

SOUTH AFRICA / JUDGMENT

Obst v Machabe N.O and Another (2021/47605) [2023] ZAGPJHC 1381 (27 November 2023)

[2023] ZAGPJHC 1381**COURT**

South Gauteng High Court, Johannesburg

BEFORE

A.D. Stein

CASE / FILE NUMBER

2021/47605

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBER:

2021/47605

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

A.D. STEIN

27 November 2023

In the matter between: KLAUS
DIETER
OBST
Applicant
and
NOZIPHO
PULENG MACHABE N.O.
First Respondent
THE
MASTER OF THE HIGH COURT, JOHANNESBURG
Second Respondent
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November 2023.

JUDGMENT

STEIN AJ:

introduction

- [1] This application revolves around the validity of a Will. The Applicant seeks a declaratory order that the last will and testament of the late Alfred Brandl (“the deceased”), which bears the date of 20 January 2021 (“the Contested Will”) is a forgery, and that it be declared null and void.
- [2] In consequence, the Applicant also seeks certain ancillary relief including that the Second Respondent, the Master of the High Court (“the Master”) accept a copy of the Will of the deceased dated 20 December 2015 (“the 2015 Will”) as the valid last will and testament of the deceased in terms of the Administration of Estates Act, 66 of 1965 (“the Act”). In addition, the Applicant seeks further consequential relief that the First Respondent be removed as Executor of the deceased’s estate and that the Master appoint the Applicant in her place.
- [3] The primary relief sought, and all of the ancillary relief depends on the veracity and validity of the two Wills, and it is that central question which I address immediately.

THE RELATIONSHIP OF THE APPLICANT WITH THE DECEASED AND THE VERACITY OF THE 2015 WILL

- [4] The founding affidavit is sworn by the Applicant. In it he avers that he was a close, personal friend of the deceased, having known him for approximately forty years. He and the deceased frequently visited each other; at least three to four times a week and that, by virtue of their close relationship, the deceased regularly confided in him.

- [5] The Applicant avers further that the deceased, during his lifetime, was single and lived alone in H[...] Street, Yeoville, Johannesburg and regarded South Africa as his permanent home, having lived here since 1968. It appears that the deceased was originally Austrian.
- [6] By virtue of his close relationship with the deceased, the Applicant avers further that he was aware that the deceased had accumulated moveable property in South Africa and had investments with both Capitec Bank and Standard Bank.
- [7] To the Applicant's knowledge, the deceased had a single living relative, Gerhard Paschinger ("Paschinger") who resides permanently in Austria. Paschinger is the deceased's nephew; his mother and the deceased were siblings.

Annexed to the founding affidavit were Paschinger's German passport, Austrian citizen certificate and a sworn translation as well as an authenticated witness statement by Paschinger and sworn translation confirming these details.

- [8] The Applicant swears further that the deceased handed him a copy of the 2015 Will for safe-keeping by virtue of their close friendship and relationship of trust. That copy of the 2015 Will is annexed to the founding papers.
- [9] The First Respondent disputes the veracity of the 2015 Will. However, no evidential basis is laid for such dispute, other than the averment that the Court should reject it because it is a copy, and no original is proffered. This contention is unsustainable.
- [10] First, the Applicant explains that on visiting the deceased's residence immediately after his death, he found it to have been ransacked and items stolen. He was unable to locate the original of this Will. The First Respondent sought to cast doubt on this by contending that the Applicant had failed to report this at the time to the Police. However, in a supplementary affidavit, the Applicant has annexed a contemporaneous police complaint and case number, confirming that it was indeed reported at the time.
- [11] Secondly, both witnesses to the 2015 Will have sworn affidavits in these proceedings confirming that they were witness to the signing of the 2015 Will by the deceased in their presence, which is further confirmed by a police stamp and signature. These corroborating facts are of critical importance to this Court's evaluation of the veracity of the 2015 Will.
- [12] Finally, the Applicant procured expert opinion evidence regarding the deceased's signature on the 2015 Will. I shall address this evidence further below. Suffice to observe for the present purposes that the First Respondent did not contest the independence or expertise of the Applicant's handwriting expert. Crucially, that expert confirmed that the signature on the alleged copy of the 2015 Will was consistent with other known signatures of the deceased. By contrast, the First Respondent's handwriting expert was not asked to opine on this critical question.

- [13] Confronted with the above, the First Respondent raised only technical objections to the 2015 Will. As already mentioned, she contended that there was no police complaint relating to the theft of the original. This is wrong. The First Respondent also contended that the apparent signature of one of the witnesses to the 2015 Will should be rejected in that it was only an initial rather than a full signature. This, too, is a frivolous challenge to the veracity of the 2015 Will. The Wills Act expressly provides that to sign includes the making of initials.[1]
- [14] In any event, other than this technical challenge to the form of the witnesses' signature, the First Respondent conspicuously does not meaningfully challenge the contention in the confirmatory affidavit that the witness was in fact witness to the 2015 Will, nor does she challenge on any basis the corroborating evidence of the second witness to the 2015 Will.
- [15] The very purpose of the statutory requirement that a valid will must have at least two witnesses who must attest and sign the Will in the presence of the testator and of each other, is to provide certainty in circumstances precisely such as these where doubt is cast upon the veracity of a will or where only a copy is available. The corroborating evidence of these witnesses is therefore of fundamental importance.
- [16] Moreover, the Applicant furnished additional corroborating evidence of both a documentary and testamentary nature. Most notable amongst this was the confirmatory affidavit of another close friend of the deceased who testified to the Applicant's close personal friendship with the deceased and the other aspects of their personal relationship.
- [17] In all of these circumstances, I find that there is overwhelming evidence in support of the Applicant's version of his close personal friendship with the deceased and that the copy of the 2015 Will is a true copy of the Will executed by the deceased in 2015.
- [18] In terms of the 2015 Will the deceased bequeathed, in specified percentages, all of his assets to certain of his friends, including the Applicant as well as his nephew, Paschinger. In view of this, the Applicant is a beneficiary under the 2015 Will and therefore has a direct and substantial interest in these proceedings. There is accordingly no basis to challenge the standing of the Applicant. In any event, by virtue of his close friendship with the deceased alone, the Applicant would have an interest in the estate in terms of the Act and would therefore have standing to bring the present application. The First Respondent's challenge to the Applicant's standings in these proceedings is therefore untenable on either basis.
- [19] This raises the second fundamental enquiry; namely whether the 2015 Will was superseded by the Contested Will. That in turn depends on whether the Contested Will is a true will and testament of the deceased. It is to that question that I now turn.

THE VERACITY OF THE CONTESTED WILL

- [20] The Contested Will purports to be signed by the deceased on 20 January 2021. On its face, it revokes all previous wills, appoints the First Respondent as executor and bequeaths the entire estate of the deceased to the First Respondent. The Contested Will therefore appears to disinherit the deceased's only known relatives as well as his close friends (including the Applicant).
- [21] The First Respondent avers in the answering affidavit that she knew the deceased for twenty-five years, was his neighbour and took care of him. There are notable inconsistencies on the First Respondent's own version in this regard. Elsewhere in the answering affidavit she alleges that she had known the deceased for sixteen years. Moreover, her domicilium is recorded as Zola North, Soweto and not H[...] Street, Yeoville, where the deceased resided.
- [22] Apart from these unexplained inconsistencies, the Applicant contends that neither he, nor the deceased, knew the First Respondent, and that the deceased was in reasonable health and did not have or require a carer until his sudden illness and death. As I have observed above, the Applicant's averments regarding his long-standing close friendship with the deceased is corroborated by another friend of the deceased who knew them both. By contrast, the First Respondent offers no such first-hand corroboration of her alleged relationship with the deceased. This highwater mark in this regard is a letter from the local municipal councillor for Ward 67, Councillor MM Mazibuko. This letter is itself peculiar and requires close scrutiny. The letter states in relevant part as follows:

"TO:

To Whom It May Concern

SUBJECT: Confirmation of Close of Friends/Neighbour

"This serves to confirm that Alfred Brandl ID No 4[...] is deceased on 09 July 2021 he was never married and not had children.

I Nozipho Puleng Machabe ID 8[...] has been taking care of the abovementioned person and have know him for about 25 years since

1996."

- [23] The letter is dated 10 July 2021 (the day after the deceased's death) and signed in the name of the Ward Councillor, Ms MM Mazibuko.
- [24] The first oddity about this letter is that it is set on the letterhead of the "Office of the Speaker" of the Johannesburg Municipality whereas it is signed by the Ward Councillor. Secondly, Councillor Mazibuko does not explain the basis of her knowledge in respect of the statements in the letter, including her knowledge of the deceased and the contention that the First Respondent had been taking care of the deceased and had known him for "about 25 years". Finally, and most notably in this regard, as appears from the quoted portion above, these relevant statements are written in the first person of the First Respondent rather than being a statement of Councillor Mazibuko herself.

- [25] In a supplementary affidavit, the First Respondent annexed an affidavit from Councillor Mazibuko, which confirms that she wrote this letter. However, the affidavit does not make use of the opportunity to explain the anomaly of the wording in the second paragraph nor, importantly, does it explain how the Ward Councillor came to have personal knowledge of the statements concerning the deceased reflected in the letter. While I have little doubt that the letter emanates from Councillor Mazibuko, I therefore can attach little evidential value to the contents of this letter. In my view, the most likely inference is that the First Respondent presented the Councillor with relevant wording which was then simply transcribed in the letter.
- [26] The First Respondent offers further documentation in the form of a medical record dated 4 July 2021 from the Hillbrow Community Health Centre. While these clearly reflect that she accompanied, or was present with, the deceased when he took ill shortly before his death, it does not, in and of itself, constitute relevant evidence beyond these facts.
- [27] A central factor in this Court's consideration of the veracity of the Contested Will is whether the signature which appears on it is that of the deceased. To the untrained eye, the signature that appears on the Contested Will differs markedly from all other known signatures of the deceased which are themselves similar to the signature that appears on the 2015 Will. The First Respondent offers the following explanation for this anomaly in the answering affidavit:

"... the deceased disclosed to me the fraudulent activities of the Applicant and that is why he kept on changing his signatures.

The deceased did not have one signature during his lifetime because the Applicant had tried so many times to defraud him of his monies."

- [28] This explanation is fanciful. There is simply no basis or corroboration for the allegation that the Applicant had ever attempted to defraud the deceased. This account is also wrong in fact. As already noted, all of the known signatures of the deceased as well as that which appears on the 2015 Will, are materially similar. Finally, this explanation defies logic.[2] The repeated alteration of a signature is more likely to be conducive to fostering fraud than to preventing it.
- [29] That, however, does not end the enquiry. The question of the authenticity of the signature on the Contested Will is one in respect of which expert opinion evidence is relevant and admissible.[3] In the present case, both parties presented reports of handwriting experts. I reproduce below relevant portions of the report of the Applicant's expert, Ms Andrea le Sueur, a certified forensic document examiner, whose independence and expertise was not contested:

“I was provided with a photograph of the questioned will containing one signature (coded Q1) and electronic scans and/or photographs of documents containing eight exemplar signatures of the late Alfred Brandl (K1, K2, K3, K4, K5, K6, K7 & K8). The questioned and known signatures are illustrated on EVIDENCE SHEET 1. The signature coded K1 was certified as the genuine signature of Alfred Brandl on 21.10.2009 by Ingrid Bosch, Vice Consul, Österreichisches Generalkonsulat,

Kaapstadt.

I was requested to convey my preliminary feedback regarding the likely authenticity of the questioned signature.

The questioned signature omits the first name “Alfred” which follows the surname “Brandl” in all the known

signatures. Furthermore, it is oversimplified, lacking the handwriting complexity that characterises the way in which the

surname “Brandl” is written in all the known signatures.”

The report concludes:

“Based on the material provided for my examination and subject to examination of the originals, my preliminary opinion is that the signature coded Q1 is not genuine. The questioned signature bears numerous and significant differences when compared to the eight known signatures of Alfred Brandl: the notable disparities are too numerous to be attributed to chance.” [emphasis added]

[30] The expert report relied upon by the First Respondent is that of Mr Yossi Vissoker, whose independence and expertise, again, were not challenged. However, of critical importance to the issue in the present proceedings, Mr Vissoker was not furnished with a copy of the Contested Will nor asked to opine on the probable authenticity of the signature that appears on it. Moreover, Mr Vissoker was not asked to compare this to known signatures of the deceased. Instead, it appears that Mr Vissoker was provided with a range of signatures and asked to opine on the likelihood that they emanated from the same person. The failure to procure an opinion from the expert in respect of the key issue is unexplained by the First Respondent and is inexplicable. Even in respect of the limited question put to him, this expert’s conclusion is guarded:

“... I did find some similarities amongst the signatures which could enable me to conclude that it is probable/possible to assume that all of the signatures have been signed by the same hand.”

[31] Accordingly, the opinion of the First Respondent’s expert is of no assistance in determining the likely authenticity of the signature on the Contested Will. Moreover, the First Respondent’s expert does not contradict the opinion of the Applicant’s

expert that the signature on the Contested Will is probably not genuine. This in my view is determinative in evaluating the opinions

of the parties' respective experts.[4]

[32] In all of the above circumstances, in my view, the overwhelming probability is that the signature on the Contested Will is not that of the deceased and the Contested Will is a fraud.

[33] In reaching this conclusion I am particularly mindful of the applicable principles governing disputes of fact in motion proceedings.[5] A court will not simply accept the respondent's version where, in its view, that version is inherently improbable, rests upon bald denials, is contrary to logic, contains self-contradictions, lacks corroboration and is contradicted by corroborated evidence of the Applicant, or where the version of the Applicant is not bona fide disputed. The First Respondent's version is littered to a greater or lesser extent with all of these features. My conclusion in this regard is strongly reinforced by the failure of the First Respondent to procure confirmatory affidavits from the purported witnesses to the Contested Will. This is in stark contrast to the Applicant who did procure the confirmatory affidavits of both witnesses to the 2015 Will. As I remarked above, one of the fundamental reasons for the formalities required under the Wills Act is to provide for the circumstances where the authenticity of a Will is in doubt.[6]

CONCLUSION AND ANCILLARY RELIEF

[34] I have found that the 2015 Will is valid and that, on a balance of probabilities the Contested Will is fraudulent. The ancillary relief sought by the Applicant follows from this.

[35] The First Respondent, appointed as executor of the deceased's estate in terms of the Contested Will cannot be allowed to remain in that office and the Court has the express power to remove an executor in such circumstances.[7]

[36] The Applicant, in that event, urges that he should be appointed to replace the First Respondent as executor. As I have found, the Applicant has demonstrated that he was a long-standing and trusted friend of the deceased. Moreover, the Applicant's appointment as the executor is supported by the only known relative of the deceased, his nephew, Mr Paschinger who, although resident in Austria, has sworn a witness statement in these proceedings. There are no other candidates for appointment as executor. Accordingly, it is appropriate that the Applicant be appointed to perform those responsibilities.

[37] In terms of the Act it is a criminal offence to falsify any document purporting to be a Will.[8] While I have found that the overwhelming probability is that the Contested Will is a forgery, I cannot find on the papers before me beyond a reasonable doubt that it is the First Respondent who is responsible for that act of fraud. In the event that the application is successful, the Applicant asks that the costs be paid out of the deceased's estate and in these circumstances I consider that to be an appropriate order.

ORDER

[38] I therefore grant the following order:

1. The document in the form of a last will and testament, purportedly signed by Alfred Brandl ("deceased") on 20 January 2021 in terms of which the First Respondent is appointed executor and sole beneficiary ("fraudulent will"), is hereby declared null and void.
2. Any dispositions in terms of the fraudulent will, including the appointment of the First Respondent as executor of the late estate of the deceased or any distribution of movables, are also declared null and void.
3. The Second Respondent is ordered to remove the First Respondent as executor of the late estate of the deceased, estate number 20241/2021, ("late estate") and to revoke and cancel the letters of executorship issued in her favour within 10 days from the date of delivery of this order.
4. In terms of section 2(3) of the Wills Act 7 of 1953, the Second Respondent is ordered to accept a copy of the will and testament signed by the deceased on 20 December 2015 at Yeoville, ("last will and testament") as the deceased's last will and testament for purposes of the Administration of Estates Act 66 of 1965. For the avoidance of doubt, a copy of the last will and testament is that which is annexed to the founding affidavit in these proceedings as annexure FA2.
5. The Second Respondent is ordered to appoint the Applicant as executor of the late estate within 10 days from the date of delivery of this order and to issue letters of executorship in favour of the Applicant.
6. The Applicant and Second Respondent are authorised to liquidate and distribute the deceased estate in terms of the last will and testament and reserving the rights and powers of the Second Respondent to issue such directives as may be applicable as though such last will and testament were the original last will and testament of the deceased.
7. The costs of this application are to be paid out of the late estate.

Acting Judge of the High Court

Gauteng Division, Johannesburg

Heard:

22 February 2023

Judgment:

27 November 2023

Appearances:

For Applicant: Adv Jeanne-Mari Butler Instructed by: Barry Kirkman Attorneys For First Respondent: Mr T Mukwani (Attorney with rights of appearance) Instructed by: T Mukwani Attorneys

[1] Wills Act, No 7 of 1953, section 1.

[2] A court will reject a version that is contrary to logic or common sense, see, for example Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1184 (SCA), para 39; and see Louwrens v Oldwage 2006 (2) SA 161 (SCA), para 27.

[3]

Annama v Chetty 1946 AD 142; and see Molefi v Nhlapo and Others

[2013] JOL 30227 (GSJ).

[4] Michael & Another v Linksfield Park Clinic (Pty) Ltd & Another 2001

(3) SA 1184 (SCA), para 39

[5]

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 12984 (3) SA 623 (A).

[6]

Wills Act, section 2(1); and see the helpful discussion and authorities referred to in Segal and Another v the Master of the High Court Cape Town and Others

[2020] ZAWCHC 144 (Case no. 145/19, 22 October 2020), para 30.

[7]

Act, section 54(1)(a).

[8]

Act, section 102(1)(a)

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