

SOUTH AFRICA / JUDGMENT

# Nage v Absa Bank Limited and Others (29775/2020) [2020]

## ZAGPPHC 792 (29 December 2020)

[2020] ZAGPPHC 792

## COURT

North Gauteng High Court, Pretoria

## BEFORE

N Janse Van Nieuwenhuizen

## CASE / FILE NUMBER

29775/2020

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IN THE

HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

## DATE:

29 DECEMBER 2020

Case

Number: 29775/2020

PONTSHO

JEANETTE NAGE

Applicant

And

ABSA

BANK LIMITED

First

Respondent

ABSA

TRUST LIMITED

Second

Respondent

MASTER

OF THE HIGH COURT

Third  
Respondent

## JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant seeks an order in the following terms:

*“1. That the first and/or second respondents provide the applicant within ten (10) days with the original Will bearing Will number 41027374817.*

2. That in the event, the first and/or second defendants are unable to provide the applicant with the original Will bearing Will number 41027374817 within ten days then the following order be made:

2.1 that the first and/or second respondents acknowledge in writing that the original Will bearing Will number 41027374817 has been lost by the second respondent and/or its representative;

2.2 that the first and or second respondents acknowledge in writing that the provided copy of the Will bearing Will number 41027374817 shall stand in the place of the original Will bearing Will number 41027374817 that has been lost by the second respondent and/or its representative;

2.3 that the first and/or second respondents provide the applicant with the full details of the person in the first or second respondents' employ who assisted the late testatrix, Tsiane Sanah Nage, in drafting the Will bearing Will number 41027374817;

2.4 that the first and/or second respondents provide the applicant with the full details of the persons who are in the employ of the first and/or second respondents and who signed the Will bearing Will number 41027374817 as witnesses and thereafter, provide applicant with written acknowledgement from those persons that they indeed witnessed the signing of the Will bearing Will number 41027374817.

3. That in the event of the order in paragraph 2 herein above being made, the third respondent accept the copy of the Will bearing Will number 41027374817 and such written acknowledgement from the first

and/or second respondents for purpose of registering and administrating the deceased estate and of dealing therewith as the testate estate.

4. That the third respondent halts the registration of the deceased's estate of the late Tsiane Sanah Nage as intestate by any other person until this matter is finalised.

5. That the costs of the application be paid by the first and second respondents jointly and severally, the one paying and the other to be absolved.”

[2] Upon the filing of the first and second respondents' answering

affidavit, the relief claimed against the first and second respondents became moot. In the affidavit, deposed to by Sherine Jansen, the Regional Manager of the Estates Department of the second respondent, she confirmed that the original will was signed in the

presence of a representative of the first respondent, Thuso Phochane. Thuso Phochane signed as the second witness to the will.

[3] In the premises, the parties are ad idem that an order authorising the third respondent to accept the copy of the Will bearing Will number 41027374817 as the Last Will and Testament of the deceased, be issued.

[4] The parties are, however, not in agreement in respect of the cost order that should follow.

[5] In order to adjudicate the cost dispute, a short summary of the events leading to the launching of the application is apposite.

## Background

[6] The applicant brought the application in her capacity as the heir in terms of the Will executed by the deceased on 22 February 2016 at the first respondent's offices in Pretoria.

[7] The deceased informed the applicant of the Will and stated that she had a copy of the Will in her house. The deceased and the applicant shared a residence. The deceased passed away on 17 February 2020.

[8] Shortly thereafter the applicant found the copy of the Will and presented the copy to an employee of the first respondent at one of its branches. The applicant enquired about the finalising of the estate of the deceased as the second respondent was nominated as executor of the estate.

[9] The copy of the Will is accompanied by a document with the heading

*"SAFE CUSTODY OF YOUR WILL". The document presented three options and the deceased chose the following option:*

*"A. I/We the undersigned authorise Absa Trust to keep my/our Will in safe custody at an annual fee of R 100, 00 (VAT included) and debit my/our account held at Pretoria (name of bank), Cheque (account type) with account number 4040384775."*

[10] Notwithstanding the aforesaid, the applicant was informed that the second respondent is not in possession of the original Will. The applicant referred the first respondent to the Safe Custody Agreement and insisted that the Will be produced. The second respondent insisted that the Will is not in its safekeeping and after some to and fro, the applicant received an email from Gert Kruger ("Kruger"), an employee of the second respondent, on 11 March 2020, advising the applicant that the estate needs to be administrated as an intestate estate.

[11] The applicant was not satisfied with the response from Kruger and enlisted the services of her attorneys. On 12 March 2020 the applicant's attorney addressed a letter to Kruger requesting the original Will. The attorney also made the following request:

*"In the unfortunate event that Absa Bank or Absa Trust is not in a position to furnish us with the original will, we require and hereby request to be furnished with a written and detailed affidavit explaining their knowledge of the existence of the will, its contents and details of what happened to the Original Will."*

[12] On 15 May 2020, Mrs V Magascan, an employee of the second respondent sent a letter to the applicant's attorney with the following short reply:

*"We herewith confirm that Absa Trust is not in possession of a signed will for the abovementioned client."*

Application for a will was received on 10 February 2016.

Our office did not receive the signed will for safekeeping.

We trust that the above finds you well."

[13] The remainder of the details requested by the applicant's attorney was not supplied, which led to the launching of this application.

[14] The application was successful, in that the first and second respondents confirmed that the copy of the Will in the applicant's possession is a true copy of the original.

[15] The first and second respondents, however, contend that they had to oppose the application on the basis that the original Will was never placed in their possession which leads to an impossibility to comply with certain aspects of the relief claimed by the applicant.

[16] The fact that it was impossible to comply with the relief claimed in prayers 1, 2.1 and 2.2 was brought to the attention of the applicant's attorney in an email dated 18 August 2020. The relevant portion of the email reads as follows:

*"As per your prayer 2.3 and 2.4 – our client will do its utmost to locate the persons who assisted the testatrix as well as any witnesses who were involved and shall request that they too assist your client with confirmatory or supporting affidavits to any application your client wishes to bring wherein they confirm that they witnessed the will being signed."*

Our client has advised that they cannot confirm that the original will was ever left at the ABSA branch as it was not in their safe custody department and that they would like to avoid unnecessary litigation and to rather assist your client to declare the will in her possession as the original will.

Furthermore, no court can force our client to confirm that they have lost the will and therefore should you persist with your current application, we will have no choice but to carry on with our opposition and to file an answering affidavit.

We would obviously rather prefer the approach to rather assist your client than to fight the matter which will take some time to be heard and dealt with.”

[17] This is the first time the first and second respondents provided some of the information requested by the applicant’s attorney in May

2020. The name of an employee who could confirm the authenticity of the copy of the Will was, however, still not provided.

[18] The applicant’s attorney responded in an email dated 19 August 2020 that the applicant is amenable to the first and second respondent’s proposal. The first and second respondents were requested to provide the affidavit/s from its employee/s within seven days of the date of the email. Should same be complied with, the applicant would withdraw the application and the first and second respondents should pay all costs incurred by the applicant.

[19] On 20 August 2020 the first and second respondents confirmed their undertaking to assist the applicant with the necessary supporting affidavits but insisted that such affidavits will only be furnished to support a new application which should be brought by the applicant to seek a declarator that the copy of the Will in the applicant’s

possession can be considered the original and last will of the deceased. The first and second respondents refused to pay the costs

of the application.

[20] On 21 August 2020 the applicant’s attorney reminded the first and second respondents that the affidavits tendered by them in their emails were requested prior to the application being launched. This is borne out by the letter from the applicant’s attorney of 12 March 2020 referred to supra.

[21] In a return email dated 25 August 2020 the first and second respondents, notwithstanding their proposal in the email dated 18 August 2020, did an about turn and responded as follows:

*“Our client disputes that your client ever requested affidavits from our client, your client’s email to our client was requesting the original will.”*

[22] In view of the fact that the applicant’s attorney requested affidavits from the first and second respondents in his letter of 12 March 2020, the first and second respondents’ response is astonishing, to say the least.

[23] The name of the person who confirmed that the will was signed in her presence was only provided to the applicant in the answering affidavit filed on 4 September 2020.

[24] At that stage, the only issue that remained was the costs of the application.

[25] Without a tender for costs the applicant filed a short replying affidavit and the matter was set down for hearing.

## Discussion

- [26] The first and second respondents conduct in the events leading up to the launching of the application and prior to the filing of the answering affidavit, leaves much to be desired.
- [27] The fact that the proposal in respect of supporting/confirming affidavits was made on 18 August 2020 and then summarily withdrawn on 25 August 2020 is not an indication of a litigant who wished to avoid litigation and the incurring of unnecessary costs. Their conduct is to be deplored.
- [28] Had the first and second respondents complied with the applicant's attorneys request as far back as 12 March 2020, an opposed application would not have been necessary.
- [29] I am mindful of the fact that the applicant included the relief in respect of the original will, but without such relief no confirmation that the copy of the will is a true copy of the original would have been forthcoming.
- [30] In the premises, I am of the view that the first and second respondents should be liable for the applicant's costs.

## ORDER

[31] In the premises, I grant the following order:

1. The third respondent is ordered to accept the copy of the Will bearing Will number 41027374817 for purposes of the Administration of Estates Act, 66 of 1965, as a will.
2. The first and second respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD

30 November 2020

**JUDGMENT**

**DELIVERED**

29 December 2019

**APPEARANCES**

Counsel for the Applicant:

Advocate H.L. Kelaotswe

Instructed by:

Alabi Inc.

Counsel for the First and Second Respondents: Advocate C.B. Ellis

Instructed by:

Gildenhuys Malatji Attorneys

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