

SOUTH AFRICA / JUDGMENT

Mokoena v Molefe and Others (CIV APP FB 10/2022) [2023] ZANWHC 116 (7 August 2023) [2023] ZANWHC 116

COURT

North West High Court, Mafikeng

BEFORE

Hendricks JP, Petersen J, Khan AJ

CASE / FILE NUMBER

CIV APP FB 10/2022

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Policy**IN THE NORTH WEST HIGH****COURT, MAFIKENG****CASE****NO: CIV APP FB 10/2022**

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In

the matter between:

EDITH
LEBOGANG MOKOENA
Appellant
and
EPHRAIM
TSHEPISO MOLEFE
1st Respondent
O[...]
S[...]
2nd Respondent
C[...]
T[...] S[...]
3rd Respondent

CORAM:

HENDRICKS JP et PETERSEN J & KHAN AJ
DATE
OF HEARING (ON PAPERS)
: 09 JUNE
2023
DATE
OF JUDGMENT
: 07
AUGUST 2023
FOR
THE APPELLANT
: MR
ESTERHUYSE
FOR
THE RESPONDENT
: NO
APPEARANCE

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 am on 07 August 2023.

ORDER

Resultantly, the following order is made:

- (i) The appeal is upheld.
- (ii) The order of the court a quo is set aside in its entirety and is substituted with the following:

“The application is dismissed with costs, save insofar as the deletion of the name “Tshepi Molokwane” with the identity number and the amount reflected thereon on the Will is not valid.”

(iii) The costs of the appeal in the Full Court, including the costs of the application for leave to appeal, shall be borne by the estate

of the late Jeffrey George Molefe.

HENDRICKS JP

Introduction

- [1] This appeal to the Full Court of this Division is with leave of the former Judge President of the Division, Judge President Leeuw (the court a quo), against the whole of the judgment and order.
- [2] The crux of this appeal turns on sections 2(1) and (3) of the Wills Act 7 of 1953 (“the Wills Act”) in respect of the Will and Codicil of the late Jeffrey George Molefe. The matter initially came before the court a quo as an opposed motion. The application was opposed by inter alia, the three respondents in this appeal. The court a quo found that there were disputes of fact on the papers and the matter was referred to oral evidence in terms of Rule 6(5)[1] to ventilate the factual disputes based on the validity of the Will. The court a quo reserved judgment on 04 February 2019, and judgment was subsequently handed down on 27 June 2019.
- [3] The history and background facts, the evidence adduced, the submissions and the applicable law were comprehensively dealt with in the main judgment of the court a quo.[2] The judgment of the court a quo is unfortunately not reported in any law reports, which would have facilitated ease of reference thereto. For purposes of this judgment, I can therefore do no better than to borrow where necessary, extensively from the judgment of the court a quo, to appreciate the issues in the matter in relation to the grounds of appeal.

The relief sought in the court a quo

- [4] In the court a quo, the respondents (the first three applicants in the application in the court a quo) sought an order:
- (i) declaring the Last Will and Testament, identified as annexure
“WT”, purporting to be the Will of the Late Jeffrey George Molefe invalid;
 - (ii) the setting aside of the appointment of the first respondent in the application in the court a quo as the Executor of the estate of the Late Jeffrey George Molefe;
 - (iii) appointing the applicant in the application in the court a quo as the Executor in the late estate of Jeffrey George Molefe; and
 - (iv) that if the orders sought were granted, that the time period for the lodgement of the Liquid and Distribution account be extended by six months; and

- (v) the file of the late estate of Jeffrey George Molefe, held by the Master of the High Court be transferred to the Master of the Gauteng North High Court;
- (vi) and that the costs of the application be the costs in the late estate.

The parties

- [5] The first respondent, Ephraim Tshepiso Molefe (Ephraim Tshepiso Molefe) is the biological son of the deceased Jeffrey George Molefe (the deceased), who was born out of a relationship between Tshepiso Molefe's mother and the deceased before the deceased's marriage to the fifth respondent, Ouma Violet Molefe (Ouma Molefe). Prior to the deceased's death, Tshepo Molefe was using the surname "Molokwane", which is his mother's surname.
- [6] The second respondent, O[...] S[...] (Omphemetse) and the third respondent, C[...] T[...] S[...] (Thato) cumulatively referred to as the minor children, were born out of an extra-marital relationship between the deceased and another woman, who is also deceased. At the time of the hearing of the application in the court a quo, Omphemetse, who was born on 10 April 2001, was 17 years old and Thato, born on 15 October 2002, was 16 years old. According to Tshepiso Molefe the minor children were at the time under the guardianship of their uncle and aunt. No further particulars were provided in that regard.
- [7] The appellant, Edith Lebogang Mokoena (Edith Mokoena), is the biological daughter of the deceased and Ouma Violet Molefe. The third respondent in the application before the court a quo, Frederik Hendrik Terblanche (Terblanche), is an admitted attorney appointed by Ouma Molefe to assist in the administration of the deceased's estate. The third and fourth respondents in the application before the court a quo Jennifer Marshall (Marshall) and Milyska Grové (Grové) respectively, are the two witnesses who attested and signed as witnesses on two documents purporting to be a will and codicil executed by the deceased. They were both employees of Old Mutual Life Assurance Company (South Africa) Ltd (Old Mutual) in Rustenburg. Marshall was working as financial advisor and Grové

was her secretary.

Factual Background

- [8] The deceased and Ouma Molefe were married in community of property when the deceased died on 26 January 2016. Ouma Molefe who was the deceased surviving spouse at the time of his death, registered his estate at the office of the Master of the High Court, Mahikeng (the Master) on 11 February 2016. Ouma Molefe further filed a letter written by Terblanche, wherein Terblanche noted that he represented the executor of the deceased's estate. Attached to the letter were amongst others, the original will and codicil. The original copy of the will as well as the codicil were purportedly received by the Master's Office on 17 January 2016. However, on 19 January 2017, the Assistant Master deposed to an affidavit explaining that the date was erroneously reflected as 19 January 2017, and that the correct date of submission is 17 February 2017.

- [9] When Ouma Molefe completed the Death Notice, she only wrote down the names of three children of the deceased, namely Omphemetse, Thato and Edith Mokoena, to the exclusion of the first applicant in the application in the court a quo, Tshepiso Molefe. Edith Mokoena was nominated by Ouma Molefe, to act as the executrix of the deceased's estate. Letters of executorship were accordingly issued by the Master to Edith Mokoena on 17 February 2016.
- [10] According to certain terms of the will, dated 26 September 2013, the beneficiaries of the estate are recorded as being the deceased's spouse, Ouma Molefe, Edith Mokoena, Tshepiso Molefe (referred to as Tshepi Molokwane), Omphemetse, Thato, Masego Mirriam Senokwane (Masego Senokwane) and Lesego Magdeline Senokwane (Lesego Senokwane). Masego Senokwane and Lesego Senokwane are the twin children of the deceased's late sister (the twins). The will, titled: "Last Will of Jeffrey George Molefe Identity Number: 6[...]", was allegedly signed by the deceased as the testator, and signed by two witnesses, Grové and Marshall.
- [11] Nearly one year later on 23 September 2014, a "codicil to existing will", (the codicil), was purportedly signed by the deceased as the testator, and Grové and Marshall signed as witnesses. The codicil amended some of the terms of the will. Amongst others, it removed Tshepiso Molefe, Lesego Senokwane and Masego Senokwane as beneficiaries of the deceased's estate.
- [12] Evidence was presented in court in relation to the authenticity of both the will and the codicil. Tshepiso Molefe testified for the applicants. Marshall and Grové (who after marriage, is using the surname De Lange) and Jan Kleinsmith who is the assistant Master, testified on behalf of the respondents.
- [13] The will dated 26 September 2013 reads as follows:

"Last Will of Jeffrey George Molefe Identity Number 6[...]"

- My last wishes are to have a burial.
- The Dodge Calibre 2011 model (H[...]) to be given to my Spouse Ouma Violet Molefe 6[...].
- The BMW 1 Series that my daughter Edith Lebogang Mokoena is driving to my Daughter Edith Lebogang Mokoena 8[...].
- To my spouse Ouma Violet Molefe a cash amount of R1 000 000.00

All other assets should be sold including excluding the business (Jemie Mining) and placed in a trust

The Trust should provide for the following:

- Monthly income for my spouse Ouma Violet Molefe (As needed by her)
- Monthly income provided to my daughter Edith Lebogang Mokoena (R10 000)

· Monthly income including all fees for education provided to my other children.

o O[...] S[...] (0[...])

o C[...] T[...] S[...] (0[...])

o Tshepi Molokwane (8[...] (R10 000)

· Income for education and schooling and all other needs regarding education (Uniforms, Stationary & Textbooks) for the children of my Late sister

o Masego Mirriam Senokwane 9[...]

o Lesego Magdeline Senokwane 9[...]

The trust should be terminated when all the children reach the age of 25 and the remainder of the trust should be divided equally to my spouse Ouma Violet Molefe, Edith Lebogang Mokoena,

O[...] S[...], C[...] T[...] S[...] and Tshepi Molokwane.

Signed at Brits on this 26 day of September 2013

Jeffrey George Molefe (signed)

Witness (signed)

Witness (signed)

Postal Address:

Postal Address

Box 2[...]

Box 2[...]

Rustenburg

Rustenburg

Relationship:

Relationship:

None

None.”

[14] The following deletions were made on the will:

14.1 The word “including” was cancelled with a pen and “excluding” was effected on top. Three initials appear next to the deletion, namely that of Grové and Marshall, and one purporting to be that of the deceased;

14.2 Under the heading “The trust should provide for the following”:

- (a) The following is added and handwritten with a pen after “Monthly income provided to my daughter Edith Lebogang Mokoena”: Grové and Marshall and the deceased appended their signatures next to the additions;
- (b) At the bottom of the provision that provides as follows: “Monthly income including all fees for education provided to my other children,” the name Tshepi Molokwane, is typed, but his identity number “(8[...])” and “(R10 000)” respectively, are handwritten next to his name. A line is drawn across it with a pen. The same three aforesaid initials appear next to the deletion.

14.3 The will was purportedly signed by the deceased, and Grové and Marshall signed as witnesses at Brits on 26 September 2013. The deceased signed with a blue pen and the two witnesses signed in a black pen.

[15] A handwritten codicil attached to the will reads as follows:

“Codicil to existing Will

1. Jemie Mining should not be sold. Daughter Lebo Molefe (El Mokoena) should run and take over the company and all existing contracts. All Enterprises and CC in the name of Jeffrey Molefe should be managed by Lebo Molefe (Lebo Appointed as CEO).
2. Ouma Violet Molefe should be given the vehicle currently driven by her if the Dodge is no longer in her possession. Cash amount to be paid to her as afforded by Estate.
3. Tshepi Molokwane to be removed from will, together with late sister’s children.
4. Jemie Mining should pay Lebo a Market Related income and all employees should be paid market related income. A portion of the revenue made by Jemie Mining should be paid to a trust to provide an income to all the beneficiaries noted for the trust. (Beneficiaries to remain in trust: OV Molefe, EL Mokoena, Omphemetse & Cassius Sekao).
5. All other assets should be sold or agreed upon to keep.

NB:

- Children to be removed:
 - 1) Tshepi Molokwane
 - 2) Masego Mirriam Senokwane
 - 3) Lesego Magdeline Senokwane

Signed at Brits on the 23 day of September 2014

Testator/Testatrix (signed)

Witness (signed) Relationship: None

Witness (signed) Relationship: None.”

15.1 The codicil was signed at Brits on 23 September 2014, and purportedly signed by the deceased as the “testator/testatrix” and Grové and Marshall signed as witnesses.

15.2 The codicil does not fully describe or refer to a specific will sought to be amended, save for stating that it is a “codicil to existing will”.

15.3 The full names of the “testator/testatrix” are not written under the signature purporting to be that of the deceased.

[16] According to Marshall, prior to 26 September 2013, the deceased had instructed her and Petersen, who was also the deceased’s financial advisor, to prepare a draft will for him which they orally discussed with him and had taken notes of his instructions. They later, on 26 September 2013, approached the deceased and presented the typed draft will to him. According to Marshall, the deceased instructed her to substitute the word “including” for “excluding”, as well as the handwritten endorsement of “R10 000” next to the name of Edith Lebogang Mokoena and “(8[...]) (R10 000)” next to the name of Tshepi Molokwane. Grové, wrote the changes in her handwriting.

[17] Pursuant thereto, on their next annual financial review visit to the deceased on 23 September 2014, the deceased indicated that he wished to amend the draft will, because his businesses were not doing well and some of his life policies had lapsed. At that time, they only had a template of the codicil. The deceased told them about the changes he wished effected on the will. Grové took down the notes and wrote on the template codicil in her own handwriting. The deceased instructed her to remove the name of Tshepi Molokwane and Masego Senokwane as well as Lesego Senokwane as beneficiaries in his estate. In addition to the notes she reduced to writing in the codicil, a line was drawn across the name of Tshepi Molokwane on the will. This deletion, which was effected on the 23 September 2014, was neither initialled by the deceased nor the two witnesses.

[18] The Codicil was purportedly signed by the deceased as “testator/testatrix”, and Grové and Marshall signed as witnesses. Grové and Marshall testified that, despite the fact that it was endorsed in the Codicil (that the aforesaid persons should be removed from the will as beneficiaries,) the deceased insisted on Tshepi Molokwane’s name being deleted by drawing a line across it. When Grové wanted to effect the deletions on the names of Masego Senokwane and Lesego Senokwane, Marshall advised her not to do so, because the will would be defaced and become incomprehensible, with too many deletions. Because of the deceased’s insistence that those names be removed, she added the following additional notes at the bottom of the codicil, “NB:

- Children to be removed: 1) Tshepi Molokwane, 2) Masego Mirriam Senokwane and 3) Lesego Senokwane.

[19] Tshepiso Molefe submitted the will, the codicil and a copy of a document signed by the deceased, with a heading: “Memorandum Agreement” dated 15 October 2012, to a handwriting expert on 23 November 2017, for analysis. Ludwig du Toit, who is a “forensic document examiner”, came to the following

conclusion:

“4. Conclusion

After the microscopic examinations and comparisons, I reached the following qualified and conclusive opinions:

4.1 The disputed signatures of a “Jeffrey George Molefe” marked by me as Q1 and Q2, were in fact written/created (on a balance of probabilities) by the author of the specimen signature marked S1:

2.5cm; margin-right: 1.21cm; text-indent: -1cm; margin-bottom: 0cm; line-height: 150%”>

4.2 Due to lack of specimen signatures, we were unable to reach a conclusion (beyond any reasonable doubt). In order to reach a conclusion beyond a “balance of probabilities”, further specimen signatures contemporaneous to the disputed signatures are required for a re-examination.”

[20] The factual matrix with all the roles of all the relevant interested parties, is what the court a quo was called to consider, having regard to the sections 2(1) and (3) of the Wills Act.

[21] The first respondent (applicant in the main application) in the founding affidavit, stated that the will and codicil should be declared invalid on the following grounds:

- (a) the signature of the deceased had been forged;
- (b) the will and the codicil as well as the deletions do not comply with the formal requirements prescribed by the Wills Act;
- (d) Edith Mokoena and Ouma Molefe excluded his name from the Death Notice in an effort to hide his existence from the Master; and
- (e) that Edith Mokoena should be removed as the executrix of the deceased’s estate since she was not properly appointed.

[22] In their answering affidavits, Edith Mokoena and Ouma Molefe stated that:

- (a) they were not aware of the existence of Tshepiso Molefe before the death of the deceased, and that they only came to know about him after the Death Notice was completed; and
- (b) that the will and codicil were executed by the deceased who signed as testator in the presence of two witnesses in accordance with the Wills Act.

[23] The court a quo identified the issues for adjudication to be, whether:

- (a) the impugned will and codicil comply with the formalities required for the execution and amendment of a will in terms of the Wills Act;
- (c) the deceased intended the impugned will to be his final will;
- (d) the deceased intended to amend the impugned will through the codicil;
- (e) the administration of the deceased's estate should be transferred to the Master of the High Court: Gauteng Division; and
- (f) Costs.

The Law

[24] The court a quo had regard to the following relevant provisions of the Wills Act. In terms of section 1 of the Wills Act, "will" includes a codicil and any other testamentary writing. The formal requirements for the execution of a valid are set out as follows in section 2(1) of the Wills Act:

[1] Rule 6(5) provides that:

"(g) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise".

[2] Paragraphs [1] – [31] of the judgment of the court a quo.

[3] 2010 (6) SA 544 (SCA) at [13] and [14].

[4] 1995 (4) SA 731 (W) at 735 F-G.

[5] 1995

(2) SA 713 (C).

[6] 1996

(3) SA 779 (C) at 785 E-F.

[7] 1995 (1) SA 199 (N) at 203 F-G.

[8] 1968 (1) SA 322 (C) at 323 H where the Court referred to *Kunz v Swart and Others* 1924 AD 618 in which it was held that a will registered with the Master and complete and regular on the face of it is presumed to be valid until the contrary is proved.

[9] 2003

(5) SA 173 (SCA).

[10] 2000

(4) SA 168 (T).

[11] [1996] 2 B All SA 161 (K).

[12] 1997

(1) SA 836 (T).

[13] 2004

(1) SA 348 (SCA) at [14] and [16].

[14] 2006 (2) SA 277 (SCA) at [11].

[15] Loosely translated: “Client is going to personally take the documents to the Master”.

[16] See Bekker above n8, where the court held that the Legislature intended that the word “draft” requires a personal

action of the testator.

[17] See above n3 at paras 13 and 14.

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Prepared on 9 October 2026 · Esheria