REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 58612/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

12/2/2026 [redacted]
DATE SIGNATURE

In the matter between:

MODISE NEHEMIA	Applicant
and	
MODISE REFILOE AGNES N.O	First Respondent
ABSA BANK LIMITED	Second Respondent
MASTER OF THE HIGH COURT OF SOUTH AFRICA	Third Respondent

JUDGMENT

MAKUME, J

Introduction

[1] In this matter the Applicant seeks an order that the last will and testament of the late Matsatsi Agnes Khutsoane ("the deceased") be declared invalid.

[2] The application is opposed by the first Respondent who is cited in her capacity as the executrix duly appointed by the Master of the High Court (third Respondent) pursuant to the wishes of the deceased.

[3] The second Respondent ABSA Bank as well as the third Respondent have indicated that they will abide the decision of this Court.

Background facts

[4] It is necessary to set out a brief narrative of certain facts and circumstances giving rise to the litigation which bear on the question to be decided as they appear from the papers.

[5] The deceased Matsatsi Agnes Khutsoane was born on 30 September 1938 and died of natural causes on 6 December 2012 at Tsakane, her place of domicile. She was formally Modise and got married to a Mr Khutsoane.

[6] On 21 January 2013 the third respondent issued the first respondent with letters of executorship in terms of section 13 and 14 of the Administration of Estates Act.[1] The appointment was made pursuant to the filing of a will dated 13 November 2012, which will was signed by the making of a mark.

[7] In the will, the deceased bequeathed her estate to her grandchildren namely Thabang Modise, Nthabiseng Modise, Karabo Modise and Rifilwe Agnes Modise. It is worth noting that none of the heirs have been cited as interested parties in this application. I will revert to this later in this judgment.

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[1] 66 of 1965.

[8] In clause 4 of the contested will, the deceased nominated Rifilwe Modise as executrix of her estate. Rifilwe Modise is a daughter of Moeketse Modise, the late son of the deceased. She is thus the granddaughter of the deceased.

The applicant's replying affidavit and condonation

[9] During 2013 Rifilwe Agnes Modise, in her personal capacity, obtained an order in the Brakpan Magistrates Court under case number 1579/2013, evicting the Applicant and all those in occupation. The order attached does not specify eviction from where the eviction place. I will, for purposes of this judgment assume it is eviction from a property inherited by Rifilwe Modise, being Erf 6209 Venda Street, Tsakane, Brakpan.

[10] The Applicant confirms in his replying affidavit that on 19 December 2012, shortly after the death of the deceased, he was shown a copy of the deceased's will. He has thus been aware of the contents of the will since that time.

[11] During or about November 2013, the Applicant applied for leave to appeal the eviction order and was not successful, or as he says he abandoned the application as he could not afford fees for legal representation.

[12] During March 2021, the applicant launched this application seeking an order declaring the will invalid on the basis that the deceased was not in a healthy state to have executed the will on 13 November 2012. Secondly, the Applicant seeks an order that the first Respondent be removed as executrix and that the estate of the deceased be dealt with as an intestate estate.

[13] On 25 March 2021, the Applicant instructed his attorneys Messrs Umeneka to investigate circumstances relating to the drafting of the will by the deceased who, on 13 November 2012 was on her dying bed. Secondly, to investigate if indeed the will was drafted by ABSA Bank and whether the deceased was indeed present during the drafting of the will. The power of attorney says nothing about instituting action to declare the will null and void. I will, however, accept that the notice of motion supported by the Applicant's affidavit has the effect of curing what appears on the power of attorney.

The Applicant's Case

[14] The applicant's case is to the effect that the deceased was not well and could never have been able to travel from Brakpan to Springs to have a will drawn up and signed. It is implied that because in the medical certificate dated 18 June 2012 by Dr M Sarang, it is said that the deceased suffered from mild hemiplegia and was unable to walk and needs a wheelchair. It is on this basis only that the Applicant would like the Court to accept that the deceased was of unsound mind and could never have been able to appreciate what she did on 13 November 2012. The Applicant further maintains that the will, so signed, by the making of a mark does not comply with the requirements of the statute.

The Respondent's Case

[15] The Respondent's case is that she lived with the deceased and that on 13 November 2012, she, her own mother and aunt Winnie drove to ABSA Bank in Springs with the deceased, where the deceased executed the will. She was not present at the signing as she stood outside the bank premises.

The Issues

[16] It is common cause that the will was signed by the making of a mark and witnessed by two witnesses. It is further common cause that the commissioner of oaths Trinesha Pillay only attached her certificate on 20 December 2012, some two weeks after the death of the deceased who died on 5 December 2012.

[17] The issue to be determined by this Court is whether the deceased executed the will on 13 November 2012, secondly whether the fact that the commissioner of oaths only certified the will after the death of the deceased invalidates that will.

The Evidence Applied To The Legal Position

[18] It is trite law that a will which is regular on the face of it is presumed to be valid unless it is declared invalid and the onus of proving its invalidity is on the person

who challenges it, which onus is discharged on a preponderance of probability. In *Essop v Mustapha*[2] Friedman J held at page 22, paragraph i as follows:

> "The testator's mental condition at the time he gave instructions for the drafting of his will is irrelevant, particularly in the circumstances of the present case."

[19] In this matter there is overwhelming evidence that the deceased was accompanied by her daughter and another relative to ABSA Bank, Springs, and that she was of sound mind. The Applicant can only rely on a medical condition of 18 June 2012 some five months prior to the execution of the will.

[20] The will is drafted on the letterhead of ABSA Bank. There is confirmation to that effect by an official of the bank and one of the witnesses to the will also signed next to the thumbprint of the deceased. The bank official could not have signed, clearly noting that the deceased was of unsound mind.

[21] The second issue raised is that the commissioner of oaths only appended his signature to the will, signed by the making of a mark, two weeks after the death of the deceased. The Applicant argues that alone also invalidates the will. It is worth noting that this was only raised in the replying affidavit when in fact the Applicant had been placed in possession of the will since 2013. There is no explanation why he did not allude to this fact in his founding affidavit.

[22] Section 2(v)(bb) of the Wills Act[3] is clear and unambiguous, it reads as follows:

> "If the testator dies after the will has been signed in terms of subparagraph (i), (iii) and (iv) but before the commissioner of oaths has made a certificate concerned, the commissioner of oaths shall, as soon as possible thereafter, make or complete a certificate and sign each page of the will, excluding the page on which his certificate appears."

[23] This is exactly what happened, the commissioner did so and attached his certificate two weeks after that of the deceased. There is now prohibition that a

[2] *Essop v Mustapha* 1988 (4) SA 213 (D)
[3] 7 of 1953.

commissioner may not do so after the death, it can be done at any time after the signing of the testatrix. The fact that the testatrix had died is of no consequence. The commissioner did satisfy himself that the will signed by the making of a mark is that of the deceased as to how he or she satisfied himself and arrived at that conclusion is not what the Act requires. It could have been by the person at the bank who drafted the will, it could also have been on the information from the witnesses to the will. In the matter of *Roberts and Another v the Master*[4] Moll J quoted with approval the decision in *Arendse v The Master and Others*[5] wherein Baker J, after exhaustive review of the authorities concluded arbiter that the prescribed certificate can be appended at any time after the will has been marked by the testator and signed by the witness, and this even post-mortem testatoris.

[24] In the result this Court is satisfied that the Applicant has failed to discharge the onus that the will of the deceased is invalid. Having said so there is another issue that I now deal with mero motu, it is the non-joinder of the heirs. The Applicant, in his own words testified that the police showed him a copy of the will in 2013. He has been aware since then that there are other beneficiaries in the will, namely Thabang Modise, Nthabiseng Modise, Karabo Modise and Rifilwe Modise and yet none of them have been cited as parties to the application. That alone, is fatal to his case.

[25] In *Amalgamated Engineering Union v Minister of Labour*[6] and in the matter of *Bowring NO v Vrededorp Properties CC*[7], paragraph 21 it was held that a Court must raise the issue of non-joinder mero motu if it believes that there are interested parties who should have been joined or given notice of the pleadings and this can be done even on appeal.

[26] This Court raised this, mero motu, with the applicant's counsel, as to why the other heirs have not been joined as they clearly have a vested interest in the outcome of this litigation. I invited the parties to send me supplementary heads dealing with that aspect. I have now received the supplementary heads from both parties and I am grateful for the insightful submissions made by both

[4] 1975 (4) (WLD).
[5] 1973 (3) SA 333.
[6] 1949 (3) SA 637 (A).
[7] 2007 (5) SA 391 (SCA).

counsel, which have been helpful. I am aware that counsel dealt with other issues that I have already touched on in this judgment. My interest was only on the joinder or non-joinder.

[27] Having said that I, however, that in the supplementary heads the Respondent has dealt with the issue of the notice of motion which calls for a review of the decision taken by the Master in accepting the will as being genuine. The Respondent has correctly drawn my attention to the requirements for review as set out in the Promotion of Administration Justice Act[8] as well as to Rule 53 of the uniform rules. It is correct that the fact that the Applicant now challenges the validity of the will does not find grounds to challenge the Master's exercise of his statutory discretion. Review applications are governed by and must follow the requirements of Rule 53 of the Rules, with reference to the provisions of PAJA. Counsel for the respondent has referred me to the decision by Brand J in the matter *of Ncelekazi v Master of the High Court Mthatha and Others*[9] wherein the court stated that:

> "It is axiomatic that the rights to review an appointment by the Master in terms of section 95 of the Administration of Estates Act is a statutory recordal of such right and provides no independent grounds for review apart from those contained in the Promotion of Administration of Justice Act 3 of 2000 or, to the extent appliable, the common law."

The Nonjoinder Of Other Beneficiaries As Mentioned In The Will

[28] It is common cause that in the will the testatrix not only bequeathed her estate to the first Respondent but also the three other grandchildren namely Thabang Modise, Karabo Modise and Nthabiseng Modise. The question is whether they should have been joined or not in the application. The applicant argues in his supplementary heads that it is not necessary as the estate is represented by the executrix in the litigation and that the beneficiaries have no locus standi to litigate while the executor is in office. The applicants have missed the point and ignored the fact that in the evet the Court declares the will invalid, then the nominated

[8] 3 of 2000.
[9] 2023 JDR 3510 ECM.

beneficiaries have no claim to the estate. The deceased has, in the will, said that the property should not be sold but it should remain as a family house, and that does not cure the defect of nonjoinder.

[29] It is trite law that immediately on the death of a deceased, the assets vest in the nominated beneficiaries represented by the executor. To say that those beneficiaries have no interest cannot be correct. The *ABSA Bank v Naude and Others* decision quoted by the applicant in the supplementary heads, is on point.

[30] I have accordingly come to the conclusion that the Applicant has failed to make out a case and that the application should be dismissed with costs.

Order

[31] In the result I make the following order;

(a) The application is dismissed with costs.

[redacted]

MAKUME

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicants	:	Adv N Mohlala
Instructed	:	Umenaka Attorneys
For the Respondent	:	Tlou J Phihlela
Instructed	:	Legal Aid South Africa
Date of hearing	:	26 January 2026
Date of Judgement	:	12 February 2026