



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4373/2021

In the matter between:

MARIA MPOTSENG NHLAPHO-MASOEU

1st Applicant

LYDIA MOSIDI MASOEU THAELE

2nd Applicant

MATSHEPISO SARAH MASOEU-LECHE

3rd Applicant

and

PULENG MARIA MOKOENA

1st Respondent

REMASOEU PULENG FUNERAL HOME

2nd Respondent

REMASOEU THATO FUNERAL

3rd Respondent

THE MASTER OF THE HIGH COURT (BLOEMFONTEIN)

4th Respondent

HEARD ON: 20 JANUARY 2022

JUDGEMENT BY: LITHEKO, AJ

DELIVERED ON: 27 JANUARY 2022

INTRODUCTION

[1] On the 23rd September 2021 the Applicants obtained an interim prohibitory interdict against the Respondents on an urgent *ex parte* basis in the following terms:

1. “The application is found and held to be urgent and the applicant’s non-compliance with the requirements of the Rules of court relating to service and time periods is waived and/or condoned.
2. The first respondent (and second and third respondents as the case may be) is/are hereby interdicted and/or restrained from dealing in and/or transferring and/or disposing of and/or in any manner alienating the estate or any of the proceeds therefrom, forming part of the joint will (attached here marked A) of the late Tlala Doctor Masoeu (ID number [....] and Rachel Motsilisana Masoeu (ID number. [....]) and
3. The first respondent (and second and third respondents as the case may be) is/are hereby interdicted and/or restrained from dealing in and/or transferring and/or disposing of and/or in any manner alienating any part of the estate be it forming part of a will and/or any other testamentary document by and/or any community estate (if any) between the first respondent and the late Tlala Doctor Masoeu (ID number [....]), and
4. The relief set out in paragraph 2 and 3 above is granted operate as interim orders with immediate effect pending the final determination and outcome of Part B of this application.
5. The applicants are hereby ordered and directed to forthwith serve on the respondents
 - 5.1. a copy of any order granted in respect of paragraphs 2 and 3 above;
 - 5.2. the notice of motion in this application and the founding affidavit together with its annexures; and
 - 5.3. a notice informing the respondents that the return date referred to below may be anticipated on 24 hours written notice to the applicants at the address of the applicants’ attorneys.

6. Calling on the first and/or the respondents to show cause on 28 October 2021 at 9h30 or soon thereafter as the matter may be heard why the interim orders in paragraph 2 and 3 should not be made final, and why the respondents should not be ordered to pay costs of the application.”

- [2] On the 27th October 2021 the respondents delivered their answering affidavit and on the 28th October 2021 the Rule *Nisi* was extended to the 20th January 2022. The applicants served their replying affidavit on the 10th January 2022 and filed it with the Registrar on the 11th January 2022.

THE RELEVANT FACTUAL BACKGROUND

- [3] The applicants are the biological children (although not the only children) of the late Rachel Motsilisana Masoeu, who died on the 5th July 2019 and the late Tlala Doctor Masoeu, who died on the 1st September 2021. The deceased will hereinafter be referred to as the late Mr and Mrs Masoeu respectively.
- [4] The late Mr and Mrs Masoeu, who were married to each other on the 24th April 1978 in community of property, executed a joint will on the 22nd January 2019 (the 2019 joint will).

Clause 3.1 of the 2019 joint will stipulates that,

“we appoint the surviving spouse as the sole and universal heir or heiress of all our estate and effects, movable and immovable, wherever situate and nothing excluded”.

- [5] On the 30th July 2020 the late Mr Masoeu married the 1st respondent out of community of property without accrual and on the 8th June 2021 they executed a joint will (the 2021 joint will). The revocation clause thereof provides that,

“We hereby revoke, cancel and annul all previous wills and testamentary dispositions made and executed by us and declare this to be our last will and testament”.

THE APPLICANTS' VERSION REGARDING APPLICATION FOR AN INTERIM ORDER.

- [6] The Rule *Nisi* was issued on the basis of the allegations which are contained in paragraphs 30 up to and including 42 of the founding affidavit and they may be summarised as follows,
- [7] The applicants are the beneficiaries of the estate of the late Mr and Mrs Masoeu as stipulated in the 2019 joint will.

After the death of the late Mr Masoeu, the 1st respondent unlawfully ordered an employee of Remasoeu Funeral Home CC, a company of which the 1st applicant is a 10 percent shareholder, to deposit R10 000.00 into the 1st respondent's personal banking account.

She took control of the estate of the late Mr and Mrs Masoeu and thereby deprived the applicants of their rights as the beneficiaries of the estate.

The applicants aver further that the 1st respondent is in control of all the bank and phone sim cards belonging to Remasoeu Funeral Home CC which control enables her to divert all the business of that company to the 2nd and 3rd Respondents, the companies co-owned by the 1st respondent and the late Mr Masoeu and which were incorporated after the death of the late Mrs Masoeu.

It is on the basis of the foregoing assertions that the Applicants submit that there is a real danger that they, in their alleged capacities as the beneficiaries of the joint estate of the late Mr and Mrs. Masoeu, would suffer irreparable harm if the 1st respondent is not interdicted from further dissipating that joint estate.

THE REPLYING AFFIDAVIT OF THE APPLICANTS

- [8] As indicated earlier in this judgment, the applicants' replying affidavit was delivered out of the prescribed time limits and in her heads of argument Ms Macakati, who appeared for the respondents raised issue with this non-compliance with the Uniform Rules of Court on the part of the Applicants. Mr Bodlani, appearing for the applicants applied informally for condonation of the late filing of the replying affidavit. Ms Macakati opposed this application. Counsel for the applicants and the respondents advanced arguments in this regard.

Although I have decided to exercise my discretion in favour of granting the applicants the indulgence, based on the conclusion that I have reached, nothing turns around the admission or rejection of the applicants' replying affidavit and nothing more needs to be said on this issue.

THE VERSION OF THE RESPONDENTS

- [9] In opposing the application the respondents denied that, (a) the applicants are the beneficiaries of the estate of the late Mr and Mrs Masoeu in terms of the 2019 joint will, (b) the 1st respondent is dissipating or alienating the assets of the joint estate of the late Mr and Mrs. Masoeu.
- [10] The 1st respondent avers that the applicants, with the assistance of the 3rd applicant's husband, together with Thapelo Masoeu and Themba Masoeu unlawfully evicted her from the property that she occupied with the late Mr Masoeu. Although she reported this unlawful eviction to the police, they did not restore her into possession of the property as they considered the issue to be a civil matter.
- [11] The 1st respondent has made a counter-accusation that the 1st applicant is the one who has taken over the business of Remasoeu Funeral Home CC and she is conducting same under the name and style of Rebomasoeu Funeral Home. This new entity is used to siphon off and/or divert and/or generally to dissipate Remasoeu Funeral Home businesses for the benefit of the 1st applicant.

THE ISSUE

- [12] When I called upon Counsel for the parties to identify the legal issue that this application raises, they were in agreement that the confirmation or discharge of the Rule *Nisi* issued herein is dependent upon the determination of Part B of the application.

The prayers sought in Part B are stated as follows in paragraph 43 of the founding affidavit,

- “42.1 (sic) that the terms and stipulations of the joint will of the late Tlala Doctor Masoeu and the late Rachel Motsilisana Masoeu, the testators are valid and the true reflection of the last will and testament of the testators.
- 42.2 the estate of the joint will mentioned above is not part of and is specifically excluded from any estate, if any, including but not limited to any accruals in terms of the Matrimonial Property Act 88 of 1984, as the case may be, between the first respondent and the late Tlala Doctor Masoeu.
- 42.3 An order diverting the first respondent and/or the respondents altogether or whoever may be in possession of any of the estate belonging to and owned by the joint estate to immediately return same to the joint estate”.

THE LEGAL PRINCIPLES

- [13] Either party to a mutual or joint will may, while both are alive, revoke his or her share of the mutual will with or without communication to the other party. But after the death of one party, the survivor may not revoke his or her share of the mutual will where both of the following further conditions or circumstances occur: (a) the mutual will effects a “massing” and (b) the survivor has accepted some benefit under the will.¹
- [14] Notwithstanding its form, a joint will is simply two separate wills embodied for convenience in one document.²
- [15] Sometimes, a joint will is in fact the will of the first-dying only, e.g. where the will appoints the survivor of the testators as the sole heir of the first-dying.³

EVALUATION AND APPLICATION OF LAW TO THE FACTS

- [16] The applicants brought this application on allegations that they are the beneficiaries of the estate of their late parents, Mr and Mr Masoeu. As Mr Bodlani argued, they rely on the provisions of clause 3 and 5 of the 2019 joint will. The only part of clause 3 that finds application in this matter is clause 3.1

¹ Kruger vs Terblanche 1978 (2) SA 198 (T) at 205

² Warren and Tupin vs The Master and Silberbauer 1913 CPD 784 at 791

³ Wille’s Principles of South African Law, 9th Edition at page 691, Skead vs Fourie (1896) 3 O R 183

which I quoted hereinabove. Clauses 3.2 up to and including 4.5.13 would have applied if the late Mr and Mrs Masoeu had died simultaneously.

Clause 5 stipulates that,

“Any benefits which an heir may derive out of this Will shall be his or her own separate property, and where he or she marries or is married in community of property, such benefit shall not form part of the joint estate, nor in case of a female heir, shall it be subject to the marital power of her husband. Furthermore, it shall not be subject to execution for the debts and liabilities of her husband, nor, in the event of his insolvency, shall it fall within the insolvent estate.”

- [17] Mr. Bodlani argued that because the late Mr. Masoeu accepted the benefits under the 2019 joint will, and as that will is still in force, so the argument went, he could not revoke it. He argued that the revocation clause in the 2021 joint will could, on a proper interpretation thereof, not have been intended to refer to the 2019 joint will because the 1st respondent was not the Testatrix of the 2019 joint will. As authority for the proposition that once a testamentary beneficiary has accepted the benefits under a joint will, it becomes irrevocable, Mr Bodlani referred me to the case of *Mochochoko vs Mochochoko* 2019 JDR 0026 (FB), at paragraph 19.

In that case, Daffue J, quoting Wille’s *Principles of South African Law* (supra) at page 727 – 728 stated the following,

“If the survivor abides by the will and accepts benefits thereunder. he/she cannot later on revoke such joint will in a later will. He/she is under an obligation to allow the property to devolve in terms of the joint will”.

- [18] Although the above is a correct statement of the law of testate succession, Mr. Bodlani quoted the *Mochochoko* case out of context. The joint will that was referred to in that quote is one that effected a massing⁴ of the estates. The case of *Mochochoko* is therefore of no relevance in this application.

⁴ Massing is a disposition by the testators in a mutual will of their joined property or a portion of it in favour of the survivor, giving him or her a limited interest (usufructuary or fiduciary) in the joined property, and providing that on his or her death such property is to go to some other person or persons. See *Rhode v Stubbs* 2005(5) SA 104 (SCA) at [12]

- [19] It is abundantly clear that the 2019 joint will did not effect a massing as the late Mrs Masoeu appointed the late Mr Masoeu as, “the sole and universal heir of all her estate and effects, moveable and immovable, wherever situated and nothing excluded”. Upon the death of the late Mrs. Masoeu, the late Mr, Masoeu acquired ownership of all the properties belonging to their joint estate and he was consequently entitled to deal therewith in any manner that he preferred, including, as he has done, bequeathing it to the 1st respondent.
- [20] The effect of clause 5 of the 2019 joint will is that the property that the late Mr. Masoeu inherited in terms of that will could not form part of any joint estate in the event he remarried in community of property nor could it be subject to execution for the debts specified in that clause. It is not a resolutive condition as Mr. Bodlani argued, which, if not fulfilled stripped the late Mr Masoeu of his ownership of the inheritance.
- [21] Mr Bodlani argued further that because the late Mr. Masoeu’s registration and incorporation of the 2nd and 3rd respondent companies, which he co-directed with the 1st respondent constituted the formation of a joint estate between them, ownership of the property that he inherited reverted to the joint estate and fell to devolve in terms of the rules of intestate succession. This, he argued, is the basis whereupon he submitted the applicants are the beneficiaries of the portion of the estate of the late Mrs Masoeu. I do not agree with Mr Bodlani in this regard as this is plainly not a correct statement of the law.
- [22] Even if the incorporation of the 2nd and 3rd respondent companies could be construed as an act of establishing a joint estate between the 1st Respondent and the late Mr. Masoeu, as argued by Mr. Bodlani, that would not have disentitled the late Mr. Masoeu to inherit in terms of the 2019 joint will.

CONCLUSION

- [23] The 2019 joint will, although it was executed by both the late Mr and Mrs. Masoeu jointly, it essentially turned out to be the will of the late Mrs. Masoeu, as

the first-dying for the reason that it appointed the late Mr. Masoeu as the sole and universal heir of the late Mrs. Masoeu. The legal effect of this in my view is that all the applicants were disinherited and they are therefore not the beneficiaries of the estate of the late Mr Masoeu who became the sole beneficiary of the estate of the late Mrs Masoeu when the latter died.

Although the 2019 joint will was valid, it did not have any effect on the right of the late Mr Masoeu to bequeath the property he inherited in terms thereof. I have found that the 2019 joint will is as good as having been the will of the late Mrs. Masoeu. No benefit could be derived therefrom by any of the applicants when she died.

The Rule *Nisi* issued on the 23rd September 2021 therefore, falls to be discharged as the applicants have not shown on a preponderance of probabilities that they have any rights to the estate that they claimed to be the beneficiaries of. Even if the 1st applicant has a 10 percent shareholding in the Remasoeu Funeral Home CC, the remedy that she seeks in this application is not the only remedy to enforce her rights.

THE ORDER

[24] I therefore make the following order:

The Rule *Nisi* issued on the 23rd September 2021 is hereby discharged. The Applicants are ordered to pay the costs of the application, inclusive of the costs of the 28th October 2021.

M. S. LITHEKO, AJ

For the Applicants:

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For the Respondents:

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