



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

Case No: 09/2025

In the matter between:

MMELESI, GAOLATLHWE DAVID

Applicant

And

MOKGORO, ITHATHENG N.O.

1st Respondent

MOKGORO, ITHATHENG

2nd Respondent

MOKGORO, MPHO JOSEPH

3rd Respondent

MOKGORO, ITUMELENG

4th Respondent

BOBO RADU, GAOBOLELWE (born Mokgoro)

5th Respondent

MONYEKI, ORATILE NALEDI

6th Respondent

THE MASTER OF THE HIGH COURT, KIMBERLEY 7th Respondent

CAPITAL LEGACY FIDUCIARY SERVICES (PTY) LTD 8th Respondent

In re:

MOKGORO, ITHATHENG N.O. 1st Applicant

MOKGORO, ITHATHENG 2nd Applicant

MOKGORO, MPHOS 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, GAOLATLHWE DAVID 2nd Respondent

CAPITAL LEGACY FIDUCIARY SERVICES (PTY) LTD 3rd Respondent

Coram: Lever J

JUDGMENT

Lever J:

1. This is an application for Leave to Appeal the judgment and order handed down by me on 1 August 2025. The said judgment ordered the Master (the first respondent in the court *a quo*) to accept what was referred to as the 2021 will in the court *a quo* as the will of the deceased (Jennifer Yvonne Mokgoro) for the purposes of the Administration of Estates Act 66 of 1965.
2. It was common cause that the signatures to the 2021 will were appended electronically and that a copy of the said will was recovered from an independent financial broker (the third respondent in the court *a quo*) who had stored the said document in electronic form.
3. The first applicant in the court *a quo* brought the application in his capacity both as the duly appointed executor of the deceased's estate and in his capacity as one of her sons (second applicant in the court *a quo*). The application in the court *a quo* was supported by four other family members of the deceased (the third to sixth applicants in the court *a quo*). These are the respondents who oppose the current application for leave to appeal the judgment of 1 August 2025.

4. The application in the court *a quo* was brought in terms of section 2(3) of the Wills Act 7 of 1953 (Wills Act) to recognise the said 2021 will as the will of the deceased despite its non – compliance with the statutory formalities and that an original physically signed document was not available. The said document was not signed by the testatrix or the relevant two witnesses in pen, but such signatures were appended electronically.
5. The second respondent in the court *a quo*, the current applicant for leave to appeal, Gaolatlhwe David Mmelesi was the life partner of the deceased. He was the only person that opposed the application in the court *a quo*.
6. It is common cause that the difference between the contested 2021 will and the 2014 will, which complied with the required formalities, was the way the deceased's share in a fixed property situated in Magersfontein would be dealt with. The 2014 will leaves her share in the said property to Mr Mmelesi, whilst the 2021 will leaves the deceased's share in the said property to her children and granddaughter. Effectively, the first to the sixth applicants in the court *a quo*. The first to sixth respondents in the present application.
7. Not only was it not disputed by Mr Mmelesi that the deceased intended the 2021 will to be her last will and testament but Mr Babuseng, who represented Mr Mmelesi in the court *a quo* and in the present application, expressly

conceded this in the court *a quo*. Accordingly, the intention of the deceased regarding the 2021 will, must be taken to have been properly established.

8. At issue in the court *a quo* and again placed in issue in the Notice of Application for Leave to Appeal is the question of whether sections 4(3) and 4(4) read with the relevant schedules of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) excludes the application and operation of section 2(3) of the Wills Act. In my judgment in the court *a quo* I found that the relevant provisions of ECTA did not exclude the application and operation of section 2(3) of the Wills Act.

9. In my judgment in the court *a quo* I found that the three jurisdictional requirements necessary for the application of section 2(3) of the Wills Act as set out by the Supreme Court of Appeal (SCA) in the case of SMITH v PARSONS NO AND OTHERS¹ had either been conceded, uncontested and/or established. That in such circumstances and on the authority of the decisions of the SCA in both the case of SMITH v PARSONS NO AND OTHERS² and VAN DER MERWE v THE MASTER AND ANOTHER³, once the said three jurisdictional facts have been established, the court has no discretion but to grant the relief contemplated in section 2(3) of the Wills Act.

¹ 2010 (4) SA 378 (SCA) at para [7].

² As in footnote 1 above at para [7].

³ 2010 (6) SA 544 (SCA) at para [14].

10. Accordingly, in my judgment in the court *a quo* I applied section 2(3) of the Wills Act and ordered the Master to accept the 2021 will.

11. The test of what needs to be established in order to be granted the necessary leave to appeal is now set out in s 17(1) of the Superior Courts Act⁴, the relevant provisions of which read as follows:

- “17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
- (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) The decision sought on appeal does not fall within the ambit of s 16(2)(a); and ...”

12. On the face of it, the wording of the said section of the Superior Courts Act as quoted above, the requirement for granting leave to appeal is thus more stringent than was previously required. This is in fact what Bertelsman J held in the case of *MONT CHEVAUX TRUST v TINA GOOSEN AND OTHERS*⁵. Bertelsman J held that the test now is not whether another court might come to a different conclusion but in using the word “would” in the said section of

⁴ Act 10 of 2013.

⁵ 2014 JDR 2325 (LCC).

the Superior Courts Act, the test now is that there is a measure of certainty that another court will reach a different conclusion to the court of first instance.

13. Having regard to the change from “could” to “would” brought about by section 17(1)(a)(i) of the Act, there existed some differing approaches on how “reasonable prospects of success” would be determined. Such controversy as might have existed appears to have been settled in the case of RAMAKATSA AND OTHERS v AFRICAN NATIONAL CONGRESS AND ANOTHER⁶, where Dlodlo JA set out the position as follows:

“...The test for reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”⁷ (references omitted)

14. Save for the fact that at the hearing of oral argument herein, Mr Babuseng on behalf Mr Mmelesi abandoned the grounds of appeal based on section 4(4) of ECTA, the arguments raised by Mr Babuseng on behalf of Mr Mmelesi, the applicant herein, are precisely the same as those raised by him in the court *a quo*. I dealt with these arguments comprehensively and succinctly in my

⁶ (Case No: 724/2019) [2021] ZASCA 31 (31 March 2021).

⁷ RAMAKATSA case above., para [10].

judgment in the court *a quo*. No purpose will be served by repeating my judgment in the court *a quo* herein.

15. There are only two aspects that need to be deliberated upon to some degree.

Firstly, Mr Babuseng argued that in order to apply section 2(3) of the Wills Act, the applicant (in the court *a quo*) needed to show the shortcoming in the will concerned was contemplated in section 2(1) of the Wills Act. In other words, that this was a prerequisite to being able to apply section 2(3) of the Wills Act. He went on to submit that this could not be done because of the provisions of section 4(3) of ECTA read with the appropriate schedule. Having looked at and reconsidered the legislation concerned, I believe Mr Babuseng's conclusion doesn't follow from his argument. The facts of the case and the decision of the SCA in the VAN DER MERWE case (referred to above) illustrate that Mr Babuseng's argument cannot be correct.

16. Having considered all these arguments afresh and applying the test quoted above for considering an application for leave to appeal, I cannot find that there is any reasonable prospect that another court will come to a different conclusion on any of these arguments.

17. The second aspect that needs some attention is Mr Babuseng's submission that I ought to find compelling reasons to refer the matter on appeal by virtue of the provisions of section 17(1)(a)(ii) of the Superior Courts Act. The reasons

provided for the argument that the matter should be referred for appeal under section 17(1)(a)(ii) of the Superior Courts Act are that the provisions of ECTA have not received prior judicial consideration, that the issue is new and novel, and that my judgment received wide attention in the media. In my view the issue is not new or novel in the real sense. It is true that the exact facts and circumstances have not been judicially considered, but it is merely an application of the provisions of section 2(3) of the Wills Act where the requirements necessary to establish the necessary jurisdictional facts were either conceded, not contested or otherwise established. In other words, such jurisdictional facts were not controversial in the court *a quo*. They are also not controversial now.

18. There is no provision in ECTA which either expressly or by necessary implication excludes the operation of section 2(3) of the Wills Act where the jurisdictional facts necessary for the application of the said section 2(3) are established and are not controversial on the facts of the case.

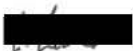
19. In these circumstances, I cannot find that there are reasonable prospects that another court would come to a different conclusion under the provisions of section 17(1)(a)(i). Nor can I find that there is any special circumstance or compelling reason or basis which would constitute a compelling reason why the matter should be referred for an appeal under the provisions of section 17(1)(a)(ii) of the Superior Courts Act.

20. In these circumstances the application for leave to appeal stands to be dismissed.

21. The only outstanding issue is the question of costs. No reason has been raised to show that costs should not follow the result. I can also not find any reason to make another ruling other than that costs follow the result. Accordingly, costs will follow the result. Having considered the circumstances I believe that costs should be taxed on scale B.

22. Accordingly, the following order is made:

- 1) The application for leave to appeal is dismissed.
- 2) The applicant for leave to appeal, Mr Mmesesi, will pay the costs of this application on scale B.



L.G. LEVER

Judge of the High Court

Northern Cape Division, Kimberley

APPEARANCES:

On behalf of the Applicant:

Adv B Babuseng

Instructed by:

Lulama Lobi Inc.

On behalf of the 1st to 6th Respondents:

Adv S.L Erasmus

Instructed by:

Engelsman Magabane Inc.

Date of Hearing:

23 January 2026

Date of Judgment:

30 January 2026