17] Ms. Hageman testified that on 1 March 2022, she was appointed nominee of FNB in terms of the Letters of Executorship issued in her name in the Estate of late Dorcas Moeketsi. She says that the deceased's estate had been initially reported to the Master as an intestate estate because the first Plaintiff had misrepresented to the Master that the deceased died intestate and was survived by only two children instead of four children.

[18] She avers that on 24 March 2017 after realizing the above misrepresentation, she through FNB advised the first Plaintiff's attorneys in writing and informed them of the existence of the 2013 Will and requested the first Plaintiff to return his Letters of Executorship to the Master. She says this request was ignored by the first Plaintiff and his attorneys.

[19] Nothing comes out in the witness's cross-examination.

[20] Ms. Schnepel testified that she was employed as a Financial Planner by FNB at its Brakpan branch, and was so employed at the time when the 2013 Will was signed. She admits that the deceased was well known to her as she had assisted the deceased with financial and banking advice over a long period. She avers that the deceased had requested her to make certain changes to the deceased's 2009 Will. On 19 October 2013, the deceased came to the bank to verify the changes that she had requested to be made to her Will. On this day the deceased was accompanied to the bank by the third Defendant. Ms. Schnepel brought the deceased to her office to explain and go through the changes that the deceased had requested. Also, present in her office during this consultation was Ms. Struwig.

- [21] Ms. Schnepel avers that throughout her consultation with the deceased, the third Defendant waited in the waiting area and was not part of their consultation. That after she had explained and discussed the changes of the 2009 Will, the deceased was satisfied with the changes and she then signed the 2013 Will, and Ms. Schnepel and Ms. Struwig signed as witnesses concurrently all present in the same place and same time.
- [22] Ms. Struwig 's testimony is to the effect that she was employed as Ms. Schnepel's assistant at the FNB Brakpan branch and was so employed when the 2013 Will was concluded. She testifies that on 19 October 2013, she was present at the Brakpan branch when the deceased came to consult with Ms. Schanepel regarding the deceased's will. She confirms that the deceased was accompanied by the third Defendant and that whilst the deceased attendant to Ms. Struwig's office, the third Defendant remained seated in the waiting area. She confirms that the deceased signed the 2013 Will in her presence, and she simultaneously also signed the 2013 Will as a witness in the presence of the deceased.

SECOND AND THIRD DEFENDANT'S CASE

- [23] Only the third Defendant Ms. Marcia Moeketsi testified on behalf of the second and third Defendants (Marcia).
- [24] Marcia confirmed that she and the second Defendants are siblings and two of the four children of their deceased mother. She testified that she was generally in charge of looking after the deceased, including taking her to the doctors and being responsible for the care and travel arrangements of the deceased.
- [25] She said that the deceased had some time back indicated to her that the deceased wanted to change her will so that the Will can include some of her grandchildren including the first Plaintiff's child. She testified that on 19 October 2013, she drove the deceases to the FNB Brakapan branch. On their

arrival, a certain white lady came to them and escorted the deceased to a consultation room. Whilst the deceased was in consultation, she remained sitting in the waiting area. That after a while the deceased came back and informed her that the changes to the Will had been affected and that they could leave.

[26] Under cross-examination, Marcia denied that she and the second Defendant exerted undue influence on the deceased concerning the 2013 Will or any of the deceased's Wills. She denied that the 2013 Will was fetched by her from the FNB Branch in Brakpan taken home by her and made the Will to be signed by the deceased and that thereafter she took the will back to the FNB Branch to be signed by the witnesses.

[27] The first and second Defendants then closed their cases.

[28] It is a trite principle of our law that a testator has the right to dispose of his/her assets in any manner or form that the testator wishes.

[29] At the heart of the dispute is whether the 2013 Will stands to be set aside because the testatrix did not sign the Will in the presents of the witnesses

[30] Section 2 of the Will Act provides as follows that;-

(1)....

- (a) *no will executed on or after the first 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 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 witness 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 of such other person;

[31] In his testimony, the first Plaintiff insisted that the deceased did not sign the 2013 Will in the presence of the two witnesses. His submission is that the second Defendant took this will to the Brakpan Branch of FNB whereupon the two witnesses signed the Will in the absence of the testator. Thereafter, the first plaintiff avers that the second defendant took the Will back home for the deceased to sign.

[32] In my view, the first Plaintiff came out as a very contrived and dishonest witness. He was evasive in his testimony and gave long unwarranted answers. He lied under oath to the Master and said his late mother was never married. He was untruthful when he completed the Next of Kin affidavit where he intimated that the deceased was survived by only two children, that is, himself and the second plaintiff, whereas the deceased was survived by four children.

[33] It is apparent from his testimony that he feels very aggrieved from not being bequeathed substantial assets in the Will, hence his obvious misrepresentation to the master to obtain the Letters of Executorship and to have the deceased estate dealt with intestate.

[34] The first Plaintiff's allegations in this regard are sharply disputed by the evidence of the first, second, and third Defendants. In my view, these witnesses were open and honest witnesses. Their evidence was never challenged during cross-examination by the first Plaintiff's legal representative. They gave a fair and truthful account of how the deceased signed the 2013 Will. Marcia's evidence that she was requested by and took the deceased to the FNB Branch for the deceased to sign her will remains uncontested and there is no evidence before me to rebut it. Her testimony was that when she arrived at the bank, she remained seated in the waiting

and the deceased was led to the consultation room by Ms. Schnepel its not disputed.

[35] Marcia's evidence in this regard is corroborated in all material respect by Ms. Schnepel, and Ms. Struwig. The two witnesses testified that on the day, the third Defendant brought the deceased to the Bank, that third Defendant remain seated in the waiting area and was not part of the consultation with Ms. Schnepel. Further, these witnesses testified that the deceased signed the 2013 Will in their presence and importantly that they both signed as witnesses to the 2013 Will in the deceased presence.

[36] I am therefore satisfied that the deceased signed the 2013 Will at the FNB branch in Brakpan in the presence of the two witnesses.

[37] The first Plaintiff has not provided a shred of evidence to challenge the defendant's assertion and he has failed to discharge the onus of proof that rested on his shoulders.

[38] In all the circumstances that I mentioned above, the first Plaintiff's claim stands to be dismissed.

ORDER

1. The first Plaintiff's claim is dismissed with costs.

DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:

25 April 2022

Handed down on: 20 September 2022

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