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

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| (1) NOT REPORTABLE |
| (2) NOT OF INTEREST TO OTHER JUDGES |

CASE NUMBER: 2021/35301

In the matter between:

MAMOIPONE MIRRIAM MASILO

Applicant

and

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

First Respondent

KALANENG PAULINE SOKO

Second Respondent

SALOME MATLHAGA NHLAPO

Third Respondent

ELEKIA RAKETE MASILO

Fourth Respondent

TSHEPO RAMOAGA MASILO

Fifth Respondent

KATLEHO MAMON EWA MASILO

Sixth Respondent

Delivered: 13 May 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines*

and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 May 2024

Summary: Wills Act section 2(3) – Will noncompliant with section 2(1)(a)(iv) in that first page not initialled. No dispute that deceased signed the Will in 2013. Factual dispute over how the Will was dealt with shortly before the deceased's death does not change the intention of the testator when she signed the document intending it to be her Will.

JUDGMENT

Turner AJ

[1] Aletta Lipuo Masilo (“the deceased”) passed away on 18 July 2020. She was survived by her children: the applicant, the first respondent, the second respondent and the third respondent; as well as by her grandchildren the fourth and fifth respondents (“Tshepo” and “Katileho”), being the children of the deceased's son, Mohapi David Masilo who died on 14 May 2007.

[2] In the current application, the applicant seeks the following relief:

“That the document headed Last Will and Testament of Aletta Lipuo Masilo dated at Germiston 24 October 2013 ... is declared to be the last Will of the late Aletta Lipuo Masilo under Estate No. 003572/2021 ...”

In addition, the applicant seeks an order directing the Master to accept the Will as well as an order for costs against any respondent opposing the application.

[3] The Master did not accept the Will as it does not comply with the formalities recorded in section 2(1)(a)(iv) of the Wills Act 7 of 1953, which states:

“(1) Subject to the provisions of s 3 bis-(a) no will executed on or after the 1st of January 1954 shall be valid unless - ...

(iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page ...”

[4] The Will is signed by the testator and witnesses only on the last page. The first page (of the two page Will) does not reflect the signatures or initials of the testator and witnesses. If the first page of the Will had borne the initials of the testator and witnesses, it would have been accepted as a valid Will.

[5] The current application is made pursuant to section 2(3) of the Wills Act, which 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 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, as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).”

[6] The Supreme Court of Appeal has confirmed in *Van Wetten*¹ :

“.. the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.”

[7] In support of the application, the applicant relies on the following facts:

- a. The Will is signed and witnessed by two witnesses. In paragraph 20 of the founding affidavit, the applicant confirms that the Will was signed by the deceased.
- b. The Will is accompanied by a certificate issued by a Commissioner of Oaths (Hilda Mtlabo) an administration officer at the Palm Ridge Court. In that certificate, Ms Mtlabo confirms that she satisfied herself as to the identity

¹ *Van Wetten and Ano v Bosch and others* 2004 (1) SA 348 (SCA)

of the testator, Aletta Lipuo Masilo, and that the accompanying Will was the Will of the Testator.

c. In the founding affidavit, the applicant confirms that the deceased informed her and the second respondent that she had executed a Will and nominated the applicant as the beneficiary of her property. She also told a relative, Mr Thami Mpiti.

d. In 2019, the deceased showed the Will to the applicant, the second respondent and the two of them showed Mr Mpiti.

e. In 2020, the deceased spoke to members of her community forum (including Busisiwe Mlangeni, Elizabeth Mokgehle and Andrew Tladi) and informed them that she had executed a Will and bequeathed her house in to the applicant. Affidavits by these three individuals were provided in which they also confirmed the deceased showed them a copy of the Will which recorded that the property was bequeathed to the applicant.

[8] Notices of intention to oppose were delivered by the third and fourth respondents. The answering affidavit was deposed to by the fourth respondent and was supported by confirmatory affidavits prepared by the second and third respondents.

[9] In his answering affidavit, the fourth respondent relies on the following evidence to resist the application:

a. He contends that during 2020,
“I asked my mother whether she had to put anyone in charge of the house if she was to pass away. She said that she left the house to no-one.”

b. During July 2020, the fourth respondent spoke to the deceased about the possibility of moving with his family to her home at Erf 7210 Thokoza Township. He states:

“my mother agreed that I could live at the house however, [she said] Miriam would have a problem with me. It seemed that Miriam was influencing my mother not to grant me access to her house.”

[10] The upshot of his exchanges with the deceased was that the deceased had refused the fourth respondent's request to move to the house at Thokoza Township because the applicant (Miriam) lived in the house with the deceased. Rather than support the respondent, this appears to confirm the deceased's preference for the applicant living in the house, rather than the fourth respondent. From the available evidence, it appears that the fourth respondent made a number of attempts to move back to the house but was resisted while the deceased was alive.

[11] There is a dispute of fact over the events shortly before the deceased's death in 2020. The core of the dispute relates to the conduct of the second respondent. The applicant contends that the will was disclosed to the second respondent and that the second respondent was involved in the safekeeping of the Will prior to the deceased's death. The second respondent denies these allegations as well as other allegations made by the applicant in relation to her conduct. These are not disputes that can be resolved in the applicant's favour on the papers and it is therefore also necessary to decide whether the applicant can be granted the relief claimed while these factual disputes remain unresolved.

[12] The central question to be answered in this matter is whether the threshold set by section 2(3) of the Wills Act has been met, as crystalised in *Van Wetten*. To this end, the critical factual inquiry must be directed at whether the deceased signed the Will and, if so, whether she intended the Will to be her Last Will and Testament.

[13] In resisting the conclusion that the deceased intended the Will to be her last will and testament, the only evidence relied upon by the fourth respondent is that he was only informed of the existence of the Will after her death, and when he asked her whether she had bequeathed the house to anyone, she had said no.

[14] In dealing with the details of the documents in his answering affidavit, the fourth respondent does not deny the applicant's factual averments surrounding the signatures on the Will. Instead he merely insists on the formalities of the Wills Act being enforced. The allegations in paragraphs 33.3 and 41 of the answering affidavit are critical:

“33.3 The alleged Will (hereinafter referred to as ‘the Will’) by my late mother consisted of two pages. The first page of the Will is not initialled by my mother. My mother signed the last page of the Will with her name and surname ‘Aletta Masilo’. I am not sure who the witnesses are or whether they are competent witnesses as defined by the Wills Act. ...”

“41. My mother did not sign, initial or mark the first page of the Will. The Will has not been certified accordingly in terms of the Wills Act. My mother did not bring it to the attention of any of her other children that she had signed or drafted a Will. The Will was only brought to my attention after her death. My mother did not intend the Will to be her Last Will and Testament.” (emphasis added)

[15] The relevant concession that emerges from these paragraphs, when read with the founding affidavit², is that the fourth respondent accepts that the deceased signed the Will on the second page. He does not contend that her signature was forged. He also does not contend that the deceased was unable to read or that she would have been unable to understand the content of the document.

[16] On applying the well-established test for interpretation, there can be no doubt that when she signed the Will, the deceased intended it to be her Last Will and Testament. This is apparent from the heading on the document, the revocation of all previous Wills and the appointment of an heir. The intention is also confirmed by the existence of the certificate by the Commissioner of Oaths, which is also not alleged to be fraudulent.

[17] In my view, the fourth respondent’s evidence regarding what was told to him by the deceased is not strong evidence that would contradict the existence or enforceability of the Will. At the time that the fourth respondent spoke to his mother in mid-2020, she was ill and, from the other surrounding evidence, it appears that she did not want to spark confrontation. If she had told the fourth respondent that there was a Will and that the Will bequeathed the house to the applicant, it is likely that such an announcement would have sparked confrontation. It is not inherently

² Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E–G.

probable that the deceased would have told the fourth respondent about the Will, particularly in light of the other surrounding evidence (discussed below). Consequently, even if I accept that the statements attributed to the deceased were made to the fourth respondent, it is not improbable that the deceased made these statements to avoid confrontation.

[18] I find support for this view in the affidavits of the independent witnesses from the community forum. Those witnesses confirm that on 2 July 2020, the deceased approached them (as community leaders) to inform them that she was experiencing problems with her children and that the fourth respondent (erroneously referred to as the third respondent) had frequently attended her home enquiring about the house and who would inherit it. In this context, she told the community leaders about the Will and what it contained.

[19] In the circumstances, I find that by signing the Will the deceased indicated an intention that this Will would be her Last Will and Testament. The Will was never revoked and her conduct towards the fourth respondent in 2020 does not change the underlying and continuing intention of the deceased expressed at the time that she signed the Will. Her conduct towards the community leaders indicates that she held out to them that the Will reflected her intention.

[20] In the circumstances, I find that the admissible and uncontroverted evidence before me satisfies the requirements of section 2(3) of the Wills Act. There is consequently no need to resolve the factual dispute in relation to the conduct and involvement of the second respondent in order to decide the central issue in the case. The validity of the Will is not affected by that dispute.

[21] I am required to exercise a discretion in determining the liability for the costs of this application. The opposition to this application was clearly fuelled by the economic interests of the respondents who would be beneficiaries of a portion of the deceased (intestate) estate if the application had been unsuccessful. In my view, having recognised that the deceased signed the Will and in circumstances where no allegations of fraud or forgery could be supported, there was no valid basis for the

fourth respondent to have opposed the application. As such, the costs of the application are payable by the fourth respondent.

[22] In the circumstances, I make the following order:

- (1) The document headed “Last Will and Testament of Aletta Lipuo Masilo” ID No. 3[...] and attached to the applicant’s founding affidavit as “MMM3” is hereby declared to be the Last Will of the late Aletta Lipuo Masilo, who died on 18 July 2020.
- (2) The first respondent (Master of the High Court, Johannesburg) is directed to accept the above document for the purposes of the Administration of Estates Act, 1965 as the Last Will of the late Aletta Lipuo Masilo under Estate no. 003572/2021.
- (3) The costs of this application are to be borne by the fourth respondent on the party and party scale.

DA TURNER AJ

Gauteng Division, Johannesburg

HEARD ON:	24 January 2024
JUDGMENT DATE:	13 May 2024
FOR THE APPLICANT:	M Maema (Attorney)
INSTRUCTED BY:	Maema Attorneys
FOR THE RESPONDENT:	D Mbuyisa (Attorney)
INSTRUCTED BY:	Haffeggee Roskam Savage Attorneys