

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 09/2025
Reportable/Not Reportable

In the matter between:

MOKGORO, ITHATHENG N.O. 1st Applicant

MOKGORO, ITHATHENG 2nd Applicant

MOKGORO, MPHO JOSEPH 3rd Applicant

MOKGORO, ITUMELENG 4th Applicant

BOBO RADU, GAOBOLELWE (born Mokgoro) 5th Applicant

MONYEKI, ORATILE NALEDI 6th Applicant

and

THE MASTER OF THE HIGH COURT, KIMBERLEY 1st Respondent

MMELESI, GOALATLHWE DAVID 2nd Respondent

CAPITAL LEGACY FIDUCIARY SERVICES (PTY) LTD 3rd Respondent

JUDGMENT

Lever J:

1. This application concerns the estate of the late Jennifer Yvonne Mokgoro, a Constitutional Court Justice, who at the time of her passing, on the 9 May 2024, was no longer on active service (the deceased).
2. The purpose of the present application is to seek an order from this court to compel the Master, the first respondent herein, to accept a will annexed to the papers as annexure “FA1”, under the provisions of section 2(3) of the Wills Act¹. In these proceedings, the said document came to be referred to as the 2021 will. For the sake of consistency, I shall use the same description.
3. The first applicant is the duly appointed executor of the said estate. Such appointment as executor was made in terms of a 2014 will, after the nominated executor declined the appointment. The first applicant also moves this application in his personal capacity as a son of the deceased. The third and fourth applicants are also sons of the deceased. The fifth applicant is the deceased’s daughter and the sixth applicant is the deceased’s granddaughter who is also the daughter of the first applicant.
4. The third to the sixth applicants have filed confirmatory affidavits in support of the application.
5. The second respondent is the only person opposing the present application. During the life of the deceased, the second respondent was her life partner.
6. After the passing of the deceased, the first applicant contacted the third respondent, who he had learned dealt with the affairs of the deceased insofar as it concerned her last will and testament. A meeting was held between the first applicant and representatives of the third respondent. At this meeting first applicant learnt that the third respondent was in possession of two wills from the deceased. The first being an original of the 2014 will. The second, being what the third respondent presented as a copy of the 2021 will.
7. The first applicant states in his founding affidavit that he examined the 2021 will more closely and noted two features of this 2021 will. Firstly, the place of

¹ 7 of 1953.

signature had not been filled in at the appropriate place on the said document. Secondly, that the signatures on the 2021 will appeared to be electronic signatures as opposed to signatures signed physically by the deceased testatrix and the witnesses concerned in pen.

8. Having made this assessment the first applicant stated that both witnesses, referred to as Oliphant and Leshabane in the papers were known to him. He contacted both who confirmed that the signatures were indeed electronic signatures. They both confirmed the signatures on the 2021 will were appended electronically. The first applicant asked his attorney to contact the said witnesses to the 2021 will, to establish the facts and obtain evidence for the purpose of this application. A detailed explanation of how the 2021 will came into being is set out in the founding affidavit which is confirmed by the confirmatory affidavits of the said witnesses and the confirmatory affidavit of the first applicant's attorney, Liebenberg.
9. The material difference between the 2014 and 2021 wills appears from paragraph 3 of each document. Paragraph three of both wills deal with '*Bequests and Legacies*'.
10. Paragraph 3 of the 2014 will reads as follows:
 - "3. BEQUESTS AND LEGACIES
 - 3.1 I specifically bequest my share in the property in Kimberley, No 1[...] M[...] Golf Estate as follows:
 - 3.1.1 100% to my Partner, David Gaolatlhwe Mmelesi, born 1958.
 - 3.2 I specifically bequest the Jeep Wrangler P[...] as follows:
 - 3.2.1 100% to my Partner, David Gaolatlhwe Mmelesi, born 1958.
 - 3.3 I bequest the residue of my estate as follows:
 - 3.3.1 20% to my Son, Ithateng Mokgoro, born 1971.
 - 3.3.2 25% to my Son, Mpho Mokgoro, born 1973.
 - 3.3.3 25% to my Son, Itumeleng Mokgoro, born 1975.
 - 3.3.4 25% to my Sister, Gaobolelwe Mokgoro, born 1985.
 - 3.3.5 5% to my Trustees in Trust for the benefit of my Granddaughter, Oratile Naledi Monyeki, born 1996."

11. Paragraph 3 of the 2021 will reads as follows:

“3. BEQUESTS AND LEGACIES

- 3.1 *I direct that any of my Heir(s) or Beneficiary(ies), as nominated by me herein, must survive me by thirty (30) days or longer in order to inherit or benefit from my Estate.*
- 3.2 *I specifically bequeath, my share in the property in Kimberley, No 1[...] M[...] Golf estate as follows:*
 - 3.2.1 *25% to my Son, lthateng Mokgoro, born 1971.*
 - 3.2.2 *25% to my Son, Mpho Mokgoro, born 1973.*
 - 3.3.3 *25% to my Son, Itumeleng Mokgoro, born 1975.*
 - 3.3.4 *25% to my Daughter, Gaobolelwe Mokgoro, born 1985.*
- 3.3 *I specifically bequeath, my Jeep Wrangler P[...] as follows:*
 - 3.3.1 *100% to my Partner, David Gaolatlhwe Mmelesi, born 1958.*
- 3.4 *I bequeath the residue of my Estate as follows:*
 - 3.4.1 *20% to my Son, lthateng Mokgoro, born 1971.*
 - 3.4.2 *25% to my Son, Mpho Mokgoro, born 1973.*
 - 3.4.3 *25% to my Son, Itumeleng Mokgoro, born 1975.*
 - 3.4.4 *25% to my Daughter, Gaobolelwe Mokgoro, born 1985.*
 - 3.4.5 *5% to my Granddaughter, Oratile Naledi Monyeki, born 1996.”*

12. The second respondent admitted that there was a mistake in the 2014 will, being in paragraph 3.3.4 of the said 2014 will Gaobolelwe Mokgoro is referred to as the deceased's sister. Gaobolelwe Mokgoro is the deceased's daughter. This was corrected in the 2021 will.

13. The second respondent also admits that the material differences between the two aforesaid wills is in clause 3 of the respective documents. The second respondent further admits that the remainder of the said 2021 will is materially the same as the 2014 will.

14. For the most part, the second respondent does not substantively engage with the factual assertions made by and on behalf of the applicants. Aside from a limited number of admissions, the second respondent simply notes a portion of the

founding affidavit and issues a bald and blanket denial in respect of the remaining factual contentions made by and on behalf of the applicants.

15. The second respondent, in his answering affidavit, contents himself with raising what he calls 5 points *in limine*, which in the alternative are referred to as matters of substance that need to be raised 'upfront'.
16. The first of these issues raised by the second respondent is that sections 11, 12, 13, 14, 15, 16, 18, 19 and 20 of the Electronic Communications and Transactions Act² (ECTA) do not apply to the Wills Act.³ The second respondent goes on to argue that a will may not be signed by way of an electronic signature and second respondent contends that it follows from that fact that section 2(3) of the Wills Act⁴ is not applicable in the present case. In his answering affidavit, the second respondent has not explained how the latter follows from the former.
17. The second of these issues raised by the second respondent is that section 4(4) of ECTA⁵ read with Schedule 2 of such Act prohibits the execution, retention and presentation of a will or codicil by way of electronic signature. It should be noted that the way the second respondent makes this argument is not a true reflection of what section 4(4) as read with schedule 2 of ECTA stipulates. What is stipulated by the said section 4(4) as read with the said schedule 2 is that ECTA must not be construed as giving validity to the execution, retention and presentation of a will or codicil as defined in the Wills Act.
18. Again, in respect of this second issue raised by the second respondent he argues that the will cannot be executed, retained and presented by way of electronic signature. He further goes on to state that accordingly the provisions of section 2(3) of the Wills Act do not apply in the circumstances. Again, the second respondent does not explain how the latter follows from the former.

² 25 of 2002.

³ Above at footnote 1.

⁴ Above at footnote 1.

⁵ Above at footnote 2.

19. The third issue raised by the second respondent is that the Wills Act does not make provision for an electronic signature but only for a written signature or mark.
20. The fourth issue raised by the second applicant is that there was no compliance with the required formalities as set out in section 2(1)(a) of the Wills Act. The second respondent also sets out several respects in which, presumably the 2021 will, does not comply with the formalities set out in the said section of the Wills Act referred to herein.
21. The fifth issue raised by the second respondent is that he contends that one of the witnesses acted fraudulently in that such witness signed the document on a date different to the date reflected on the document. The second ground of fraud alleged by the second respondent is that despite what is set out in the 2021 will the testatrix (the deceased) did not append her signature to the 2021 will in the presence of the two witnesses and the said witnesses did not sign the 2021 will in the presence of each other and the deceased.
22. These five points *in limine* or arguments raised by the second respondent can be dealt with after examining the case made out by the applicants in their founding papers.
23. It is contended by Ms Erasmus who appears for the applicants herein that there is sufficient evidence in the founding affidavit to show that the deceased intended the 2021 document to be her last will and testament. Hence the application in terms of section 2(3) of the Wills Act.
24. Ms Erasmus submits that the evidence provided in the founding affidavit establishes that: the 2021 will exists; that the 2021 will was drawn up by the third respondent under the express direction of the deceased; and that it was clearly the intention of the deceased that the 2021 will was to be her last will and testament.
25. To support the above submissions Ms Erasmus refers to an e-mail sent by the deceased to two of her known confidants, Andiswe Oliphant and Florence Mpho

Leshabane. The said email was annexed to the founding affidavit as “FA4”. Ms Erasmus found it necessary to quote the full text of this e-mail to make her point. The said e-mail reads:

“Dear Andi, Mpho

I trust you’re both well.

May I ask the two of you to do me a very special and personal favour, which is to kindly sign as witnesses, my last will and testament attached below.

First, Andiswe will attach my electronic signature at the appropriate spaces identified as ‘testatrix’ on each page. There is also identified spaces to be signed by each of the two witnesses required. For consistency please let Andiswe kindly sign as the first witness on each page and Mpho will do so as the second witness. Then kindly return the document to me.

Please do not see my humble request as an undue burden because I have done all I can to make my last will and testament as fair and as uncomplicated as I can. That is why it is so brief.

Thank you for doing it.

With warmest regards to and utmost trust I have in both of you,

*Much love,
YM”*

26. Ms Erasmus points out that the 2021 will was attached to this email. Ms Erasmus points out that Oliphant and Leshabane have filed confirmatory affidavits, wherein: they effectively identified the 2021 will; confirmed they were telephonically contacted by the deceased prior to such email; that they carried out the deceased’s wishes by giving effect to her instructions.

27. Ms Erasmus goes on to point out that in the answering affidavit filed by the second respondent that: He does not dispute that the deceased phoned both Oliphant and Leshabane and made arrangements with them as set out in the email quoted above; He does not dispute that the third respondent was in possession of the 2021 will; and The said will could only have been provided to the third respondent by the deceased with the intention that it be given effect to.
28. Ms Erasmus submits that the second respondent admits that the 2021 document reflects the true intention of the deceased. Mr Babuseng, who appeared for the second respondent, expressly conceded this.
29. Mr Babuseng argued that by virtue of the provisions of sub-sections 4(3) and 4(4) of ECTA that sub-section 2(3) of the Wills Act had no application in the present circumstances.
30. The effect of sub-section 4(3) which must be read with Schedule 1 of ECTA, is that sections 11, 12, 13, 14, 15, 16, 18, 19 and 20 of ECTA do not apply to a will purportedly executed under the Wills Act.
31. Section 11 of ECTA gives legal recognition to data messages in certain circumstances.
32. Section 12 of ECTA simply states that if a law requires a document to be written, this requirement is met if the relevant document is in the form of a data message and it is accessible for subsequent reference.
33. Section 13 of ECTA sets out the requirements for an electronic signature to be accepted.
34. Section 14 of ECTA deals with when the law requires an original document and when a data message can be regarded as an original and how the integrity of such data must be assessed.
35. Section 15 of ECTA deals with the admissibility of a data message and the way its evidential weight is to be assessed.

36. Section 16 of ECTA deals with the situation where the law requires information to be retained and how a data message could comply with such requirement.

37. Section 18 of ECTA deals with the situation where the law requires a signature, statement or document to be notarised, acknowledged, verified or made under oath and when such requirements are met in respect of a data message. The section also deals with how certified copies of such data messages are furnished.

38. Section 19 of ECTA provides for miscellaneous scenarios where multiple copies of a document need to be delivered. That certain verbs and nouns must be interpreted to include data messages unless otherwise stipulated within ECTA. If any law requires a 'seal' how this is to be accomplished in relation to an electronic document. That documents required to be sent by registered mail may be registered by the Post Office and sent by electronic means to an electronic address.

39. Section 20 ECTA deals with automated transactions and has no relevance in the present circumstances.

40. Properly construed, sections 11, 12, 13, 14, 15, 16, 18, 19 and 20 of ECTA as referred to in sub-section 4(3) of ECTA as read with Schedule 1 of ECTA, means that a Will or testamentary instrument may not rely on or be proved by the provisions of the said sections of ECTA.

41. The second respondent also relies on sub-section 4(4) of ECTA which reads as follows:

"4(4) This Act must not be construed as giving validity to any transaction mentioned in Schedule 2."

42. Schedule 2, insofar as it relates to the Wills Act reads as follows:

"The execution, retention and preservation of a will or a codicil as defined in the Wills Act, 1953 (Act 7 of 1953)"

43. I have considered sections 4(3) and 4(4) of ECTA and I cannot find support for Mr Babuseng's contention that the provisions of these sub-sections prevent the applicants from invoking the provisions of section 2(3) of the Wills Act. I have three reasons for reaching this conclusion.
44. Firstly, I do not find on an ordinary grammatical reading of the provisions of ECTA relied upon by the second respondent and Mr Babuseng that such provisions of ECTA would prevent the applicants from invoking section 2(3) of the Wills Act.
45. Secondly, the applicants do not contend that a will can be executed by way of an electronic signature or that it can be executed, retained or presented in an electronic format as a data message. On the contrary they seek to invoke section 2(3) of the Wills Act because they acknowledge that the 2021 will does not comply with the formalities contained in the Wills Act and it is evident from their application that they do not rely on any provision of ECTA to support their application.
46. Finally, as pointed out by the Supreme Court of Appeal (SCA) in the case of *Van Der Merwe v The Master*⁶ that by inserting section 2(3) into the Wills Act the Legislature intended that failing to comply with the formalities prescribed by the Wills Act should not frustrate or defeat the genuine intention of the testators. Conceptually, I can see no reason why mistaken reliance on an electronic signature or electronic transmission or storage of a will should be allowed to frustrate the genuine intention of a testator if the foundational facts required for an application under section 2(3) of the Wills Act can be established.
47. This also deals with and disposes of the first four points *in limine* or substantive issues raised by the second respondent. It is accordingly unnecessary to consider them further.
48. Turning now to the fifth point *in limine* raised by the second respondent being the two instances of fraud alleged by the second respondent. The first by one of the witnesses to the 2021 will. The second by the deceased. I debated this issue with Mr Babuseng and he correctly conceded that the contentions made by the

⁶ 2010 (6) SA 544 (SCA) at para [14].

second respondent do not amount to fraud. Mr Babuseng maintained that they were misrepresentations. I agree that this is as far as the matter can be taken. In my view in all the circumstances of the case, these were not deliberate misrepresentations by either the witness concerned or the deceased. Accordingly, this can have no effect on the application under section 2(3) of the Wills Act.

49. Section 2(3) of the Wills Act reads as follows:

“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 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).”

50. In dealing with this section of the Wills Act Seriti AJA (as he then was) in the case of *Smith v Parsons and Others* set out the position as follows:

“[7] Thus if the document in issue is shown to have been drafted or executed by a person, since deceased, who intended that the document in issue to be his or her will, the court must direct the Master of the High Court to accept that the document as a will or an amendment to it...”⁷

51. It appears from the passage from the *Smith* judgment that there are three requirements that need to be established in order to secure the relief contemplated by section 2(3) of the Wills Act, namely: (a) the document needs to be drafted or executed by the person concerned; (b) that person has died in the interim; and (c) that such person must have intended that document to be his or her will.

⁷ *Smith v Parsons* 2010 (4) SA 378 (SCA) at para [7].

52. In the case of *Bekker v Naude*⁸ the SCA per Olivier JA held that there must be a strict interpretation of section 2(3) of the Wills Act. The relevant document must be drafted or executed by the person concerned.
53. Although the facts of the present case are completely different from the facts of *Bekker's* case referred to in the paragraph above, the requirement that the deceased should have personally 'drafted' has probably not been sufficiently established. In the present case the deceased's will appears under the cover page of the third respondent. Also, the third respondent has sent instructions on how the will is to be executed and kept safe.
54. While it appears that the third respondent drafted the 2021 will it is clear from the nature of the difference between the 2014 will and the 2021 will that there was direct input from the deceased and it could only have been on her direct instruction that the change in who was to benefit from her half share in the Magersfontein property could have been made.
55. This direct input is supported by the email correspondence the applicants' attorney Liebenberg obtained from the third respondent and confirmed in his supporting affidavit. Such email correspondence is annexed to the founding affidavit as annexure "FA6". The email correspondence annexed confirms the deceased's direct instructions even where all her suggestions and requests were not ultimately in the final draft of the 2021 will that was executed on the instructions of the deceased.
56. The email to Oliphant and Leshabane shows that despite the involvement of the third respondent that when the deceased had emailed her request to Oliphant and Leshabane she had accepted the 2021 will as her own. This is confirmed by the following passage in the said email which I believe should be the end of any doubt on this issue. The relevant paragraph reads: "Please do not see my humble request as a burden because I have done all I can to make my last will and testament as fair and uncomplicated as I can. That is why it is so brief."

⁸ *Bekker v Naude* 2003 (5) SA 173 (SCA) at para [20].

57. While this may not be sufficient under the strict interpretation of the word 'draft' in section 2(3) of the Wills Act, as required in Bekker's case.⁹ The said section requires that the deceased 'draft' or 'execute' the relevant document.

58. The term 'execute' or 'executed' is not defined in the Wills Act. Nor is it defined in section 2 of the Wills Act. Accordingly, the said term must bear its ordinary grammatical meaning within the context of section 2(3) of the Wills Act.

59. The NEW SHORTER OXFORD ENGLISH DICTIONARY¹⁰ defines the term 'execute' as follows:

"1. Carry out, perform, etc 1 a v.t. & i. Carry out, put into effect, (a plan, purpose, command, sentence, law, will, etc.). ..."

60. The LIVING WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE¹¹ defines the term 'execute' as follows:

"To carry through to the end; to inflict capital punishment on, esp. in accordance with legal sentence; to perform or do skillfully; to put into effect; to administer, transact, or carry through in the manner prescribed by law; to produce by following a plan or design." (my emphasis)

61. Even though it does not comply with the formalities set out in section 2(1) of the Wills Act, the 2021 will was still executed by the deceased in the ordinary sense of the word, by virtue of the instructions set out in the email quoted above.

62. The term execute needs to be read in its ordinary meaning in this context, otherwise it would render section 2(3) of the Wills Act nugatory and of no useful purpose. Accordingly, the deceased can be said to have executed the 2021 will as required by section 2(3) of the Wills Act.

63. It is common cause that the deceased died after drafting and executing the 2021 will in the manner described above.

⁹ Bekker's case., above., at para [16].

¹⁰ NEW SHORTER OXFORD ENGLISH DICTIONARY., Ed. Lesley Brown., Clarendon Press, Oxford., 1993.

¹¹ LIVING WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE., Delair Consolidated Publishing Company., New York., 1977.

64. It is also clear from the email quoted above that the deceased intended the 2021 will to be her last will and testament. None of this was disputed by the second respondent. In fact, as set out above the second respondent has admitted that the deceased intended the 2021 will to be her last will and testament.

65. In these circumstances, I find that the applicants have established the three jurisdictional facts required for the relief sought under the provisions of section 2(3) of the Wills Act. In these circumstances, this court has no discretion to refuse the relief sought.¹²

66. The last remaining issue is the issue of costs. Ms Erasmus submitted that the applicants sought an order of costs to be paid by the deceased's estate and only if anyone opposed the relief sought, that such person pay costs on an attorney and own client scale. In the alternative to what is set out in the Notice of Motion, Ms Erasmus asked that costs be awarded against the second respondent on Scale C. Ms Erasmus submitted that given the common cause facts the opposition to the application was ill conceived. Accordingly, she submitted that a punitive costs order should be awarded.

67. Mr Babuseng submitted that the issues raised by the second respondent were novel issues that if the applicants succeed that the second respondent should not be ordered to pay costs and that if the second respondent was successful in his opposition costs should follow the result.

68. Costs are firstly within the discretion of the court that entertains the matter. In the ordinary course costs follow the result unless there are good grounds to depart from this general rule. While the issues raised by the defendant are novel in the sense that they appear not to have been raised before, in the circumstances I do not believe that this warrants a departure from the general rule that costs follow the result. While the issues raised by the second respondent may have been ill conceived given the common cause facts, I do not believe the second respondent's conduct is such that it warrants a special or punitive order as to costs. In my view costs should follow the result. While novel the issues were not

¹² See: Van Der Merwe v The Master., above at para [14] and Smith v Parsons., above at para [7].

complex. In the circumstances, I think party and party costs on scale B should be awarded.

Accordingly, the following order is made:

1. The Master of the High Court is directed to accept the document annexed to the founding affidavit as Annexure "FA1" as the will of the deceased Jennifer Yvonne Mokgoro, identity number 5[...], for the purposes of the Administration of Estates Act 66 of 1965.
2. The second respondent is to pay the party and party costs on scale B.

L.G. LEVER

Judge of the High Court
Northern Cape Division,
Kimberley

APPEARANCES:

On behalf of the Applicants:

Adv S.L Erasmus

Instructed by:

Engelsman Magabane Inc.

On behalf of the 2nd Respondent:

Adv B Babuseng

Instructed by:

Lulama Lobi Inc.

Date of Hearing:

25 July 2025

Date of Judgment:

01 August 2025