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

CASE NO: 20/13909

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
25/01/2022

In the matter between:

DUBE, SIMANGELE JOHANNA

Applicant

and

NDLOVU THULISILE IRENE

First Respondent

MADLALA BONGANI ERIC

Second Respondent

MASTER OF THE HIGH COURT

Third Respondent

JUDGMENT

FLATELA A.J

Introduction

Can a court nullify testator's last and final Will and declare a previous Will the final Will on the basis that the testator failed to bequeath an asset he previously bequeathed to a beneficiary?

[1] The testator, Mr Samuel Madlala executed three Wills in his lifetime. The first Will was executed in 2009, the second Will in 2011 and the third and final Will in 2014. Mr Madlala was married in community of property with Thelma Thandi Madlala. Thelma Thandi Madlala predeceased him. She died in June 2014. The testator was involved intimately with two other women. The applicant, who claim to be his customary law wife brought this application to have the testator's second Will declared as his last will. Her reasons will be discussed below.

[2] On 24 June 2011 the testator executed a Will (the second Will) in terms whereof he bequeathed to the applicant as a special legacy his share in the property described as ERF [...] Kagiso Township, Mogale City Municipality; Registration Division IQ, Gauteng Province, held by Title Deed No: 43109/2010. The property will be referred to as Kagiso Property. In terms of the second Will the applicant was also appointed as the executor of the estate.

[3] On 2 February 2014 at Ladysmith, the deceased executed a third Will and revoked all Wills and codicils previously made by him. In the third Will the deceased appointed his heirs Thulisile Irene Ndlovu, the first respondent, Nomsombulukoko Ndlovu (the first respondent's mother and alleged customary law wife) and Mandla Madlala, the second respondent. He bequeathed cash to them. He bequeathed the residue of his estate to his spouse Thelma Thandi Madlala. The deceased appointed ABSA Trust as the Executor of his estate. The applicant does not feature at all in this third Will.

[4] On 5 October 2018, the agent of the Executor and the Estate Administrators prepared and submitted the first and final liquidation account of the estate of the late Samuel Madlala. The Administrator of the estate regarded the Kagiso Property as the residue. He distributed it in equal shares between the first and second respondent. The deceased spouse, Ms Thelma Madlala pre-deceased the deceased.

[5] Having failed to convince the administrators to transfer the Kagiso Property to her in terms of the 2011 Will, the applicant launched these proceedings. In her Notice of Motion, the applicant is seeking the following relief:

- 5.1. Recognizing the Will dated 24 June 2011 as the relevant and final Will in as far as the deceased intentions regarding the property ERF [...], Kagiso Township, Mogale City, Gauteng;
- 5.2. Accepting that all other Wills specifically failed to deal with aforementioned property and that;
- 5.3. Ownership of the property described as ERF [...] Kagiso Township; Mogale City be transferred to applicant
- 5.4. Interdicting the first and second respondents from any attempt to sell and/or any attempt to evict applicant from said property.
- 5.5. Further and/or alternative relief.

[6] In her founding affidavit the applicant states that she is seeking the following relief:

- 6.1. that the subsequent Will be declared null and void, in line with the wish of the deceased in his last Will dated 24 June 2011;
- 6.2. that the first to third respondents be ordered and directed to furnish the applicant with a full and final distribution of the late Samuel Madlala's Estate, financial and bank statements, up to the time when the matter was finalised by the Master of the High Court;
- 6.3. that the first and second respondents be directed that all the funds that

have been unlawfully paid into their bank accounts in violation of the 2011 Will be recovered and that she be provided for a share as well

6.4. that the respondents be interdicted from parading themselves as the sole heirs of her late husband Mr Samuel Madlala.

[7] The relief sought in the Notice of Motion is starkly different from the relief sought in the founding affidavit.

[8] The application is opposed by the first respondent only. The second respondent has since died. The third respondent is not opposing the application.

[9] The applicant is seeking final relief. The evaluation of the affidavits must be in accordance with the *Plascon Evans* principle.

[10] In *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* Corbett JA said the following to the approach in determining the facts in motion proceedings for final relief¹

‘It is correct that, where in proceedings on notice of motion, disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact...If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court. . . and the Court is satisfied as to the

¹ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* (53 of 1984) [1984] ZASCA 51, para 8 to 9.

inherent credibility of the applicants factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. . . Moreover, there may be expectations to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely in the papers’.

[11] In support of the relief sought, the applicant avers the following:

11.1. She met the deceased in 1998. They got involved in a love relationship and moved in together as husband and wife².

11.2. In 2009 she and the deceased decided to buy the house which was bought in 2010 and they only moved to their home in 2011³.

11.3. Before the deceased got possession of the title deed, the deceased deposed to an affidavit at the police station which clearly demonstrated his intention to co-own the Kagiso Property with her⁴.

11.4. On 24 June 2011, the deceased executed second Will. In this Will the deceased awarded the Kagiso Property to her. The deceased’s mindset and intention has always been that the applicant would inherit it.

11.5. On 16th June 2013, she and the deceased married in terms of customary law. The applicant attached a handwritten lobola agreement letter allegedly between the deceased and her family⁵.

11.6. There are no children born out of the marriage, but the applicant avers that they built the house together with the deceased for themselves and for her child who was born prior to the marriage.

11.7. In 2014 the deceased executed the third will. in this third will, the deceased made no mention of the Kagiso Property because he clearly knew in

² Para 8.1 of the Founding affidavit

³ Para 8.2 of the founding affidavit

⁴ Para 7.5 of the founding affidavit

⁵ Para 8.3 of the founding affidavit

his mind that the Kagiso property has been bequeathed to her⁶.

11.8. The deceased died on 24 December 2014 in her hands on his way to the hospital at his home eMnambithini. The deceased had requested the applicant to take him to his place of birth to take care of him until his death.

[12] She seeks a declaratory order to the effect that the third Will is null and void; and to declare the second Will dated 24 June 2011 as the deceased last Will.

[13] The applicant states that the Master of the High Court relied on the Will that had been revoked in denying her rightful inheritance despite receiving a letter from the deceased attorneys regarding the Will dated 24 June 2011.

The respondent's case

[14] The first respondent filed an answering affidavit, and these facts arise from her answering affidavit:

14.1. The first respondent is the daughter of the deceased and one Ms Nomsombuluko Ndlovu whom the deceased bequeathed cash to. The first respondent was born in 1980.

14.2. The first respondent avers that the deceased was married in community of property to Thelma Madlala who predeceased him. She attached a marriage certificate.

14.3. The first respondent alleges that in 2001 the deceased married one Nomsombuluko Ndlovu, her mother, customarily. She attached the letter of agreement between the two families.

[15] The first respondent disputes that the applicant was married to the deceased but admits that they were in a love relationship. The first respondent states that she is not known in the family and that the deceased family was not involved in the purported

⁶ Para 7.4 of the founding affidavit

lobola negotiations between the deceased and the first applicant. She disputes that the applicant was the lawful wife of the deceased.

[16] The first respondent denies that the deceased's intention was for the applicant to inherit the Kagiso Property because the deceased revoked the second Will, wherein he bequeathed the Kagiso Property to her. The first respondent denies that signature in annexure JD4 which purports to be an affidavit deposed by the deceased regarding co-ownership of the property is contested. The signature is not like the signature in all three Wills.

[17] Furthermore, the first respondent avers that the deceased was married in community of property at the time of the alleged marriage and the purchase of the Kagiso Property. The deceased therefore had no authority to depose the property belonging to the joint estate.

[18] The first respondent avers that the third and last Will revoked the second Will and the applicant has no legal or factual basis for the relief sought.

[19] In reply, the applicant avers that the deceased wife, the late Thelma Thembi Madlala gave consent for her and the deceased to marry. She filed an affidavit by one Sizwe Happy Madlala in support of her averments that it was the intention of the deceased to leave him the Kagiso Property. Sizwe is the grandson of the deceased.

[20] To counter the allegation of a different signature in annexure JD4, the applicant also filed an affidavit from the police confirming that the commissioner of oaths was working at that police station.

[21] The replying affidavit clearly introduced new facts which the respondents were not given an opportunity to respond to. It is trite that the applicant must plead her case on the founding papers. The new case that she is pleading on reply will be ignored.

[22] In her heads of argument that applicant avers that the requirements of customary marriage were fulfilled. I will not deal with this aspect in this matter. The applicant is not relying on her alleged customary marriage to the deceased to claim inheritance from the estate. She relies on the 2011 Will.

[23] It is trite that the final order may only granted if the facts averred in the applicant affidavit which has been admitted by the respondent together with the facts alleged by the respondent.

[24] The pleadings in this matter were not a model of clarity. Despite this the court was able to identify the issue in this matter. The issue is whether the Court can declare a Will other than the last Will of the testator to be the last Will in as far as the Kagiso Property.

[25] It is common cause that the deceased executed three wills in his life time, the 2009 Will dated 23 October 2009, the second will date 24 June 2011 and the third and last will dated 3 February 2014.

Legal principles on the interpretation of Wills

[26] As stated earlier, the deceased executed three Wills in his lifetime but only two are subject of this application. Although the first Will is not subject of this application it is relevant for the purpose of ascertaining the intention of the testator.

[27] A testator has a right to revoke his /her will as he pleases throughout his lifetime. He/she is allowed to amend his /her Will as many times as he/she pleases.

[28] The issue to be determined by this court is whether the deceased intended the second Will read with annexure JD4, which is a copy of an alleged affidavit deposed to in 2011 to be to be his final Will within the meaning of s 2(3) of the Wills Act 7 of 1953 (the Wills Act). Regarding the affidavit purported to be deposed by the deceased, the

section provides:

‘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 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 in subsection’.

[29] The golden rule for the interpretation of Wills is to ascertain the wishes of the testator from the language used. Once the wishes of the testator have been ascertained a court is bound to give effect to them.⁷ It follows that where a bequest has been made in an earlier testamentary disposition it would require clear and unambiguous language in a later testamentary disposition to justify a court finding that the testator had intended to revoke such bequest.⁸

[30] In *Ranbenheimer v Ranbenheimer*⁹ the court held that in interpreting a Will, a court must if at all possible give effect to the wishes of the testator. The cardinal rule is that *‘no matter how clumsily worded a will might be, a will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes can be carried out’*.¹⁰

[31] Theron JA said in *Pienaar v Master of the Free State High Court*¹¹

“Where a testator dies leaving more than one testamentary disposition the wills must be read together and reconciled and the provisions of the earlier

⁷ *Robertson v Robertson’s Executors* 1914 AD 503 at 507; *Cuming v Cuming* 1945 AD 201 at 206; *Cohen NO v Roetz NO* 1992 (1) SA 629 (A) at 639A.

⁸ *Ex parte Adams* 1946 CPD 267 at 268.

⁹ *Raubenheimer v Raubenheimer* (560/2011) [2012] ZASCA 97, para 23.

¹⁰ Per Steyn J in *Masters v Estate Cooper* 1954 (1) SA 140 (C) at 143H-144A.

¹¹ *Pienaar v Master of the Free State High Court* (579/10) [2011] ZASCA112

testaments are deemed to be revoked in so far as they are inconsistent with the later ones. Where there is conflict between the provisions of the two wills, the conflicting provisions of the earlier testament are deemed to have been revoked by implication.”

Evaluation

I now deal with the relevant clauses of the wills

The 2009 Will

[32] The 2009 Will was executed by deceased at ABSA BANK BRANCH in Midrand. In terms of this Will he bequeathed his estate to his spouse Thelma Thandi Madlala. This Will was executed by the deceased exactly 10 years after he and the applicant allegedly moved in together as the husband and wife. The deceased appointed ABSA BANK TRUST as executors of his estate.

[33] In 2010, the deceased bought the Kagiso Property. According to the Windeed search attached by the first respondent, the property in question was purchased in October 2010. It was registered in the deceased’s name in December 2010.

[34] In 2011, before the deceased received his title deed, the applicant alleges that the deceased went to the police station in Midrand to depose to an affidavit. The alleged affidavit is annexed JD4 in which it is alleged that the deceased stated that he intended to include the applicant in the ownership of the Property.

The 2011 Will

[35] On 24 June 2011, the deceased executed the second Will and revoked any previous Wills made by him. In this Will, the deceased deposed of his estate as follows:

“LEGACIES

As a special legacy, I bequeath my share in the house being ERF[...] Kagiso Township to Simangele Johanna Dube, Identity Number :[...].

APPOINTMENT OF HEIRS

I hereby appoint as heir of the balance of my estate, Thelma Thandi Madlala “

[36] This Will has a reservation clause where the deceased reserved the right to at any time to ‘revoke or alter this will by a new will or adding any codicil, and such will or codicil signed by him in the presence of two competent witnesses signing as such in the presence of each shall be of full force and effect’. (My underlining).

The 2014 Will

[37] On 3rd February 2014 at ABSA Bank in Ladysmith, the deceased executed the third and final Will. It states that:

‘I, the undersigned Madlala (ID [...])

Married in of community of property, hereby revoke all wills and codicils previously made by me and declare this to be my will.

1. Heirs

I bequeath my estate as follows:

1.1 A cash amount of R200 000.00 (Two Hundred Thousand Rand) to Thulisile Irene Ndlovu (Born 30-07-1980)

1.2 A cash amount of R100 000.00 (One Hundred Thousand Rand to Nomsombulukoko Elizabeth Ndlovu (Born 1 -11-1942)

1.3 A cash amount of R100 000.00(One Hundred Thousand) to Bongani Eric Madlala (born 29-12-1970)

1.4 The residue to my spouse Thelma Thandi Madlala’

[38] The 2014 Will is totally different from the previous Wills in that the deceased bequeathed cash to his children and to Ms Nomsumbuluko Ndlovu who is a mother to

the first respondent. In his previous wills, his children and Ms Nomsumbuluko never featured.

[39] The second notable change is that the applicant is not mentioned at all in the Will. She was replaced as an executor of the estate, and she was not listed as one of the heirs. She was not bequeathed any estate whether in cash or in property.

[40] The applicant avers that she brought this application because the Will dated 23 October 2009 and the Will dated 3 February 2014 have made no mention of the Kagiso Property. According to the applicant, this was because the deceased had already bequeathed Kagiso Property to her in terms of the Will dated 24 June 2011 .

Freedom of Testation

[41] Freedom of testation is an inherent foundational right to an individual's governance of their affairs. It affords them authority over their property and arrangement thereto. Erasmus AJA puts this position as follows in *BoE Trust Limited NO & others*¹²:

'Section 25(1) of the Constitution provides that no one may be deprived of property, except where the deprivation is done in terms of a law of general application. What is more, it entrenches the principle that no law may permit the arbitrary deprivation of property. The view that section 25 protects a person's right to dispose of their assets as they wish, upon their death, was at least accepted in *Minister of Education v Syfrets*, although no decision to this effect was made. This view, is to my mind, well held. For if the contrary were to obtain, a person's death would mean that the courts, and the state, would be able to infringe a person's property rights after he or she has passed away unbounded by the strictures which obtains while that person is still alive. It would allow the state to, in a way, benefit from someone's death. Francois du Toit, after having

¹² *BoE Trust Limited NO & others* (846/11) [2012] ZASCA 147

done extensive research on freedom of testation in South Africa and in other jurisdictions, states the position thus:

“Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit. This principle is supplemented by a second important principle, namely that South African courts are obliged to give effect to the clear intention of a testator as it appears from the testator’s will. Freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property. An owner’s power of disposition includes disposal upon death by any of the means recognized by the law, including a last will. The acknowledgement of private ownership and the power of disposition of an owner therefore serve as a sound foundation for the recognition of private succession as well as freedom of testation in South African law.”¹³

‘Indeed, not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.

Did the 2014 Will revoke the 2011 Will?

[42] The nub of the applicant’s case is that the 2011 is the final Will as far as the Kagiso Property is concern. The applicant avers that the fact that the 2014 Will is silent on the Kagiso Property which was bequeathed by the deceased in 2011, therefore the

¹³ F du Toit ‘The constitutionally bound dead hand? The impact of the constitutional rights and principles on freedom of testation in South African law’ 2001 *Stell LR* 222 at 224

2011 Will must be regarded as a final Will of the deceased regarding the Kagiso Property. Simply put, her case is that the Kagiso Property must not be regarded as a residue but the Executor and Master must regard the 2011 Will as the final will in as far as her inheritance is concern. There is no merit in the applicant's argument. It is clear from the language used in the 2014 Will that the deceased intended to revoke all the wills and codicils made by him and the 2014 replaced all wills and codicil he previously made including the 2011 Will. I have already alluded to the differences between the 2011 and the 2014 Wills. In the 2014 Will, the deceased appointed his children as heirs and he bequeathed cash to them as their inheritance. The deceased also named Nomsombuluko Ndlovu as one of his heirs and he bequeathed cash to her too. Ms Nomsombuluko Ndlovu is one of his children's mothers. He then bequeathed the residue of the estate to his late wife Thelma Thembi Dladla. At the time of executing this will Thelma was still alive. It seems to me that the deceased knew exactly what residue of the estate meant at the time of the execution of the 2014 Will. He named his heirs and the people he wanted to give inheritance and the applicant is not one of them unfortunately.

In my view, the 2014 Will is not even remotely similar to the 2011 Will. It is a radical departure in character from the 2011 Will.

[43] Regarding the Freedom of testation as a constitutionally protected right ;Mhlantla J said in *Wilkinson and Another v Crawford N.O. and Others*¹⁴

“Freedom of testation itself is constitutionally protected as it implicates the rights to property, dignity and privacy. This Court has acknowledged that freedom of testation “is fundamental to testate succession”

[44] With regard to the allegation that it was not the intention of the testator to revoke the 2011 Will, it bears to mention that unlike the first Will , this Will had an amendments and alteration clause where the testator reserved the right to, at any time, ‘*revoke or*

¹⁴ [2021] ZACC

alter this will by a new will or adding any codicil, and such will or codicil signed by him in the presence of two competent witnesses signing as such in the presence of each shall be of full force and effect’.

[45] Even if the 2011 Will did not contain the Revocation Clause, the 2014 Will had its own clear preamble different to that of 2011 Will. It states, ‘*I, the undersigned Madlala (ID [....]) Married in of community of property, hereby revoke all wills and codicils previously made by me and declare this to be my will.*’ This provision carries no margin of error to sustain finding contrary to the testator intention.

[46] The testator in the 2014 Will as in 2011 Will dealt with residue. In the 2011 Will he appointed Thelma Madlala as heir and he bequeathed the residue of the estate to her. It is clear from these wills that the testator’s intention was for his spouse Thelma Thandi Madlala to inherit the unspecified assets. The deceased have other properties in Gauteng and in KwaZulu Natal according to the attached First and Final Liquidation and Distribution Account of the Estate of the deceased. He had not specified these assets. In 2014 Will he does not specify these assets but state that the residue is bequeathed to his spouse Thelma Thandi Madlala.

[47] The applicant attached JD14 to show the testator’s intention that he intended for her to inherit the house. The JD14 was allegedly deposed in the police station before the 2011 Will was drafted on 16 April 2011. The 2011 Will was revoked by 2014 Will.

[48] The language used in the 2014 Will clearly shows that the deceased never intended the applicant to inherit from his estate and I must give effect to that. Brooms J words in *Price v The Master and others*¹⁵ [1982] 2 All SA 147 N are apposite:

“In a situation such as this where there are two wills, the terms of which are to some extent identical, but in the main they differ and each of which deals with the entire estate, I have great difficulty in appreciating how they can be

¹⁵ *Price v The Master and others* [1982] 2 All SA 147 N

reconciled. I have no doubt that they cannot stand together and that the later must be construed as impliedly revoking the earlier... This view accords with the general rule stated by GARDINER, J.P. in *Vimpany v. Attridge* 1927 CPD 113 at 115: "Each of these wills disposed of the whole of his estate, and the one is wholly in conflict with the other. Each was what the Roman lawyers would call a *testamentum perfectum*. In such circumstances, according to the law of Rome and also of South Africa, the later will would ordinarily operate as a revocation of the earlier, even in the absence of a clause of revocation."

[49] In my view, the 2014 Will revoked the 2011 Will. The administrator of Estate and the third respondent were correct to regard the Kagiso Property as a residue of the estate.

ORDER

In the result, the following order is made:

1. The application is dismissed with costs.

FLATELA L

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 25 January 2022.

Date of Hearing: 13 October 2021

Date of Judgment: 25 January 2022

Applicants' Counsel: Adv Jabu J Mabaso

Instructed by: Frans Mashele Incorporated

Respondent's Counsel: Adv R Mthembu
Instructed by: S E Dube Attorneys