

SOUTH AFRICA / JUDGMENT

F.Z.M v S.M and Others (2995/2024)

[2024] ZAFSHC 343 (31 October 2024)

[2024] ZAFSHC 343**COURT**

Free State High Court, Bloemfontein

BEFORE

J J F Hefer

CASE / FILE NUMBER

2995/2024

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA

FREE STATE DIVISION,
BLOEMFONTEIN

Reportable Yes/No**Case No: 2995/2024****In**

the matter between:

F[...]
Z[...] M[...]
Applicant
And
S[...]
M[...]
First
Respondent
T[...]
E[...] obo
N[...]
O[...] U[...] MA[...]
Second
Respondent
ADV
CHRISTOFFEL JACOBUS HENDRIKS N.O.
obo

L[...] M[...] M[...]
Third
Respondent
MASTER
OF THE HIGH COURT, FREE STATE
DIVISION
Fourth
Respondent

CORAM: Hefer AJ

Heard: 10 October 2024

Delivered: 31 October 2024

Summary: ORDER
1.
The Master of the High Court, Free State,
Bloemfontein, is ordered to accept the document marked 'H'
annexed to the
founding affidavit of the applicant, as the last will
of M[...] J[...] M[...].
2.
Each party is to pay its own costs.

JUDGMENT

Hefer AJ

- [1] 'As appears from the terms of s 2(3) of the Wills Act, before a Court can make an order pursuant thereto, a Court must be satisfied – in a case such as the present where a will is in issue, as opposed to an amendment – that it has before it a document: (a) which was drafted or executed by a person; (b) who has since died; and (c) who intended the document to be his/her will.'^[1]
- [2] It is common cause that M[...] J[...] M[...] (the deceased), passed away during March 2023 after he had been diagnosed with cancer a mere two months before.
- [3] Approximately four months after the deceased had passed away, the applicant lodged all necessary documents to report the estate with the Master of the High Court, Free State, Bloemfontein, such being the fourth respondent before Court.
- [4] These documents included a document titled 'Will and Final Testament' dated 28 February 2023 and which had, according to the applicant, been signed by the deceased as well as two witnesses, the identity of whom had been provided by the applicant. This document will hereinafter be referred to as 'the Will'. The fourth respondent rejected the Will as the Will does not comply with the provisions of s 2(1)(a)(iv) of the Wills Act 7 of 1953 (the Act) in that the Will consists of more than one page and only the last page thereof had been signed by the deceased and the witnesses.

- [5] The first respondent, who is the biological daughter of the deceased, opposes the application by the applicant for relief sought in terms of s 2(3) of the Act, being the rescue provision of the Act in terms of which a Court may order the Master to accept a document as the valid will of the testator, although it does not comply with all the formalities as set in s 2 of the Act.
- [6] The second respondent, being the deceased's ex-wife from whom he had been divorced since June 2017, the third respondent, being the curator ad litem on behalf of the minor child born from the erstwhile marriage between the deceased and second respondent, as well as the fourth respondent do not oppose the relief sought.
- [7] The crux of the first respondent's opposition to the application is that the applicant has failed to prove that the Will contains or is a true reflection of the deceased's intentions. The first respondent effectively disputes the requirements that the Will was drafted by the deceased and that he intended it to be his will.
- [8] Mr Rawson, appearing on behalf of the first respondent, referred me to the matter of *Smith v Parsons NO and Others*[2] in which Lethuli AJ held that 'a great measure of certainty is required to show that it was actually the intention of the testator that the document in question be his will.'[3]
- [9] Lethuli AJ further referred to the matter of *Schnetler NO v Die Meester and Andere*,[4] in which it was held that what had to be decided was, whether on the basis of the facts as set out and the circumstances surrounding the drafting of the document, it could convincingly be said that the document was meant to be the deceased's will.
- [10] The first respondent contends that the deceased could not have intended the purported Will to be his last will and testament on two inter-related grounds namely:
- (i) The applicant has failed to prove on a balance of probabilities that the deceased would have had the intention to give his entire estate to the applicant and thereby depriving all of his children of their right to inherit in terms of the intestate succession; and
 - (ii) The applicant has failed to prove on a balance of probabilities that the deceased was in his right state of mind and mentally capable of appreciating the legal effect of signing the purported Will.
- [11] Mr Rawson argued that the Will could not have been drafted and executed by the deceased because the contents of the Will appears to be 'professionally drafted, complying with formalities, using legal jargon and explicitly identifying assets'.
- [12] In this regard, it is the version by the applicant that on the day in question, being the 28th of February 2023, the deceased called his biological uncle, Mr E[...] M[...] to come to their house as the deceased wished to draft his Will. Mr E[...] M[...] arrived and they discussed the content of the deceased's Will. After their discussion, the deceased, according to the applicant, personally typed his Will on his laptop in the presence of his uncle and the

applicant. When the deceased finalized his Will, he saved it on a memory stick as his laptop was not connected to a printer and requested the applicant to print the Will from another laptop which was connected to a printer. The applicant then handed the hard copy of the Will to the deceased and his uncle. After they had read through the Will, a certain Mr Daniele Mpayiphieli was

called to come to the deceased's house. The deceased then signed the Will in the presence of the said Mr E[...] M[...]

and Mr Mpayiphieli.

- [13] The fact that because the signatures of the deceased and the witnesses were omitted from the first page of the Will does not, as contended by Mr Rawson, '... that as lay-people, they were not sure of the prescribed formalities to execute a valid will', as opposed to the fact as already mentioned and relied upon by the first respondent, that the Will appeared to be professionally drafted complying with the formalities, provide a basis for a finding that the Will was not drafted and executed by the deceased.
- [14] The same applies to the contention by Mr Rawson regarding the applicant's maiden name as contained in the Will. At that stage, a customary marriage only had been concluded between the deceased and the applicant. It was only after the death of the deceased that an abridged marriage certificate has been issued by the Department of Home Affairs.
- [15] As far as all the grounds advanced by the first respondent are concerned, there exists no factual basis upon which the version by the applicant, stands to be rejected. Her version is also confirmed by the two witnesses who signed the Will, the most important being the deceased's uncle who was present when the Will was drafted by the deceased.
- [16] According to Mr Rawson, the applicant has failed to allege and prove sufficient surrounding circumstances to support her claim that the deceased executed the Will or intended the Will to contain his testamentary wishes. This is also not correct.
- [17] The uncontested facts show that the applicant concluded a customary marriage with the deceased during October 2019, which customary marriage was confirmed by the Department of Home Affairs by the issuing of the abridged marriage certificate.
- [18] Approximately four years later the deceased was diagnosed with cancer. Soon thereafter he decided to execute a Will which resulted in the document currently before Court. There is no reason as contended by Mr Rawson why the deceased must or should have discussed his intention to bequeath his entire estate to his wife before executing the Will. In fact, bequeathing one's estate to your spouse is nothing out of the ordinary.
- [19] First respondent's further contention that it is improbable that the deceased would have had the intention to bequeath his entire estate to the applicant and thereby depriving all of his children of their right to inherit in terms of intestate succession, can also not be upheld.

- [20] The minor child, N[...] O[...] U[...] M[...], as represented by her biological mother, does not oppose the relief sought. Provision was in any event made for maintenance for this minor child in the deed of settlement concluded at the time of the divorce action between the deceased and the second respondent in her personal capacity.
- [21] As far as the minor child, L[...] M[...] M[...] is concerned, Adv Hendriks, the appointed curator ad litem for this child, correctly pointed out that the deceased estate is liable for the child's maintenance and that the obligation of the estate of the deceased parent to support a minor child takes priority over all bequeathals. Should either or both the parents pass away, the obligation to support the child to claim maintenance from the estate of the deceased parent continues. This, of course, also applies to the minor child, N[...].
- [22] As far as the first respondent herself is concerned, on her own version, the deceased already has made her one of the beneficiaries of his Sala Pension Fund.
- [23] In conclusion, taking into account all the surrounding circumstances, I am satisfied that the applicant has succeeded in showing that the Will was drafted by the deceased with the intention to be his last will and testament.
- [24] It is further common cause that the deceased drafted his Will a mere two months after he had been diagnosed with cancer.
- [25] I accept, as alleged by first respondent, that since being diagnosed with cancer, the deceased may have experienced some 'bad days'. Taking into account the relatively short period of time since he had been diagnosed, there is however, on a balance of probabilities, nothing to conclude that the deceased was not in his right state of mind or not mentally capable of signing the purported Will. The diagnoses of cancer does not mean that it affected the deceased's mental capacity.
- [26] As far as costs are concerned, as the successful party, the applicant is entitled to be awarded costs in her favour. However, Mr Berry, appearing on behalf of the applicant, on his own accord and graciously, indicated that the Court should consider an order in terms of which each party is to pay its own cost. He has done so with reference to the fact that the first respondent was represented by the UFS Law Clinic. I consider this concession by Mr Berry to be admirable and on that basis, costs are to be awarded on the basis that each party is to pay its own cost. At this point, I also wish to commend Mr Rawson, from the UFS Law Clinic, in particular, for the manner he presented his argument before Court.

Order

Therefore, I make the following order:

1. The Master of the High Court, Free State, Bloemfontein, is ordered to accept the document marked 'H' annexed to the founding affidavit of the applicant, as the Last Will of M[...] J[...] M[...].

2. Each party is to pay its own costs.

J J F HEFER, AJ

Appearances: On behalf of the applicant: Adv AP Berry Instructed by: HJ Booysen Attorneys Inc. Bloemfontein On behalf of the first respondent: Mr C Rawson UFS Law Clinic Bloemfontein

[1] As per Selikowitz J in Ex Parte Maurice 1995

(2) SA 713 (CPD) at 715E-H.

[2] Smith v Parsons NO and Others

[2009] ZAKZHC 2; 2009 (3) SA 519 (D).

[3] Ibid at 525B-C.

[4] Schnetler NO v Die Meester and Andere 1999 (4) SA 1250 (C).

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Prepared on 10 October 2026 · Esheria