

SOUTH AFRICA / JUDGMENT

Ngakaemang and Another v Master of the High Court and Others (1620/2019) [2023] ZANCHC 88 (1 December 2023)

[2023] ZANCHC 88

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

1620/2019

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA
NORTHERN CAPE
DIVISION, KIMBERLEY
Case

No: 1620/2019

Heard on: 24/10/2022;
12/04/2023;
24/07/2023

Delivered on: 01/12/2023

In the matter between: ANGELINE
KEIKANTSEMANG NGAKAEMANG
First Applicant
RIANO
GAGIANO
Second Applicant
and
THE
MASTER OF THE HIGH
COURT
First Respondent
GRACE
KEITUMETSE
MOKENG
Second Respondent
SARAH
KEDIBONE
TEU
Third Respondent
ISAAC
ONETHATA
MOKENG
Fourth Respondent

JUDGMENT

MAMOSEBO J

- [1] This matter poses some intractable problems. The testatrix executed two testamentary executions. The first was purportedly executed on 09 February 2018. In it her full names are Kesolofetse Mary Mmusi. On 20 November 2018 I declared it her valid Last Will and Testament. She had died on 12 July 2018 of natural causes. She was born on 07 March 1938 which made her 80 years old. She was a divorcee and died without any offspring.
- [2] The second Will was executed on 19 June 2018 the terms whereof were diametrically opposed to the will described in para 1 (above). By virtue of this irreconcilable testamentary dispositions by agreement between the parties the Court, per Mamosebo J, granted the following order on

08 October 2020:

2.1 That the drafting, signature and execution of the Last Will and Testament Annexure “ISA 1”, executed on 09 February 2018; and

2.2 That the drafting, signature and execution of the Last Will and Testament marked Annexure “A”, executed on 19 June 2018:

Be referred for oral evidence in order to determine which of the two Wills is the valid Last Will and Testament of Kesolofetse Mary Mmusi/Oliphant.

- [3] The parties further agreed that the applicants will file a Notice of Amendment to include the following new prayer:

“That the order granted in this Court on 20 November 2018 [which declared the Will valid], be rescinded and set aside.”

- [4] The deceased had a sister whose name has not been furnished but she is still alive and is the mother of the litigants apart from the officials. She played no part in the litigation. What is of consequence is that the deceased's sister has three daughters and a son who are litigants pertaining to the disputed Wills. They are: Angeline Keikantsemang Ngakaemang, who is the applicant in the matter that now serves before me. The others are Grace Keitumetse Mokeng (second respondent); Sarah Kedibone Teu (third respondent) and Onethatha Isaac Mokeng (the fourth respondent). The fourth respondent is the only respondent who is opposing Ngakaemang's application and contesting the second testament drafted by attorney Riana Gagiano. Gagiano is the executrix of the testator's estate. She is the second applicant in Ngakaemang's application in which the Master of the High Court is the first respondent. The second respondent, Grace Keitumetse Mokeng, passed away in April 2020 after the application was issued and served on her. Because she played no practical part in this litigation Isaac Onethatha Mokeng, the 4th respondent, will simply be referred to as Mokeng.
- [5] Three witnesses testified on behalf of the applicant, namely, Angeline Keikantsemang Ngakaemang (the applicant), Ms Riana Gagiano (executrix) and Cst Merapelo Ronnie Pilane (commissioner of oaths). Two witnesses testified on behalf of the fourth respondent, namely, Mr Isaac Onethatha Mokeng himself and Mr Molelekwa Ashworth Tau.
- [6] The relief that Ngakaemang seeks is that the Court should order the Master “to accept the Will and Testament of the late Kesolofetse Mary Oliphant (attached as Annexure “A” to the papers) as the Last Will and Testament (of the said KM Oliphant) in terms of section 2(3) of the Wills Act, Act 7 of 1953, for purposes of the Administration of Estates Act, Act 66 of 1965.”
- [7] The terms of the Will purportedly devised by “Kesolofetse Mary Oliphant ID Number 3[...]” nominates Riana Gagiano as the executrix. From Clause 4, LEGACIES, the Will provides that:

“4.1 I bequeath my immovable property known as Erf 1[...], Kimberley, also known as 3[...] Di[...] Street, Vergenoeg, Kimberley to my niece Angeline Keikantsemang Ngakaemang.

5.2 I direct that the remainder of my estate shall devolve upon my niece, Angeline Keikantsemang Ngakaemang.

5.3 If Angeline Keikantsemang Ngakaemang pre-decease me without leaving issue, the portion which would have accrued to her shall accrue to her three children in equal shares.

5 FUNERAL ARRANGEMENTS

I hereby direct that my funeral service shall be conducted at the Church of Christ, Phajane Street, Kimberley and that I will be buried in Kimberley.

6 EXEMPTION

The property or income devolving upon any beneficiary under this will shall subject to the terms of this will, become her own property, free and unencumbered, whether or not she is married in community of property or any community of profit and loss or any accrual in terms of the Matrimonial Property Act, 88 of 1984. Should a spouse of any such beneficiary become insolvent then, subject to the provisions of the Insolvency Act or any other statute, such property or income shall not vest in such spouse's Curator.

Thus done and signed at Kimberley on this 19th day of June 2018 in the presence of the undersigned witnesses who signed in our presence and in the presence of each other."

[8] In her founding statement commissioned on 16 July 2019 Ngakaemang states that the testatrix is her aunt. She has been taking care of her aunt since she was 70 years old. This computes to the year 2008 since the testatrix was born in 1938. She adds that she "attended to her everyday needs".

[9] During March 2018 the testatrix requested her to contact an attorney who would draft her Will. This is how Gagiano of the firm of attorneys Hugo Matthewson & Oosthuizen Inc now PGMO Attorneys came into the picture. After consultation with her aunt on 03 April 2018 Gagiano produced the Will reflected in para 4 above. It is prudent to reproduce what Ngakaemang declares in her own words in her founding affidavit concerning what transpired after the

consultation of 03 April 2018. She states from paras 4.7 to 8:

"4.7 After the consultation Ms Gagiano informed me that she will draft the will and that she would contact me, when I have to bring my aunt to her office to have her sign her will.

4.8 On the 18th June 2018 I took my aunt to Ms Gagiano to have her sign her will and I informed Ms Gagiano that my aunt cannot write her name anymore, due to her old age.

4.9 Ms Gagiano informed me, that due to the fact that she is appointed as the executrix of the estate of my aunt, she would prefer it if I took my aunt to the police station to have her sign her will by making a mark, in the presence of a Commissioner of Oaths.

5.1 On the 19th of June 2018 Constable Merapelo Ronnie Pilane commissioned the last will and testament of my aunt.

5.2 The last will and testament of my aunt was commissioned in my presence and I confirm that constable Pilane requested my aunt to provide him with her identification document, in order for him to confirm that she is indeed the testatrix and that this is the last will and testament.

5.3 The will was signed by the deceased and 2 witnesses as required by law.

5.4 The two witnesses are Modisaemang Morgan Sebico and Veronica Meisietjie Golebamang Olifant.

6.1 I took the original will and testament as signed by the deceased and witnesses and commissioned by a commissioner to Ms Gagiano.

6.2 Ms Gagiano reported the estate of my aunt at the Master's office and I attach hereto a copy of her letter to the Master of the High Court, dated 18th of August 2018, marked Annexure "AKN2".

6.3 I was informed by Ms Gagiano that she received an e-mail on the 21st of August 2018 from Ms Yolande Stegman of the Master's office, informing her that the will has been rejected because it does not comply with s 2(1)(a)(v) of the Wills Act 57 of 1953.

6.4 I was advised by Ms Gagiano that Section 2(1)(a)(v) of the Wills Act 57 of 1953 requires the following:

"If the will is signed by the testator by making a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator and each page of the will excluding the page on which his certification appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies."

6.5 The original will and testament as signed by the deceased and two witnesses in the presence of the commissioner of oaths, but the commissioner has neglected to initial every page of the will and only signed the certificate.

6.6 I submit that this was a bona fide error from the commissioner of oaths.

7.1 Ms Gagiano made an appointment with Mr Wayne van Rensburg, the assistant Master of the High Court and informed him that it was merely a bona fide mistake by the commissioner, that he did not initial every page of the will.

7.2 Mr Van Rensburg informed Ms Gagiano, that she has to bring an application in the High Court to have the last will and testament of my aunt declared valid.

8. I submit that a proper case has been made out for the relief sought and I request the Court to grant the relief as set out herein."

[10] In her oral testimony, she repeated the consultation date of 03 April 2018 and that they returned to Gagiano on 19 June 2018 to collect the Will which was commissioned on the same day. The deceased expressed her wish to her that should she die she wishes for her to take her house and its contents but should not sell it. Should she predecease her, her children (Ngakaemang's children) must inherit the house and its contents but must also not sell it.

[11] Ngakaemang testified that whenever the deceased needed to go to a doctor she, Ngakaemang, ensured that she, the deceased, was taken to the doctor. What is pertinent in her testimony is that she took the deceased to Dr Muamza on the 19 June 2018 after complaining of a painful leg. She countered the hallucination allegations proffered by Mokeng by furnishing the following explanation:

“Ms Stanton: Now, according to your brother, Mr Mokeng, your aunt did not understand what she was doing at the end of her life, she was hallucinating, talking to herself, what do you say about that?”

Ms Ngakaemang: Nothing of that ever happened in front of me. The last day when I took her to the doctor, it was her last admission. When we entered there, the doctor asked her who she was. She answered by herself.

Ms Stanton: What did she say to the doctor?

Ms Ngakaemang: She said I am Mary Oliphant.

Ms Stanton: Can you also tell the Court what happened between her and the doctor?

Ms Ngakaemang: I was with my sister, the doctor then asked her ‘Ma, is it morning or is it at night?’ She answered and said no, it is evening.

Ms Stanton: Was it in fact evening?

Ms Ngakaemang: It was around 5, 6 then. ...in the evening 17:00 -18:00.”

Ngakaemang confirmed that the deceased only suffered from high blood pressure and arthritis. She accompanied the deceased to the doctor in June 2018 because of painful joints. She denies that the deceased was ever treated for Alzheimer’s or Dementia as alleged by the fourth respondent, Isaac Mokeng.

[12] Ngakaemang was also asked how it was that she was in possession of the deceased’s Green Identity Booklet and the Identity Card and her response, which was not refuted, led to her sketching the circumstances under which Mokeng ended up staying with the deceased. She explained:

“Ms Ngakaemang: When my big brother needed a place to stay, he [approached] me and told me that his girlfriend and his children, were chased away by the mother at home. So, he asked me to go and speak to my aunt, on his behalf, because he said he knows if at all I speak to my aunt, she will listen to me. I went and spoke to my aunt.”

Ms Stanton: I just want to understand you correctly, Ms Ngakaemang, you asked your aunt if your brother and his girlfriend and his girlfriend’s children could move in with your aunt?

Ms Ngakaemang: Yes, I asked her to stay with them, for some time, not permanently as [he] asked.

Ms Stanton: But how did you get, why were you in possession of your aunt’s identity documents?

Ms Ngakaemang: We were sitting there in the dining room, and with my brother, Isaac, and then she said, if at all it is you who is asking, it is okay. She went to the bedroom, and when she returned, and then she said, here are my two ID's. I am giving them to you. If the conditions might change, I will come back to fetch my ID's. Then I took the ID's, and I kept them with me, and then I took my van, I borrowed it to my elder brother, so that he can go and stay there with his family."

[13] Ngakaemang also added the following which in my view is relevant in the assessment of the evidence in this matter:

"There was a time when I did not go to my aunt, when my brother saw that, he cannot get hold of the ID's, and the house of my parents was already in my name. He threatened that he will kill me. So I could not go anymore to visit my aunt. The time when I only saw her, was when she was at home, visiting my mother."

In the last six months of her aunt's life, she saw her in April and June and over the weekends when she was spending time at her mother's or sister's place. She was afraid of her brother. Her sisters always called her when her aunt was around.

[14] When the Commissioner of Oaths, Cst Pilane, enquired from the deceased whether she knew the lady standing next to her, referring to Ngakaemang, her response was in the affirmative and the deceased further added that Ngakaemang is the apple of her eye. Mr Kgotlagomang's cross-examination, acting for Mokeng, did not elicit anything of consequence.

[15] Gagiano confirms all the essential details of Ngakaemang's statement, not merely by generic expression by using her own ipsissima verba which would be superfluous to repeat. However, at her para 4.7 to 5.1 she says importantly:

"4.7 I informed the first applicant [Ngakaemang] that if the deceased signs her will by making a mark it has to be done in the presence of a commissioner of oaths and that I would prefer it if she took the deceased to the police, as the deceased nominated me as executrix of her estate."

5.1 The first applicant took the deceased to have her sign the will by making a mark in the presence of a commissioner of oath, which was Constable Merapelo Ronnie Pilane.

5.2 The first applicant brought the original will and testament to my office and I reported the estate of the deceased to the Master's Office on the 20th of August 2018.

5.3 I received an e-mail from Ms Yolande Stegmann on the 21st of August 2018, who informed me that the will dated the 19th of June 2018 was rejected because it does not comply with Section 2(1)(a)(v) of the Wills Act 57 of 1953.

6.1 I made an appointment with Mr Wayne van Rensburg, the Assistant Master of the High Court, and informed him that it was merely a bona fide mistake by the commissioner, that he did not initial every page of the will.

6.2 Mr Van Rensburg informed me that I have to bring an application in the High Court, to have the last will and testament of the deceased declared valid.”

[16] In as far as the deceased’s state of mind is concerned, Gagliano testified in this manner:

“Ms Stanton: I know, Ms Gagliano that you are not a medical expert, but from a professional point of view, after consulting with numerous clients for last wills and testaments, what was your observation regarding Ms Oliphant’s state of mind?”

Ms Gagliano: She was of sound mind. She could tell me her name, surname, she could tell me where she resides, she could tell me why she is there. I asked all [those] questions, does she have a sibling. The questions normally asked to determine if a person is sound of mind.”

Ms Ngakaemang sat quietly next to the deceased as she was asking the deceased questions and typing most of the Will on the computer as a rough draft and did not make full handwritten notes. She told them she will finalise the draft and she will contact Ms Ngakaemang to bring the deceased in for signature. When they returned on the 19th June 2018 she was still of sound mind except for the painful leg. She was not present when the Will was signed and commissioned but she had advised the deceased to return it to her for filing of the original at the Master’s office as the Master does not accept copies. Gagliano kept the original in the vault.

[17] Before she included the clause “revocation” in the Will that she drafted, Gagliano enquired from the deceased if she had any previous Wills and the deceased answered in the negative. Her reaction after Gagliano explained the effect of the revocation clause was that she does not know of any previous Will and that that Will be her only Will.

[18] Further importantly, Cst Merapelo Ronnie Pilane confirms that he commissioned the “Last Will and Testament of the deceased” and that it happened on the 19th of June 2018. He also says that the testatrix provided “her identification document, in order for me to confirm that she is indeed the testatrix.” The co-witnesses Modisaemang Morgan Sebico and Veronica Meisietjie Golebamang Olifant confirm their involvement.

THE SECOND WILL AND ISAAC MOKENG’S ACCOUNT

[19] There is a fly in the ointment. It is Isaac Mokeng. I first reflect the crucial position of the Will that makes him the beneficiary. There is a dichotomy in surnames of the testatrix. Her names are given in it as Kesolofetse Mary Mmusi (not Oliphant). The ID Number, however, does correspond, being 3[...]. The full contents from para 1 to the end at para 6 read as follows:

“1. Revocation

I hereby revoke all my prior Wills and Codicils and declare this to be my Last Will and Testament.

2. Bequest

I hereby bequeath my entire estate to Isaac Mokeng.

3. Substitution

Should an heir predecease me:

3.1 The benefits accruing to such predeceased heir shall devolve upon such predeceased heir's descendant per stirpes by representation;

3.2 or in the event of such predeceased heir dying without leaving any descendants then such predeceased's heir's benefits will vest and devolve upon my remaining heirs or their descendants per stirpes by representation.

4. Executor

I appoint Isaac Mokeng for the time being to be the executor of my estate.

4.1 I hereby grant to my executor all such powers and authority as are allowed or required in law, and especially that of assumption.

4.2 I direct the Master of the Supreme Court to dispense with the furnishing of security by my executor for the fulfilment of any of his functions as such.

5. Special Condition

All benefits accruing to any beneficiary under this Will shall be excluded from any community of property and from any accrual

sharing system, which may at any time exist between such beneficiary and his or her spouse.

6. Clause Headings

Clause headings are inserted for the sake of convenience only and shall be disregarded in the interpretation of this will.

Signed by me at Kimberley on this 9th day of February 2018 in the presence of the undersigned witnesses, who signed this will in my presence and in the presence of each other, all of us being present at the same time."

[20] From para 1 to 7 of his answering affidavit Mokeng identified himself and deals with what he considers to be the "Formalities required in the execution of a will", which need not be repeated. However, from para 8 to 24 thereof he recounts what led to the execution of the Will. He states:

"8. I have been advised that it is also prudent that I should deal with the brief history relating to the estate of the late Kesolofetse Mary Oliphant in order to put the court in a clear picture.

9. During February 2018, I attended the offices of Duncan & Rothman with the deceased. The deceased consulted with Ashworth Tau of Duncan & Rothman and developed a will copy of which is attached hereto and marked as "IS1".

10. On the 18th of August 2018, the Master of the High Court held that Annexure “IS1” does not comply with the provisions of Section 2(1)(a)(v) of the Wills Act 57 of 1953 as amended.
11. I caused to be issued an application under Case No 2418/2018 in the High Court of the Northern Cape Kimberley and on the 26th of October 2018, the Honourable Court granted an order that the original Annexure “IS1” is the last will and testament of the deceased. [The correct date is 20 November 2018].
12. I attach hereto a copy of the Court order and mark it as Annexure “IS2”.
13. Pursuant to Annexure “IS2”, the Master of the High Court issued me with letters of authority under Estate Number 3768/2018 on the 20th of November 2018 a copy of which is attached hereto and marked as Annexure “IS3”.
14. The deceased in this matter is my aunt. She was at all material times resident at House Number 3[...] D[...] Street, Galeshewe, Kimberley, Northern Cape.
15. Prior to 24 December 2015, the deceased was residing with another man by the name of Noel Radebe. Every time I paid her a visit, I realized that she could not take care of herself.
16. During the month of December 2015, the deceased’s neighbours came to me and informed me that they were concerned about the wellbeing of the deceased. They informed me that they had observed that there were times when they noticed that she does not close and lock her door at night and this was a safety concern for them. The names of the ladies are Bonamang and Nene. I contacted my sisters and informed them that I intended moving in and staying with the deceased.
17. Based on that information, on the 24th of December 2015 I moved into that house and have been staying in that house till to date.
18. I moved in with my daughters namely Mapaseka and Refiloe. We have been taking care of the deceased from the 24th of December 2015.
19. Around the 18th of June 2018, I requested one of my sisters, namely Grace Keitumetse Oliphant, to take care of the deceased. The reason for the request was that my youngest daughter had decided to further her academic studies and that required of her to wake up early whilst the deceased was still asleep.
20. Mapaseka was the one who assisted the deceased with bathing. Due to the fact that I am a male, I could not attend to bathing the deceased. It was for this reason that I requested my sister to take care of the deceased. This was not a permanent arrangement. The deceased would have come back to her house when Mapaseka was on school holidays.
21. During the latter part of May 2018, the deceased displayed some mental incapacity during some of our discussions with her. She would be giving incoherent answers. She was hallucinating and at times she would engage in conversations alone and would not even want to talk to anyone. She would even talk to us about dead people as if they were still alive.

22. At some point she would talk to us as if we were strangers. She would not even remember our names.
23. I noticed this behaviour [but] I did not deem it necessary to take her to the doctors for observation. I had accepted that this was related to her age. At this time the deceased was really frail. Her condition deteriorated shortly after she had signed the will that is attached hereto as Annexure "IS1".
24. During March 2018, the deceased informed me that she had intended to award the house to the first applicant, [Ngakaemang], however, she changed her mind due to the fact that the first applicant had abandoned her and she was no longer paying her a visit."
- [21] In his oral testimony, Mokeng confirmed that he and his two daughters aged 32 and 26 years have been residing at the deceased's home since 2015 and it is now a period of seven (7) years. The deceased visited her sister during weekends. He describes the deceased as a moody person. The deceased told him on 06 February 2018 that she must make a Will. She said she just want to get an attorney and finish with the thing of the house and get it done. On 09 February 2018 they went to Duncan & Rothman Attorneys. Mr Tau found them there and having established that his aunt wanted a Will executed he, Tau, took her alone to a separate room. When they emerged from that room there were three people excluding his aunt. Mokeng did not know those people. He sat in the waiting area. He did not witness the drafting or signature of the Will. Tau told him they are done and gave him the envelope containing the Will which he concealed at home in his aunt's bedroom.
- [22] Mokeng later discovered when he took the Will to the Master's office that there was a problem in that there was a signature missing. He says "according to what I realised, we were supposed to go and rectify this matter with the will, where it was not signed.". He was told by Tau that the person who was supposed to sign had left Duncan & Rothman Attorneys and no longer resides in Kimberley. Tau took him to Van de Wall Inc. where he signed some documents. He was told at Van de Wall that everything was now rectified and was fine. Mokeng does not know why the problem was not solved at Duncan & Rothman and why they had to go to Van de Wall Inc. He states that he was in possession of the deceased's ID book which he found in one of her drawers when he accompanied her to the attorneys. He subsequently received a Letter of Authority from the Master.
- [23] In June 2018, his eldest sister, the late Grace Mokeng, cared for the deceased but he cannot state where the deceased was on 19 June 2018. In April 2018, his younger sister, Angeline Ngakaemang, the applicant, 'borrowed their aunt' from him and she stayed with her for about two days. He does not know what happened during that period.
- [24] According to him his aunt's medical condition was so critical that by May 2018 she was forgetful. Around May/June 2018 her conversations were incoherent. She would relieve herself anywhere. At one stage she stood next to his bed naked. He dressed her and put her

to bed. One cold winter morning he found her lying on the floor next to her bed. He has had to call an ambulance at least three times in March, April and May of 2018 for assistance. He could neither furnish the names of the treating doctors nor the medication that his aunt was taking. He does not deny that Ngakaemang took the deceased to the doctor.

[25] It was put to him that Ngakaemang took the deceased to Dr Muamza who treated her for a sore leg and no other ailments. His response was that the doctors do not see things the same way. It was further put to him that the deceased's mental capacity was in order in June 2018 when she executed her Last Will and Testament. He refuted the assertion claiming that her condition was bad. In cross-examination he was asked why these allegations that he is using to support his claim that the deceased was mentally unsound, are not contained in his answering affidavit. He could only say "it is not there, then it is not there."

[26] It was further put to him that whereas in his answering affidavit he stated that the deceased was hallucinating he did not testify about it in his oral evidence. He said even though he did not do it he knew he would come across it during cross-examination. Ms Stanton put it to him that he was adjusting his evidence as it suited him and he went along. He was further asked whether he was aware that the deceased was issued with an ID card on 11 March 2014 he responded in the negative.

[27] At para 14 of his answering affidavit, Mokeng stated that prior to 24

December 2015 the deceased was residing with another man by the name of Noel Radebe. When counsel asked him why he was silent about Radebe in his evidence in chief he said it is because Radebe stopped residing with his aunt and even stopped visiting her after he and his daughters moved in with her. His response was that it never crossed his mind. The reasons why he moved in with his aunt was after the neighbours complained that she left the gate and doors open and the lights on. He also wanted to dispel the assumption or perception that she did not have family.

[28] Ms Stanton put it to Mokeng that despite the application being served personally on his sisters, Grace and Sara, they did not oppose the relief that Ngakaemang is seeking which implied acquiescence. His response was that Sara is an untruthful sister and Grace would have opposed the application if she had not passed on. The assertion regarding Grace, however, cannot be true because the application was issued and served in 2019 and she passed on in April 2020.

[29] In re-examination, Mokeng was asked why he cannot recall the prescription medication that his aunt was taking. His response is baffling:

"During my upbringing and the time when I grew up, there are things that happened and now I am like disturbed [in] my mind."

[30] Mr Molelekwa Ashworth Tau testified for Mokeng. He has been employed at Duncan & Rothman for the past 20 years as an insolvency practitioner. Mr Kgotlagomang enquired from him in-chief:

“On the 9th of February, it is not in dispute, that there was a document that was developed, in actual fact there is evidence here that the document was developed at Duncan & Rothman. It was a will of Kesolofetse Mary Mosi [I take it the surname is referring to Mmusi]. Now, the evidence before this court, is that you consulted with Kesolofetse Mary Mmusi on the 9th, and you developed a will. Do you have any recollection about the development of such a will?”

- [31] Tau testified that he was called by the receptionist who informed him that there was an elderly lady who required assistance with the execution of a Will. Although the firm has set aside Thursdays for the execution of Wills, he still assisted her without an appointment. She was brought by Mokeng to their firm. He invited her to his office for consultation and drafted the Will. He then summoned the second witness and the commissioner of oaths. The testatrix could not sign. Tau was the first witness and Mr Leonard Motlhanke was the second witness. The commissioner of oaths was Mr Theo Williams, an admitted attorney at Duncan & Rothman. When asked whether he developed the Will in her presence he said: “I went to my office, drafted the will and then came back and explained the contents of the will to her.” He went on:

“After explaining the contents, I then, together with the witness, and the Commissioner of Oaths, then we started with the procedure of putting the fingerprint on the will, with the signatures of, signing the will.”

- [32] After the signing of the Will with a thumb-imprint, Mokeng was handed the copy for safekeeping. The next time when he dealt with this Will was when he was informed by Mokeng that the Master had rejected that Will. He consulted with Mokeng and filed an application to the High Court for the Court to declare the Will valid. The only omission was that the commissioner of oaths did not append his initials on every page of the Will. The testatrix had her identity document with her.

- [33] I draw attention to the multiple unsatisfactory aspects in Mokeng’s version of events:

33.1 In para 24 of his affidavit he says the deceased informed him during March 2018 that “she had intended to award the house to the first applicant [Ngakaemang]. However, she changed her mind due to the fact that [Ngakaemang] had abandoned her and was no longer paying her a visit.” What is bizarre about this statement is that the impugned Will, Annexure “ISA1”, had already been executed on 09 February 2018. The Letter of Authority in favour of Isaac Mokeng ID Number 7[...] was issued on 19 February 2018 by the Master. In view of the earlier rejection by the Master for non-compliance with the provisions of s2(1)(a)(v) of the Wills Act 57 of 1953 the Master, Method Gqetywa, subsequently approved the Will on 20 November 2018 following the Court’s declaration on 20 November 2018 that the Will was valid and that the Master must accept it.

33.2 It was common cause that Isaac Mokeng had acted on a frolic of his own by filing the first Will (Annexure “ISA1”), in that he did not serve the application which declared it valid on any of his siblings nor did he make them aware of the state of affairs concerning the Will. In the result they were blissfully unaware of its existence.

33.3 It is evident that, having been evicted with his daughters by his girlfriend’s mother, Mokeng was stranded and had nowhere to stray. Therefore, the account of Ngakaemang on how he relocated to the testatrix’s home with his daughters is more coherent and probable. She pleaded his case with his aunt who embraced them.

33.4 The fact that Mokeng was not aware that the testatrix had upgraded her ID Book to a ID card accords with his statement that he was not given the ID Book by his aunt but he took it upon himself to take it from one of her drawers. In this regard I prefer the account of Ngakaemang that in the presence of Mokeng she was handed both the defunct ID Book and the current ID Card, contingent upon her inevitable demise.

33.5 The circumstances surrounding the manner in which Mokeng and Tau went about to have the Will executed is muddled. For the record, Tau is not an admitted attorney but an insolvency practitioner. Be that as it may, he ventured in drafting the Will. He enlisted the assistance of Mr Theo Williams, an admitted attorney of the same firm he was attached to, to commission the Will. It was common cause that, in the same manner as the Will commissioned by Cst Pilane in the latter Will, Williams (the commissioner of oaths) omitted or failed to initial all the pages. On that basis also the Master rejected the Will as flawed.

33.6 Williams was not called as a witness. He had left the firm Duncan & Rothman. No practicing attorney can disappear like a needle in a haystack. Mokeng and his attorneys were indifferent to call him. It is unacceptable, particularly having regard to the shenanigans that Tau and Mokeng embarked upon to validate the Will. Why they resorted to a different firm of attorneys, Van de Wall Inc., more than once it seems, to achieve such a result is suspicious, to say the least. It must be emphasised that no aspersions are cast in the direction of Van de Wall Inc.

33.7 In describing why and how he happened to stay with the testatrix, Mokeng sketched a disturbing picture of the health and mental state she was in. This moved the neighbours to urge him to come to her rescue, he says. A repetition of what he relates makes for depressing reading. However, it can be safely accepted he never took her to a doctor because there must have been no need. If his explanation is true, then she could not remotely have been in a position to execute the Will of her own volition because of the condition he had allegedly found her in when he moved in at her place. The further implication is that she never recuperated because he says at para 23 of his affidavit:

“I noticed this behaviour [but] I did not deem it necessary to take her to the doctor for observation. I had accepted that this was related to her age. At this time the deceased was really frail. Her condition deteriorated shortly after she had signed the Will (Annexure “IS1”).”

This muddies his evidence irreparably.

Implicit in this agreement is that the validity of this Will (Annexure “ISA1”) has to be treated or regarded as pro-non scripto. In other words, as if its validity has not been determined. However, to dispel any uncertainty or ambiguity I hereby rescind the order made by me on 20 November 2018 on that basis. The status of the Wills are accordingly now on par.

33.8 Tau explained that their second visit to Van de Wall Inc. was to have Mokeng’s affidavit commissioned. He disputes Mokeng’s averment that the purpose related to the rectification of the Will. Mokeng further stated that there was a signature “inserted” at Van de Wall Inc. Tau strenuously denies this. This contradiction from the same party is irreconcilable and destructive of Mokeng’s case. It smacks of something dodgy if not worse, fraud.

[34] I am satisfied that Mokeng was clutching at straws and would do anything to gain the inheritance even if it means fabricating the evidence. He was adjusting his evidence to suit him. He had an ulterior motive to prevent the applicant, Ngakaemang, from visiting and taking care of their aunt. He feared that she might spill the beans on him. Out of Mokeng’s own mouth it would have been more appropriate for Ngakaemang to take care of the deceased after her condition had worsened. A few weeks before she died, and evident from the conversation that the testatrix had with the doctor, she appeared compos mentis (of sound mind). I therefore find the evidence of Mokeng to be unreliable, not credible and improbable and reject it as false.

[35] It therefore follows that the document that was marked “ISA1” or sometimes “IS1” purporting to be the Last Will and Testament of Kesolofetse Mary Mmusi cannot be her Last Will and Testament. The only reasonable inference to be drawn under these circumstances is that the Will was executed using the old ID document which referred to her in her maiden surname. I accept that Ngakaemang was still in possession of the two latest ID documents with the current surname being “Oliphant”.

[36] On the other hand the record shows and the assessment of the evidence bears out the fact that the evidence by Ngakaemang, Gagiano and Pilane is simple and straightforward. Gagiano, an admitted attorney, took her time in consulting with the testatrix and drafting the Will, the study of which displays more professionalism. Only when she was satisfied with the contents was the Will executed on 19 June 2018, some two months later. The error of the unintended pages crept in with the commissioner of oaths, Cst Pilane, which he satisfactorily explained away and which error I condone. I find all three of them to have been honest and reliable witnesses. I accept their evidence.

[37] I am mindful of the principle and approach to be adopted where a Court is faced with diametrically opposed versions. The SCA in Stellenbosch Farmers’ Winery Group Ltd and Another v Martell ET CIE SA and Others 2003 (1) SA 11 (SCA) where the following is stated at para 5:

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be

summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of B his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[38] On the question of costs there is no reason why costs should not follow the result.

[39] In the premises, the following order is made:

1. The order granted by this Court on 20 November 2018 under Case Number 2418/2018, is rescinded and set aside.
2. The Master of the High Court, Kimberley, the first respondent, is ordered to accept the document marked annexure "A" dated 19 June 2018, annexed to the founding affidavit of the applicants as the Last Will and Testament of Kesolofetse Mary Oliphant for the purposes of the Administration of Estates Act 66 of 1965.
3. The fourth respondent, Mr Isaac Mokeng, is ordered to pay the costs of the application on a party and party scale.

NORTHERN CAPE DIVISION

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