REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 22-19945

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

....
DATE
SIGNATURE

In the matter between:

MOLEKO DANIEL MAIMANE	Applicant
and	
THABO SHOLE-MASHAO N.O.	First Respondent
DIMAKATSO PAULINE MAIMANE N.O.	Second Respondent
ROSINA MAIMANE	Third Respondent
ELIZABETH MAIMANE	Fourth Respondent
THABO SHOLE MASHAO	Fifth Respondent
PUSO MEKO	Sixth Respondent
KEAMOGETSWE MASHAO	Seventh Respondent
TSHEPO MASHAO	Eight Respondent
LETLOHOGONOLO MAIMANE	Ninth Respondent
THE MASTER OF THE HIGH COURT	Tenth Respondent

JUDGMENT

VAN DER MERWE, AJ:

[1] In this application the applicant seeks an order declaring that the will of the late Mphele Anna Mashao (the deceased) is invalid and that the deceased died intestate. The applicant is the brother of the deceased. The first and second respondents are the executors appointed by the Master to administer the deceased estate. The third to ninth respondents are the beneficiaries under the will. The Master is the tenth respondent. The Master did not oppose the application. The first respondent (in his capacity as executor) and in his personal capacity, delivered a notice to the effect that he abides by the court's decision on the validity of the will. The second respondent did not oppose the application. The third, fourth, seventh, eighth and ninth respondents oppose the application. A reference to "the respondents" in what follows is a reference to the opposing respondents.

[2] The will consists of a cover page with the word "*WILL*" at its top. It also reflects the name of the deceased and her identity number, but nothing else. The cover page does not contain any information that is not repeated in the pages that follow it. It can therefore be safely left out of the reckoning. The following four pages contain the text of the will. Where I refer to "the will" in the paragraphs that follow, I mean that be a reference to the four pages following the cover page.

[3] The troublesome page is the third one. At the bottom of the other three pages of the will, provision is made for the signature of two witnesses under the words "*AS WITNESSES*". Provision is also made for the deceased's signature, underneath of which appears the word "*TESTATRIX*". The third page has none of these features.

[4] In argument before me, Mr Matsiela, who appeared for the respondents, conceded that the will does not comply with section 2(1)(a)(iv) of the Wills

Act.[1] Mr Matsiela also conceded that if the third page does not comply with section 2(1)(a)(iv), then the same fate must befall the entire will.

[5] Both concessions were correctly made. Section 2(1)(a)(iv) requires the testatrix' signature on every page of the will. When a will is measured against the requirements of section 2(1), it is done without regard to the equities,[2] even when it is clear that a will, though defective, reflects the wishes of the testatrix.[3] On Mr Matsiela's second concession the law is settled: if the invalid part of a will contains dispositions made by the testatrix, then the entire will is invalid.[4] Here that is clearly the case.

[6] All other things being equal then, the applicant is entitled to the order he seeks.

[7] However, in the answering affidavit the respondents rely on section 2(3) of the Wills Act. The relevant part of the section reads:

> " If a court is satisfied that a document … drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will … the court shall order the Master to accept that document … 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 … of wills referred to in subsection (1)."[5]

[8] The ninth respondent deposed to the answering affidavit. She explains that after the death of the deceased on 7 July 2020, the applicant requested her to search for the deceased's important documents. She did so but did not come upon the will. That happened only in September 2020, when the third and fourth respondents found the will in an envelope in a bedside pedestal in the deceased's bedroom, a discovery by chance.

---

1 7 of 1953.

2 *Tshabalala v Tshabalala* 1980 (1) SA 134 (O) at 137.

3 *The Leprosy Mission and Others v The Master of the Supreme Court and Another NO* 1972 (4) SA 173 (C) 184H-185A.

4 *In re Morkel's Will* 1938 T.P.D. 432; Comley v Comley 1957 (3) SA 401 (E); *The Leprosy Mission and Others v The Master of the Supreme Court and Another NO* 1972 (4) SA 173 (C); *Oosthuizen v Die Weesheer* 1974 (2) SA 434 (O); E*x parte Michaelis* 1975 (2) SA 452 (W); *Ex parte Cartoulis* 1974 (2) SA 156 (C); *Wehmeyer v Nel* 1976 (4) SA 966 (W).

5 Above n1.

[9] Although the answering affidavit does not say so in so many words, in context it is clear enough that the respondents' version is that the will is an authentic document. From that premise coupled with the evidence of the discovery of the will, the respondents rely on section 2(3) of the Wills Act. I have reservations about whether the evidence presented by the respondents meet the requirements of section 2(3). For instance, it is not obvious to me that there is evidence that the deceased drafted or executed the will. For the reasons that follow however, it is not necessary for me to decide this issue.

[10] The respondents rely on section 2(3) as a defence. The question is whether it is competent for the respondents to do so. Section 2(3) allows a court to make an order. If a party seeks an order from a court, it must pursue that relief by a stand-alone application or action or as a counter-application or counter-claim. In motion proceedings certainly, a respondent should not be allowed to rely on section 2(3) as a defence without a counter-application in which an order in terms of the section is sought. In motion proceedings for final relief, factual disputes are resolved according to the rules in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[6] Those rules give the advantage to the respondent, as the party *against* whom an order is sought. To enjoy the advantage, all that is required of a respondent is to present tenable evidence on oath.[7] The rules in *Plascon-Evans* are not a device for discovering the truth. If an applicant is entitled to an order sought on a respondent's version (coupled with the common cause facts), then a matter is capable of being adjudicated on motion, as opposed to in a trial. If that is the case, then it does not matter that the respondent's version may not be true. The respondent's version may be pure fiction (so long as it is tenable), but it remains unnecessary to test the veracity of that version. This is what allows cases to be decided in motion proceedings.

[11] If the respondents brought a counter application, then the applicant would have been the respondent in that application and the advantages that the

---

[6] 1984 (3) SA 623 (A).

[7] That is to say, evidence that is not so untenable or far-fetched that it may be rejected out of hand. See *Plascon-Evans* at 635C.

rules in *Plascon-Evans* provide would have operated in its favour. In *Luster Products Inc v Magic Style Sales CC*[8] Plewman JA found:

> "While the matter can then be considered on the basis of Mr *Puckrin's* concession, it is, I think, necessary to refer to the Court below's approach. The learned Judge, in considering the evidence, applied (as he put it) the guidelines laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) as explained in *Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C-263C. In so doing, however, the learned Judge accepted or assumed (as counsel also seem to have done) that he was dealing with a single comprehensive application. He thus accepted the *dictum* of Corbett JA at 634-5 in the *Plascon-Evans* case as operating against the appellant and that it was the respondent's version (subject to the recognised qualifications) which had to be accepted. In this he erred. The present proceedings consist of separate applications, having a certain overlap and being argued at a combined hearing, but separate and independent applications nonetheless. The proper approach in these circumstances is that while the respondent's version must be looked to insofar as the main application is concerned, the reverse is the case with the counter-application."

[12] It would go against the foundational principles underlying the rules in *Plascon-Evans* that allow a matter to be decided on evidentiary material that is not tested for its veracity, if the respondents were allowed to seek an order in terms of section 2(3) on the allegations in their answering affidavit.

[13] Mr Matsiela argued that I should accept the allegations made in the answering affidavit for purposes of the respondents' case on section 2(3), because the applicant did not deliver a replying affidavit. A replying affidavit would not address the problem I dealt with above, i.e., that an order in terms of section 2(3) should be pursued in motion proceedings in which the respondents are the applicants (in convention or reconvention).

---

[8] 1997 (3) SA 13 (A) at 21E-H.

[14] For these reasons, it is not necessary for me to consider the respondents' case on section 2(3).

[15] Mr Matsiela argued that the respondents could not institute a counter- application, because section 2(3) provides for a court to direct the Master to accept a will. Here the Master had already done that, so it would not have been competent for the respondents to seek an order directing the Master to do what had been done already. Mr Scheepers, who appeared for the applicant, argued that the respondents could have brought a conditional counter-application, for a declaratory order if needs be. Whether the respondents could have brought a counter-application has no bearing on the issues I am to decide, save perhaps for costs. But, since the parties are agreed that the proper costs order is for the costs to be paid by the deceased estate, I am not required to decide this issue.

[16] As the respondents are not permitted to rely on section 2(3), it follows that an order should be made declaring the will to be invalid.

[17] The applicant seeks a separate order declaring that the deceased died intestate. It may be open to the respondents to seek an order in terms of section 2(3) of the Wills Act in subsequent proceedings. If I were to make the order sought by the applicant, the issue at hand may be *res judicata* or issue estoppel and thus present a bar to the respondents in such proceedings. Moreover, if the respondents do not seek an order in terms of section 2(3) or if they do and their application or action is not successful, it must follow that the deceased's estate should be administered on the basis that she died without a valid will and therefore, intestate. I therefore decline to make the order sought by the applicant. Section 2(3) applies to formally invalid wills, so that an order declaring the will to be invalid, does not present a bar to proceedings in terms of the section.

[18] I make the following order:

(a) The will of the late Mphele Anna Mashao dated 20 November 2007 is declared to be invalid.

(b) The costs are to be paid by the deceased estate of the late Mphele Anna Mashao.

_____

H A VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 5 October 2023

Delivered on: 23 October 2023

For the applicant: Adv J Scheepers

Instructed by: Niel Schoeman Attorney

For the first to ninth respondents: Adv L Matsiela

Instructed by: Masike Inc