

/LVS

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE <u>19/5/09</u>	SIGNATURE <u>[Signature]</u>

20/5/09
DATE: ~~18~~ MAY 2009
8473/07.
CASE NO: ~~8439/2007~~

In the matter between:

RAMADIMETJE MAGDELINE MATABANE FIRST APPLICANT
MOLEBOGENG EMILY MATABANE SECOND APPLICANT
MORAMMOFO SIPHO MATABANE THIRD APPLICANT

vs.

THE MASTER OF THE HIGH COURT, PRETORIA

	FIRST RESPONDENT
SEBILETISO MOTONE MATABANE	SECOND RESPONDENT
ISSY WILLIAM GUNDELFINGER N.O	THIRD RESPONDENT
KHESWA ROSIE FLATER	FOURTH RESPONDENT
MATABANE MALEROTHU GILBERT	FIFTH RESPONDENT
MATABANE PERCY TSIDISHO	SIXTH RESPONDENT

JUDGMENT

BOTHA J:

In this matter the applicants apply for an order declaring a document marked RRM1 to be the last will and testament of the late William Ntinyane Matabane (the deceased). In the alternative the court is asked to declare his previous will, marked RRM3, revoked.

The main relief is claimed in terms of section 2(3) of the Wills Act, 1953 (Act 7 of 1953). The alternative relief is claimed in terms of section 2A of that Act.

The three applicants are all relations of the deceased. They would be beneficiaries if RRM1 is accepted as the deceased's will.

The first respondent is the Master of the High Court, Pretoria.

The second respondent is the deceased's ex wife. She is the sole heir of his estate in terms of RRM3.

The third respondent is the duly appointed executor of the deceased's estate. There is an ancillary prayer that the applicants' attorney, Mr Mendelow, be appointed in his place.

The third to sixth respondents are also relations of the deceased.

The deceased and the second respondent were divorced on 11 April 2006 after they had been together for 40 years. On that day only the divorce was granted. The patrimonial issues between the parties were settled on 30 June 2006 in terms of a deed of settlement.

The deceased and the second respondent had no children.

On 14 April 1976, whilst living in exile in the United States of America, the deceased signed the will, RRM3, in which he bequeathed his half of the joint estate to the second respondent.

In 2004, after the deceased and the second respondent had returned to South Africa, the second respondent instituted divorce proceedings against the deceased in the Witwatersrand Local Division.

The matter was set down for hearing on 10 February 2006, but it had to be postponed due to the deceased's state of health.

The deceased's attorney, Mr Mendelow, went to visit the deceased in the Carstenhof Clinic to discuss a settlement proposal. After the settlement proposal had been discussed, the deceased produced in draft a will that he had drawn up in his own handwriting. It was unsigned. The deceased also had a copy of RRM1, RRM8, that he showed to Mr Mendelow.

RRM1 in its original state reflected the following distributions of the estate of the deceased:

- First applicant: 60%;
- Fifth respondent: 10%;
- Second applicant: 10%;
- Third applicant: 10%;
- Fourth respondent: 5%;

Sixth respondent: 5%.

In the case of each beneficiary a motivation of the bequest was given.

The deceased told Mr Mendelow that he would type up his will. Mr Mendelow advised the deceased that because he was critically ill, it would be advisable for him to sign it and for Mr Mendelow to witness it. He advised him that the will would then be capable of being accepted as his will even though it did not conform with the Wills Act. The deceased then indicated that he would sign it and he did sign it at the bottom of each page.

Mr Mendelow signed as a witness on each page. After signing Mr Mendelow left with RRM1 and RRM8.

The deceased recovered to the extent that he was discharged from the clinic.

On 10 May 2006 the deceased met Mr Mendelow in his office in order to discuss settlement proposals. When the issue of the deceased's will came up for discussion, Mr Mendelow took out

RRM1 and told the deceased that they had to get "moving on it". By that Mr Mendelow mean that it had to be typed up. The deceased then told Mr Mendelow that he wanted to make some changes to RRM1. Mr Mendelow advised him that it would be better to make the changes there and then. The deceased then amended page 4-7 of RRM1 to the following effect;

- (a) In the case of the first applicant the figure 60 was changed to 50.
- (b) In the case of the fifth respondent the figure 5 was changed to 10.
- (c) In the case of the third applicant the figure 10 was changed to 20.
- (d) In the case of the fourth respondent the figure 5 was changed to 10.
- (e) The bequest to the sixth respondent was deleted.

The figure 10 against the name of the second applicant was left intact.

After these amendments were made the deceased told Mr Mendelow that one of his family members would type the will and that he would contact Mr Mendelow in order to effect proper

compliance with the formalities. Mr Mendelow then handed a copy of RRM1 to the deceased.

On 30 June 2006 the deceased and the second respondent signed a deed of settlement in which they settled all their patrimonial disputes.

On 18 July 2006 the deceased died. At the time of his death the deceased had not vacated the communal home.

It appears that the deceased had an alcohol dependency problem and that that was the reason why the second respondent insisted on a divorce. According to the second respondent the relations between her and the deceased were cordial after the settlement of the patrimonial issues. The deceased told her that he still loved her. When the deceased retired he started drinking. He appeared to resent the fact that she continued to work in a high profile position. The deceased then sought refuge in a relationship with the first applicant. She annexed three notes that she received from the deceased in which he expressed his love for her. The last two were received on 2 June 2006 and 8 June 2006 respectively.

When the deceased died they were still living together. She did not accept that the deceased wanted to benefit the applicants as alleged by them.

Mr Mendelow, in the replying affidavit, stated that RRM1 was signed on 8 February 2006. Then, as well as on 10 May 2006 it was the intention of the deceased that the signed document should be his will. In his view the deceased did not want the second respondent to inherit his estate in addition to what she had received in terms of the settlement agreement, which he considered to be unfair to him.

The test is whether RRM1, as amended, was intended by the deceased to be his will.

RRM1 was entirely in the handwriting of the deceased. It clearly purports to be a will that supersedes and nullifies all previous wills. It was intended to be typed eventually as can be seen from the typing instructions.

Ms Foulkes-Jones SC, who appeared for the second and third respondents, stressed the fact there were typing instructions

and that it was the intention of the deceased to have RRM1 typed up and finalized as a will.

What makes it clear that RRM1 was intended to have the force of a will in the mean time, was the advice that Mr Mendelow gave the deceased and his reaction thereto.

The deceased was under no illusions that RRM1 was not a valid will, but he was told that in view of his precarious health, he should sign it, and if he signed it, it would be capable of being accepted by a court as his will.

In my view the probabilities show that the deceased had made up his mind that the second respondent should not inherit his estate.

He wanted to bequeath his estate to his relatives with the first applicant, with whom he had a relationship, being the major beneficiary. The motivation he gave for the bequest to her makes it perfectly clear.

It is improbable that the deceased would have intended that the second respondent should inherit his entire estate after she had already received her share of the joint estate in terms of the settlement agreement dated 30 June 2006.

The intention of the deceased not to make the second respondent his heir was confirmed by the alterations he effected to RRM1 on 10 May 2006. The scheme remained the same: to bequeath his estate to his relations with the first applicant receiving the largest percentage.

The fact that the amendments were not signed or initialled does not detract from the fact that the amendments reflected the intention of the deceased at the time.

They were intended as amendments to RRM1 which the deceased had been advised would be capable of being accepted as valid.

There is something that I should stress in this matter. There is hardly a dispute of fact. The bona fides of Mr Mendelow is not questioned at all. If his version is accepted – as I believe it must –

it is clear that the deceased intended RRM1 to be his will even though it was intended to be typed up. It is not a case where there is any danger of the substitution of a fraudulent document. See **Ndebele and Others NNO v The Master and Another 2001(2) SA 102(C) at 110F.**

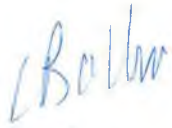
In my view the relief claimed should be granted.

It was not contended that if RMM1 is accepted as the will of the deceased relief should not be granted in terms of prayers 3 and 4. Even though Mr Mendelow signed RRM1, there is no reason why he should not be appointed as executor in terms of section 4A(2)(a) of Act 7 of 1953. It is clear that the deceased trusted him and that the initiative to appoint him as executor came from the deceased.

The applicants had to approach the court for relief. Where it cannot be said that the opposition was unreasonable, it would only be fair if the costs of opposition be paid by the estate of the deceased. See **Ndebele and Others NNO v The Master and Another *supra* at 111J-112B.**

In the result the following order is made:

1. An order is granted in terms of prayers 1, 2, 3, 4 and 5 of the notice of motion.
2. The costs of the application, including the costs of opposition, are to be paid by the estate of the deceased.



C. BOTHA

JUDGE OF THE HIGH COURT