REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA

CASE NO: 21381/11

26/3/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

26.03.13
DATE

SIGNATURE

In the matter between:

MAFULUDI JUDITH DIKGALE	Applicant
and	
THE MASTER OF THE HIGH COURT, POLOKWANE	First Respondent
LINAH LEKOTA	Second Respondent
MAROPING JAN DIKGALE	Third Respondent
MALEHU GRACE DIKGALE	Fourth Respondent
LETHEBE HENDRICK DIKGALE	Fifth Respondent
LEDILE ALBERT DIKGALE	Sixth Respondent
SELLO HAMILTON DIKGALE	Seventh Respondent
LUCY MASEREMI DIKGALE	Eighth Respondent
RAESETJA DAMARIS DIKGALE	Ninth Respondent

JUDGMENT

TEFFO, J:

INTRODUCTION

[1] The applicant seeks an order for condonation of the non-compliance with certain formalities prescribed by the Wills Act 7 of 1953 ("*the Act*") in respect of a document written by Raesetja Damaris Mahlo ("*the deceased*").

[2] She also seeks an order that the said document be declared in terms of section 2(3) of the Act to be the will of the deceased.

[3] The applicant further applies for an order that the first respondent be authorised and ordered to accept the said document as the deceased's will for purposes of the Administration of the Estates Act 66 of 1965 as amended.

FACTS WHICH ARE COMMON CAUSE BETWEEN THE PARTIES

[4] The following facts are common cause between the parties:

4.1 The applicant is the deceased's niece in that her deceased father is the brother to the deceased.

4.2 The deceased was married and she and her late husband did not have children of their own during their life time.

4.3 The deceased informally adopted the applicant at a very tender age and she raised and brought her up. She stayed with the deceased at her house. The deceased took her to school and paid her tuition fees.

4.4 The deceased passed on on the 3rd day of September 2009 after she was admitted at Maphutha Malatji Hospital in Phalaborwa.

4.5 Even after the deceased's death, the applicant is still staying at Erf No 2875 Namakgale B in a house that belonged to the deceased and her late husband.

4.6 The deceased's husband predeceased her.

4.7 After her husband's death the deceased continued to stay at the said house.

4.8 The house is currently registered in the name of the deceased.

4.9 After the deceased's death a diary for 2006 was found in her belongings.

4.10 On the dates 4, 5 and 6 September 2006 of the diary the following words are written and signed allegedly by the deceased:

> *"Ge ke hwile le se tshwenye ngoanaka. Dilo tsaka ke tsa gagwe. Le tshentshe sefane. A bitse ka sefane saka le monna."*

4.11 The following words appear on dates 14, 15 and 16 September 2006 of the diary:

> *"Ba go nyale ba ga Mahlo. R10 000-00. Mafuludi Judith Dikgale. O dule ka mo gae o age (sware lapa la ga A.S. le D.R. Mahlo gabotse. O tsofalele ka mo 2875 Namakgale. Dilo ka moka ke tsa M.J. Dikgale. Wa gago."*

Then there is a signature allegedly of the deceased.

4.12 After the deceased's death the applicant together with the second respondent accompanied by one Mr Jerry Mahlo and Mr Ntjaka Amos Madike went to the office of the first respondent and the applicant was appointed the Executrix in the estate of the deceased.

4.13 Attorneys Joubert and May of Tzaneen were instructed to administer the deceased's estate after it was reported to the first respondent. The first respondent advised them by letter that the extracts from the 2006 diary of the deceased cannot be regarded as a will of the deceased.

[5] The second respondent contends that there are disputes of fact in the application which cannot be resolved on the papers. Further that the applicant anticipated such disputes of facts when she launched this application. She further contends that she is the only surviving sibling of the deceased who should have been appointed as the executrix in the estate of her late sister. She also contends that the family has never agreed that the applicant should be appointed as executrix in the estate of the deceased. She alleges that she has never seen the original extracts of the diary of the deceased and that the copies thereof which have been annexed to the applicant's founding affidavit have been tempered with. She avers that there are some additional notes to the extracts of the diary. Further that the copies of the extracts have not been certified by a Commissioner of Oaths. According to her the applicant did not take the copies for certification as she knew that the Commissioner of Oaths would notice that they had been tempered with and not certify them.

[6] The second respondent also challenges the interpretation of the wording used in the extract. According to her the contents of the extract do not make sense literally and that the interpretation submitted by the applicant is not what is written in the diary. She avers that there is a possibility that there are other pages which link up with the extracted pages which can be read together.

[7] Other issues raised were that the applicant is not the person who collected the deceased's belongings at the hospital but one Selina Thobejane, the sister to the deceased's husband.

[8] Accordingly the second respondent contends that based on the above factual disputes the application should be dismissed with costs, alternatively it should be referred for oral evidence or trial so that she can be afforded the opportunity to cross-examine the handwriting expert and the person who translated the extracts of the diary.

[9] Because of the issues raised by the second respondent the applicant obtained a certified translation of the diary extracts which translation has been verified by one Motlokwe Mphahlele in an affidavit.

[10] A translation of the extracts as quoted in paragraphs 4.10 and 4.11 of this judgment is the following:

> "*When I am dead do not trouble my child as my property belongs to him/her and his/her property belongs to me. Please change his/her surname to that of me and my husband.*"
>
> B Mahlo
>
> "*May the Mahlo family marry you with R10 000-00. Mafuludi Judith Dikgale you must stay at the home of D.R. Mahlo and build (sustain) it. Get older at No. 2875. Everything belongs to M.J. Dikgale.*"

[11] The issues for determination are whether the application raises disputes of fact which cannot be resolved on the papers. Should I find that such disputes of fact exist, I still have to determine whether they are genuine *bona fide* disputes of fact. In case I find that no such disputes of fact exist, I have to determine whether the extracts found from the deceased's diary comply with the requirements laid down in section 2(3) of the Act.

[12] In the case of *Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at p 1165 Murray, then AJP said:

> "*A bare denial of the applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by the respondent to enable the Court to conduct a preliminary examination ... and to ascertain whether the denials are not fictitious intended merely to delay the hearing.*"

He went on to say:

> "*The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard.*"

[13] In *Soffiantini v Mould* 1956 (4) All SA 171 (E) the following principle was articulated:

> "*If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning*

> *of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.*"

[14] The applicant maintains that she never anticipated that the second respondent would contest her appointment as executrix and the contents of the diary extract. According to her the second respondent together with other family members accompanied her to the first respondent's office where the second respondent was interviewed by employees of the first respondent. The second respondent informed the employees of the first respondent in her presence that it was the deceased's wish that the applicant should inherit her property and that she does not object to her being appointed the executrix in the estate of the deceased. Although the second respondent does not deny that she went with the applicant together with one Jerry Mahlo and Amos Madike to the first respondent's office as alleged by the applicant and that the applicant was on that day appointed the executrix in the estate of the deceased, she denies that she consented to the applicant's appointment as executrix in the estate of the deceased and avers that she was tricked into putting her thumb print on the documents that were completed as the documents were not explained to her. This allegation by the second respondent is very strange and does not make sense. She does not say she was forced to put her thumb print on the documents. She does not deny that she is the one who told the officials of the first respondent that the deceased always wanted the applicant to inherit her entire estate. She only says she did

not consent to the applicant being appointed executrix in the estate of the deceased because in her family they do things through meetings with elders. To say that she was tricked into putting her thumb print on the documents is an afterthought. The second respondent should have shown her disagreement with what the applicant was doing by refusing to go with her to the first respondent's office from the onset. It indeed does not make sense for her to go there, put her thumb print on the papers given and then retract and say she was tricked into doing what she did.

[15] It also does not make sense for the second respondent to contend that her family never agreed that the applicant should be appointed the executrix in the estate of the deceased. If one looks at the admitted facts by the second respondent, viz, that the applicant was raised and brought up by the deceased at her own house as a child of her own, this is not an issue that needed the family to decide on it. If indeed the second respondent is the one who told the officials of the first respondent that it was always the deceased's wish that the applicant should inherit her entire estate, the consent of the family as alluded to by the second respondent becomes irrelevant.

[16] On the allegation that she has never seen the original diary and that copies thereof have been tampered, have not been certified by a Commissioner of Oaths as the applicant knew that the Commissioner of Oaths would notice that the extracts have been tempered; she does not say where and how have the extracts been tempered with. No evidence has been adduced to substantiate the allegations. The applicant has always maintained

that the original diary was available for inspection and that it will be made available at court. The second respondent does not aver that she requested to inspect the original diary and that the request was refused. In his report supported by his affidavit, Mr G M Cloete who holds the title of examiner of questioned documents and handwriting, confirms that the disputed writings as described were written by the same hand and that they were in all probabilities written with exactly the same pen. This proves that the document was never tempered with as averred by the second respondent. No evidence has been adduced by the second respondent to dispute the allegations by Mr Cloete. The averments by the second respondent are therefore unsubstantiated and devoid of the truth.

[17] The diary extracts have been translated by one Mr Mphahlele and this is just a literal interpretation of the words as they appear. Although the second respondent tries to challenge the wording thereof, there is no evidence that she puts forth to the effect that that is how she understands the wording to be. She only says that the interpretation by the applicant is not what is written and that there is a possibility that there could be other pages which link up with the extracted pages which can be read together. The original diary was made available in court and both the court and the second respondent's counsel inspected it, no such pages were noted and the second respondent's counsel never raised such an issue after inspecting the original diary.

[18] An issue was also raised with regard to the payment of an amount of R10 000,00 for the lobola of the applicant. The second respondent contends that the amount was never paid and that the interpretation of the wording does not make sense. According to her the issue of lobola of the applicant is not clear as according to customary law that is not how things are done. When the matter was argued it was made clear to counsel for the second respondent that there is no allegation by the applicant in the papers that the amount of R10 000,00 was paid to her mother. What is mentioned is that the applicant's mother knows that it was the deceased's intention to pay lobola for the applicant so that she can remain at her house and sustain it. Further that the applicant's attorneys had already drawn a Liquidation and Distribution Account where they had included a transaction for the payment of the amount for her lobola to her mother. Counsel conceded to this and submitted that he could have misunderstood the papers.

[19] Other issues raised, I found them not to be serious. For an example the issue that when the applicant went to stay with the deceased she was five years or older. The age is not an issue here. It is irrelevant. The fact of the matter is that it is common cause between the parties that the applicant was raised and brought up by the deceased at her own home. There was also an issue relating to the service of the papers on the respondents. The Sheriff's returns have been filed and the court is satisfied that all the respondents were properly served with the application. The other issue related to the fact that it was not the applicant who fetched the deceased's belongings at the hospital but one Selina Thobejane. This issue is irrelevant because it is not in dispute

that the diary of the deceased was found and the extracts were written as alleged by the deceased.

[20] All the issues raised by the second respondent are unsubstantiated, irrelevant and mere denials which have the effect of either delaying or defeating the applicant's application (*Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd* and *Soffiantini v Mould* referred to *supra*). They are not genuine, material and *bona fide* disputes of fact. I therefore do not find any reason why I cannot deal with this matter as it is on the papers before me.

[21] I now turn to deal with the merits of this application.

[22] Section 2(3) of the Act as amended provides:

> "*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 66 of 1965, as a will, although it does not comply with all the formalities for the execution or amendment of wills referred in ss (1).*"

[23] From the wording of this section the court must be satisfied that the following requirements have been met:

23.1 There must be a document.

23.2 The document should have been drafted or executed by a person who has died since then.

23.3 The deceased should have intended the document to be his will.

[24]

24.1 There must be a document:

In the present matter it is not disputed that a 2006 diary belonging to the deceased exists. The extracts in the diary are not disputed.

24.2 The document was drafted or executed by a person who has died since then:

Evidence on the papers establishes that the extracts have been made in the handwriting of the deceased. It is also not in dispute that the deceased's signature appears to the extracts in the diary.

In *Bekker v Naudé* 2003 (5) SA 173 (SCA) the following was held:

> "*The court accepts that the Legislature intended that the word 'draft' requires personal action of the testator, thus applying the strict or literal approach.*"

24.3 The deceased intended the document to be his will.

In *Horn v Horn* 1995 (1) SA 48 (W) and *Logue v The Master* 1995 (1) SA 199 (N) courts were called upon to determine whether a document which does not comply with the prescribed formalities is in fact a will. In both these matters the deceased had drafted in their own hand documents purporting to be their last wills and they had signed them. No witnesses were there to witness what the deceased did. Flemming AJP in the *Horn* case found that if all the requirements as provided for in section 2(3) of the Act were present, the court has no discretion but to recognise the documents as wills. The same conclusion was reached in the *Logue* case and Booysen J also found that the provisions of section 2(3) are peremptory rather than directory. The facts in the present matter are similar to the facts in the cases discussed here. The deceased made notes in her 2006 diary. Those notes have been translated. There is no doubt that a reading of the notes in the deceased's diary explains that she intended the document to be her will. The deceased has also appended her signature to the notes she made in her diary. Nobody witnessed the signature and the making of the notes thereof.

[25] It is apparent from section 2(3) of the Act that the legislature while still providing for formalities to ensure authenticity and to eliminate false or forged

wills, nevertheless intended that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of the testators. The Wills Act, as now amended by the Law of Succession Amendment Act 43 of 1992, stresses the importance of giving effect to the genuine will of a deceased expressed in a document (*Logue and Another v The Master supra*).

[26] I am therefore satisfied that the deceased intended that the diary extracts be her will.

[27] The applicant's attorneys were advised by the first respondent that it cannot accept the diary extracts as the will of the deceased due to non-compliance with the Wills Act. As a result the applicant launched this application. I am therefore persuaded that a proper case has been made out for the relief sought and that this application must succeed.

[28] In the premise I order the following:

28.1 That the non-compliance with certain formalities prescribed by the Wills Act 7 of 1953 in respect of a document written by Raesetja Damaris Mahlo is condoned.

28.2 The said document is declared to be the will of the deceased in terms of section 2(3) of the said Act.

28.3 The first respondent is authorised and ordered to accept the said document as the deceased's will for purposes of the Administration of the Estates Act 66 of 1965 as amended.

28.4 The second respondent is ordered to pay the costs of this application.

M J TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

HEARD ON	12 MARCH 2013
FOR THE APPLICANT	S A VISSER
INSTRUCTED BY	STEWART MARITZ BASSON INC C/O KLOPPER & VORSTER ATTORNEYS
FOR THE SECOND RESPONDENT	N R MKHIZE
INSTRUCTED BY	MKHIZE ATTORNEYS