

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

Reportable: NO
Case no: 592/2024

In the matter between:

K[...] M[...]

First applicant

and

THE MASTER OF THE HIGH COURT:
FREE STATE, BLOEMFONTEIN

First respondent

K[...] M[...] N.O.

(In her capacity as executrix of the estate of C[...] T[...] M[...],
Estate no.: 002[...])

Second Respondent

B[...] S[...] M[...] N.O.

(In his capacity as Master's Representative of the estate of S[...]
S[...] M[...], Estate no.: 000[...])

Third respondent

M[...] E[...] M[...]

Fourth respondent

OLD MUTUAL TRUST (PTY) LTD

Fifth respondent

Coram: Opperman, J

Heard: 12 September 2024

Delivered: 28 January 2025. This judgment was handed down in court and electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 28 January 2025.

Summary: Application in terms of s 2(3)¹ of the Wills Act 7 of 1953 to declare document as last will and testament

ORDER

1. Condonation is granted for the late filing of the answering affidavit by the fourth respondent. The fourth respondent to pay the costs for the condonation application.

2. The application as per the notice of motion filed 1 February 2024 by the applicant is dismissed with costs that includes costs of counsel.

JUDGMENT

Opperman, J

Introduction

[1] This is an application to declare a document² (the document) drafted in 2018 by Old Mutual Trust (fifth respondent) to be the last will and testament of C[...] T[...] M[...] (deceased) that passed away on 20 April 2023 of natural causes.

[2] The application was, at the time of the hearing of the matter, only opposed by the fourth respondent that is allegedly the wife of the deceased by customary marriage. A notice to oppose was filed by the third and fourth respondents but only the fourth respondent partook in the further litigation. The rest of the respondents did not partake in the litigation. The Master of the High Court: Free State, Bloemfontein (the Master), indicated that they will abide by the ruling of the court.

[3] The Master did not join the litigation but cautioned the court in their report dated 23 February 2024³ to take cognisance of the statutory requirements for a legal will. They also indicated that the document purporting to be the will and that is in

¹ '2(3) 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 No. 66 of 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).

[Sub-s. (3) added by s. 3 (g) of Act No. 43 of 1992.]

² Annexure F, p 37-42.

³ Pages 62-64.

issue in *casu* was not transmitted or delivered to their office as contemplated in s 8(1)⁴ of the Administration of Estates Act 66 of 1965 (Administration of Estates Act). This is notwithstanding the fact that the estate was registered and further, that the applicant was appointed as the executrix of the estate on 4 May 2023. The notice of motion was filed on 1 February 2024 and the founding affidavit (FA) was commissioned on 7 December 2023.

[4] The document came to the notice of the applicant on 1 June 2023.⁵ The fourth respondent vehemently opposes the application. The application seems to be premature since claims by other parties to be the biological children of the deceased and an application to declare a marriage of the deceased to be lawful are *inter alia* pending. The outcome of the claims might make this application moot.

The common cause and proven facts

[5] The application is marred by numerous facts that are common cause and proven by the fourth respondent. These are:

- a) The document was presented to the deceased in 2018 to be signed. On numerous occasions the representative of the fifth respondent, one Mr. De Vos (De Vos), inquired about the neglect of the deceased to sign the document. The deceased maintained the *status quo* not to sign the document up until his demise in 2023.
- b) In fact, De Vos that was involved in the drafting of the will, indicated to the applicant that there is not a will but only an unsigned draft. The fifth respondent only supplied the draft document to the applicant much later.
- c) The paternity of all the deceased's alleged children, including the applicant, is disputed. The applicant was also born out of wedlock during a relationship the deceased had with one F[...] A[...] (born M[...]).

⁴ '8. Transmission or delivery of wills to Master and registration thereof.—(1) Any person who has any document being or purporting to be a will in his possession at the time of or at any time after the death of any person who executed such document, shall, as soon as the death comes to his knowledge, transmit or deliver such document to the Master.'

⁵ FA paras 63-67, p 22-23.

d) There is litigation pending to declare a customary marriage with the fourth respondent, apparently celebrated on 17 December 2022, lawful and to be registered as such. This marriage is confirmed by, *inter alia*, the deceased's brother and uncle.⁶

e) It is the evidence of the fourth respondent that the deceased acknowledged all his biological children to her. Nothing prevented him from signing and formalising the purported will. It is the evidence of the fourth respondent that the deceased would have wanted his children and his mother to benefit from his estate.

f) There does not seem to be any evidence that the deceased was married to anybody else since the death certificate states: 'Never married'.

g) Important is that the fourth respondent, that was acknowledged by the applicant to be in the least the girlfriend of the deceased, stated in her affidavit that they opposed the appointment of the applicant as executrix. The other children were apparently misled by the applicant and the applicant reported herself as child and beneficiary of the deceased's estate to the Master. It is clear that the applicant had herself appointed as executrix of the estate without the knowledge of some that might have been beneficiaries thereto. The documents filed on record also show that a formal complaint was lodged against the applicant with the Master for falsely presenting herself as the only child and beneficiary of the estate of the deceased.

h) This is what the fourth respondent declared:

'50. ... I pause to highlight that my late husband and I do not have children of our own, however, he had five children, three are co-applicants in this matter, the Applicant and P[...] who is a minor 16-year-old minor child.'⁷

i) It is a fact proven by the fourth respondent that much occurred between the drafting of the document and the demise of the deceased that

⁶ Answering Affidavit (AA) fourth respondent paras 39 and 41, p 8-9.

⁷ Also see paras 49-55 of the AA. The matter that is referred to is the opposition of the applicant as executrix.

contradicts the proposition that the deceased intended for the document to be his last will and testament.

The law

[6] The Wills Act 7 of 1953 (the Act) stipulates formalities required for a valid will, which are briefly as follows:

- a) The will must be in writing;
- b) The will must be signed at the end by the testator (the person making the will). If the will has more than one page the testator and witnesses must sign on every page;
- c) Signature of the testator must be made in the presence of two or more competent witnesses;
- d) The above-mentioned witnesses must attest and sign the will in the presence of the testator and each other;
- e) Where a testator marks with a mark or where the testator instructs another person to sign on his or her behalf a commissioner of oaths must be present and certify to the identity of the testator and that the document signed is the will of the testator;
- f) The person making the will must be 16 years or older and not mentally incapacitated.

[7] Notwithstanding the directions⁸ as to the signing of a will that was appended to the draft will and some prompting by De Vos over the period from 2018 to 2023; the deceased did not sign and formalise the will nor was it attested to by witnesses and so signed. The deceased was not a layperson. He was a politician that rose to become the Second Deputy Secretary General of the South African Communist Party in South Africa. He also apparently pursued doctoral studies in the Republic of China.

⁸ 2023: D Meyerowitz, *The Law and Practice of Administration of Estates and Their Taxation*, 2023 Edition, Juta & Co at 4.2.

[8] In terms of s 2(3) of the Act, if a court is satisfied that a document or an amendment, drafted or executed by a person who has since died, was intended to be that person's will or an amendment thereto, the court shall order that the Master accept that document as a will, in spite of the fact that it does not comply with the prescribed formalities.

[9] The prerequisites to the declaration by the court of a document as a will are: a) The document must be served to the court; b) the said document must be proven to have been drafted or executed by a person that subsequently died; and c) the said deceased person intended the document to be his will although it does not comply with all the formalities for the execution or amendment of the will required by the Wills Act.⁹

Conclusion

[10] In light of the evidence adduced the court cannot find that the document was drafted by the deceased nor that the document is his will. There is just too much uncertainty that overwhelms the case for the applicant.

Order

[11] The following order is made:

1. Condonation is granted for the late filing of the answering affidavit by the fourth respondent. The fourth respondent to pay the costs for the condonation application.
2. The application as per the notice of motion filed 1 February 2024 by the applicant is dismissed with costs that includes costs of counsel.

Opperman, J

Appearances

For applicant: S Ngombane

⁹ Ibid at 4.3 and footnotes 31-39 therein.

Instructed by: Cape Town
Thebe Attorneys Incorporated
Bloemfontein

For fourth respondent: TM Ngubeni
Bloemfontein

Instructed by: Zwelibanzi Ngququ Incorporated
Bloemfontein