

SOUTH AFRICA / JUDGMENT

Segal and Another v Master of the High Court Cape Town and Others (145/19) [2020] ZAWCHC 144 (22 October 2020) [2020] ZAWCHC 144

COURT

Western Cape High Court, Cape Town

BEFORE

LekhULENI

CASE / FILE NUMBER

145/19

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)

Case

Number: 145/19

In

the matter between:

LOIUS
BRIAN
SEGAL First
Applicant
BRIAN
DAVID
SAREMBOCK Second
Applicant
and
THE
MASTER OF THE HIGH
COURT First
Respondent
CAPE

TOWN
STEVAN
MELMED Second
Respondent
RONALD
MELMED Third
Respondent
RONALD
MELMED
N.O Fourth
Respondent
Date
of hearing : 13 October
2020
Date
of Judgment : 22 October 2020

JUDGMENT

LEKHULENI AJ

1.

INTRODUCTION

[1] This is an application in terms of section 2(3) of the Wills Act 7 of 1953 (“the Wills Act”>) read with sections 8(1) and 8(4) of the Administration of Estates Act 66 of 1965 (“Estates Act”), to declare the Will (“contested Will”) and Testament of the late Leonard Samuel Melmed valid, despite the failure of the Will to comply with the formalities set out in section 2(1)(a)(ii) and (iii) of the Wills Act. The applicants seek an order in the following terms:

1.1 That in terms of section 2(3) of the Wills Act, the Will signed on the 31 March 2012 by the late Leonard Samuel Melmed (identity number [...]) (“the deceased”), which was lodged with the first respondent on 18 February 2013, marked annexure “LM1” to the founding affidavit be declared the Last Will and Testament of the deceased despite not being witnessed, and that the first respondent be directed to accept the Will as the last will and testament for the deceased;

1.2 That the failure of the deceased to comply with the formalities set out in section Section 2(1)(a)(ii) and (iii) of the Wills Act be condoned;

1.3 That the Master of the High Court is authorised and ordered, to accept the document as a Will for the purpose of the Administration of Estate Act 66 of 1965;

1.4 That pending the finalisation of this application, the third and fourth respondents and / or any other person/s that may be / have been appointed as executors to the Deceased’s Estate are interdicted from administering the estate of the Deceased;

1.5 That the applicants sought condonation to the extent that it was required, for the delay in filing this application from the date the contested Will was rejected by the first respondent; and condonation for the late filing of the confirmatory affidavits.

[2] The applicants in this application are the appointed beneficiaries and executors in terms of the contested Will. The first respondent

did not oppose the application and instead, it filed a notice to abide the decision of the court. The second and third respondents are the biological children of the deceased. The second respondent has not filed a notice of intention to oppose the application, despite the application being duly served upon him in terms an Edictal Citation and such an order was granted by this court on the 15 of January 2019. The third and the fourth respondents (“the respondents”) opposed this application.

2. PRELIMINARY ISSUES: STRIKING OUT APPLICATION, ADMITTANCE OF THE FORENSIC REPORT AND APPLICATION FOR CONDONATION

[3] The third and fourth respondents filed an application to strike out certain paragraphs of the applicants’ founding affidavit on the grounds that the contents thereof constitute hearsay evidence. In particular, the respondents averred that the Forensic Report of the Handwriting expert Ms Yvette Palm (“Ms Palm”), was hearsay and inadmissible as Ms Palm had not provided a confirmatory affidavit in support of the applicants’ application. Pursuant to this application, the applicants brought an application for condonation for the late filing of the confirmatory affidavits of Ms Palm and the tracing agent Mr Johannes Jacobus Van der Westhuizen (“Mr Van der Westhuizen”).

[4] The applicants likewise sought an order to strike out certain allegations contained in the respondents’ answering affidavit,

on the basis that they constitute hearsay evidence. At the hearing of this matter, the applicants abandoned their application to strike out. Instead, the applicants brought an application in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (“Evidence Amendment Act”) for the admittance of the Expert Report of Ms Palm as it sought to prove the authenticity of the Will and it complied with all the relevant requirements of this section. Section 3(1)(c) provides as follows:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

(c) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

[5] The filing of this application rendered both the applicants and respondents striking out applications moot. As a result

thereof, neither party pursued same.

- [6] Turning to the application to admit Ms Palm’s report, Ms Palm is an independent handwriting expert. The applicants procured her expertise for her to examine the authenticity of the signatures in the contested Will of the deceased. It is common cause that the respondents did not file an expert report to counter that of Ms Palm. Instead, their challenge was purely on the fact that the Will was not valid due to its non-compliance with section 2(1)(a)(ii) and (iii) of the Will’s Act and that the applicants have failed to place evidence before this court showing that the deceased drafted the contested Will.
- [7] The report of Ms Palm was impugned by the respondents on the basis that the author, Ms Palm did not file a confirmatory affidavit in support of the averments of the applicants. The respondents argued further that if this Forensic Report was admitted, they would be prejudiced in that they never had an opportunity to deal with this report prior to the hearing of this matter.
- [8] The handwriting expert in my view, is an independent person and has no interest in the matter. She attended to an examination in loco of the original Will and Testament of the deceased at the Office of the Master of the High Court Cape Town on 28 November 2018. She examined the signatures of the deceased microscopically. She compared this signature with the sample signatures of the deceased and came to the conclusion that the signature of the contested Will was that of the deceased. The respondents did not provide an expert report contesting the authenticity of the actual signatures and or initials on the contested Will. More importantly, the respondents have not disputed that the signature of the contested Will is that of the deceased (“their father”). They did not dispute the contents of the Will. Instead, they corroborated the contents of the Will, despite the fact that they were estranged from the deceased, they could positively identify the items mentioned in the Will as that of the deceased.
- [9] The court considered this point, and the fact that the purpose of the expert report was to confirm that the signature in the contested Will was that of the deceased. The court also considered the fact that the report was referred to by the applicants in their main application and that it was attached to their founding affidavit. This report did not come as a

surprise to the respondents. Having considered the argument on both sides, the court came to the conclusion that in cases such as these, all issues have to be ventilated to enable the court to make an informed decision. Furthermore, the court was satisfied that there was no prejudice whatsoever that would be suffered by the respondents if the report was accepted especially because the respondent did not dispute that the actual signatures and or initials on the contested Will are those of the deceased. Consequently, the court granted the applicants' application and accepted the Forensic Report as evidence.

[10] The applicants' filed an application for condonation for the late filing of their confirmatory affidavits. In

addition, to the extent that condonation was required from the date the contested Will was rejected by the first respondent, it was applied for. The reasons advanced by the applicants in this regard was that the applicants tried various ways to obtain the whereabouts of the second and third respondents and were eventually successful when the advertisement was placed in the SA Jewish Report in September 2018. The applicants also averred that the second and the third respondent were so estranged from their father so much so that they themselves did not know of his passing and that no prejudice was suffered by any party as a result of the delay in launching this application.

[11] It has been argued on behalf of the respondents' that the fact that the applicants' delayed by some five and a half years before taking steps to declare the Will valid demonstrates a clear and unequivocal intention to acquiesce in the Master's decision to reject the Will. To this end, the respondents relied on the common law doctrine of peremption which entails that a party cannot equivocate by acquiescing in a judgment and later on deciding to appeal it. The respondents contend that the applicants' failure to take reasonable steps within a reasonable time to challenge the Master's decision must be seen as an acquiescence in such order, and that their rights to now seek to challenge such order have been preempted by their lack of action.

[12] I do not agree with this argument. As explained above, the first applicant lodged the Will with the Master of the High Court and the latter rejected the will because it was not compliant with the relevant formalities. The Applicant had to bring an application in terms of section 2(3) of the Wills Act for the court to validate the Will. The applicants were bound to trace the respondents as interested parties before they could launch this application. It took a long time for the applicants to locate the respondents. The applicants engaged the services of tracing agents to no avail until an advertisement was placed in the SA Jewish Report that they became successful to locate the respondents. The applicants also had to first bring an application for Edictal Citation in order to ensure that this application was served upon the second respondent who is based in Canada. In my view, the argument of peremption in these circumstances is without merit and cannot be sustained. It is abundantly clear that the first applicant persisted and correctly so, to locate the respondents until he obtained their contact details before he launched this application.

[13] Furthermore, the applicants took considerable time and at their own expense in tracing the whereabouts of the children of the deceased. That points to their honesty and integrity. In fact, they put aside for years the fact that they were beneficiaries in a Will and focussed on finding the children of the deceased. They acted with great lucidity and transparency. The cause for the delay cannot be put squarely on them, as the knowledge of the status quo benefitted all the interested parties. All the parties concerned needed to have certainty and closure on the death of the deceased. I am satisfied that the delay was for a good cause. The applicants' application for condonation succeeds.

FACTUAL

BACKGROUND

[14] During his lifetime, the deceased resided at [...], Sea Point. He was diagnosed with non-Hodgkin's lymphoma during or around

2012. He underwent a course in Chemotherapy which was unsuccessful. He passed away on 17 January 2013. Subsequent to his death, the first applicant was presented with the contested Will of the deceased by, one Carole Bramley, a member of the Body Corporate and resident of the apartment where the deceased resided by virtue of the first and second applicant having been cited as alternative executors in the contested Will.

[15] On 18 February 2013 the first applicant lodged the contested Will with the first respondent, in accordance with the provisions of section 8(1), read with section 8(4) of the Estates Act. On 24 June 2014, the first respondent rejected the contested Will on the basis that it failed to comply with the formalities set out in section 2(1)(a)(ii) and (iii) of the Wills Act. As a result of the decision of the first respondent rejecting the Will, the applicants launched an application to this court in terms of section 2(3) of the Wills Act for the court to determine whether the contested Will was intended to be the Deceased's last Will and Testament. The applicants had to contact all immediate family members as interested parties in order to serve and file this application. It is common cause that the family members of the deceased including the second and the third respondent were estranged from the deceased.

Neighbours

of the deceased could not assist the applicants to trace the family members of the deceased and as a result, the applicants appointed

tracing agents to locate the deceased's children.

[16] A report from the tracing agent failed to reveal the whereabouts of the deceased's children. The first applicant eventually caused an advertisement to be placed in the South African Jewish Report dated 7-21 September 2018. The advertisement sought to locate the children or any living relatives of the Deceased to contact the first applicant in connection with the deceased. Subsequent to this advertisement, the second and the third respondent, both being the biological children of the deceased contacted the first applicant and provided him

with their contact details. The first applicant also emailed the contested Will to them and informed them of his intention to launch this application. From the correspondences between the first applicant, the second and third respondent, it is patently clear that five and a half years after the death of the deceased, neither the second, nor the third respondent had any knowledge of the death of the deceased. After a copy of the Will was dispatched to the respondents, the third respondent applied to the first respondent to have himself appointed as the executor of the intestate estate of the deceased on 26 October 2019.

ISSUES

FOR DETERMINATION

- [17] This Court is called upon to determine first, whether the contested Will is the Last Will and Testament of the deceased. Second, whether this Court can condone the non-compliance with section 2(1)(a)(ii) and (iii) of the Wills Act in the sense that it was not witnessed properly in the presence of two or more competent witnesses, present at the same time and that such witnesses sign and attest in the presence of the testator and of each other. Third, if the requested declaratory orders are granted would they cause prejudice to the respondents.

ANALYSIS

OF THE PARTIES SUBMISSIONS AND APPLICABLE LEGAL PRINCIPLES

- [18] It is common cause that the deceased had an acrimonious relationship with his family in particular the second and the third respondents. He also had an acrimonious relationship with his sister Ms Shirley Anne Bader who lived in the United States of America. The deceased had not seen his children for many years before his death. From the consideration of the answering affidavit, it is evident that for several years prior to his death the deceased no longer showed any interest in reconciling with his family or attending family meeting or gatherings. The deceased lived alone and had no contact whatsoever with the respondents. The respondents in particular the second and third respondents (his biological children) did not know that the deceased passed away nor did they know the date of his death for over five years. They did not know whether he was buried or cremated.
- [19] In his email correspondence dated 13 September 2018, the second respondent requested the first applicant to furnish him with the exact date of his father's death so that he can memorialise or immortalise it in years to come. The third respondent also admitted in his answering affidavit that as at July 2015, he did not know that his father passed away. From the above, it is abundantly clear that the respondents did not have any relationship whatsoever with the deceased. In my view, the intention of the deceased should be viewed from this perspective.
- [20] I turn to consider and examine the provisions of the contested Will in order to determine the intention of the deceased. The Will is titled Last Will and Testament of Leonard Samuel Melmed, [...] and dated 31 March 2012. The ID number on the Will is the same ID number

that appears on his death certificate. From the reading of this Will, it is very clear that this Will is intended to be the final Will of the deceased. In the preamble, the testator revokes, cancel, annuls and declares all previous Wills drawn by him or by Neville R Cohen, ostensibly his erstwhile attorney, made prior to this Will to be invalid. The deceased recorded with a capital NOT to emphasise that the previous Wills are not valid. The deceased clearly appointed the applicants as the executors of his estate and exempted them from furnishing security. The deceased clearly set out all the items and how his estate should be distributed upon his death.

[21] At paragraph 4 of the Will, the deceased gave clear and unequivocal instructions as follows:

“I hereby specifically record that it is my express wish and instruction that there is to be no bequest WHATSOEVER to anyone who claims and or proves to be family of mine or related to me. This shall include any of my children and – Shirley Anne Bader (born Melmed) and any of their family or children, cousins etc.”

[22] At paragraphs 7 and 8 of the Will, the deceased bequeathed various assets to his heirs and listed all investments held in different

financial institutions and made specific reference to their respective account numbers. In addition, he referred to movable assets including the registration number of his motor vehicle and cell phone numbers of various people that only fall within his personal knowledge. In my view, the wording of the Will is in such a way that it is clearly meant to be a final document and not a preparatory document.

[23] I agree with the views expressed by the applicants’ counsel that the deceased lived on his own and that it would be highly

unlikely that the contested Will could have been forged and or altered by another person. Furthermore, the details of the names of the beneficiaries and their contact numbers, as well as the full names of the deceased’s sister are listed in the contested

Will, which details would not easily be available to other person. This view also finds support in paragraph 4.2 of the Will in which the deceased bemoans what her sister took and tried to take from him such that he had to apply to the High Court for the resolution of the dispute. The matter was ultimately resolved in a just and equitable manner by means of a settlement. The settlement agreement in question forms part of the bundle of these proceedings.

[24] More importantly, the third respondent stated in his answering affidavit that he visited the deceased’s apartment and he does not dispute that the items listed in the contested Will, are in the apartment of the deceased. The respondents do not deny that all the items listed in the Will are those of the deceased. They admit that the deceased was cremated as directed by his Will. They also do not dispute that the first applicant ensured that the deceased is cremated as he was directed by the deceased in terms of the Will. In my view, the probabilities are highly overwhelming that the Will in question is that of the deceased and that he intended it to be his last Will.

[25] In paragraph 9 of the contested Will, the deceased gives the following instructions:

“I direct that my executor must make it absolutely clear to all the above beneficiaries referred to in clause 7 and 8 above that in the event of any of them intending to redistribute their share of the inheritance, or a portion thereof, as set out above in clause 7 and 8 to any of my children, or their family, as well as my sister or any of her family then in that event I DIRECT that their share of my estate shall be forfeited and that such share shall BE DONATED to a CHARITY in the sole discretion of my executor. All heirs AND Legatees shall be required to give a signed undertaking to my executor that they accept their bequest SUBJECT TO THIS CONDITION.”

[26] In my view, these are the words of a person who has made a decision to which immediate effect is to be given. The words expressed are the deceased’s unequivocal dying wish. The very words used by the deceased are thus also decisive of the question before the Court, namely, that the deceased intended the document to be his last Will and Testament. The surrounding circumstances, and in particular, the fact that the deceased was estranged to his family are clearly evidenced in the instructions that the deceased is giving in his Will. In my view, the deceased made his intentions clear in the Will that he did not want his children and his family to have a share in his estate. This is corroborated by the fact that the deceased lived alone. The deceased had not seen his children for several years before he died. His children did not care and more so, they did not even know his date of death.

[27] The applicants contended that the Will was signed by the deceased. In support of this submission, the applicants have submitted a Forensic Report of a handwriting expert who was provided with several samples of signatures and initials on various documents signed by the deceased between the periods 10 February 1984 to 11 June 2012. The expert also had the opportunity to inspect the original contested Will at the Master’s Office. Based on her expertise, she came to the conclusion that the signature on the contested Will is that of the deceased. The conclusion drawn by the expert witness is that the signatures and initials in the contested Will are genuine and authentic and are the signatures and initials of the same person whose signature and initials are contained in the sample provided to her by the first applicant being that of the deceased.

[28] The formalities required in the execution of a Will are set out in section 2(1) of the Wills Act. The contested Will was rejected by the first respondent on the basis that it did not comply with section 2(1)(a)(ii) and (iii) of the Wills Act. For the sake of completeness, the relevant parts of section 2(1)(a) provides as follows:

“(1) Subject to the provisions of section 3bis—

- (a) no will executed on or after the first day of January, 1954, shall be valid unless—
- (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and

(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person;

(iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and

(iv) if the will consists of more than one page, each page other than the page on which it ends, is also signed by the testator or by such other person anywhere on the page...”

[29] The applicant in this application further seeks condonation in terms of section 2(3) of the Wills Act for non-compliance with the above formalities. Section 2(3) of the Wills Act sets out the power of a court in relation to a Will or amendment thereof which does not comply with the prescribed formalities. The subsection reads as follows:

“If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).”

[30] The formalities prescribed by section 2(1) in relation to the execution of a Will are to ensure the authenticity and to guard

against false or forged Wills. In *Van der Merwe v Master of the High Court* 2010 (6) SA 544 (SCA), the Supreme Court of Appeal per Navsa JA, gave the follow explanation on this section:

“By enacting s 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators. It has rightly and repeatedly been said that once a court is satisfied that the document concerned meets the requirements of the subsection a court has no discretion whether or not to grant an order as envisaged therein. In other words, the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.”

[31] Section 2(3) of the Wills Act is very clear and unequivocal. In terms of this section, the court must direct the Master of the High Court to accept the document after it satisfied itself that indeed it reflects the true intentions of the deceased. First, the document must have been drafted or executed by a person who has subsequently died (the would-be testator). Second, the document must have been intended by the deceased to have been his or her last Will and Testament (see *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA) at para14). The purpose of this provision is to avoid thwarting the lawful wishes of the deceased. In *Mdlulu v De Laray*

- [1998] 1 AII SA 434 (W), the court held that the introduction of section 2(3) of the Wills Act, shows an intention and an opportunity to save a Will that would otherwise be invalid due to a formal defect in its attestation.
- [32] The court must be satisfied on a preponderance of probabilities that the deceased intended it to be his or her Will. Once it is satisfied that the documents comply with the requirements of section 2(3), the court is obliged by these peremptory provisions to order the Master of the High Court to accept it as the deceased last Will and Testament. See *Paul Grobler v Master of the High Court and Another*
- [2019] ZASCA 119 (23 September 2019) at para 13. The provisions of section 2(3) of the Wills Act do not empower or sanction a court to make a Will out of a document which was never intended by the deceased to be his last Will.
- [33] In my opinion, it was for the reasons below mentioned that the second respondent decided not to oppose this application despite same being duly served upon him, as he could not dispute the authenticity thereof. Importantly, the respondents did not deny in their answering affidavit that the actual signatures and or initials on the contested Will are those of the deceased. Though it is not clear who drafted the contested Will, however the probabilities are very much overwhelming that the contested Will was executed by the deceased. This leads me to the second question whether the deceased intended this document to be his last Will and Testament.
- [34] It has been argued on behalf of the respondents that the relief sought by the applicants is drastic in nature and that the court must be satisfied that the deceased genuinely intended for the document to be his last Will and Testament. It was further contended on behalf of the respondents that on the applicants' version, the deceased was informed by Mr Erickson that the Will had to be witnessed lest it is invalid. The fact that the contested Will was not witnessed despite this knowledge, so the arguments goes, suggests that the deceased did not intend it to be his last Will and Testament.
- [35] In my view, the crucial question to be considered by this court is whether the contested Will expresses the animus testandi of the deceased. This enquiry of necessity entails an examination of the Will in the context of the surrounding circumstances. The surrounding circumstances of this matter more in particular, the relationship of the deceased and the respondents is evidenced in both the founding and answering affidavit as well as in the contents of the contested Will as discussed above. The contested Will expresses a clear and unambiguous intention to dispose the testator's property on death. It is unmistakably clear that the deceased vented his anger towards his family by disinheriting them for neglecting him during his lifetime. He made it very clear and indisputable that this was his last Will and Testament.
- [36] Lastly, it has also been argued that the applicants used a wrong procedure to vindicate their rights. It was submitted that the applicants should have instituted summons so that the respondents could subpoena and cross-examine Ms Erickson and Ms Bramley who at some

point had a dealing with the deceased in relation to the alleged Will. In my view, such submissions are incorrect as the facts of this case are very simple and straight forward. The issue before court is a question of law and not of fact. Even if Mr Erickson was called to testify he would not take the matter any further. This view is supported by the fact that the respondents do not deny that the signature in the Will is that of the deceased. Secondly, the contents of the Will are confirmed by the respondents in their answering affidavits on the acrimonious relationship that they had with the deceased. The list of assets contained in the Will have been confirmed by the respondents in their answering affidavit. The contested Will is boldly entitled Last Will and Testament of Leonard Samuel Melmed which clearly indicates that the deceased intended it to be his last Will. The evidence before court is very much overwhelming that the Will in question is that of the deceased and that it was intended to be his last Will. The only issue which makes it impeachable is that it was not signed by the witnesses.

[37] In the result, the Court is satisfied that the Will as presented by the applicants was signed by the deceased and represented his true intention on what should be done in his estate upon his demise. In the circumstances, the Court condones the non-compliance with the formalities of the Will as stipulated in section 2(1)(a)(ii) and (iii) of the Wills Act, and declares the Will of the deceased as put before this Court as his Last Will and Testament. In doing so, the Court finds that there is no prejudice that would be suffered by the respondents as a result thereof. In fact, the respondents' opposition is groundless and without merit.

[38] As far as costs are concerned, it is a trite principle of our law that a court considering an order of costs exercises a discretion.

Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others

[1996] ZACC 27; 1996 (2) SA 621 (CC). The court's discretion must be exercised judicially. *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975

(1) SA 618 (O) at 631A. It is well established that the general rule is that costs follow the result. During the hearing of this matter the third and fourth respondent applied that the costs occasioned by the filing of the application for condonation for the late filing of the confirmatory affidavits be borne by the applicants. The applicants' counsel conceded to this proposition. Both applicants and the respondents agreed that each party be ordered to pay their own costs in respect of the costs reserved on 18 March 2020 when the matter was postponed due to the effect of Covid-19.

[39] In my view, the applicants have substantially succeeded in their application. Notwithstanding, the award of costs is a judicial discretion. The opposition by the third and fourth respondent in my view was unwarranted and unnecessary and they should be ordered to pay the costs of this application.

[40] In the result, I grant the following order:

41.1 That the Will signed on the 31 March 2012 by the late Leonard Samuel Melmed (identity number [...]), which was lodged with the first respondent on 18 February 2013, is declared the Last Will and Testament of the deceased despite not being witnessed, and that the first respondent is directed to accept the Will as the Last Will and Testament for the deceased;

41.2 That the failure of the deceased to comply with the formalities set out in section 2(1)(a)(ii) and (iii) of the Wills Act is condoned;

41.3 That the Master of the High Court is authorised and ordered, to accept the document as a Will of the deceased for the purpose of the Administration of Estates Act 66 of 1965;

41.4 The condonation is granted for the late filing of the main application;

41.5 The costs occasioned by the postponement of the matter on 18 March 2020 are to be borne by the parties respectively;

41.6 The third and fourth respondents are ordered to pay the costs of this application in its entirety, including the tracing agent costs and the handwriting expert costs. Such costs will exclude the costs for the late filing of the confirmatory affidavit.

LEKHULENI AJ

Appearances:

For the Applicants:

Adv N Lawrenson

Instructed by:

Bisset Boehmke McBlain

(Ref: Mr J Pieterse)

For the Third and Fourth Respondent: Adv R Scholtz (Johannesburg)

Instructed by:

Edelstein Faber Grobler Inc

(Ref: Ms L Ndlovu)

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