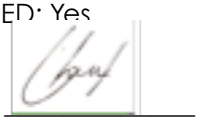
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 31823/2021

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes

Signature: 

Date: 15 December 2021

In the matter between:

SESI DINAH MNISI Applicant

and

JOACHIM FREDERICK DE BEER First Respondent

(In his capacity as the Executor for the

Estate Late MC Mnisi)

DE BEER & CLAASEN GROUP Second Respondent

THELMA MUSA MNISI Third Respondent

MASTER OF THE GAUTENG LOCAL DIVISION Fourth Respondent

HIGH COURT

DEPARTMENT OF HOME AFFAIRS Fifth Respondent

JUDGMENT

CORAM: Q LEECH AJ

1. The applicant and the third respondent both claim to have married the late Mr Mnisi. (I refer to Mr Mnisi as "the deceased" in the paragraphs below.) The facts that led to such a situation are mostly irrelevant to the relief sought by the applicant and I do not intend to traverse the facts in any detail.

2. The applicant seeks a set of declaratory orders declaring her marriage to the deceased to be valid and the marriage to the third respondent to be invalid, and declaring the Mutual Will executed by the deceased and the third respondent to be invalid. The applicant also seeks to stay the administration of the estate of the deceased pending the final outcome of this application. However, at the hearing, an undertaking was provided that the administration of the estate would not proceed pending my order and the parties accordingly accepted that such interim relief is unnecessary.

3. The third respondent contended that the marriage between her and the deceased was valid and did so up until the hearing. However, in the answering affidavit the third respondent stated that "as much as I was married to the deceased customarily as well as in a civil way … I will not contest the issue of the marriage" and, at the hearing, counsel for the

third respondent conceded, in my view correctly, that on the papers before the court the marriage between the applicant and the deceased was valid and, accordingly, the alleged marriage between the third respondent and the deceased was invalid.

4. The only material issue between the parties is accordingly whether the Mutual Will of the deceased and the third respondent is valid. The applicant does not contend in the affidavits placed before the court that the Mutual Will does not satisfy the formalities for a valid will. The applicant contends that the will is invalid for reasons extraneous to the document. Counsel for the applicant belatedly contended that a manuscript amendment to the date of the will rendered it uncertain and accordingly invalid. The applicant is not permitted to raise the issue without providing notice of the point in its papers and affording the third respondent an opportunity to address the issue (*Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA), para. 43).

5. The deceased executed the Mutual Will with the third respondent in terms of which they disposed of their estates in the following terms, “[w]e hereby appoint the survivor of us as sole and universal heir / heiress of the estate of the first dying of us”. The will provides for the eventuality of simultaneous death and death in close proximity or as a result of the same calamity, in which event the applicant and the third respondent “direct that the whole of our respective estates, property and effects shall be administered and liquidated as a joint estate” and bequeath that joint estate to a trust for their children.

6. The deceased and the third respondent were living together as husband and wife. However, the deceased was married to the applicant in

community of property at the material time and the applicant was unaware of the execution of the Mutual Will.

7. The Mutual Will records that the deceased and the third respondent are married in community of property and there was a tentative attempt to delve into the question whether the deceased executed the Mutual Will in the belief that he was lawfully married to the third respondent or under the pretence that he was. However, in my view, the issue is irrelevant as it is not for the applicant to contest the validity of the will based on a misrepresentation that the deceased might have made to the third respondent, and I did not understand counsel for the applicant to be contending that the applicant did so. The issue is, in any event, not adequately addressed on the papers and any enquiry into the state of mind of the deceased would be speculative.

8. The question is whether the invalidity of the marriage between the deceased and the third respondent invalidates the Mutual Will. In my view, it does not for the reasons stated below.

9. Counsel for the applicant submitted in the heads of argument that "[s]hould the marriage between the deceased and the Third Respondent be found to be void … it will mean that the mutual or joint will has to suffer the same fate." Counsel did so on the premise that "a spouse in a marriage that is in community of property may not legally enter into a mutual will with someone else other than the person he or she is married to". As I understand the argument, the applicant contends that I must apply a rule of law that prohibits the execution of the Mutual Will. No source or authority is provided for such a rule in the heads of argument and counsel was unable to refer me to any during argument.

10. The submission that there is a legal impediment to the execution of a mutual will by anyone other than spouses sits uncomfortably with the principle of freedom of testation. The applicant is effectively contending that any person who enters into a marriage in community of property is deprived of the right to freely dispose of their assets.

11. As the third respondent submits, “freedom of testation is a central principle of testate succession and testators are permitted to dispose of their assets freely, except insofar as the law places restrictions on this freedom” (*Wilkinson and Another v Crawford NO and Others* 2021 (4) SA 323 (CC), para. 69). “Freedom of testation itself is constitutionally protected as it implicates the rights to property, dignity and privacy” (para. 70). The entrenchment of the freedom of testation in the law of succession is evident from *Joubert v Ruddock and Others* 1968 (1) SA 95 (E), at 98 F, in which the court refers to *Censura Forensis* (Part I, Bk. 3.11.6) (*Schreiner's* translation) and wherein van Leeuwen writes, “there is nothing to which men are more entitled than that their power of making a last will should be free, and hence the rule; that no one can deprive himself of this power.”

12. The minority judgment in *Wilkinson* reaffirms the principle. However, it does so in terms which, in my view, speak to the circumstances of this matter and would be useful to quote in full. I do so below:

> “Freedom of testation is not merely a common law principle. Freedom of testation is founded upon the fundamental rights of dignity, privacy and property enshrined in the Constitution. It includes the right to dispose of property during one’s lifetime as well as at death. … It implicates [the] right to privacy in a particularly fundamental way. A testatrix’s decisions on whom to include and

exclude in bequests, are manifestations of personal love and affection, loyalties and kinship. Those decisions are taken in a most intimate, personal sphere - they occur within what this court has called the person's 'inner sanctum', and within 'the core most protected realms of privacy'." (para. 118)

"Thus, a high premium is placed on freedom of testation and the legislature and courts alike should be slow to limit these rights by too readily interfering with an individual's testamentary freedom. We must heed the caution so often expressed by this court, in respect of reticence to interfere. … To override an individual's testamentary choices is to criticise those choices. That criticism is not only of the testatrix's proprietary choices, but also of her personal preferences. … At best, what we say to her is that her subjective worldview, personal loyalties, affections and sense of duty were so unreasonable - for being contrary to society's expectations - that those choices warrant intrusion and must be overridden by a court. At its worst, legislative and judicial intervention may dictate to the testatrix whom she may or may not love, and may exact punishment on the testatrix's preferred heirs by denying them the testatrix's property and its concomitant freedoms." (para. 119)

"Testatrices as property owners have a right to choose to whom to leave their property when they die. This basic proposition, that individuals enjoy freedom of testation, is the cornerstone of our law of succession." (para. 120)

13. The applicant approaches this court to judicially interfere with the deceased's freedom of testation and indirectly to impinge upon the fundamental rights afforded to him by the Constitution during his lifetime.

The applicant effectively requests this court to overrule the deceased's expression of affection, love and personal preference, and to exact a punishment on his preferred heirs by denying them the property left to them in terms of the Mutual Will. The applicant does not do so on the basis that the deceased's expectations were so unreasonable and contrary to society's expectations to warrant such interference. The applicant does so on the basis that there is a rule of law that precludes the execution of a mutual will by spouses married in community of property with anyone other than their spouse. In my view, a rule in such uncompromising terms would erode the freedom of testation and impact on fundamental rights to a degree that would require our courts to carefully consider whether such limitation is reasonable and justifiable, and the reticence to interfere is unlikely to ever result in a rule in such terms.

14. Furthermore, the presence of such a rule is inconsistent with the rights of ownership of spouses married in community of property. It is trite that "spouses married in community of property are the owners in common of the joint estate in equal undivided shares" (*Estate Sayle v C.I.R.,* 1945 AD 388). The death of one or other of the spouses dissolves the community and the survivor is entitled to half of the nett residue after the estate has been liquidated and the debts of the joint estate are paid (*van Wyk v Joubert* 1947 (1) SA 825 (T), at 299). If the deceased spouse had no will, the estate would be distributed according to the rules of intestate succession and the surviving spouse would not inherit the entire estate. The spouses may, however, dispose of their half shares after their deaths in separate wills or a mutual will. And, if they do, their heirs do not become the owners of the undivided half share of the estate but are residuary legatees of half of the net assets of the estate (*Greenberg v Estate Greenberg* 1955 3 SA 361 (A), at 364 G - 365 G). There is,

accordingly, no merit in the submission by the applicant that a spouse impoverishes the joint estate by executing a mutual will with a person other than their spouse.

15. The execution of a mutual will does not add an overriding complexity as in *Estate Gonsalves v Pataca and Others* 1957 (4) SA 585 (T), the court stated that it was a general rule of our law that "a mutual will, notwithstanding its form, is to be read as the separate wills of the two spouses executed at one time and in one document, the disposition of each spouse being treated as applicable to his or her half of the joint property." I mention that that is a general rule and as such is subject to the terms of the mutual will in issue. The applicant does not make out a case that the mutual will executed by the deceased and the first respondent cannot be read as their separate wills and the terms mentioned above indicate that general intention.

16. In a mutual will each spouse is free to dispose of their half share in the joint estate to whomever they prefer and may change their minds as "[t]estaments are also invalidated or rather revoked by the intention of the testator … when the testator has changed his mind. This it is, and continues to be, in his power to do at any time: since the intention of a man is, up to the end of his life, liable to change" (*Joubert*, at 98 F). In respect of their separate estates, there is no suggestion that the spouses require the consent or permission of the their spouse or that, after executing a mutual will, any subsequent revocation or variation is required to be contained in another mutual will or an addendum, and the revocation or variation may be executed without the knowledge of the their spouse.

17. The general rule does not imply that only spouses may enter into a mutual will, as contended by the applicant. To the contrary, the general rule contemplates that every person enjoys the freedom of testation and in order to give effect to that right the general rule provides that, if spouses, married in community of property execute a mutual will, the mutual will should be treated as their separate wills. In my view, it follows that the spouses may do so of the own accord without informing or discussing the matter with their spouse and may do so with someone other than their spouse. In my view, the following statement is correct:

> "Any two or more persons can make a joint or mutual will (the terms are normally interchangeable). The most common joint will is made by spouses, but there is nothing to prevent any two persons who are not married to each other from making a joint will. Thus, two or more siblings or even persons unrelated to each other may execute a mutual will and it is not uncommon for partners in a business or a profession to make such a will" (Wills and Trusts, *RP Pace* and others, para. A49).

18. In the premises, there is no basis on which to contend that there is a legal impediment to the execution of a mutual will by spouses married in community of property with persons other than their spouse and without their knowledge. The Mutual Will executed by the deceased and the third respondent cannot be invalidated on the basis that the deceased was married to the applicant at the time of its execution.

19. I do not intend to convey that there are no circumstances that would justify judicial interference with the deceased's freedom of testation. However, our law is clear and in plain terms can be stated as follows: Freedom of testation entails the deceased's right to dispose of his estate

as he pleases in a will, provided that the disposition is lawful and is not contrary to public policy. Subject to these restrictions he is free to do as he wishes with his property and his wishes must be respected after his departure from this world (*King and Others NNO v De Jager and Others* 2021 (4) SA 1 (CC), para. 94). Accordingly, the applicant must bring her challenge to the mutual will within the restrictions and justify the judicial interference on the basis that the disposition is unlawful or contrary to public policy. There is no legal impediment to the disposition and the applicant has made no attempt to justify the interference on the grounds that the disposition is contrary to public policy. In addition, any interference must be restrained and targeted at the offending disposition.

20. Although the third respondent contended that her marriage to the applicant was valid, the third respondent signalled the intention to abandon that issue in the answering affidavit and to contest only the validity of the Mutual Will. The main issue in this matter was whether the Mutual Will was valid, and as the third respondent has succeeded on that issue, the applicant should pay the costs of this application.

21. In the premises, I make the following order:

(1) The marriage between the applicant and Mziwakhe Christopher Mnisi is declared valid, during the lifetime of Mziwakhe Christopher Mnisi.

(2) The marriage between the third respondent and Mziwakhe Christopher Mnisi is declared invalid.

(3) The applicant shall pay the costs of this application.

QG LEECH

Acting Judge of the High Court of South Africa,

Gauteng Local Division, Johannesburg

HEARD ON:	6 October 2021
DATE OF JUDGMENT:	15 December 2021
COUNSEL FOR THE FIRST AND SECOND APPLICANTS:	MM Hlatshwayo
INSTRUCTED BY:	Frans Mashele Inc.
COUNSEL FOR THE RESPONDENT:	BM Lukhele
INSTRUCTED BY:	Qhali Attorneys