

SOUTH AFRICA / JUDGMENT

Mavuso v Ndaba and Others (45990/2021) [2024] ZAGPJHC 906 (6 September 2024)

[2024] ZAGPJHC 906**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

45990/2021

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****Number: 45990/2021****(1) REPORTABLE: NO****(2) OF INTEREST TO OTHER****JUDGES: NO****(3) REVISED: NO****DATE: 06/09/2024****SIGNATURE:**

In the matter between: JACONIA
MGALAJA MAVUSO
Plaintiff
And
PHUTUMA
DOCTOR NDABA
First Defendant
THE
EXECUTOR- ESTATE LATE- LENA GAMA
Second Defendant
THE
MASTER OF THE HIGH COURT
Third Defendant
JOHANNESBURG
ABSA
TRUST LTD
Fourth Defendant
THE
REGISTRAR OF DEEDS
Fifth Defendant

JUDGMENT

FISHER J

Introduction

- [1] The plaintiff and the first defendant are the true parties in this dispute. The other defendants have been joined for formality or their possible interest. The first defendant is thus referred to in this judgement as “the defendant”.
- [2] The case involves the validity of a will.
- [3] The plaintiff’s case is that the will in issue which leaves the estate of the testator to the defendant is forged and that an earlier will which leaves the estate to the plaintiff is the valid will.
- [4] The wills will be referred to respectively as the 1993 will and the 2016 will. The sole asset in the deceased estate is an immovable property situated at 3[...] T[...] Street, Tsakane (the property).
- [5] The dispute is factual. The plaintiff must show that the will was not signed by the deceased.
- [6] The dispute has a long history. The action was brought in 2021. The dispute, as is generally the case in such matters, involves fractured family relationships. The dispute that led to the case arose during 2018 and played itself out in the six months prior to the death of the testator on 25 May 2018 at the age of 99.

[7] The plaintiff is represented by Stegmanns attorneys and counsel, Ms J Themane.

Application for postponement

[8] On the day of the hearing the defendant appeared in person. He had previously been represented, but his legal representative had withdrawn. He asked for a postponement. He had, he said, applied for legal aid but he did not yet have legal representation. His income was limited, he said. He is a vendor who sells bread in his local community in Tsakane.

[9] In light of the delay, the familial relationships requiring resolution, and the fact that the defendant could not give a proper account as to why he had not acted sooner than the day of trial to seek a postponement notwithstanding the withdrawal of his attorney in February 2024, I refused the application for postponement.

[10] The defendant thus elected to conduct the proceedings personally.

[11] The plaintiff testified and called three other family members who had involvement in the family saga being Christinah Sarafina Maduna (Sarafina), Daniel Thlabati (Dan), Busisiwe Bester Ngubane (Bester). To avoid confusion, I refer to the witnesses by the names used by counsel for the plaintiff.

Material facts

[12] The plaintiff and the defendant are related on the basis that they form part of the Mavuso Family.

[13] The Family Tree put into evidence by the plaintiff, and which is not disputed, starts with Julia who married Mathengwa Mavuso. Of their union seven children were born and of these children were Lena who is the testator, Josephine who is the grandmother of the defendant, Joseph who is the father of the plaintiff and his sister Bester.

[14] Simply put, the plaintiff and defendant are related on the basis that their respective grandparents and the testator were siblings.

[15] The plaintiff and Bester have taken leading roles in the family saga. They emerge as a united and formidable force in the Mavuso Family. They have been influential in the matters that concern this court.

[16] Lena, the testator married George Gama and thus took his name and became Lena Gama. She went by that name in the documents which have been introduced into evidence under her signature. This includes the wills in issue.

[17] Josephine, as I have said is the defendant's grandmother. He was born of her son, Nangcomo.

- [18] When the defendant was about 19 years of age, he left Mpumalanga where he had spent a large part of his childhood and went to live with Lena in Tsakane in the property. This was a mutually beneficial arrangement in that Lena had no children and thus no grandchildren. The defendant could thus be expected to take on the role of a grandchild and to do the chores about the house that would ordinarily fall to a child or grandchild, and he could be near the Johannesburg job market.
- [19] At this time, Lena was employed in the kitchen at Brenthurst, a prominent mansion in Parktown. The defendant was allowed to work there part- time as a gardener.
- [20] Whilst living with Lena, the defendant learnt how to drive and obtained his driver's licence. He then obtained employment at Checkers.
- [21] The defendant wanted to pursue the life of a pastor and, to this end, he embarked on studies in Durban to obtain a degree in theology. Whilst studying in Durban he stayed at the student hostel but would return to the property during vacation times. He regarded the property as his permanent home. He regarded Lena as a grandmother and referred to her as such. He testified that she regarded him as her grandson.
- [22] There was some dispute as to the length of time which the defendant spent living with Lena but I accept that he stayed with her for long periods of time and that he regarded the property as a primary residence.
- [23] He did, however, spend long periods of time in the United Kingdom where he earned a degree in Business Finance at the University of Ulster in Birmingham.
- [24] Whilst in the UK, he was employed by Marks & Spencer and on his return to South Africa he worked for Woolworths in Cape Town and then in Mpumalanga.
- [25] He testified that he was in constant contact with Lena, that he regularly sent her money and that he transferred to Mpumalanga so that he could see her more often. This was because he was concerned that she was becoming ever more frail. It is not disputed that she suffered from osteoarthritis which made her unstable and led to falls.
- [26] A turning point came in 2016. At that stage the defendant's plans were to leave South Africa and pursue his vocation as pastor in the United States of America (US). He testified that he had secured a visa from the US embassy and that his departure was imminent.
- [27] In February 2016, on returning to the property he was hijacked at gunpoint. The hijackers made off with his Volkswagen Polo motor vehicle and its contents. Unfortunately, the contents included his passport with the US Visa inside it.
- [28] The defendant testified that this loss meant that he could not travel as planned. He testified also that as Lena grew ever frailer it became difficult to leave her.

- [29] It is not disputed that he lived at the property in a back room permanently from February 2016. In order to sustain himself and, on his version, the household, he started a small business distributing bread which is how he continued to earn a living.
- [30] It is not in dispute that he resided with and provided some comfort and support to Lena.
- [31] The plaintiff and Bester dispute that the defendant was as involved in Lena's care to the extent suggested by him.
- [32] Bester sought to suggest that it was she and her late husband, the Reverend Simon Ngubane (Rev. Ngubane) who were the more involved caregivers. She testified that she and her husband bought groceries and adult diapers for Lena in the months leading up to her death as she was bedridden and incontinent.
- [33] The defendant conceded that he and the other family members including Bester and the plaintiff worked together as a family to care for Lena. He stated, however, that he was a dominant caregiver, assisted from time to time by caregivers employed by the family.
- [34] In 2017 Lena was admitted to hospital. She had lost her appetite and had become malnourished and dehydrated. On her discharge she was bedridden. It is not in dispute that, at this stage, Sarafina, the stepdaughter of Lena was asked to reside with Lena as her caregiver. A previous caregiver had been dismissed due to drunkenness.
- [35] In the time before her admission to hospital, Lena's predicament as to her toilet requirements had become physically challenging. The toilet facilities were outdoors. This entailed Lena having to be helped by the defendant or others to this outside toilet, whereupon the person accompanying her would have to wait outside until she could be helped back to the house.
- [36] Lena found this arrangement to be an indignity. She asked that the defendant assist her with the construction of an inside toilet.
- [37] It is not in dispute that the defendant saw to the construction of an indoor toilet within in easy reach of Lena's bed.
- [38] The defendant testified that he paid for the labour and the materials for the construction of the toilet. The defendant was satisfied, he said, that the monies spent on these renovations would not be lost as he was assured by Lena that she considered the property to be his.
- [39] Bester testified that Lena had expressed that it was she (Lena) who had financed the construction of the toilet. It seems not to be in dispute that at the time of the construction the only income available to Lena was her old age SASSA grant. In my view, the probabilities support the version of the defendant as to his financing of the construction and the assurances of Lena that the outlay would be taken account of by the fact that the house would ultimately belong to him. These assurances allegedly led to the signing of the disputed will.

- [40] The defendant testified as follows in relation to the coming into existence of the 2016 will. An attorney became known to him and Lena through the fact that he advertised his services on pamphlets which were handed out in the community. The attorney was Jan L. Jordaan who advertised himself as being specialist in, inter alia, the drafting of wills.
- [41] The defendant testified that Lena spoke fluent Afrikaans. She instructed someone from the offices of Jan L Jordaan in Afrikaans over the telephone. The defendant was present during this telephonic consultation. The defendant then took over and assisted with providing the firm with details and liaising with the firm in relation to the completion of the document. When it was ready, he went to the firm's offices to collect it.
- [42] The 2016 will is simple in its terms. It contains a general revocation of all previous wills and nominates the defendant as Lena's sole heir.
- [43] On the face of it, the will is signed by two witnesses at Benoni on 30 November 2016. I shall return to the evidence surrounding the signing of the will.

The period from Lena's discharge from hospital to her death

- [44] Sarafina confirmed that after the hospitalisation and discharge of Lena during 2017, she was called upon to care for Lena. She testified that, at a stage in 2017, the plaintiff employed a neighbour to assist her.
- [45] Lena was discharged from hospital in November of 2017. After Lena's discharge atmosphere in the home was becoming tense in the lead up to Lena's impending death. The defendant testified that he noticed a tension between him and the plaintiff when the plaintiff came to visit. There were, he said, occasions when the plaintiff would not greet him. When the defendant sought to make a contribution to the salary of the neighbour who had been employed to assist with the care of Lena, this was refused.
- [46] The defendant testified that it became clear that he was being treated as an outsider by the Mavuso siblings. He expressed that Sarafina took their side and he felt that he was being watched by her and that all that happened at the property was being relayed to the Mavuso siblings.
- [47] At a stage the defendant confided to Rev Ngubane, that the house was to be left to him.
- [48] This information was conveyed to Bester. Bester was very perturbed by the possibility that the property would not stay in the Mavuso family, as she saw it.
- [49] The plaintiff relies on the events following it coming to the knowledge of Bester via the defendant's disclosure to Rev. Ngubane that the house had allegedly been promised to the defendant.
- [50] Bester testified that she was distressed because as she put it "nobody from the family was fighting for the property".

- [51] On Good Friday 30 March 2018, Bester attended at the property with the intention of confronting Lena as to whether she had ‘given’ the defendant the property. She decided that she would video Lena’s response on her smart phone.
- [52] The video was allowed into evidence provisionally. In addition, the sound thereon was transcribed and translated by an independent professional transcriber.
- [53] The defendant does not deny that the video footage is that taken of Lena by Bester. He also does not place the translation in dispute.
- [54] I am persuaded that both the footage and the translated transcription should be allowed into evidence.

The video

- [55] The video is approximately 20 minutes long. Lena is filmed in bed. She is lucid but clearly unwell. She is exceedingly thin and moves her arms and hands with difficulty. She speaks clearly with some force despite her obvious frailty and her advanced age (she was 99 at the time).
- [56] I followed the transcription whilst I watched the exchange between Bester and Lena on the video. Sarafina was also present during the filming of the video and interjected from time to time. Thus, although I was not able to understand the language being spoken, I could gain a sense of the tenor and mood of what was being said. The content of what was being said was set out in the translation.
- [57] The impression gained is one of gentle but firm interrogation of Lena by Bester. She inquires as to whether a paper was signed by Lena in relation to the property being given to the defendant. Lena’s responses are vague and very evasive. Lena denies that she signed the paper and says she refused to sign when asked to do so. However, she also implies that she did sign something. There is mention of a pastor in the context of the signature.
- [58] An important part of the conversation is that Lena discloses that she signed an earlier will which left her estate to the plaintiff. She explains that, while she was still working “the whites” who employed her advised her to make a will. They asked her, she says, who she wanted to take her money on her death and she named the plaintiff.
- [59] She was asked if the will was in the house, and she said that it was. On inquiry from Bester, she disclosed that she was using ABSA bank. Bester then asked if ABSA had the will and she answered in the affirmative.
- [60] There is a reference to R400 000 which the defendant is waiting for. The defendant later explained that this was probably a reference to his pension monies which were coming from Marks & Spencer in the UK. Bester then tells Lena that she intends to call a family meeting to establish the truth about the signing of the document. The implication she makes is that the defendant has forged a will.

[61] Bester then set about convening a meeting of the wider Mavuso family.

The family meeting of 02 April 2018

[62] The meeting was attended by about 10 family members including Lena, the plaintiff, Bester, Sarafina and Dan. The attendance of the Rev. Ngubane is disputed by Bester.

[63] Dan confirmed that Lena was his father Zebelon's sister. Apart from confirming that the meeting took place and some of the attendees, Dan seemed unclear as to its purpose. He is also aged and appeared frail. He had to be helped to and from the witness box.

[64] Dan testified that, on his understanding, the meeting was convened because Lena had mentioned that her documents got lost in the house. By documents he said he was referring to her identity document, the title deed to the house and her social security (SASSA) card.

[65] He described that the defendant was not initially at the meeting but was outside on the premises. The defendant was called into the meeting at a stage and asked for the documents whereupon he produced the identity document and the SASSA card.

[66] Sarafina testified that she was Lena's primary caregiver after her discharge from hospital. She said it was at Lena's request that she moved into the property to care for her.

[67] Sarafina said she did not know of the reason the meeting was called and she indicated that she did not know why she had been involved, as the plaintiff was in court, and he was the one who should tell the court about the meeting.

[68] The plaintiff described the family meeting as follows. The meeting was commenced by Bester playing the video to the attendees. He said the purpose of the meeting was to establish if the defendant had been promised the house.

[69] The defendant did not initially know of the meeting. He was called in when it was underway. On the defendant's arrival he was confronted with the accusation that there was a will that he had orchestrated. The plaintiff testified that the defendant then admitted that he had written the will to protect himself. Plaintiff testified further that Lena openly said at the meeting that

she did not give him the house.

[70] An important piece of evidence given by the plaintiff was to the effect that the defendant had openly expressed surprise at the fact that Lena had said she did not give him the house. The plaintiff testified that the defendant said "Mavuso(a reference to Lena) are you taking it back!".

[71] The plaintiff confirmed that the defendant was then asked for the will and the title deeds to the house as well as the identity document of Lena. The defendant then produced Lena's identity document and said he did not know where the other documents

were.

- [72] The defendant was very emotional at the meeting. He said he did not want the house and that he would provide an affidavit to that effect. The affidavit would, he said, invalidate the will.
- [73] Bester confirmed that she had convened the meeting, and that the defendant was called into the meeting to give an account of the will. He confirmed that he had written the will to protect himself because of all the money he had spent on the renovations to the house. Bester testified that the deceased had intervened and said that she had given the defendant money for the renovations.
- [74] On 04 April 2017 (i.e. two days after the meeting) a WhatsApp communication between Bester and the defendant was put into evidence. The message from Bester states that she has consulted her attorney who had told her that the defendant must give the will to “us” or Lena as a matter of urgency. She continued in the text message that she had told her lawyer that the defendant had said that he would cancel the will and provide proof of cancellation but that her attorney was not in agreement with this course of action. She indicated further in the text message that she was unsure what was happening with the title deeds of the house. She indicated that “Khoza” was waiting for feedback before close of business “tomorrow the 5th of April 2017”. Bester later clarified that the reference to 2017 was a typographical error and that she had meant to type 2018.
- [75] The defendant answered Bester’s text as follows: “As I said I pulled off from it in good spirit on that day. No longer interested affidavit ready here with me. As agreed, upon. Consider it invalid!”
- [76] The defendant did not produce the required affidavit. This obviously caused concern for the plaintiff. The defendant’s version of the meeting was not dissimilar to that of the Plaintiff’s witnesses. The defendant confirmed the attendees save for the fact that he said that the Rev Ngubane, Bester’s husband was there. He said the Rev. Ngubane was the only person who spoke out in his favour and asked the gathering why he should not have the house. Bester, in her evidence, was adamant that her husband did not attend.
- [77] The defendant confirmed that he was called to the meeting from where he was working in the yard of the premises. This was unexpected. He says that he entered the room and took a seat immediately beside Lena. He was sitting close to her. Lena was then asked to confirmed to the meeting that she never gave him the property and did so.
- [78] The defendant confirmed that this confirmation from Lena came as a shock to him. He testified that when he was asked to confirm this to be the case and he began talking about the will, Lena nudged him in the ribs with her elbow. He said he took this as a sign for him to be quiet.
- [79] He explained that he thought that either she was not in her sound senses or that she wished to keep the will a secret from the others at the meeting.

- [80] The defendant confirmed that he was emotional and that he said he would write an affidavit in which he would say the will was not valid.
- [81] He testified that he had meant it when he said he would write an affidavit to the effect that the will was invalid and that to this end he attended at the police station to get the affidavit signed. He testified further that a policeman there warned him that he should be careful what he put in the affidavit as it could be read as an admission of guilt in that he was being accused of forging the will. This, he said, concerned him.
- [82] Under cross examination the defendant said that, in his view, Lena was afraid of the family's disapproval.

Lena's sworn statement

- [83] On 13 April 2018 it was obviously decided that more evidence of the lack of validity of the will was needed.
- [84] Police were brought to the bedside of Lena by the plaintiff, Bester and Dan. Lena is alleged to have given the following statement to one of the policemen, Captain RM Kgomo who wrote it down in manuscript:

"I am living with sister's grandson Phutuma Doctor Ndaba [the defendant] at my house at 3[...] T[...] Street Tsakane. My sister's

grandson approached me together with his wife to go with them to their lawyers in Benoni to change the title deed of the house. I refused to go with them to the lawyer. He further came with a pastor to my house requested me to sign some documents papers to change the house on his name but I refused to sign. My sister's grandson requested my neighbours to witness the changes of the house they also refused to sign. My will, which I signed in 1992 some papers are missing and my original title deed is also missing. I never signed any documents or a will with my sister's grandson."

- [85] After Lena was asked to sign the statement, she said that she was unable to do so because of her osteoarthritis which had deformed her hands. The police then drove back to the police station and returned with a stamp pad so that Lena could append her fingerprint to the affidavit. The fingerprint is barely visible.
- [86] Lena passed away approximately a month later.

The reporting of the competing wills

- [87] The plaintiff testified that after the death of Lena he went to ABSA to source the will that had been mentioned by Lena in the video. He knew that he was the sole beneficiary under that will. He testified that once he had managed to obtain the will from ABSA, he set about registering the will with the Master's office and obtaining his appointment as Executor of Lena's estate. The letters of executorship were issued on 05 September 2018.

[88] The defendant testified that he initially had no knowledge of the 1993 will. The first indication that he had that the plaintiff was claiming an interest in the house was when he received a notice to vacate the premises from the plaintiff qua Executor.

[89] In October 2018 the defendant presented the 2016 will for registration by the Master whereupon the plaintiff's letters of executorship were cancelled, and the defendant was issued with letters of executorship.

[90] Hence the dispute as to which will was valid began.

The Action

[91] The plaintiff seeks an order declaring the 1993 will as the valid will and the 2016 will to be null and void on the basis that it was forged by the defendant.

[92] The plaintiff alleges that the defendant had admitted the forgery at the meeting of 02 April 2018.

[93] The defendant denies the admission of forgery and pleads that the will was signed by the deceased in the presence of two independent witnesses one of whom was a Reverend of the Methodist Church in the community.

[94] The dispute thus settles neatly in the question whether the 2016 will was forged by the defendant or signed by the deceased.

[95] The evidence as to the signature of the 2016 will is thus the most crucial part of the trial.

[96] As to the signature, the defendant testified himself and called as a witness Reverend Thabo Joel Shabalala (Rev. Shabalala) who is mentioned in the plea as a person who witnessed the signature of the will.

The signing of the 2016 will

[97] As I have said, the defendant testified that he collected the will from attorney Jordaan. He said that it was sealed in an envelope. The instructions given by the attorneys were that the will should be opened in the presence of the deceased and two witnesses and signed by the deceased in the presence of those witnesses who would sign as such.

[98] The defendant stated that the deceased indicated that she wanted a reverend from the Methodist Church in the community to witness her signature. Even though she was not of the parish she said to him that she trusted that the reverend was well educated.

[99] The defendant testified that on these instructions he approached Rev. Shabalala to witness the signing of the will. Rev. Shabalala knew Lena from the community but not well as she was not of his parish. He also knew the defendant although not as well as he knew Lena.

- [100] The defendant accompanied Rev Shabalala to the house where Lena was waiting to sign. The other witness was a person who was employed by the defendant. She left his employ years ago and he is unable to recall her name.
- [101] There was a photograph put into evidence of Lena signing a document which was alleged to be the will. The defendant testified that the photograph was taken on Lena's request by one of the teenage family members. It was taken in the defendant's absence but on his smartphone – a Blackberry.
- [102] After accompanying Reverend Shabalala into the room where Lena was waiting to sign the document, and after seeing them exchange a few pleasantries, the defendant testified that he left the room.
- [103] Rev. Shabalala testified as follows. During November 2016 he was approached by the defendant to be a witness to the will of Lena. He was, at that stage stationed at the Tsakane Methodist Church.
- [104] Although he did not know the defendant by name and was not acquainted with him, he had seen him in the neighbourhood on occasion and assumed he lived there. He also did not know Lena but also knew her by sight from the neighbourhood. He confirmed that she was not one of his congregants.
- [105] He agreed to witness the will and with this purpose he attended at the home of Lena where he found Lena and a few other ladies.
- [106] Lena explained to him that she needed an educated person to witness the signing of her will.
- [107] He testified that he made sure that Lena knew what she was signing by obtaining her repeated assurances of this whilst the defendant was present and when the defendant left the room. He asked whether she understood the document that she was signing whereupon she confirmed that she was leaving her property to the defendant of her own accord. It was from her heart he said.
- [108] Rev. Shabalala testified that he was satisfied that she understood what she was signing and that she did so voluntarily. He confirmed that Lena signed the document in his presence and in the presence of a few other ladies – one of whom signed as second witness. He also did not recall the name of the other witness.
- [109] When referred to the photograph of the signing by Lena, he confirmed that he was the person sitting next to her. He confirmed also that the photograph was taken by a young person whom he did not know.
- [110] Rev. Shabalala had also made an affidavit to the above effect the contents of which he confirmed in his testimony.

Discussion re evidence

- [111] The sworn statement of Lena which was procured by the plaintiff, Dan and Bester in the presence of the policemen who attended at her bedside, is hearsay.
- [112] The plaintiff sought its admission, apparently for the purposes of arguing that Lena did not make the second will. The admission of this sworn statement was not objected to but, as the defendant was unrepresented, I will deal with whether the hearsay exception should be allowed.
- [113] The hearsay exception is statutory and is contained section 3(1)(c) of the Law of Evidence Amendment Act of 1988 (the Evidence Act).
- [114] In terms of this section, hearsay evidence is admissible if the court having regard to the (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; and (vi) any prejudice to a party which the admission of such evidence might entail; is of the opinion that such evidence should be admitted in the interests of justice.
- [115] I have no doubt that the affidavit was procured in the manner testified to by the plaintiff and it is admitted on that basis.
- [116] The contents written down and attested to is probably what was told to the police officer Cpt Kgomo in the presence of the plaintiff. It is admitted on this basis.
- [117] The weight of the statement and the reasons for it being made are another matter – which must be considered with reference to the entire factual complex.
- [118] Lena emerges from the evidence as a woman who, notwithstanding that she had no children of her own, occupied a matriarchal position in relation to other members of the family including the defendant. The impression created is that she was highly regarded by the members of her family who testified including both parties.
- [119] She emerges as a woman of strength and some sophistication in relation to the recordal of her testamentary wishes. In 1993 she wrote a will which was lodged at ABSA bank and which bequeathed her estate to the plaintiff, the child of her brother.
- [120] In 1993 Lena was employed and independent. Whilst she was employed at Brenthurst she arranged work for the defendant in its gardens.
- [121] It is not seriously in dispute that the defendant, at least for long stretches in his youth and early adulthood, regarded Lena's home as his primary residence.

- [122] There is no question that he resided with Lena permanently from at least 2015. Furthermore, it appears that he resided with her on the basis that she enjoyed having him on the property with her. He was a source of security and comfort to her, and he maintained the property and renovated it according to her request.
- [123] From all the evidence, I am persuaded that there was a loving bond between Lena and the defendant. She viewed him as a surrogate grandchild, and he saw her as a grandmother. That he assisted her physically as she grew older, and frailer is not in dispute.
- [124] Whilst the plaintiff and Bester were clearly supportive of Lena, they were not as constant a presence in her life in the years prior to her death.
- [125] Lena was, to my mind, astute to the tensions between the defendant and the plaintiff and his family. I believe that Lena was clear in her intention to leave the property to the defendant. She knew that this would displease the plaintiff and Bester. She did not want them to know of the 2016 will and kept it from them.
- [126] When the existence of the will was disclosed by the defendant to the Rev Ngubane with the result that Bester came to know of it, Lena was placed in a difficult position. To my mind it is for this reason that, when confronted by Bester on video, she was evasive and prevaricated.
- [127] When confronted by the family at the family meeting she had no choice but to put up the pretence of a denial.
- [128] The statement that she swore to shortly before her death was similarly designed to placate the family members.
- [129] She had, however, made the 2016. This is proved without doubt. What is more, I believe, that in making the will Lena had taken measures to ensure that the will was unassailable. Hence the involvement of a highly respected witness in the form of Rev Shabalala and the taking of a photograph in commemoration of the signature.
- [130] The existence of the 2016 will was not seriously in dispute. The fact that there was a will which the defendant, in his emotional state undertook to declare invalid is clear from the text message exchanges between the defendant and Bester.
- [131] The defendant was upset at being attacked in the meeting. There is an element of pique to his statement that he would seek to invalidate the will. I believe that he intended to make the promised affidavit, thinking that if said the will could be regarded as invalid, this could be achieved. He was unaware that this would not be sufficient to invalidate the will. However, Bester obtained legal advice to that effect which she conveyed in the text message.
- [132] It is relevant that notwithstanding Lena's denials as to her leaving of the property to the defendant; the fact of the existence of the 2016 will and the pressure, which was being brought to bear on her, Lena never changed her will.

[133] All the witnesses who testified did so honestly and from a perspective of each of their own truth and understanding of the facts that they were aware of.

[134] The defendant and the Rev. Shabalala were compelling witnesses.

Conclusion

[135] There is clearly no basis on which to hold that the 2016 will is a forgery.

[136] The statements by Lena to the effect that she did not intend to leave her estate to the defendant were made in an attempt to appease the plaintiff and Bester who were clearly outraged at the prospect of what they saw as the family home being bestowed on the defendant who they saw as an outsider.

[137] That there were tensions between these cousins is clear. That pressure was brought to bear on Lena to disclose her intentions as to the property is also clear.

[138] Lena's reasons for the leaving of the property to the defendant are not directly relevant. It may have been out of a sense of duty, love, or the keeping of a bargain.

[139] To me, it seems that there was a sincere mutual affection between Lena and the defendant, and that the bequest was more than merely transactional.

Costs

[140] There is no reason why the costs in this matter should not follow the result.

Order

[141] In the circumstances the plaintiff's claim is dismissed with costs on the scale of B.

JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 06 September 2024.

Heard:

12, 13, 14 & 15 August 2024

Delivered:

06 September 2024

APPEARANCES:

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Adv. J Themane

Plaintiff's Attorneys:

Stegmanns Inc Attorneys

Defendant :

In Person

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