IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 29850/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: **09/06/2023**

SIGNATURE:

In the matter between:

SELLO POOLO	First Applicant
WELHEMINAH MOTLALEPULA NYALO	Second Applicant
BOITUMELO BEAUTY POOLO	Third Applicant

and

OSCAR JABULANI SITHOLE N.O.	First Respondent
KUTUMELA SITHOLE INCORPORATED	Second Respondent
NOMSA MALULEKA	Third Respondent
MENDE POOLO	Fourth Respondent
BILLY POOLO	Fifth Respondent

VENDITOR AUCTIONEERS Sixth Respondent

MASTER OF THE HIGH COURT, PRETORIA Seventh Respondent

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] When is a last will and testament, not a will? This matter came before me in the unopposed motion court on 22 May 2023. The applicant believed that the application made out a proper case, and therefore sought an order, *inter alia*, declaring the last will and testament (the will), purportedly drafted by the deceased, invalid, null, and void.

[2] However, a perusal of the papers does not support the granting of the relief sought. I specifically deal with two aspects, namely; the disputed signature of the deceased, and the issue of non-service to affected parties.

THE PARTIES

[3] The First Applicant is Jerry Poolo, an adult male person who is the first-born biological son of the deceased who resides in Shoshanguve.

[4] The Second Applicant is Welheminah Motlalepule Nyalo, an adult female person who is the second biological daughter of the deceased and resides in Ga-Rankuwa.

[5] The Third Applicant is Boitumelo Beauty Poolo, an adult female who is the last born and biological daughter of the deceased.

[6] The First Respondent is Oscar Jabulani Sithole, an adult male with full legal

capacity, who is cited in these proceedings in his capacity as the executor in the estate of the deceased, Jerry Poolo, whose place of business is at 5[...] C[...] Avenue, Waterkloof Ridge, Pretoria.

[7] The Second Respondent is Kutumela Sithole Incorporated, a firm of attorneys duly incorporated in terms of the company laws of the Republic of South Africa, whose principal place of business is 5[...] C[...] Avenue, Waterkloof Ridge, Pretoria.

[8] The Third Respondent is Nomsa Maluleka, an adult female, and a sister to the deceased whose address of service is that of Kutumela Sithole Incorporated.

[9] The Fourth Respondent is Mende Poolo, an adult male person and a brother to the deceased who resides in Ga-Rankuwa. There is no relief that is sought against him but is cited as an interested party.

[10] The Fifth Respondent is Billy Poolo, an adult male person and a brother to the deceased who also reside in Ga-Rankuwa. There is no relief that is sought against him but is cited as an interested party.

[11] The Sixth Respondent is Venditor Auctioneers, a company with limited liability and dully registered in terms of the company laws of the Republic of South Africa, whose principal place of business is at 1[...] G[...] Road, Queenswood, Pretoria.

[12] The Seventh Respondent is the Master of the High Court, Pretoria, an organ of state and the Department of Justice and Correctional Services entrusted with the duty and responsibility to regulate matters in respect of, *inter alia*, the deceased estates, and whose place of business is at Corner T[...] S[...] and F[...] B[...] Streets, Pretoria.

FACTUAL BACKGROUND

[13] The deceased passed on 16 December 2016 and post his death, the Applicants had a family meeting with the Third to Fifth Respondents to discuss

how the issues related to the deceased estate such as an executorship should be handled. It was resolved that Thapelo Motaung Attorneys (the attorneys) should be approached to assist with the administration of the deceased's estate.

[14] In January 2007, the Applicants, accompanied by the Third Respondent, consulted the attorneys who advised them that the deceased estate would devolve intestate as the deceased had no will. To this end, the Applicants agreed amongst themselves to be appointed as joint executors and executrixes. As a result, the Seventh Respondent appointed them as such on 25 January 2016.

[15] As the administration of the deceased estate unfolded, the attorneys received a letter from the Seventh Respondent around June 2017, advising that the deceased had left a will, and such a will was lodged by the Third Respondent.

[16] Following the discovery of the will, the Seventh Respondent requested the attorneys to inform the Applicants to return the letter of executorship that was issued to them. The effect of this was that the Third Respondent is the new executrix of the deceased estate as per the will. It is the said will that has become the subject of this litigation. The Applicants dispute the validity of the will on the basis that the Fifth Respondent had confirmed in his affidavit that the said will was brought to his attention by the Third Respondent's husband post the death of the deceased.

[17] Based on the above, the Applicants seek to have the decision of the Seventh Respondent to accept the will be reviewed in terms of section 95 of the Administration of Estates Act 66 of 1965 (the Estates Act) and declared invalid.

THE ISSUE

[18] The issue to be determined by this court is the validity of the purported last will and testament of the deceased.

APPLICABLE LAW

[19] The formalities for a valid will are provided for in section 2 of the Wills Act 7 of 1953 (the Wills Act). Section 2 of the Wills Act, in part, reads as follows:

> '(1) Subject to the provisions of section three *bis*—
>
> (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
>
> (ii)[1] 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
>
> (iv) 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
>
> ….'.

[20] It is apparent from the aforesaid provision that the validity of a will needs to be

---

[1] There appears to be a mistake with the numbering on the Wills Act as Roman Figures (ii) is repeated.

measured against section 2 of the Wills Act. It follows that the will in question must be assessed whether it complies with the requirements set forth in section 2 of the Wills Act. If the answer is yes, that would be the end of the matter. If the answer is no, the person disputing the validity of the will has to show this court that in one way or the other, the will does not comply with the requirements stipulated under section 2 of the Wills Act.

[21] The Master of the High Court has the authority to issue a letter of executorship to any person who has been nominated as an executor by any deceased person in a will in terms of section 14(1)(a) of the Estates Act.

[22] In an instance where an appointment of an executor is disputed for one reason or the other, the aggrieved person may approach a court to challenge such an appointment under section 95 of the Estates Act. Section 95 of the Estates Act provides as follows:

> 'Every appointment by the Master of an executor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be'.

[23] It is evident that the aforesaid provision is applicable in the present matter because the Applicants are aggrieved by the appointment of the Third Respondent as an executor of the deceased estate based on the alleged fraud of the deceased's signature.

[24] Considering the above legal framework, I now turn to consider the application to ascertain whether a case has been made out for the relief sought.

BURDEN OF PROOF

[25] Forgery involves factual questions. The onus of proof in respect of the

authenticity of the signature, therefore, lies with the Applicant.[2]

APPLICANT'S SUBMISSIONS

[26] Counsel argued that the First Applicant has examined the will and noticed that the signature on it 'was in fact not that' of his father 'but a forgery'. He reached this conclusion after comparing the documents that were signed by the deceased and the purported will.

[27] Counsel for the Applicant further contended that this Court ought to declare the said will null and void on the basis that the Applicant, had seen that the deceased signature was forged. To support this, counsel referred this Court to a letter from the attorneys of the deceased former employer. The letter, *inter alia*, stated that Toyota does not deal with wills. Based on this, counsel submitted that it was proof that the will was forged.

[28] Additionally, counsel relied on an affidavit from the Fifth Respondent who is one of the witnesses to the will who stated that the Third Respondent's husband brought him a document and misrepresented the facts so that he could sign it. Based on the aforesaid misrepresentation, the Fifth Respondent signed the said document without being aware that it was a will.

[29] Counsel further submitted that the fact that the Respondents did not oppose the application, it was evident that the said last will and testament was forged.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[30] In this section, I deal with the aspect of a handwriting expert and non-service of the notice of set down to affected parties.

HANDWRITING EXPERT

[31] As a starting point, it is apparent from the reading of the will in the present matter that it complies with all the requirements as stipulated earlier except requirements (iii) and (iv) which require the will to be signed by the testator and

---

2 *Yokwana v Yokwana* (9438/2011) [2013] ZAWCHC 22 para 14.

in the presence of two witnesses. The basis for this is that it is the Applicant's case that one of the witnesses to the will, the Fifth respondent, was approached after the death of the deceased and therefore the deceased could not have signed the will whilst alive and in the presence of two witnesses. In other words, the will only surfaced after the deceased had died and the deceased never signed it. The deceased signature is disputed.

[32] When counsel was asked by this Court whether the person who had examined the will and ascertained that it was forged was qualified to do so, counsel's response was in the negative. The expert evidence of a forensic and writing examiner plays an important role in cases such as this one. In *Annama v Chetty*[3], the court confirmed the function of a handwriting expert as follows:

> 'His function is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors'.

[33] No one was before the court to point out the above factors. This Court is aware that it has the discretion whether to accept or decline the evidence of the handwriting expert. In my view, the Applicant is not able to assist this Court with his assessment of the signatures because he is not a handwriting expert. Accordingly, his assessment of the signatures does not carry any weight.

[34] When counsel was asked about the whereabouts of the handwriting expert evidence as mentioned in the founding affidavit, his response was that they did not persist in getting one because the application was not opposed. This response is not satisfactory. An unopposed application does not relieve the Applicants, on a balance of probabilities, from making out their case. He who alleges must prove. It is unusual when the authenticity of a signature is at issue, a handwriting expert is not involved. Handwriting experts are routinely

---

[3] 1946 AD 142 at 155-156.

called to prove the authenticity of a signature.[4]

[35] Regarding a letter from the attorneys of the deceased's former employer, although the deceased former employer had stated that they do not deal with issues related to wills and further disputed the letterhead that purported to be theirs on the will in question, counsel ignores the fact that the very same letter states that:

> 'Neither our client or McCarthy (Pty) Limited employs handwriting experts and therefore cannot comment to the validity of any signature(s) nor the content of the document [will]….'[5]

[36] The significant role that may be played by evidence of the handwriting expert in cases such as this one cannot be gainsaid. It is evident that the absence of handwriting expert evidence places this court in a difficult position. This Court is not persuaded that the Applicants have made out the case for the relief sought in Part B of the notice of motion. For this reason, the application ought to be dismissed.

NON-SERVICE TO AFFECTED PARTIES

[37] Another noticeable defect in this matter is the non-service to the affected parties especially the Seventh Respondent who is responsible for issuing and cancelling the appointment of executorship. In addition, relief is sought against the Seventh Respondent to cancel a letter of appointment of executorship issued to the Third Respondent.

[38] The Practice Note is silent about the notice of the set down. Furthermore, a perusal of the application on CaseLines does not reveal any heading about set down for the current year. There is also no return of service. All these factors point me to one conclusion, that there was no compliance with the Uniform Rules of Court. Rule 6(5)(a) requires that:

---

[4] See for example, *Yokwana v Yokwana (*n 5), *S v Maqubela and another* 2014 (1) SACR 378 (WCC).
[5] Annexure SP8 at para 4.4, Notice of Motion (CaaseLines 001).

> ‘every application other than one brought ex parte must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, must be served upon every party to whom notice thereof is to be given’. (Own emphasis).

[39] Consequently, the application further stands to be dismissed as the Applicants have failed to serve the notice of set down to the affected parties and/or interested parties. To do otherwise, will result in the violation of the right to be heard.[6]

ORDER

[40] Considering the above, I, therefore, make the following order:

(a) The application is dismissed.

M R PHOOKO
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 09 June 2023.

APPEARANCES:

Counsel for the Plaintiff:	Adv R Masipa
Instructed by:	Rammutla-at-Law Inc

[6] See *De Lange v Smuts N O and Others* 1998 (7) BCLR 779 (CC) para 131.

Counsel for the Defendant:	n/a
Instructed by:	n/a
Date of Hearing:	22 May 2023
Date of Judgment:	09 June 2023