IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 960/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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E.M. KUBUSHI **DATE: 27 OCTOBER 2023**

In the matter between:

LEBOGANG ANDY THOBEJANE	APPLICANT
and	
MASTER OF THE HIGH COURT – PRETORIA GAUTENG DIVISION	FIRST RESPONDENT
NEDBANK LIMITED	SECOND RESPONDENT
ARNEL MOEKETSI MOOKO NO – NEDGROUP TRUSTS	THIRD RESPONDENT
OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD	FOURTH RESPONDENT
KAREL FOURIE	FIFTH RESPONDENT
DESIREE NONHLANHLA MEKHOE	SIXTH RESPONDENT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 27 October 2023.

[1] The application turns on the revocation of a Will in terms of section 2A(c) of the Wills Act ("the Act").[1] The Applicant seeks, in the main, declaratory relief in terms of which the Will of her late husband, Sebabatso Shadwick Mekhoe ("the deceased"), dated 19 December 2015 ("the 2015 Will"), is revoked. The Applicant, also, seeks ancillary relief in terms of which the Will of the deceased dated 23 December 2019 ("the 2019 Will"), is declared as the deceased's Last Will and Testament. In the *alternative*, the Applicant seeks an order that, in the event that the Court does not make a finding that the 2019 Will is the Last Will and Testament of the deceased, that the Master of the High Court be directed to finalise the estate of the deceased in terms of the law of intestate succession.

[2] The parties refer to the 2019 Will interchangeably as the 2020 Will because it was allegedly transmitted via email on 7 January 2020, to the deceased for perusal. I shall, for consistency, refer, in this judgment, to this Will as the 2019 Will.

[3] The application is opposed only by the Sixth Respondent, whose contention is that the 2019 Will does not comply with the requirements of section 2(3) of the Act and, therefore, is not the Last Will and Testament of the deceased; and that there is insufficient evidence in the Founding Affidavit to support the revocation of the 2015 Will. The Sixth Respondent argues further that the

[1] Act No. 7 of 1953.

Applicant's alternative prayer for the Court to declare the deceased to have died intestate, does not arise.

[4] The factual background is mostly common cause between the parties. As outlined in the Applicant's founding affidavit, the deceased was married to the Sixth Respondent and they had two children. On 19 December 2015, the deceased executed a Will in which he named the Sixth Respondent as the heir to his estate. As proof, the Applicant attached a copy of the 2015 Will to the founding affidavit. The deceased and the Sixth Respondent's marriage dissolved in 2017.

[5] In 2019, the deceased got remarried to the Applicant, and they had one child. On 23 December 2019 the deceased is alleged to have caused a second Will (the 2019 Will), to be drafted by the Fifth Respondent. This Will is electronic and was drafted by the Fifth Respondent and sent by email to the deceased for perusal. It stipulates that the deceased's estate will devolve only upon his three children. The deceased passed away on 5 August 2021 without having signed the purported Will. The Applicant has attached to the founding affidavit, a copy of the email that was sent to the deceased as proof of the existence of the 2019 Will.

[6] It is further alleged that the 2019 Will revoked the Sixth Respondent as the heir and replaced her with the deceased three children, which is denied by the Sixth Respondent.

[7] The provisions of section 2A(c) of the Act are that

> If a court is satisfied that a testator has drafted another document or before his death caused such document to be drafted, by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked.

[8] From the above, it is clear that the requirements of section 2A(c) of the Act are: the drafting of another document by the deceased, or causing a document to be drafted before his/her death, and an intention to revoke his/her Will (or part thereof). It has, also, been held that the intention of the deceased to revoke his/her Will must be apparent from the document itself or the revocation of his/her Will must be in writing.[2]

[9] Having regard to the statutory requirements for revocation of a Will, the question is whether the deceased drafted the document, or before his/her death caused the document to be drafted and whether the deceased's intention to revoke his/her earlier Will or part of his/her earlier Will is apparent from the document itself.

[10] The document referred to in section 2A(c) of the Act ought to be understood as the document upon which reliance is placed to revoke an earlier Will.

[11] In the circumstances of the matter before me, the question is whether the deceased drafted the 2019 Will, or before his death, he caused the 2019 Will to be drafted and, furthermore, that his intention to revoke the 2015 Will is in writing or apparent from the contents of the 2019 Will.

[2] Mdlulu v Delarey and Others [1998] 1 All SA 434 (W) at 449-453.

[12] It has now been established through various decisions of our Courts that for the deceased to have drafted another document as envisaged in section 2A(c) of the Act, he/she must have personally drafted the document.[3]

[13] In the instance of the matter before me, it is common cause that the deceased did not personally draft the 2019 Will. The evidence on record is that the Will was drafted in December 2019 by the Fifth Respondent who emailed it on 7 January 2020 to the deceased for perusal. The Applicant conceded as much in her papers and in oral argument in Court. Hence, the crux of her case, as I understand, is based on the document (the 2019 Will) that the deceased caused to be drafted before his death.

[14] The question therefor is whether, before his death, the deceased caused the Fifth Respondent to draft the 2019 Will.

[15] Insofar as the question of 'caused to be drafted' as envisaged in section 2A(c) of the Act is concerned, I am inclined to accept that no evidence has been placed before Court, for me to be convinced that the deceased had caused the 2019 Will to be drafted. I say so based on the reasons that follow hereunder.

[16] In *Webster*,[4] an application was made for an order declaring the revocation of the joint will of a testator and his wife to the extent that it related to the estate of the testator, and further that an unsigned draft will be accepted as the will of such testator. In holding that section 2A of the Act application succeeds, the Court remarked as follows:

[3] Bekker v Naude en Andere 2003 (5) SA 173 (SCA) at para 20.
[4] Webster v The Master 1996 1 SA 34 (D).

> "The conduct of the deceased in deleting portions of the joint will, in instructing him (Kleyn) to prepare a new will, and in perusing and approving the draft thereof demonstrates that the deceased intended to revoke the joint will insofar as it affected his estate and that accordingly in terms of paras (b) and (c) of s 2A of the Act the Court should declare the joint will to be *pro tanto* revoked." [5]

[17] It is apparent from the afore stated passage that there should be some conduct on the part of the deceased that shows that he caused the document to be drafted. The deceased must have instructed someone to draft or prepare a document that is meant to revoke an earlier Will.

[18] In this instance, there is no evidence that the deceased instructed the Fifth Respondent to draft or prepare the Will (the 2019 Will). This was conceded by the Applicant, in oral argument in Court. Even if it can be assumed that the deceased instructed the Fifth Respondent to draft the 2019 Will, the difficulty that the Applicant is settled with, is that, even though on the face of it, it is stated that the deceased revokes all testamentary dispositions previously made by him, there is no evidence proffered to demonstrate that it was the intention of the deceased to revoke the 2015 Will.

[19] In the circumstances of the present matter and in light of the *Webster* judgment, the deceased should have on receipt of the Will perused and reconciled himself with the contents thereof, and then approved it. There is no evidence that on receipt of the email from the Fifth Respondent the deceased perused the Will attached to that email. Certainly, it does not appear from the

[5] At 40B-C.

record that the deceased reconciled himself with the contents of the Will as it was drafted and approved it.

[20] The submission that I must consider the discussions between the deceased and his friend of 17 years, and that of the deceased and his parents, wherein the deceased orally indicated his wishes to change the 2015 Will to make his three children the only beneficiaries, as indicative of the deceased's intention to revoke the 2015 Will, does not assist as the authorities make it clear that revocation of a Will must be in writing or it must be apparent from the document itself.[6] The deceased having not acquainted himself with the 2019 Will and approved it, it cannot be said that he had agreed to the wording used therein.

[21] The further submission that I must take the surrounding circumstances into consideration when deciding whether or not there was an intention by the deceased to revoke his earlier Will, is of no assistance to the case, as well. It has been held that the intention of the deceased can only be established in relation to the time when the new Will which seeks to revoke an earlier Will, is drafted. As such, only facts and surrounding circumstances around that time ought to be considered.

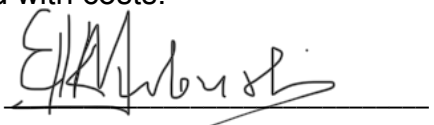
[22] I am not satisfied that the evidence as presented by the Applicant in her papers suggests a section 2A(c) of the Act scenario. In conclusion, it is my finding that the deceased did not draft the 2019 Will, nor did he cause the 2019 Will to be drafted. Furthermore, there is no evidence in support of the wording in the 2019 Will to demonstrate that the deceased intended to revoke the 2015 Will.

[6] Mdlulu at 449-453.

[23] Even though the parties addressed me at length about the requirements of section 2(3) of the Act, I do not find the provisions of that section apposite in the circumstances of this matter.

[24] There is no evidence on record to reinforce the alternative prayer that an order be made directing the Master of the High Court to finalise the deceased estate in terms of the law of intestate succession. The Applicant relies on the interest of justice principle, in order for the deceased's estate to be finalised in terms of the law of intestate succession. This issue is not vehemently argued either in the Applicant's papers, the heads of argument or in oral argument before me. The Applicant has just given it cursory attention. I, in that sense, find it not necessary to delve into that prayer.

[25] In the premises the application is dismissed with costs.



E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

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SIXTH RESPONDENT'S COUNSEL:	ADV RADICHIDI TSELE

SIXTH RESPONDENT'S ATTORNEYS: ADV RADICHIDI TSELE (TRUST ACC ADV)