



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

Reportable:	YES
Of Interest to other Judges:	YES
Circulate to Magistrates:	YES

Appeal Number: A230/2018

In the matter between:

MAMOKETSE ALINA KAMEEL
(in her capacity as executor of the
Estate Late SS Monyane)

Appellant

and

MASTER OF THE HIGH COURT BLOEMFONTEIN

1st Respondent

MALEFANE MONYANE

2nd Respondent

CORAM: MUSI, JP *et* MOLITSOANE, J *et* MOROBANE, AJ

JUDGMENT: MOROBANE, AJ

HEARD ON: 27 MAY 2019

DELIVERED ON: 1 AUGUST 2019

- [1] This is an appeal, with the leave of the court *a quo*, against a judgment of a single judge of this division arising from an application in terms of section 2(3) of the Wills Act 7 of 1953 ("the

Act"). The first respondent ("Master") was served with the court papers and he abides the decision of the court. The appeal is opposed by the second respondent.

- [2] During her lifetime, SS Monyane ("the deceased") deposed to two affidavits on 23 January and 24 January 2015 respectively. In each affidavit a police officer acted as a commissioner of oaths and the deceased signed by way of a mark, her thumb print, in the presence of some family members. Four months later on 13 May 2015, the deceased executed another document that purports to be her last will ("the purported will"). The purported will was executed at attorneys' offices. She had also signed the purported will by way of a thumb print. After her death on 16 March 2016, the appellant was appointed as the Master's representative in terms of section 18(3) of the Administration of Estates Act 66 of 1965. The Master confirmed in his report that the appellant was incorrectly cited as the executor of the estate in the application. The appellant's appointment was after the Master had rejected the affidavits and the purported will for the reasons as fully set out below.
- [3] The appellant, who is the daughter of the deceased, submitted the purported will to the Master for purposes of the Administration of Estates Act 66 of 1965. In the purported will the deceased revoked all previous Wills and left her entire estate to the appellant on condition that the house remained a family home. On the face of it, the purported will complied with all formal requirements of executing a will. However, it was rejected by the Master for non-compliance with s 2(1)(a)(v), which provides:

'if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page by the commissioner of oaths who so certifies.'

- [4] The purported will was rejected because the commissioner of oaths failed to certify that she had satisfied herself as to the identity of the testator.
- [5] Later the second respondent submitted to the Master the two affidavits of the deceased for purposes of the Administration of Estates Act. In terms of the affidavits, the deceased 'handed over' to her grandson the stand and the house situated at 30 Boitumelo street, Malebogo, Hertzogville. These affidavits were also rejected by the Master for the same reason as that of the purported will. This was the only reason given by the Master for rejecting the affidavits. As a result, the second respondent applied to the Court to declare the two affidavits as the last will of the deceased.
- [6] The deceased was the owner of the stand with a house built on it. This house was demolished by the second respondent who is her grandson. He then built a bigger and modern house for the deceased on the same stand. This house forms part of the assets in the estate of the deceased.
- [7] The appellant contends that the court *a quo* misdirected itself in its findings declaring the affidavits of the deceased as her last will

and testament, although the documents did not comply with all formalities for the execution of wills. She alleged that the court *quo* erred in its findings. In her notice of appeal, she relied on the grounds of appeal which are summarised as follows:

- (a) The learned judge erred in finding that the second respondent complied with the requirements as set out by section 2(3) of the Act;
- (b) That she erred in finding that the deceased intended to leave a final will when she deposed to the affidavits; and
- (c) That she erred in finding that the deceased had no intention to leave her estate to the appellant despite her having executed the purported will on 13 May 2015.

[8] The provisions of section 2(3) of the Act reads:

‘If a court is satisfied that a document or an 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 No. 66 of 1965) as a will, although it does not comply with all the formalities for the execution or amendment of wills ...’

[9] The party seeking an order in terms of section 2(3) of the Act bears the onus to satisfy the Court that the testator intended the document to be his will. In ***Van Wetten v Bosch***¹ Lewis AJ laid down the test that the real issue is not what the document means,

¹ *Van Wetten & Another v Bosch & Others* 2004 (1) SA 348 (SCA) at 354H-I

but whether the deceased had intended it to be his will at all. In that enquiry the court must examine the document itself and also the document in the context of the surrounding circumstances. It is trite that documents purporting to be a will cannot be rejected simply because of their form and the words used to express the intention of the deceased. A court is empowered to rescue a document as a will if it is satisfied that the requirements as stipulated by the Act have been met.

[10] From the wording of this section, the court must be satisfied that the following requirements are met:

- (a) There must be a document;
- (b) The document should have been drafted or executed by a person who has since died;
- (c) The deceased should have intended the document to be his/her will.
- (d) The document does not comply with all the formalities for the execution of wills.

[11] In ***Horn v Horn***² the court said that once the above requirements have been satisfied the court had no discretion but to recognise the document as a will. Similarly, in ***Logue v The Master***³ the court found that the provisions of section 2(3) are peremptory rather than directory.

² *Horn v Horn* 1995 (1) SA 48 (WLD) at 49H-J

³ *Logue v The Master* 1995 (1) SA 199 (NPD) at 203G

- [12] The purported will should be examined in the light of the surrounding circumstances. Indeed, a document titled '*Laaste wil en Testament van Selloane Susana Monyane*' was executed by the deceased on 13 May 2015. She signed it by way of a thumb print in the presence of two witnesses. The commissioner of oaths (an attorney) certified that the right thumb print is that of the deceased. Lastly, the intention of the deceased is found in the introductory part of the purported will which she declared to be her last will. In the context of the surrounding circumstances, the purported will is similar to a will in its form and content. In fact, it complied with all the formalities of a valid will, but one.
- [13] The court *a quo* found, at para 16, that 'although there was another purported will submitted and rejected by the Master, no evidence has been led to prove the authenticity or validity of the will, or even the identity of the testator.'
- [14] The Court *a quo* also found, at para 31, that 'since the Master rejected the purported will because of the lack of s 2(1)(a) certificate, it does not qualify as a will for purposes of the administration of the estate and therefore would not revoke the January affidavits should the Master in terms of s 2(3) be ordered to accept them as the Deceased's last will and testament.'
- [15] The court *a quo* misdirected itself by making a finding as though the rejection of the affidavits was based on their form and the words used by the deceased. That was not the case as explained at paragraph [5] above.

- [16] The court *a quo* overlooked the fact that a testator has a right to revoke his will at any time. This principle has two exceptions which are not relevant to this appeal. For instance, a revocation may be expressly done or may be implied. In this case, the purported will consists of a revocation clause expressed as follows:

'2. Herroeping van vorige Testamente

Ek herreop hiermee alle vorige Testamente en/of Kodisille en verklaar hierdier my laaste wil en Testament te wees.'

- [17] The court *a quo* considered the intention of the deceased at the time she deposed to and signed the affidavits. It ordered the Master to accept the affidavits as the last will of the deceased. The intention of the deceased may be contained in her affidavit. However, the court *a quo* overlooked the very intention of the deceased which was expressed in the purported will. That is, the purported will is a subsequent document executed approximately four months after the affidavits were signed. It also contains a revocation clause in which all previous wills were revoked.

- [18] Section 2A of the Act provides that:

'If a court is satisfied that a testator has-

- (a) Made a written indication on his will or before his death caused such indication to be made;
- (b) Perform any other act with regards to his will or before his death caused such act to be performed which is apparent from the face of the will; or

- (c) 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.

- [19] According to *Horn v Horn*,⁴ a later document which was not even a will could revoke an earlier will. In terms of s 2A of the Act, the court is also empowered to declare the will or the part concerned to be revoked if it is satisfied that the testator drafted another document by which he intended to revoke his will.
- [20] Both the affidavits and the purported will do not comply with the formalities of executing a will. In considering the said documents, the question that arises is whether or not the subsequent document can validly revoke an earlier document. The answer is in the affirmative as alluded to earlier. The yardstick to be applied is whether the subsequent document was intended to revoke an earlier will or not. According to *Van Wetten v Bosch*,⁵ the intention of the testator must exist at the time the document was drafted or executed.
- [21] In the light of the foregoing, the court *a quo* misdirected itself when it condoned non-compliant affidavits to be the will of the deceased in light of the revocation clause in the subsequent document. Under the circumstances, I see no reason why the appeal should not succeed. There was no court application to declare the purported will the last will and testament of the

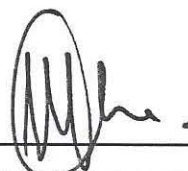
⁴ At 50C-E

⁵ At 354H-I

deceased. Nothing prevents the appellant from bringing such application.

[22] I would make the following order:

1. The appeal is upheld with no order as to costs.
2. The judgment of the Court *a quo* is set aside and replaced with the following:
 - (i) The application is dismissed with no order as to costs.



V.M. MOROBANE, AJ

I concur, and it is so ordered.



C.J. MUSI, JP

I concur.



P.E. MOLITSOANE, J

On behalf of the appellant:

Ms IL de Wet
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the second respondent:

Adv PS Mphuloane
Instructed by:
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