



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No: 2528/2023

In the matter between:

NOMALUNGISA SIGCAWU

Applicant

and

SIKELELA BAMBENI

First

Respondent

LIHLE MAGADLELA

Second Respondent

SANGE RUBUSHE

Third Respondent

MPHUTHUMI NEWMAN BAMBENI

Fourth Respondent

MPENDULO BAMBENI

Fifth Respondent

ESTATE LATE BEKITHEMBA BAMBENI

Sixth Respondent

**HUMAN RESOURCE MANAGER OR OFFICER,
14 SAI BN, SOUTH AFRICAN DEFENCE FORCE,
MTHATHA**

Seventh Respondent

MASTER OF THE HIGH COURT, MTHATHA

Eighth Respondent

JUDGMENT

MOLONY AJ:

Introduction

- [1] The applicant, who is the alleged life partner of Bekithemba Bambeni ('the deceased'), launched an application to have a copy of a Will (ostensibly signed by the deceased at the offices of the seventh respondent on 22 February 2019) declared to be the Last Will and Testament of the deceased. The copy of the Will was also does not have the deceased's signature on the first page.
- [2] The first, second and third respondents are the children of the deceased (with the second respondent being a minor). The deceased's children, along with the applicant are, according to the applicant, the beneficiaries named in the deceased's Will. The applicant and the deceased were unmarried and thus, absent the Will, the applicant would not be a beneficiary in the deceased estate.
- [3] The applicant seeks relief in terms of section 2(3) of the Wills Act 7 of 1953 ('the Wills Act'), read with sections 8(1) and 8(4) of the Administration of Estates Act 66 of 1965 ('the Estates Act'), including that:
- 3.1 The failure of the deceased to comply with the formalities set out in section 2(1)(a)(ii) and (iii) of the Wills Act be condoned.

3.2 The eighth respondent be authorised and ordered to accept the copy of the Will as the deceased's Will for purposes of the Estates Act.

3.3 Pending the finalisation of the application, the first to seventh respondents, and/or any other persons who may be or have been appointed as executors to the deceased's estate be interdicted and restrained from administering the estate of the deceased.

3.4 Any delay in launching the application be condoned.

3.5 The costs of the application be paid from the estate of the deceased, alternatively by any respondents who oppose the application (jointly and severally if opposed by more than one respondent).

- [4] The fourth respondent is, according to the deceased's alleged Will, the executor of the deceased's estate, as is the fifth respondent. The sixth respondent is the deceased estate. The seventh respondent was the deceased's employer, through which the Will in question was completed. The eighth respondent is the Master of the High Court in Mthatha.
- [5] The application was opposed by the second respondent (duly assisted by his biological mother), as well as the fifth respondent.
- [6] The applicant filed a condonation application, seeking condonation in regard to the late filing of the replying affidavit (which was ultimately filed in response to the second respondent's affidavit). The applicant did not file a replying affidavit to the answering affidavit of the fifth respondent (which was filed with a confirmatory affidavit from the fourth respondent), which post-dated the filing of the replying affidavit. The fourth and fifth respondents are siblings of the deceased.

- [7] To the extent it may be necessary, and in the absence of any objection, condonation is granted for the late filing of the replying affidavit.

Relevant Background

- [8] The deceased, according to the applicant, passed away on 20 April 2022. The second respondent denied this in his answering affidavit but did not deny that the deceased was buried on 8 May 2022, and so such denial appears to have been an oversight.¹ The fifth respondent agreed with the date of death recorded by the applicant.
- [9] The applicant, with the assistance of her attorneys of record, reported the deceased's estate to the eighth respondent on 22 November 2022, and lodged a copy of the Will. The eighth respondent rejected the copy and indicated that the deceased's estate would be administered as if the deceased died intestate unless the applicant obtained alternative relief from the High Court.
- [10] The second, fourth and fifth respondents denied any knowledge of the deceased's Will, with the fourth respondent denying any knowledge of being the nominated executor, save for what he noted from the copy of the Will, which was annexed to the application papers. The second, fourth and fifth respondents furthermore denied that the applicant was the deceased's life partner (and effectively his wife, as she was described in the copy of the Will). They denied her level of involvement in the deceased's life, referring to the applicant as being no more than the deceased's girlfriend.

¹ See para 16.15 of the founding affidavit at p. 18 and para 25 of the second respondent's answering affidavit at p.81.

- [11] The original Will, according to the applicant, was available at the offices of the seventh respondent. The applicant averred that she had sight of the original, in the company of her attorney of record. According to the applicant the fact that the deceased's signature did not appear on the first page of the copy of the Will, was potentially due to that portion being cut off when the original Will was being photocopied.
- [12] The primary basis of the second, fourth and fifth respondents' opposition to the application, aside from denying the extent of the applicant's relationship with the deceased, was that the current application, essentially, places the cart before the horse, as the original Will was available from the seventh respondent.
- [13] The applicant apparently made a number of attempts, via correspondence through her attorneys of record, to have the seventh respondent send the original Will to the eighth respondent. Having failed in this regard, this application was launched after the eighth respondent indicated the intention to treat the deceased's estate as intestate.
- [14] The second, fourth and fifth respondents' view was that the applicant should, instead of launching the current application, have applied to compel the seventh respondent to provide the original Will to the eighth respondent.
- [15] The eighth respondent unfortunately, despite the original application being served upon the Master's Office in Mthatha, did not submit a report to this court on the matter.

The Law

- [16] Section 2(3) of the Wills Act states as follows:

‘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)’

[17] It is clear that the failure on the part of a testator to sign a Will is not necessarily fatal to the acceptance of the Will. If the court which evaluates a Will is satisfied that the document in question was intended to be the Will (or amendment thereof) of a deceased, then the court is required to grant an order in terms of section 2(3) of the Wills Act. The provisions of section 2(3) of the Wills Act are peremptory once the relevant jurisdictional requirements have been met (i.e. the requirements of the subsection have been met), and a court will then be required to grant the relief sought in terms of section 2(3) of the Wills Act.²

[18] What the applicant asks this court to decide, however, is not simply whether or not the copy of the deceased’s alleged Will represents the true intention of the deceased, but additionally whether this court is satisfied that the copy produced, which does not comply with the necessary formalities in terms of section 2(1) of the Wills Act, is a true copy of the original.

[19] The question of non-compliance with section 2(1) of the Wills Act would then only apply if the first page of the original Will (represented via a true copy thereof) was also missing the testator’s signature.

² See *Van der Merwe v the Master and Another* 2010 (6) SA 544 (SCA) at paras 11 – 14. See further *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA) at para 14.

[20] Section 8(4B) of the Estates Act states that:

‘The Master may for the purposes of this Act also accept a duplicate original will.’

[21] We were, unfortunately, not addressed on the import of section 8(4B) of the Estates Act.

[22] It has been accepted that a photocopy can be considered a duplicate. What is problematic is that the use of a copy presumably only occurs if the original Will cannot be found.³

[23] By way of comparison, the matter of *ex parte Porter*⁴ related to the request that a draft version of a Will (the original, properly executed, Will having been lost), be accepted. The court’s view was that the use of section 2(3) of the Wills Act was not appropriate to such a scenario, and that it would have been more appropriate, in requesting a court to authorise that a ‘reconstructed’ copy may be used, to apply in terms of the common law.

[24] In the current matter, the original Will is known to be with the seventh respondent.

[25] It has also been suggested by the applicant that the original Will may, in fact, comply with the requirements of section 2(1) of the Wills Act.

[26] Given the problems experienced by the applicant in obtaining the original Will from the seventh respondent, the question then arises as to how far

³ See generally *Ex parte Erasmus No: In re Erasmus' Estate* 1994 (2) SA 751 (C).

⁴ 2010 (5) SA 546 (WCC) at paras 10 – 12. See further *Bekker v Naude en Andere* 2003 (5) SA 173 (SCA).

the applicant should be expected to go in her attempts to have the original Will sent to the eighth respondent.

Analysis

[27] This court would, on the factual matrix presented above, be required to determine two aspects:

27.1 Is the copy of the Will a true copy of the original?

27.2 If so, does the copy comply with the requirements of section 2(3) of the Wills Act.

[28] In order to grant the relief sought, this court would effectively be required to condone abandoning a potentially compliant and existing original Will in favour of an inadequate copy thereof.

[29] The main question then becomes, could it be expected of the applicant to have gone to the extent of launching an application to compel the seventh respondent to send the original Will to the eighth respondent? Should the applicant be required to go to such an extent, given the lack of knowledge expressed by the second, fourth and fifth respondents in regard to the Will.

[30] We were not provided with any case authority on this specific point, nor could we find any.

[31] One factor which is not to be overlooked is that the applicant (even were the application to be unopposed) is not automatically entitled to the relief sought in the absence of opposition. An appropriate case must still be made out for the relief sought.

- [32] The applicant herself did not state that the copy is a true copy of the original Will, although this can be inferred by the manner in which the founding affidavit is drafted. Having said this, the applicant's uncertainty in regard to whether or not the deceased's signature appears on the first page of the original does not support the conclusion, based on the applicant's version of events, that the copy is indeed a true copy. The papers are silent on whether the applicant attempted to approach either of the witnesses who signed the Will.
- [33] The outcome of this application will be important to the parties involved, as it will determine whether or not the applicant stands to benefit from the deceased's estate at all.
- [34] The notice of set down in this matter was not served upon the eighth respondent, whose insight by way of a report would have assisted this court.
- [35] In light of the above, the applicant's *ipse dixit* is insufficient.
- [36] Seen objectively, the applicant still launched the current application, so expecting alternative relief to be sought from this court (as suggested by the eighth respondent to the applicant) was to be expected.
- [37] An application to compel the seventh respondent to do the necessary could therefore not be considered an unduly onerous expectation, under the circumstances, but rather one that would provide the necessary degree of certainty.⁵

⁵ On the aspect of certainty in matters regarding Wills, see, by parity of reasoning, the matter of *Anderson and Wagner NNO and Another v the Master and Others* 1996 (3) SA 779 (C) where it was stated, at p. 785, in the context of section 2(3) of the Wills Act that:

‘These considerations all lead me to conclude that s 2(3) of the Act must be strictly, rather than liberally, interpreted. Whilst the pursuit of equity (sometimes erroneously confused by laymen with

[38] The applicant has therefore failed to make out an appropriate case for the relief sought, and the application accordingly falls to be dismissed.

Costs

[39] It remains unclear as to whether or not the applicant is in fact a beneficiary in the deceased's estate. There is accordingly no reason why the deceased estate should bear the cost of the application. Costs will therefore follow the result.

Order

[40] In the result the following is ordered:

The application is dismissed with costs.

N MOLONY
ACTING JUDGE OF THE HIGH COURT

Appels J

I agree

G APPELS
ACTING JUDGE OF THE HIGH COURT

'justice') and the elimination of hardships are consummations devoutly to be wished, their attainment can often not be justified if it entails the sacrifice of certainty and legal principle. I do not think that the Legislature had such a sacrifice in mind when it placed s 2(3) on the statute book.'

APPEARANCES:

For the Applicant	:	Adv: Talapile
Instructed by	:	Manitshana Attorneys Inc. MTHATHA
For the 2 nd Respondent	:	Mr Dayimani
Instructed by	:	M Dayimani Inc. MTHATHA
For the 5 th Respondent	:	Mr. Dyantyi
Instructed by	:	Legal Aid MTHATHA
Date Heard	:	19 June 2025
Date Delivered	:	16 October 2025