

SOUTH AFRICA / JUDGMENT

Khalanyane v Khalanyane and Others (1507/2018) [2020] ZAFSHC 43 (5 March 2020)

[2020] ZAFSHC 43**COURT**

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

1507/2018

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Reportable:**

YES/NO

Of

Interest to other Judges: YES/NO

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to Magistrates: YES/NO

Case number:

1507/2018

In

the matter between: KHOTSO
 ROMUALD KHALANYANE
 Applicant
 and
 MOHOABATSANE
 AGNES KHALANYANE
 1st Respondent
 MASTER
 OF THE HIGH COURT BLOEMFONTEIN
 2nd Respondent
 MANGAUNG
 METROPOLITAN MUNICIPALITY
 3rd Respondent

CORAM: CHESIWE, J

JUDGMENT

BY: CHESIWE, J

HEARD ON: 14 NOVEMBER 2019

DELIVERED ON: 5 MARCH 2020

[1] This is an opposed application wherein the applicants seeks an order in the following terms:

“1. That the Honourable Court grant an order declaring the Last Will and Testament, dated the 12th of October 2015, alleged to be signed by Makobile Nerial Khalanyane (deceased), null and void.

2. That the Second Respondent be ordered to withdraw the Letters of Executorship issued in favour of the First Respondent under Estate number 9067/2016, dated 24 October 2016, within ten (10) days from the date of this order.

3. That the First Respondent be ordered to pay the costs of this

application on an attorney and client scale.”

[2] The Second and Third Respondents have not filed any opposing papers but they will abide with the decision of the Court.

[3] Condonation application not opposed same granted.

[4] The First Respondent opposed the application on the following grounds:

4.1 That the Will annexure “E” is a fraudulent Will, as well as

denying the signature appearing on the Will is that of the First Respondent.

BACKGROUND ON THIS MATTER

- [5] The Applicant including Jeremiah Mathaba Khalanyane, Kholane Michael Khalanyane though they not cited and the First Respondent are biological children of the deceased Makobile Khalanyane.
- [6] The deceased passed away on the 5th of September 2016. John Khalanyane (biological father) predeceased Makobile Khalanyane. The applicant and the First Respondent rented in the house with the deceased. According to the founding affidavit of the Applicant their parents did not draft a Will wherein they would have outlined their bequeath of the immovable assets.
- [7] The Applicant, after the deceased passed away, remained in the property situated at number [...]. The other sibling that is the First Respondent Jeremiah Khalanyane and Michael Khalanyane moved out of the house. The Applicant stayed in the house.
- [8] After the deceased had passed away on the 5th September 2016, the First Respondent presented the applicant with a Will. The Will was sent for forensic examination.
- [9] The purported Will and Testament bequeaths the deceased assets as follows:

“To my son Khotso Romauld Khalanyane 1980/06/19 all furniture and household effects.

To my daughter Mohoabatsane Agnes Khalanyane (1963/09/28) my property – ERF 43858 Modisenyane Street, Rocklands.”

- [10] The issue in dispute is whether the submitted Will to the Master of the High Court, is fraudulent and should therefore declared null and void.

SUBMISSIONS

- [11] In oral argument and the written heads of argument counsel on behalf of the Applicant submitted that the forensic report of the handwriting before Court and is not challenged by a report from the First Respondent. Counsel raised an issue that the First Respondent has to explain the discrepancy of the document which is a signed account at Loch Logan Waterfront that was signed on 7 July 2017 whereas the deceased passed on 5 September 2016.

Counsel submitted that the signature on the Will is compared with the deceased signatures on the samples submitted which confirmed that the signature on the Will is not that of the deceased. Counsel indicated that the Respondent is not an expert and can therefore not dispute the report of the expert.

- [12] Counsel on behalf of the First Respondent in oral argument submitted that annexure “F” amounts to hearsay evidence, and should be inadmissible and be disregarded by the court. Counsel further submitted that the expert did not make an affidavit to attach it to its report, consequently the samples do not support the evidence. Counsel argued that the sampled used, that is of Woolworths and Jet stores were not originals when these were submitted to the handwriting expert, as the Applicant should have provided a genuine signature of the

deceased. He submitted that the Will was drafted by a Mr Janson and is thus valid.

- [13] It is common cause that the First Respondent produced the Will after the mother passed away, indicating that the Will was given to her shortly before the mother passed on.
- [14] The mentioned Will, annexure “E” consists of two pages and appears to be signed by two witnesses and signed by the Testatrix and it is dated 12 October 2015.
- [15] The First Respondent in the opposing affidavit indicated that the Will was drafted with the assistance of Mr Wynand Jansen as he was the appointed executor of the Estate of the late father however the First Respondent makes mention that Mr Jansen could not file a confirmatory affidavit due to ill health and was at that stage admitted in the Intensive Care Unit.

The First Respondent’s contention is that the Applicant did not visit the parents, while they were still alive, nor assisted them when they needed help. The First Respondent mentioned that the Applicant did not have a good relationship with the now deceased parents.

THE LEGAL POSITION

[16] Section 2(1)(a) of the Wills Act 7 of 1953 provides as follows:

“...

no will executed on or after the first day of January, 1954. Shall be valid unless-

- (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and
- (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and
- (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and
- (iv) if the will consists of more than one page, each page other than the page on which it ends, is also signed by the testator or by such other person anywhere on the page; and

...”

[17] In *Harper NO v Govindamall and Another*[1], the Court said:

“The requirements for signatures of witnesses to a will provides a main safeguard against the perpetration of frauds, uncertainty and speculation. Disputes regarding the validity of a will can arise only after the death of a testator, which may occur many years after it was executed. Ordinarily the only persons other than the testator who are likely to have knowledge of the circumstances of the execution of a will are the witnesses who, being present personally saw or perceived it, and can testify in that regard. That purpose fails when the witnesses cannot be identified.”[2]

- [18] The Applicant attached to its application a forensic handwriting report of an expert. The said report is attached as annexure “F”. The handwriting expert conceded that the specimens were not originals. However, the expert concluded that ST1 – Loch Logan Woolworths transaction, ST2 – Jet Stores transaction, ST3 – Jet Stores transaction are the signatures of the deceased. The expert further concluded, that the Q1 and Q2 specimen was produced by the same author.
- [19] The specimen in Q2 which is the Loch Logan Woolworths transaction, allegedly was signed by the deceased. However, the date on the transaction was 07 July 2017. The deceased’s death certificate indicates that she passed away on the 5th of September 2016. The Question is who signed this transaction a year after the deceased died.
- [20] In *Pillay and Others v Nagan and Others*[3] the plaintiff challenged the validity of the Will on the grounds of forgery. The Plaintiff challenged the signature of the testator alleging that it was not the testator’s signature. The Plaintiff in *Pillay* further argued that because of the forgery involved the First Defendant should be disqualified from receiving any benefit from the estate.
- [21] In this matter the Applicant is not saying the Respondent be disqualified rather the Will be declared null and void in order for all the siblings to benefit. The Applicant goes further and mentioned in the founding affidavit that:
- “.....During her life time my late mother expressed her wish to keep the property in dispute as a family home available to all children and not to be sold and/or bequeathed to any of her surviving children.”*
- [22] The First Respondent on the other hand in the opposing affidavit makes mention of the Applicant during the life time of the deceased claims the house belonged to the Applicant, although he could not submit proof of ownership. First Respondent went further and mentioned that she received the Will from her deceased mother with other documents.
- [23] The Applicant in this instance challenges the Will that it is invalid on the grounds that the signature on the Will was forged.

Where the authenticity of the Will is in question or attacked on the basis of forgery, the Applicant has the onus to prove the allegation by providing evidence to that effect.

- [24] The Applicant provided a report of a handwriting expert who confirmed that the signature on the Will is not that of the deceased. The Applicant provided further proof by way of an account transaction that was signed on 7 July 2017, a year after the deceased had passed away. The court cannot overlook this issue of a transaction that took place after the death of the deceased nor can the court ignore the evidence of the handwriting expert. In *Molefi v Nhlapo and others*[4] the court had to determine whether the Will was valid, the deceased’s first Will was revoked.

In Molefi supra, the Plaintiff to support the contention of the Will furnished the court with the evidence of a handwriting expert.

[25] The handwriting expert in the report in its conclusion stated as follows:

“1. Original Q and ST specimen were unavailable for the purpose of this

forensic examination therefore size and slant measurements cannot be regarded as precise measurements.

2. General similarities in length and slant is observed among ST1, ST2 and ST3.

3. As tabled and illustrated, general and idiosyncratic similarities were observed among Q1 and Q2 specimens.

4. Significant differences in the quality, physiognomy, alignment is observed among the ST and Q specimen.

5. In view of the assessment, 3 findings in terms of section 228 of the Criminal Procedure Act 51 of 1977, it is my professional opinion that Q1 was produced by the author of Q2.”

[27] The First Respondent on the other hand did not have a handwriting expert to challenge the report of the expert of the Applicant as a consequence thereof the expert evidence is left undisputed and her conclusions not contested by the non-existence of a report of an expert from the First Respondent.

[28] The First Respondent in the opposing affidavit indicated that the Will was drafted by a Mr Wynand Jansen. The First Respondent explained further that Mr Jansen was in a hospital ICU in this case, and could therefore not obtain a confirmatory affidavit from Mr Jansen. With no evidence of such confirmatory affidavit, the court has no option but to accept that the allegation that Mr Jansen drafted the Will is not possible.

[29] It is clear that an element of fraud exists. The court in Adams (Deceased) 1990 2 ALL ER 99 said the following:

“Where it is clear that an element of fraud exists in the deceased’s Will and Testament, the court should not condone such conduct and declare such a Will and Testament null and void.”

[30] Indeed, the court has no expertise in so far as experts’ findings are concerned. Where such findings are made without being challenged by evidence of another handwriting expert the court is obliged to accept such findings to be correct.[5]

[31] In my view the Applicant has discharged the burden of proof that the signature on the contested Will is forgery. The First Respondent has failed to prove that the contested Will (annexure E) was signed by the deceased.

[32] In the circumstances I make the following order:

1. That the contested Last Will and Testament dated 12 October 2017 allegedly signed by Makobile Neria Khalanyane (the deceased) is declared null and void.
2. The Master of the High Court is ordered not to act in terms of the said Will.
3. That the Master of the High Court (Second Respondent) is ordered to withdraw the letters of Executorship issued in favour of the First Respondent under Estate number 9067/2016, dated 24 October 2016, within ten (10) days from the date of this order.
4. The First Respondent is ordered to pay the costs of this application on a party and party scale.

CHESIWE, J

On behalf of the Applicant: Adv. N.D Khokho

Instructed by: Kramer Weihmann & Joubert Inc.

Kramer Weihmann & Joubert Inc

BLOEMFONTEIN

On behalf of the Respondent: Mr. R. Coetzee

Instructed by: Steenkamp & Jansen Attorneys

Steenkamp & Jansen Inc

[1] Harpur NO v Govindamall and Another (730/91) [1993] ZASCA 110; 1993 (4) SA 751 (AD);

[1993] 2 All SA 582 (A) (6 September 1993)

[2] Ibid at 760A-C

[3] Pillay and Others v Nagan and Others 2001 (1) SA 410 (D)

[4] Molefi v Nhlapo and others (2013) JOL 30227 (GSJ)

[5] Senekal v Meyer 1975 (B) SA 372 (T)

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