REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 36401/2018

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

12/05/2021
DATE

SIGNATURE

In the matter between:

LESETJA ROCKY MAPEA	Applicant
And	
PHEPHETHWA ELSIE MAPEA N.O	First Respondent
MASTER OF THE HIGH COURT	Second Respondent
SIZAKELE MONICA NHLAPHO	Third Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 12 May 2021.

JUDGMENT

SKOSANA AJ

[1] In this matter the applicant seeks the following order:

1.1 That a declaratory order be made in terms of section 2(3) of the Wills Act 7 of 1953 ("the Act") that the copy of an affidavit marked "RM1" dated 27 January 2006(hereinafter referred to as "the note") constitutes the Will and last testament of the deceased, Ms Mpheu Monicca Makhubela;

1.2 Directing that the applicant personally is the only beneficiary with regard to the disposition of the immovable property situated at no. 945 Block C, Soshanguve, Pretoria ("the property").

1.3 That the second respondent be ordered to accept the note for purposes of the provisions of the Administration of Estates Act 66 of 1965;

1.4 That the second respondent be directed to recall all letters of executorship issued to the first respondent;

1.5 That the first respondent be ordered to pay the costs of this application if she opposes it.

[2] At the commencement of the proceedings before me, the applicant applied for postponement of this matter which I refused. I set out the reasons for

such refusal at a later stage in this judgment. The matter has a long-convoluted history, I will only mention those portions of such history which I find relevant for the purposes of this judgment.

[3] The property which is central to the dispute in this matter is immovable property which is situated at no. 945 Block C, Soshanguve, Pretoria. The property belonged to one Mr Jan Makhubela who passed away on 09 August 2002 and who was married to Ms Monicca Mpheu Makhubela ("the deceased"). Subsequent to the death of Mr Jan Makhubela, the deceased was issued with a certificate of appointment under the Regulations for Administration and Distribution of Estates of the Deceased Blacks published under Government Notice No. R200 of 1987.

[4] The deceased in turn died intestate on 16 October 2007. The first respondent, Elsie Phephethwa Mapea is the applicant's biological mother and the only child of Mr Jan Makhubela and the deceased. She was also appointed by the second respondent as executrix in the estate of the Mr Jan Makhubela. The deceased is therefore the applicant's grandmother on the maternal side. The applicant was 24 years at the time of death of the deceased, being 16 October 2007.

[5] Central to the applicant's case is the note which is attached to his founding affidavit as annexure "RM1". It comprises an affidavit apparently made

by the applicant's grandmother in which she states that the is the lawful owner of the property and has given it to the applicant. The applicant alleges that the first respondent (his own mother) failed to disclose the note to the second respondent (the Master) at a time when she was issued with the letter of executorship. According to the applicant the note establishes that the deceased wished the property to be inherited by, and be given to, him.

[6] The applicant, first and third respondents lived together in Mamelodi for a number of years. After the death of the deceased, the first respondent committed to sell the property to the third respondent. The third respondent secured a loan from the bank in this regard but since transfer could not take place immediately due to the delay in the finalization of the deceased estate, the third respondent occupied the property and paid occupational rent to the first respondent. All of this allegedly occurred with the knowledge and consent of the applicant.

[7] On 18 August 2017, the third respondent obtained an order of this court under case number 33141/17 against the first respondent compelling her to transfer the property into the name of the third respondent. Subsequent to such court order, the first respondent brought an application for rescission of that court order which was dismissed on 14 November 2018.

[8] Thereafter the applicant instituted the present proceedings on 24 May 2018 without citing and/or notifying the third respondent. The applicant obtained

an order on an unopposed basis on 13 September 2018. This order was in conflict with the order obtained earlier by the third respondent for the transfer of the property into her name.

[9] The third respondent then successfully brought a rescission application against the order of 13 September 2018 which included an application for her joinder as the third respondent in the present application. In that regard, a court order was granted in favour of the third respondent including an order of costs against the applicant. Thereafter, the third respondent duly filed her opposing affidavit to the present proceedings.

[10] Not only did the applicant fail to file a replying affidavit but he also failed to take any further steps to prosecute the application with the result that the third respondent applied for a set down. The applicant's attorneys also withdrew as his attorneys of record at the beginning of March 2021. A proper notice of withdrawal as attorneys of record in terms of Rule 16(4) was filed in that regard.

[11] Notwithstanding that such notice drew the applicant's attention to the provisions of Rule 16(2) which requires him to appoint a new attorney or to provide an address on which service of process could be effected, he has failed to do so. According to the notice of withdrawal itself, it was provided to the applicant by electronic mail.

Court's finding

[12] The applicant has not filed heads of argument nor has he delivered a replying affidavit to the third respondent's opposing affidavit. The first respondent was duly appointed as an executor in the estate of Jan Makhubela and such appointment still stands. The first respondent made a formal offer to purchase the property in favour of the third respondent on 22 October 2015 which was accepted by the third respondent. The applicant signed as a witness on such purchase agreement. As a result, the third respondent has made substantial improvements on the property.

[13] The applicant relies on the note for his claim. He prays for an order that the note be declared as the deceased's Will and last Testament in terms of section 2(3) of the Wills Act which provides:

"*(3) 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 66 of 1965"), as a Will, although it does not comply with all the formalities or the execution or amendment of Wills referred to in sub-section (1).*"

[14] The third respondent denies that the note is the deceased's will and that it evidences the deceased's intention to bequeath the property to the applicant. The applicant has not replied and therefore the version of the third respondent

should be accepted. There are other potent factors militating against the acceptance of the note as the Will of the deceased, which include the following:

14.1 Section 2(3) requires me to be satisfied that the document was drafted by the deceased. The commissioner of oaths who attested the affidavit (the note) has not filed any affidavit to confirm it. The applicant states that he was told that such commissioner has been moved to another police station but does not furnish reasons why he could not follow him to that police station or wherever he is;

14.2 The contents of the affidavit themselves are vague. The deponent states that she "*declared*" that she "*gave*" the property to the applicant who resides with her;

14.3 It is not clear what previous declaration this statement refers to. It also conflicts with the evidence at hand since the applicant was not residing with the deceased but at all material times resided with her mother in Mamelodi;

14.4 The importance of the requirement of two witnesses signing a Will simultaneously with a testator is that they should confirm that the signature was appended to that Will by the testator. In the case of the testator signing by making a mark, a commissioner of oaths must certify the identity of the testator and that the Will so signed is that of the testator. Even such assurance is absent in the present case;

14.5 The applicant also avers that he was 24 years old when the note was executed but fails to clarify why he could not see the significance of keeping a copy thereof for himself and of producing it earlier;

14.6 On the contrary, he makes contradictory statements in his affidavit. On one hand he avers that the first respondent failed to inform him of the note but on the other, he says that the very first respondent informed him of the document. There would be no need to inform him of a document which was executed in his presence. His grandmother would have taken him along for the very purpose that he should know about the existence of the note. The applicant only produced the note in 2018, 12 years after its execution and 11 years after the death of the deceased;

14.7 Fundamentally, what the note says is legally invalid. At the time when it was executed the property still belonged to Mr Jan Makhubela and had not been transferred to the applicant's grandmother. She was merely appointed as an executrix for that estate and could only authorize transfer of any of the assets. However, those assets including the property did not belong to her and she could therefore not lawfully give the property to the applicant as the note purports to do.

14.8 It troubles me why the note surfaced when the first respondent began to lose the battle to the third respondent in respect of the property. It is also concerning that the note purports to deal only with the property (the house) and not any other assets of the deceased. In any event, the deceased could not include the property in her Will because she was not the lawful owner thereof. This then defeats the very purpose of the declarator sought by the applicant as the note only concerns the property.

[15] In the circumstances, I am not satisfied that the document was drafted or executed by the deceased and that it was intended to be her Will. Since prayer 1 of the notice of motion is pivotal to the applicant's case, there is no need to deal with the rest of the relief sought therein.

[16] As stated earlier, I dismissed the applicant's informal application for postponement. My reasons are briefly as follows:

16.1 The third respondent successfully applied for joinder in the past. She then filed an opposing affidavit on 04 March 2021 and served it on the applicant's attorneys, MK Mabote Inc on the same day. On the following day, being 05 March 2021 the applicant's attorneys executed a notice of withdrawal as attorneys of record for the

applicant in which they stated among others that such notice has been served on the applicant by electronic mail.

16.2 The third respondent has, in anticipation of the request for postponement, filed a supplementary affidavit in opposition thereof and in which she sets out grounds for such opposition. In such supplementary affidavit the following appears:

16.2.1 The notice of withdrawal as attorneys of record was served on the third respondent's attorneys on 09 March 2021;

16.2.2 On 12 April 2021, Mabote Inc supplied the applicant's email address to the third respondent's attorneys as "rockymapea@gmail.com" and the third respondent served a notice of set down through it on the same date;

16.2.3 On 13 April 2021, the third respondent's heads of argument as well as the index was served by email on the applicant;

16.2.4 On 29 April 2021, a Mr Francois Nortje from the third respondent's attorneys telephoned the applicant and requested him to respond to emails and acknowledge receipt of documents;

16.2.5 On 29 April 2021, the applicant responded from the above-mentioned email an acknowledged receipt of documents;

16.2.6 On 05 May 2021, the applicant sent an email, from the same email address, to the third respondent's attorneys informing them that he had approached the Legal Aid Board for assistance and that the Legal Aid Board indicated that it was a short notice and that he should request a postponement. In argument before me the applicant indicated that the Legal Aid Board refused to provide him with anything in writing.

16.3 The applicant flatly denied that he was aware of the withdrawal of his attorneys until late in April 2021. However, he was unable to explain why he would not receive the numerous emails sent to him through the email address which he admits as belonging to him and which he later used to acknowledge receipt and to communicate further in this matter.

16.4 There is immense prejudice to the third respondent which will be caused to the third respondent by any further delay of this case and which cannot be cured by an order of costs. In any event, an order of costs would serve little purpose as the applicant is currently unemployed.

16.5 The third respondent has a court order in her favour entitling her to the transfer of the property. That order has not been challenged by the applicant. I do not see how this court would be able to grant the relief that the applicant seeks in the present application while it is in conflict with that judgment and order.

[17] In the light of the above, I deem it appropriate to refuse the applicant an indulgence of a further postponement of this matter.

[18] As to costs of this application, the general rule is that they must follow the result. I do not find any reason to deviate therefrom. In any event, the conduct of the applicant as demonstrated by the history of the matter outlined above leaves much to be desired. The least that could be done to show the court's displeasure at such conduct is to mulct him with the costs of this application.

[19] In the premises, I make the following order:

1. The application is dismissed;
2. The applicant is ordered to pay the costs of this application.

DT SKOSANA (AJ)
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances:

For Applicant:	Mr LR Mapea (in person)
For First Respondent:	No appearance
For Second Respondent:	No appearance
For Third Respondent:	Mr A Van Staden
	Anton Van Staden Attorneys
	243 Jan Van Riebeeck Street
	Pretoria North, Pretora