

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: 842/2021

In the matter between:

VIWE ASEKHONA KOYINGANA

First Applicant

FANCY XAKWA

Second Applicant

and

GETRUDE KOYINGANA

First Respondent

ESKOM PENSION AND PROVIDENT FUND

Second Respondent

GOVERNMENT EMPLOYEES PENSION FUND

Third Respondent

THE MASTER OF THE HIGH COURT

Fourth Respondent

JUDGMENT

CHWARO AJ:

Introduction

[1] This application concerns a family feud about the administration of the estate of the late Zamuxolo Koyingana, (*“the deceased”*) and the assignment of guardianship and care over the deceased’s surviving minor children.

[2] The ensuing dispute resulted in an urgent application being launched out of this Division of the High Court on 26 April 2022, where the first and second applicants seek, except the usual costs order, relief in the following terms:

- “1. *Dispensing with the forms and service provided in the Uniform Rules of Court and condoning non-compliance with the Uniform Rules of Court relating to service and time periods in terms of Rule 6(12);*
2. *That the will of Zamuxolo Koyingana is declared invalid and he is declared to have died intestate;*
3. *That the First Respondent be removed as the executor of the estate of Zamuxolo Koyingana;*
4. *That the First Respondent be ordered to return S B K and A O K to the care of the Second Respondent;*
5. *That the First Respondent is ordered to return the property belong[ing] to the estate of the deceased;*
6. *That the Second Respondent be interdicted against making any pension payments to the First Respondent or the estate account;*
7. *That the Third Respondent be interdicted against making any pension payments to the First Respondent or the estate account.”*

[3] The application is opposed by the first respondent. The two pension funds and the Master of the High Court did not enter the fray. The latter’s limited involvement in the matter came through a Directive that was issued by this Court as more fully appears below.

Factual matrix

[4] The first applicant , Viwe Asekhona Koyingana, is the eldest surviving child of the three children born of the marriage between the late Zamuxolo Koyingana (“*Mr Koyingana*”) and the late Nomfundo Sylvia Koyingana, (“*Ms Koyingana*”). His siblings, SBK and AOK, are 9 and 7 years old respectively.¹

¹ The full names of the minor children are withheld.

[5] The second applicant, Fancy Xakwa, is the maternal grandmother of the first applicant and his two siblings, (*“the Koyingana children”*). The first respondent, Getrude Koyingana, is the paternal grandmother of the Koyingana children.

[6] The Koyingana children lost their parents almost three months apart from each other during 2021, with the late Ms Koyingana passing away on 12 August 2021 and her husband on 25 November 2021.

[7] During her lifetime, Ms Koyingana attested to a last will and testament in terms of which she, amongst others, bequeathed her estate to her three children and nominated her mother, the second applicant, failing a natural guardian, as the guardian of her minor children in terms of section 18 of the Children’s Act No. 38 of 2005.

[8] The nominated executor of the estate of the late Ms Koyingana , FNB Fiduciary (Pty) Ltd, renounced their appointment as such. The first applicant was subsequently appointed as an executor of her late mother’s estate. The first applicant in turn appointed his present attorneys of record, *Thomas Kouter Attorneys*, to assist him in the administration of the estate.

[9] There is no dispute regarding the validity of the will of the late Ms Koyingana and the fact that the Koyingana children are the testamentary heirs in respect thereof.

[10] During December 2021 in the course of his engagement with the Master of the High Court in respect of his late father’s estate, the first applicant learnt about the appointment of his paternal grandmother as an executrix of her late father’s estate pursuant to a document which was purportedly a will left by his late father.

[11] The document purporting to be the will of the late Mr Koyingana was, on the face of it, attested to on 22 October 2021. It was accepted and registered by the Master of the High Court, Kimberley on 31 January 2022 in accordance with the provisions of section 8 of the Administration of Estates Act No 66 of 1965.

[12] In terms of this will, the first respondent was nominated as the executrix of the estate and guardian of the two minor children. The first respondent, in her capacity as the appointed executrix through the letters of executorship bearing the Master of the High Court's date stamp of 2 February 2022, in turn appointed Gqadushe Attorneys to assist her in the administration of the late Mr Koyingana's estate.

[13] During or about January 2022, soon after the burial of the late Mr Koyingana, the first respondent took the two minor children to reside with her at Khayelitsha, in the Western Cape province where they are presently attending school.

Issues for determination

[14] Having outlined the brief background facts, this Court is then called upon to determine, except the preliminary issue relating to urgency, the following substantive issues:

- 14.1. The validity of the will of the late Zamuxolo Koyingana;
- 14.2. The validity of the appointment of Getrude Koyingana as an executrix of the estate of the late Zamuxolo Koyingana and matters related thereto ;
- 14.3. Whether Getrude Koyingana, the first respondent, should be ordered to return the minor children to the care of Fancy Xakwa, the second applicant; and
- 14.4. Whether a proper case for the granting of interdictory relief sought against the Eskom Pension and Provident Fund and the Government Employees Pension Fund has been made.

Urgency

[15] During the hearing of the application no serious contention was pursued regarding the urgency of the matter. Nonetheless, the application was heard on a

semi-urgent basis following the order that was obtained by agreement on 29 April 2022.

[16] Our courts have always recognised that there are varying degrees of urgency and thus matters ought to be enrolled regard being had to the exigencies of a particular matter and the extent to which the applicant seeks to relax the rules of court relating to time periods.²

[17] In **East Rock Trading**³, the court explained what is expected of an applicant who launches an application in terms of rule 6(12) in the following terms:

“The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.”

² Luna Meubels Vervaardigers (Edms) Bpk v Markin and another 1977 (4) SA 135 (W) at 137A-F

³ East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite and Others [2011] ZAGPJHC 196 (23 September 2011) at paras 6-7

[18] In my view, the application was properly enrolled to be heard on a preferential date as it involves, amongst others, the interests of the two minor children and their proprietary rights as heirs in the estates of their deceased parents.

[19] The applicants, and indeed the minor children, might be severely prejudiced by a hearing in due course given the imminent disbursement of the respective pension benefits due to the respective estates of their deceased parents.⁴

[20] Accordingly, the application deserves to be heard on a semi-urgent basis and condonation for non-compliance with the rules regarding service and time periods ought to be granted.

The applicable test to determine disputes in motion proceedings

[21] These being motion proceedings, it is apposite to restate the general principle which the court would normally adopt to assess and determine the conflicting versions presented by the parties.

[22] It is an established principle that in motion proceedings and with regard to factual disputes, the Court must consider the conspectus of the facts as set out by the applicant, together with any facts set out by the respondent, which facts the applicant cannot dispute and to consider whether the applicant should, on those facts, obtain final relief in an opposed motion.⁵

[23] It is only under circumstances where serious and substantive doubt is demonstrated on the case presented by the applicant that the latter cannot succeed in motion proceedings.⁶

⁴ See *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and Others* [2014] 4 All SA 67 (GP) at para 64

⁵ *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) which was later refined in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

⁶ *Webster v Mitchell* 1948 (1) SA 1186 (W) and *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C)

Validity of the will

[24] The first applicant disputes the validity of the document purporting to be his late father's will, which nominates his paternal grandmother as the executrix of the estate and the guardian of his siblings. To this end, he instructed his attorneys to appoint a forensic handwriting expert to analyse and compare the signatures appearing on the will with the specimen signatures of his late father to determine whether the signatures appearing on the will were indeed those of his late father.

[25] An entity known as *Handwriting Info Scientific* was appointed to conduct forensic examination by comparing the signatures that appeared on the document purporting to be the will of Mr Koyingana with the specimen signatures sourced from various documents that were signed by Mr Koyingana during his lifetime.

[26] In the report, which was attached to the applicants' founding papers, the conclusion of the handwriting expert is that the signatures which were uplifted from the disputed will do not resemble the specimen signatures which were taken from a total of eight official documents provided to the handwriting experts that were signed by the late Mr Koyingana during his lifetime between April 2010 and August 2021.

[27] The first respondent disavows any knowledge of the document purporting to be the will of her late son, Mr Koyingana. She contends that on her instructions, her attorneys, *Gqadushe Attorneys*, did inform his son's former employer, the Northern Cape Department of Public Works and Roads, that Mr Koyingana died intestate. This fact is further buttressed by the notice of death form (J294), which she had to complete for submission to the Master, reflecting that her son died intestate.

[28] In the end, the first respondent formed common cause with the applicants that the document purporting to be the will of her late son cannot be valid and falls to be declared invalid *ab initio*.

[29] In the execution of his duties, the Master of the High Court is enjoined to accept and register a document purporting to be a will provided that on the face of it,

such document is complete, appears to be regular and meets the prescribed formalities prescribed in terms of section 2(1)(a) of the Wills Act, No. 7 of 1953.⁷

[30] It is a trite principle of our law that the acceptance and registration of a document purporting to be a will by the Master is an administrative function which does not translate into confirmation of its validity. It is only a court of law, once called upon to do so, that can determine and pronounce on the validity of a will.⁸

[31] Forgery is one of the recognised grounds upon which the validity of a will may be contested. In the event of challenging the will on this ground, the applicants would bear the onus to establish that the will was indeed a forgery.⁹

[32] Despite there being consensus between the applicants and the first respondent that the purported will falls to be declared invalid and of no force and effect as none of them could vouch for its origin and validity, this Court became concerned by the fact that it was nevertheless submitted by someone at the Master's office where it was accepted and registered as such.

[33] On the basis of this concern and after having sought the views of the respective parties in writing, this Court issued a Directive calling upon the Master to file a report outlining the circumstances and the reasons informing the appointment of the second respondent as an executrix.

[34] In his initial report dated 23 May 2022, the Master of the High Court, Mr C D Davids, informed this Court that, amongst others, the document that was presented as a will of the late Zamuxolo Koyingana was lodged by Gqadushe Attorneys on 31 January 2022 and that the Letters of Executorship was issued on 2 February 2022 to the nominated executor as per the will.

[35] The Master's report was availed to the parties. It became apparent that the Master compiled his report of 23 May 2022 without having perused the answering affidavit filed on behalf of the first respondent in opposing this application. A

⁷ RP Pace *et al*: Wills and Trusts, Issue 22, November 2018, LexisNexis, p36(2)

⁸ *Ibid*

⁹ See Pillay and Others v Nagan and Others 2001 (1) SA 410 (D)

subsequent Directive was issued by this Court for the Master to consider the first respondent's answering affidavit and, if needs be, file a supplementary report.

[36] The Master did file a supplementary report on 25 May 2022. In this report, the Master confirmed the contents of his earlier report except to state that he was unaware as to who lodged the will with his office. Subsequent thereto, this Court requested the respective parties to file additional written submissions in reaction to the reports by the Master.

[37] On consideration of the submissions and the papers filed of record, considered against the similar view expressed by the parties, it is common cause that the document purporting to be the will of Zamuxolo Koyingana is not valid.

[38] Besides being disavowed by the respective parties, the uncontested report of the handwriting expert also confirmed that the signatures appearing on the document purporting to be the will of the late Mr Koyingana did not correspond with the true signatures as sourced from various specimen submitted for comparison.

[39] On the bases of all these factors, it is my finding that the document purporting to be the will of the late Zamuxolo Koyingana was executed as a result of fraud and is therefore declared invalid *ab initio* in its entirety. Resultantly, Mr Koyingana died intestate.

Appointment of the first respondent as an executrix

[40] To the extent that the first respondent, Getrude Koyingana, was appointed as the executrix of the estate of the late Zamuxolo Koyingana as per the will and as more fully appears on the report of the Master, such appointment falls to be reviewed and set aside in terms of the provisions of section 95 of the Administration of Estates Act, No. 66 of 1965.

[41] In opposing the relief sought by the applicants, the deponent to the answering affidavit indicated, amongst others, that the first respondent was not appointed as an executrix as per the will.

[42] It was contended that she was nominated by the surviving major children of the late Zamuxolo Koyingana, namely Nikita George and Luniko Fetese, who were allegedly born out of wedlock from other relationships that the late Mr Koyingana had prior to his marriage with Ms Koyingana.

[43] Considered in their context, these assertions about having been appointed pursuant to nomination by the two children of Mr Koyingana are in clear contrast to the report submitted by the Master detailed above.

[44] In the report of the Master, the late Zamuxolo Koyingana died having left a will and the same will nominated the first respondent as an executrix, which nomination was duly endorsed by the Master in accordance with the provisions of section 14(1)(a) of Act 66 of 1965. The Master did not appoint the first respondent in accordance with any nomination by anyone as suggested in the opposing affidavit.

[45] In any event, a letter attached to the opposing affidavit and purporting to be a nomination letter from Nikita George reveals that the latter simply states that she is in Ireland visiting her mother and thus appoint one Buyiswa Koyingana to represent her. No admissible evidence has been provided to indicate that the said Nikita George is the daughter of the late Zamuxolo Koyingana and that she consulted the first applicant, as one of the surviving major heirs, in relation to her purported nomination of the first respondent as an executrix.

[46] Similarly, the affidavit signed by one Luniso Fetese, who states that she gave permission to the first respondent "*to stand for her in everything*" that related to her father, Zamuxolo Koyingana, does not constitute a proper nomination letter to the first respondent to act as an executrix of the estate.

[47] Based on the lack of credible admissible evidence demonstrating that the deceased was her biological father as well as her lack of consultation with the first

applicant, this affidavit of Luniso Fetese renders her purported nomination of the first respondent as alleged to be doubtful.

[48] The position of Luniso Fetese is further exacerbated by the fact that she is not mentioned amongst the names of the surviving children of the deceased in the death notice (J294 form) completed and signed by the first respondent on 14 December 2021 and attached to the opposing papers. Her name was also not mentioned in the next-of-kin affidavit (J192 form) completed and signed by the first respondent, which is also attached to the opposing affidavit.

[49] In my view, the validity of the alleged nomination of the first respondent by the Luniso Fetese and Nikita George , without the involvement of the first applicant and a duly appointed representative of the minor children, is doubtful. The inescapable conclusion is that there was no valid nomination of the first respondent as executrix by the known heirs of the late Zamuxolo Koyingana.

[50] In the result, the appointment and issuance of the Letters of Executorship by the Master on 2 February 2022 to Getrude Koyingana either as per the will which has been declared invalid *ab initio*, or through the purported nomination as alleged, is reviewed and set aside and such appointment falls to be withdrawn by the Master.

Return of the goods taken by the first respondent

[51] The first applicant contends that his paternal grandmother not only took his siblings along with her to Cape Town, but also took along one of the motor vehicles belonging to his family, the keys of the other motor vehicle which is left in Kimberley, the remote control of the house gates and other documentation relating to his deceased parents. In response to these averments, the first respondent contends that she took these items in the exercise of her duties as an executrix.

[52] The position of the first respondent as an executrix has been dealt with above. In the absence of any legal title empowering her to take possession of and remain with the movable properties belonging to the estate, the first respondent had

no basis to remove the movable items belonging to the Koyingana children from their family home in Kimberley.

[53] These items must be returned to the family home to enable the appointed executor or his/her agent to proceed to deal with them in accordance with the law. It is expected of her appointed attorneys, who have been appointed as administrators of the estate on her behalf, *Gqadushe Attorneys*, to ensure that a proper account is made in respect of all the items and goods received by the first respondent in her capacity as an executrix and that same are returned to be dealt with by whoever would be appointed as an executor.

[54] In concluding this particular aspect of the judgment, it is apposite to make the following observation: Forgery amounts to a criminal offence and in certain instances, forgery of a will might lead to the guilty party being disqualified from inheriting from the will.¹⁰ One would have expected the office of the Master to have proper systems in place in terms of which the office can easily identify and confirm the identity of a person who submits a will for registration. However, it seems that the Master is unable to identify the person who submitted the document purporting to be the will of the late Mr Koyingana to his office for acceptance and registration. This Court would refrain from making any determination in that regard.

[55] This Court finds comfort in the fact that in his founding affidavit, the first applicant indicated that he has laid a criminal charge with the South African Police Service in relation to the document that was submitted to the Master purporting to be the will of the late Mr Koyingana.

[56] It is my hope that the law enforcement agencies will conduct thorough investigations and pursue the matter to its logical conclusion in identifying the culprit, whose sole intention was to misrepresent the fact that Mr Koyingana died intestate, impose the first respondent as the executrix of the estate of Mr Koyingana and nominate her as the legal guardian of the minor children.

Return of the minor children to the care of the second respondent

¹⁰ Footnote 6 above

[57] In prayer 4 of the notice of motion reproduced in paragraph 2 above, the applicants seek an order directing the first respondent to return the two minor children to the care of the second applicant.

[58] The basis for the relief sought is premised on what the applicants contend to be the testamentary nomination of the second applicant as a guardian of the minor children by the late Ms Koyingana, who in clause 5 of her will, pronounced her wish with regard to guardianship in the following manner:

“5. Guardianship

5.1. Failing a natural guardian, I nominate my mother FANCY XAKWA as the guardian of my minor children with full parental rights and responsibilities as contemplated in section 18 of the Children’s Act No. 38 of 2005.

5.2. If it should become necessary for any of the minor children to take up residence with their guardian, I direct that the costs of travel for such children, as well as that of any person who my executors may authorise to accompany them, shall be borne by my estate.”

[59] Ms Koyingana’s testamentary wishes must be considered in line with the provisions of section 27 of the Children’s Act, providing for the assignment of guardianship through a will under circumstances where the assigning parent is the sole guardian of the child.

[60] On consideration of the facts in this matter, it is apparent that at no stage during their lifetime was there a stage where Ms Koyingana became the sole guardian of the minor children, which would have entitled her to assign guardianship as she did. The common cause facts are that Ms Koyingana predeceased her husband resulting in the latter remaining as the sole guardian of the minor children. As indicated above, Mr Koyingana died intestate and did not nominate anyone for possible appointment as a legal guardian of the minor children.

[61] The first applicant posits that prior to their removal to Khayelitsha in Cape Town by the first respondent, his siblings always lived with their deceased parents at their family home in Kimberley, where they attended school. He avers that the conduct by the first respondent not only deprives him of his entitlement to stay and reside with his siblings but is also an affront to the rights of the nominated guardian, the second applicant.

[62] On the other hand, the first respondent avers that after the death of her daughter-in-law, she had to move to Kimberley during October 2021 where she stayed at the Koyingana's homestead to take care of the two minor children and her son, the late Mr Koyingana.

[63] Her short stay in Kimberley was not without incidents. She had confrontations with her grandson, the first applicant, which led her to obtain a protection order against him. After the burial of her son, she eventually went back to Cape Town with the two minor children to continue with their care and well-being, including securing schooling for them.

[64] It is without doubt that the first respondent removed and uprooted the minor children from their family home without any court order or agreement between the involved parties. This amounts to self-help and conduct that cannot be countenanced and must be frown upon, given the unfortunate turn of events where the Koyingana children lost their parents within a very short period of time.

[65] Notwithstanding the above, the fundamental question remains whether it will be in the best interests of the minor children to be uprooted from Khayelitsha where they are presently residing with the first respondent and attending school and the first respondent be ordered to return them to Kimberley.

[66] It is a well-established principle of our law that in the determination of any aspect relating to minor children, that the applicable standard that is employed by courts is the best interests of the minor children.¹¹ This standard was even applied

¹¹ Fletcher v Fletcher 1948 1 SA 130 (A)

prior to the enactment of the Constitution¹² and related legislative prescripts governing matters related to children.

[67] This principle was enshrined in section 28(2) of the Constitution and provides that the best interests of a child are of paramount importance in any matter that concerns the child. This constitutional principle is also found in section 9 of the Children's Act, No. 38 of 2005, (*"the Children's Act"*).

[68] In ***Minister of Welfare and Population Development***¹³ the apex court held that in applying the "best interests" standard, courts must be flexible as individual circumstances of each case would determine which factors are more necessary and important in securing the best interests of a particular child.

[69] In ***Fetal Assessment Centre***,¹⁴ the apex court reminded us as follows regarding the best interests of the minor child assessment:

"In South Africa, in addition to section 28(2) of the Constitution, the common law principle that the High Court is the upper guardian of children obliges courts to act in the best interests of the child in all matters involving the child. As upper guardian of all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children.."

[70] Though there is a provision in the will of the late Ms Koyingana about her wishes in relation to her minor children's guardian, one cannot disregard the fact that subsequent to her demise, Mr Koyingana remained the sole surviving guardian of the minor children. Since he died intestate, the interests of his immediate family members, including the Koyingana children's paternal grandmother, cannot be ignored in the ultimate decision on who should be appointed as their legal guardian.

[71] Having due regard to the interests of the two families involved in this dispute, the need for stability in the lives of the two minor children and the general reluctance by courts to abruptly interrupt the schooling activities of the minor children, it is my

¹² Constitution of the Republic of South Africa Act, 1996

¹³ 2000 (3) SA 422 (CC) at para 18

¹⁴ H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at para 64

view that there is a need for a substantive application envisaged in sections 23 and 24 of the Children's Act to allow a court having jurisdiction to determine and decide on the assignment of guardianship and care in respect of the two minor children.

[72] It is common cause that the minor children are presently residing with the first respondent and attend school in the Cape Town area. There are no sufficient facts, supported by objective reports by, amongst others, a family advocate or similarly placed professional, relating to the suitability or otherwise of either of the parties to be awarded the right to exercise guardianship and care, including custody, in respect of the two minor children.

[73] The exercise of guardianship over a minor child involves the administration and safeguarding of the child's property and property interests, assistance or representation in administrative, contractual and other legal matters and to give or refuse consent on a variety of issues involving the minor child.¹⁵

[74] As an upper guardian of the minor children¹⁶ and with due regard to their best interests relating to their present residence, schooling and need to have family relations with their brother, the first applicant and their maternal and paternal families, it is my view that a substantive application envisaged in sections 23 and 24 of the Children's Act, supported by all relevant and necessary information, ought to be initiated by any of the interested parties to allow a Court having jurisdiction over the minor children, to finally determine the rights of the parties in relation to the contact, care and guardianship of the two minor children.

[75] It will not be in the best interests of the two minor children to be removed from their current place of residence and school under circumstances where the rights relating to their contact, care and guardianship have not been finally determined.

[76] The need to reach finality on guardianship, care and primary residence of the two minor children is important and it will be remiss of me for not directing all interested parties to expedite the initiation of an application referred to above so as

¹⁵ Vide section 18(3) of the Children's Act

¹⁶ See *Botes v Daly and Another* 1976 2 SA 215 (N) at 222A–H.

to allow a competent Court having jurisdiction to determine these matters in the best interests of the two minor children.

Interdictory relief against the two pension funds

[77] The first respondent mounted a defence of *res judicata* in respect of the relief sought by the applicants in prayers 6 and 7 of the notice of motion reproduced above. In substantiation of this point, it was contended that the applicants brought a similar application for interim relief against the same pension funds at the Regional Court for the Regional Division of the Northern Cape, Kimberley and that the *rule nisi* obtained there was discharged on 8 March 2022.

[78] It is trite that a party seeking reliance on *res judicata* must be able to demonstrate the involvement of the same parties in the present and past litigation, which was on the same cause of action on the basis of the facts and the law and that the court gave judgment on the substantive issues which it was called upon to determine.

[79] In **Yellow Star Properties v MEC Department of Development Planning and Local Government, Gauteng**¹⁷ the rationale behind *res judicata* was succinctly explained in the following terms:

“The underlying ratio of the *exceptio rei judicatae vel litis finitae* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other on the same cause of action should not be permitted”

[80] I am unable to sustain the defence of *res judicata* as raised by the first respondent. Firstly, the second applicant was not a party in the litigation which ensued in the Regional Court and thus the first requirement relating to similar parties having been involved in the same litigation cannot be satisfied. Secondly, the papers do not demonstrate which legal or factual issue was placed before the Regional Court for its determination and lastly, it is not clear whether the order discharging the

¹⁷ [2009] 3 All SA 475 (SCA) at para 21

rule nisi can be equated to a judgment which was based on particular findings on the facts and the law.

[81] For these reasons, the point of *res judicata* as taken by the first respondent falls to be dismissed.

[82] It is trite law that an applicant seeking a final interdictory relief must establish and satisfy three requirements, being that such an applicant has a clear right, that there is an irreparable harm ensuing and the absence of a suitable alternative remedy.¹⁸

[83] The basis upon which the first respondent claimed entitlement to be appointed as an executrix of the estate of the late Mr Koyingana has been fully canvassed elsewhere in this judgment. Having also found that the late Mr Koyingana died intestate, it follows that his estate ought to be dealt with in accordance with the provisions of section 1(1)(b) of the Intestate Succession Act, No. 81 of 1987.

[84] It is not in dispute that the first applicant is the appointed executor of the estate of her late mother. As one of the descendants of her late father, the first applicant has a clear and definite right, sourced from the above legal position which places him as one of the descendants entitled to inherit from the intestate estate.

[85] This right entails ensuring that the pension benefits emanating from his late parents' employers are paid over to the correct and properly appointed executor for administration in accordance with the applicable law. This will, at the end, ensure that the benefits accrue to the rightful descendants and/or heirs.

[86] The first applicant, and indeed the two minor children, stand to suffer irreparable harm should the status quo be left undisturbed. The first respondent's appointment as an executor has been found wanting and any payment of the pension benefits in an estate account under her control would result in irreparable harm to the descendants, especially under circumstances where these benefits may be depleted.

¹⁸ Setlogelo v Setlogelo 1914 AD 221

[87] The need to protect the pension benefits becomes even more important since the interest of the minor children, who are also descendants and thus potential beneficiaries, are still to be determined in relation to the appointment of a possible legal guardian and the responsible person/s who would be awarded their primary residence and care.

[88] I can think of no other suitable alternative relief other than an interdict which is intended at preventing the disbursement of pension benefits to the estate account that was operated under the authority of the first respondent. Sans her appointment as an executrix, the first respondent has no authority or entitlement to cause pension benefits pay-outs to be paid into an estate account that was opened as a result of her purported appointment as such.

Costs

[89] The general rule is that the costs follow the results¹⁹. The determination of an appropriate costs order is a discretionary matter which is entrusted on a Court having due regard to the particular circumstances of each case, the issues and parties involved as well as the general conduct of the parties in the course of the litigation.

[90] This application was initiated by the applicants in their endeavour to safeguard the estate of the Koyingana children from being administered by an executrix who was appointed under dubious circumstances and where there was uncertainty about the document purporting to be a will of their father. The applicants further sought to protect the rights of the two minor children regarding the assignment of a legal guardian.

[91] It is without any doubt that the applicants are substantially successful in this application, and I find no other compelling reasons that would dissuade me to allow the costs to follow the results. The costs should, however, not be inclusive of the

¹⁹ Ferreira v Levin, Vryenhoek v Powell 1996 (2) SA 621 (CC) at para 3

costs occasioned by the employment of two counsel as I find no justification for such costs given the nature of the issues in dispute.

ORDER

[92] The following order is made:

1. The document purporting to be the will of the late Zamuxolo Koyingana is declared invalid, null and void.
2. It is hereby declared that the late Zamuxolo Koyingana died intestate.
3. The Master of the High Court, Kimberley is directed to remove the first respondent, Getrude Koyingana, as the executrix of the estate of the late Zamuxolo Koyingana.
4. Getrude Koyingana is ordered to forthwith return the movable items in her possession to the Koyingana household, represented by the first applicant, situated in Kimberley, including:
 - 4.1. The motor vehicle;
 - 4.2. The keys to the motor vehicle in Kimberley;
 - 4.3. Remote control of the Kimberley household gate; and
 - 4.4. All documents and items belonging to and/or relating to the deceased, Mr and Mrs Koyingana.
5. That either the first and second applicants or the first respondent and any other interested party who seeks to be assigned guardianship and care, including custody of the minor children are directed to initiate, with the Court having jurisdiction, an application envisaged in section 23 and 24, read with section 29 of the Children's Act 38 of 2005 within thirty (30) days from the date of this order.

6. The Family Advocate, Kimberley is directed to liaise with the Family Advocate, Cape Town to jointly prepare a report for presentation to the Court dealing with the application envisaged in paragraph 5 above on the best interests of the two minor children on the aspects of guardianship, primary care, residence and contact.

7. That pending the finalisation of an application envisaged in paragraph 5 above:
 - 7.1. the two minor children are to temporarily reside with the first respondent who shall exercise such rights and responsibilities in relation to them;

 - 7.2. the first respondent shall ensure that the first and second applicants have reasonable contact with the minor children at all times, which contact includes:
 - 7.2.1. telephone or electronic contact at reasonable times; and

 - 7.2.2. contact visits during long school holidays.

8. The Eskom Pension and Provident Fund be and is hereby interdicted from making any payment in respect of the pension benefits of the late Nomfundo Sylvia Welbornia Koyingana to the first respondent and/or to the estate account opened by and/or on behalf the first respondent in her capacity as the executrix of the estate of the late Zamuxolo Koyingana.

9. The Government Employees Pension Fund be and is hereby interdicted from making any payment in respect of the pension benefits of the late Zamuxolo Koyingana to the first respondent and/or to the estate account opened by and/or on behalf the first respondent in her capacity as the executrix of the estate of the late Zamuxolo Koyingana.

10. The first respondent is ordered to pay the costs, which costs shall be limited to the costs of one counsel.

**O.K.CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY**

**DATE OF HEARING: 13 May 2022
DATE OF JUDGMENT: 14 June 2022**

REPRESENTATIONS:

For the applicants:

Adv P Mthombeni
With him Adv T Tyuthuza
Instructed by:
Thomas Kouter Attorneys
Kimberley

For the first respondent:

Adv J Mongala
Instructed by:
Gqadushe Attorneys
Kimberley