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REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2020/9629

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

16 September 2022

In the matter between:

QHALI, MARTINS MONYANE N.O.

First Plaintiff

MALEVU, PECULIA LORENCIA

Second Plaintiff

RIKHOTSO, LOCRACIA

Third Plaintiff

RIKHOTSO, MOSES

Fourth Plaintiff

RIKHOTSO, BEVERLEY

Fifth Plaintiff

TLALA, AVID MABULANE

Sixth Plaintiff

MALEVU, KHETHELO

Seventh Plaintiff

MALEVU, SISEKELO

Eighth Plaintiff

THANGO, BONGA

Ninth Plaintiff

RIKHOTSO, SHILUVA

Tenth Plaintiff

RIKHOTSO, VICTORIA

Eleventh Plaintiff

And

RIKHOTSO, MARGARET

First Defendant

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

Second Defendant

JUDGMENT

SK Hassim AJ

Introduction

[1] Section 2(3) of the Wills Act, Act No 7 of 1953 (“**the Wills Act**”) empowers a court to order the Master of the High Court (“**the Master**”) to accept a document drafted or executed by a deceased person as a will for purposes of the Administration of Deceased Estates Act, Act No 66 of 1965 notwithstanding that the document does not comply with the formalities in section 2(1) of the Wills Act. The plaintiffs brought such an application. The application was allocated for hearing before me in the opposed motion court. The parties agreed to the application being referred to trial. Pleadings were exchanged and the trial commenced. The document *in casu* is a diary, or more accurately a journal. The parties are identified by their citation in the action.

[2] The first plaintiff ("**the executor**") is the executor of the estate of the late Patience Rikhotso ("**the deceased**"). The second to eleventh plaintiffs are relatives of the deceased, save for the fourth plaintiff who is her fiancé and with whom she lived.

[3] The first defendant is the deceased's biological mother ("**the deceased's mother**" or "**the defendant**"). She was the first respondent in the application and is the first defendant in the action. She opposed the application and defends this action. The Master is the second defendant. The Master did not oppose the application nor defend the action.

[4] The deceased died on 7 October 2016 without leaving a will which complied with the formalities prescribed in section 2(1) of the Wills Act. The plaintiffs allege that the instructions on how the deceased's estate must be disposed of are contained in a journal belonging to her and written in her hand ("**the Journal**").

[5] The Master rejected the Journal as the deceased's will on the basis that it did not comply with the formalities regarding the execution of wills prescribed in section 2(1) of the Wills Act. Accordingly, on or about 23 March 2020, the plaintiffs (as applicants) applied for the order¹ contemplated in section 2(3) of the Wills Act.

¹ The following relief was claimed in the notice of motion:

- "1. That the Second Respondent be directed and ordered to register, accept and effect [sic] to the document drafted in manuscript by the [sic] Patience Rikhotso ("deceased") I D NO 811118 0448 083, which is attached to the Founding Affidavit as Annexure "FA 3", as the deceased's Last will and Testament for purposes of [sic] Administration of the Estate [sic] Act 66 of 1965;
2. Directing the Second Respondent not to cancel the existing Letters of Executorship granted in favour of the First Applicant, Qhali, Martins Monyane on the 27 July 2017 and the reference number 0 2 3 6 6 4/2 1 6 which is attached on [sic] the Founding Affidavit as Annexure "FA 1";

[6] Some of the plaintiffs are identified in the Journal as the beneficiaries of the deceased's estate, the deceased's mother, the defendant is not.

The relationship between the parties and the deceased

[7] The second plaintiff ("**Peculia**") (also known as Pecu and referred to as such in the Journal) and the deceased were maternal cousins². The third plaintiff and the deceased were also cousins. The fourth plaintiff ("**Moses**") and the fifth plaintiff ("**Beverley**") are the defendant's biological sons and therefore the deceased's half-brothers.³ The sixth plaintiff is her fiancé. The seventh, ninth, tenth and eleventh plaintiffs are her nieces, and the eighth plaintiff is her nephew. According to the plaintiffs, the deceased had a close relationship with these relatives and her fiancé with whom she lived. The plaintiffs allege that the deceased had a bitter relationship with her mother. Much time was taken up by both parties either to prove or disprove this. In the final analysis, the relationship between the deceased and the defendant is of no moment.

The application referred to trial

[8] In the answering affidavit, the defendant, amongst other things, denied that the Journal belonged to her daughter or that she "*wrote the document/dairy [sic] sought to be the last Will and Testament of [her daughter].*" She alleged that even if the Journal was written by the deceased, pages had been torn from it. And what was attached to the founding affidavit is a "*selected extract and [did] not give a total view of the intention of the diary and its recorded content.*"

² Their mothers are sisters.

³ The defendant both in the answering affidavit, as well as in the plea, denied that Moses and Beverly were her sons. When she confronted with this during her testimony, she denied that she had disputed this.

[9] She furthermore alleged that even if the Journal had been written by the deceased, a reading of the selected pages extracted from the Journal show that the Journal was not intended by the deceased to be her will as envisaged in section 2 (3) of the Wills Act. “[A]t best [it] may have only been a recordal of testamentary intentions,” and the deceased did not intend the writing to constitute her last will and testament. The defendant additionally alleged that (i) she and the deceased “regularly spoke about [the deceased’s] future plans to build outside rooms at her Windmill Park residence and have [the defendant] as the beneficiary of the income when [the defendant] retired.” She suggested that the Journal was a forgery because (i) the deceased was in a lot of pain in her last days and was taking strong medication to manage it; (ii) the deceased did not have the strength to write in her Journal in the week preceding her death ; (iii) the clarity of the deceased’s mind was affected; (iv) if the Journal was written by the deceased, she was coerced into doing so by the second to eleventh plaintiffs.

[10] Not surprisingly a dispute of fact arose on the papers. Amongst others, and in addition to the allegations I have identified above, the defendant alleged in her answering affidavit that the executor had shown the Journal to her at a meeting. She noticed at the time that pages had been “ripped” [sic] from it.

[11] The application came before me and stood down. The parties agreed to refer the matter to trial. The Journal was not in the possession of the plaintiffs or under their control. It had been lodged with the Master and remained there. Because the Journal was central to the dispute and the parties (especially the defendant and her legal representatives) were entitled to inspect the Journal, and I wanted to be satisfied that the allegation that pages had been removed from the Journal was true (or untrue), I requested the Master to bring the Journal to court.

[12] I inspected the Journal in chambers on 9 June 2021 in the presence of an official in the Master’s office and the parties’ legal representatives. Thereafter the parties did so separately and perhaps jointly as well. The defendant’s legal representatives were satisfied, as was I, that there were no visible signs of pages having been removed from the Journal nor of the Journal being tampered with.

[13] The Journal was written partly in English and partly in Xitshonga. The Xitshonga portions were translated at my request by a translator who filed an affidavit. The Journal was smaller than an A4 sized sheet of paper. It was more likely the size of an A5 sheet.

[14] A number of pages in the Journal bear a signature, in most instances on the top of the page and often close to where the date and time of the entry is recorded by the author. For sake of completeness, I point out that a full signature was not appended, just initials. Notwithstanding this the witnesses referred to it as a signature. I will refer to it as such when discussing the evidence. The deceased's name is written in the front of the Journal.

[15] On the first day of the hearing I requested a colour photocopy of the entire Journal, including the front and back covers (as well as the inside of the covers). The Journal was copied such that the left page and the right page of the Journal appeared on a single A4 size sheet alongside each other.

[16] The resulting bundle of documents was introduced into evidence as Exhibit "A." I directed during the hearing that the pages should be marked sequentially and that the page on the left side of the Journal be marked with a sequential number to which the letter "a" was added. And the page on the right side of the Journal marked with the same sequential letter but with the letter "b" added thereto.

[17] The defendant's counsel recorded shortly after the trial commenced that there was no dispute that (i) the pages of the Journal attached to the founding affidavit were copies of the Journal; (ii) the copies are true copies; and (iii) the journal was lodged with the Master as being the deceased will and, was rejected by the Master.

The action

[18] In her plea⁴ the defendant denied that (i) the fourth and fifth defendants were her children. She pleaded that the deceased had only one biological brother who died in 2011; (ii) the Journal was written by the deceased or that the signatures therein were those of the deceased; (ii) all the pages in the Journal were in the same handwriting and averred that even if the Journal was written by the deceased that it was not intended to be her will.

[19] The plaintiffs led evidence to show that the defendant and the deceased were not on good terms. This in an effort to demonstrate that the diary was drafted by the deceased and that the deceased intended to exclude her mother from sharing in the estate because they were not on good terms. And that the recordal of this intention in the Journal proves that the Journal was drafted by the deceased. To meet this, the defendant insisted that she and her daughter were on good terms. This to show that there was therefore no reason for her daughter to want to disinherit her and the will could not have been drafted by the deceased.

[20] During her evidence, the defendant conceded that the Journal was written by the deceased and the signatures in the Journal were those of the deceased. It became irrelevant to show that the deceased intended to disinherit her mother because of the poor relationship and that this record in the Journal proved that the Journal was written by the deceased. In the result it became irrelevant whether the deceased had a good relationship with the defendant or not. Consequently I do not intend to narrate the evidence in this regard in detail.

[21] For the reasons set out hereunder I am satisfied that the Journal was drafted by the deceased

The issues

⁴ This was denied in the answering affidavit as well.

[22] The party who seeks in terms of section 2(3) of the Wills Act to have a document accepted as a will carries the burden to prove on a balance of probabilities⁵ that:

- (a) The document was drafted by the deceased;
- (b) The deceased died since drafting the document; and
- (c) The document was intended by the deceased to be his/her will.

[23] Once these requirements are established, on a balance of probabilities, the court does not have a discretion whether to direct the Master to accept the document as a deceased person's will; it must so direct.⁶

[24] The second requirement is satisfied in this case. Accordingly, the issues which I must consider are whether:

- (a) The Journal was drafted by the deceased personally,⁷ in other words created⁸ by her. If she had written it, then she was the person who created it and the Journal was drafted by her; and
- (b) The deceased intended the Journal to be her will.

[25] Whether pages had been removed from the Journal was resolved when the diary was inspected. I refer in this regard to paragraph [12] above.

⁵ Ex parte Maurice 1995 (2) SA 713 (C) at 715 G-H approved in Ndabele NO v the Master of the Supreme Court and another [2000] 1 All SA 475 (C) para 19.

⁶ Ndabele NO v the Master of the Supreme Court para 19.

⁷ Van Wetten and another v Bosch and others [2003] All SA 442 (SCA) para 14.

⁸ *Ibid.*

The circumstances surrounding the Journal

[26] To determine whether the Journal was drafted by the deceased and whether the deceased intended the Journal to be her will, the Journal must be examined, and it must be examined in the context of the surrounding circumstances.⁹

[27] It is common cause on the evidence that the deceased was diagnosed with cancer in March 2016, and she was hospitalized on two occasions. The first, over the period March-July 2016. She was admitted during September 2016 for the second time and died in hospital on 7 October 2016.

[28] The plaintiffs called three witnesses in support of their case.

(i) The evidence of the first plaintiff

[29] The executor testified how and when he came to meet Beverley, Moses and Peculia and the deceased's fiancé. These plaintiffs were preparing to travel to Tzaneen to bury the deceased and needed to access cash for her conveyance to Tzaneen, as well as for the funeral expenses. They presented the Journal to the executor to show that the deceased had entrusted Peculia to deal with her estate. This was the first time that the executor saw the Journal. The executor facilitated the issuing of letters of administration which enabled these plaintiffs to pay the funeral expenses.

[30] Subsequent thereto, and on 27 July 2017, the Master issued letters of executorship to the plaintiff. The executor met with the third and fourth plaintiffs as well as the defendant. When the executor told her that she had been disinherited, the defendant retorted that the deceased must have been influenced by Peculia who was the "*ring-leader*" in the quest to disinherit her.

(ii) The evidence of Beverley Rikhotso, the fourth plaintiff

⁹ Van Wetten and another v Bosch and others para 16.

[31] Beverley's testimony commenced to disprove the allegation that he was not the defendant's son. While this evidence was being led, the defendant's counsel interjected to place on record that the defendant does not dispute that Moses, Beverley and the deceased are her biological children.

[32] The deceased had lived with Beverley when she attended the Central Johannesburg College ("JCC") in 2005-2006.

[33] Moses, Beverley and the deceased were raised by their maternal grandmother because the defendant was employed a distance from where they lived.¹⁰ She sent money for their food.

[34] Beverley testified that as the brothers grew up their relationship with the defendant had also become distant.

[35] The relationship between the defendant and the deceased soured when the deceased began dating. The deceased asked the defendant to sign a suretyship for college fees. The defendant refused and told the deceased to "*go and get it from the boyfriend.*" As a result Beverley and Peculia paid for the deceased's studies.

[36] Over time the defendant and the deceased became distant. The deceased told Beverley that their mother had said to her that she (the deceased) and he (Beverley) "*think that [they] are better*" and that for as long as the defendant lived neither of them would have progeny.

[37] Whilst the deceased was hospitalized Beverley visited her two to three times per week. He also visited on weekends. Collectively over the two periods of hospitalization he visited the deceased more than ten (10) times. The deceased's regular visitors were Robert Rikhotso (the defendant's brother), Salome Rikhotso (the defendant's sister and

¹⁰ They lived in Tzaneen and the defendant worked in the Johannesburg area. There was a suggestion that she stayed in Durban at some point.

Peculia's biological mother), Peculia, Zanele, Violet, and David Tlale, the deceased's fiancé. The named female relatives bathed the deceased in hospital and if they were not able to do so, her uncle did. The named relatives took food to the deceased in hospital. He never saw the defendant during any of his visits to the deceased. He was the last person to have visited the deceased before her death.

[38] He identified the Journal as the "*diary*" which he always saw on the table to the side of the deceased's hospital bed. He took particular note of it in the last week of the deceased's life. After the deceased passed away, he, Moses, and Peculia collected the deceased's belongings, which included the Journal, from the hospital. Peculia kept these with her.

[39] He identified exhibit "B3" as a copy of the deceased's smart identity document¹¹ ("**Smart ID**") and identified the signature thereon as that of the deceased. He was asked to compare the signature on the Smart ID against the signature on one of the pages of the Journal.¹² With reference to the form and placement of the letters in the signature, he concluded that the signature on the page from the Journal resembled the signature on the Smart ID.

[40] In cross examination he readily conceded that while he had seen the Journal at the hospital, he had not seen the deceased write therein. In re-examination he was asked whether the Journal was what he saw in the hospital. He confirmed that it was. It was not put to the witness that the Journal was not the deceased's Journal. Nor was it put to him that the journal/diary which he saw at the hospital was or may have been something other than the Journal.

(iii) *The evidence of Peculia Malevu, the second plaintiff*

¹¹ Issued 27 November 2014.

¹² The page marked 8(a).

[41] The deceased and Peculia were raised in the same house and attended the same primary and high schools. They wore the same clothes and were always in each other's company. Their teachers did not know they were cousins. The witness was called "Pecu" and the deceased "Pershey." The deceased attended a college in Pretoria as well as a college in Johannesburg. Peculia helped to pay the deceased's college fees.

[42] The deceased too assisted Peculia financially. She bought clothes for her children and paid for petrol when Peculia and her husband were estranged. The deceased loved Peculia's children dearly. She spoilt them and bought them designer clothing, deaf to Peculia's protestations. She checked in on Peculia's children daily and her visits to Peculia were regular.

[43] The deceased was not able to conceive a child. Her last pregnancy was ectopic. She was advised amongst others to consider surrogacy. Peculia and the deceased agreed to Peculia being the surrogate.

[44] Peculia recalled an incident when she accompanied the deceased to visit the defendant with a view to obtaining financial assistance from her for her studies. The visit became unpleasant. The defendant claimed that the deceased had too many boyfriends and that she should be asking them for money. Both the defendant and the deceased were abusive and insulting towards the other.

[45] When in 2015 the deceased suffered a miscarriage three months into a pregnancy, she did not want the defendant to know about the tragedy because she did not want the defendant to celebrate the loss. She expected the defendant to say "I told you so." This corroborates what Beverley testified the defendant had said about him and the deceased having progeny.¹³ The deceased did not want the defendant to nurse her even though she needed care. She opted to have her aunt, Salome care for her.

¹³ Paragraph 36 above.

According to Peculia the defendant was not aware of the deceased's pregnancy nor of the subsequent miscarriage.

[46] Peculia visited the deceased in hospital every alternate day. She arranged her work day by starting early in the morning so that she could travel from her place of employment in Sunninghill to Baragwanath hospital (the former name of the Chris Hani hospital) in Soweto. She corroborated Beverley's evidence that Beverley, Robert, Salome, Zanele, Violet and David visited the deceased regularly. Even though Moses stayed in Tzaneen, he visited whenever he could and visited more than the defendant did.

[47] She only saw the defendant visit the deceased once. She was told that there was one other when she was not at the hospital. These visits by the defendant were over the period March-July 2016.

[48] The deceased's relatives bathed her at the hospital daily. The deceased expressed a wish to have her mother bathe her.

[49] After the deceased was discharged from hospital after the first hospitalization, she stayed with Salome together with Peculia's biological sister Locacia (aka Zanele) and their cousin Violet Rikhotso. They took care of the deceased. Peculia visited the deceased once a week. The deceased had conveyed to Peculia what happened during a visit by the defendant. The defendant told the deceased that she was going to die during year and that she would never have children. The visit had upset the deceased. She phoned Peculia crying uncontrollably. Shortly after the visit the deceased was readmitted to hospital.

[50] Towards the end of September 2016, the deceased wanted to have a discussion with Peculia because she said she was not going to live and mentioned that she wanted some of her belongings to go to the children. Peculia avoided the discussion.

[51] Peculia recognised exhibit “A” as the Journal in which the deceased wrote while in hospital. During the last week of her life the deceased showed the Journal to Peculia and told her that she was “*writing everything down.*”

[52] Because Peculia was reflected as the deceased’s next of kin on the hospital records she received a call from the hospital informing her that the deceased had passed away. She went to the hospital and found the deceased on the bed. She amongst others removed the deceased’s jewelry and collected the deceased’s belongings, such as her night clothes, food containers as well as the Journal.

[53] She testified that she is able to recognise the deceased’s handwriting. Her earliest memory of the deceased’s handwriting was when the deceased was in primary school. She recounted an anecdote about how bad her own handwriting was and that even though she was two years ahead of the deceased at school, the deceased’s handwriting was neater than her own. Peculia had bragged about the deceased’s neat handwriting and teased her that she had “*a model C handwriting.*” She said she was therefore able to recognise the deceased’s handwriting even if woken up from her sleep.

[54] She described and pointed out a peculiar characteristic in the deceased’s formation of the capital letters “P” and “R.”

[55] When the deceased relocated from Mossel Bay, where she had worked for Afrox for a few years, to Johannesburg she left documents such as correspondence, work books and notebooks at Peculia’s house. When the dispute as to the authenticity of the Journal arose, she searched for books and documents at her house which the deceased had left. She found a notebook/workbook which the deceased maintained when she worked at Afrox. I will refer to this book as “**the workbook.**” This was not the only documents in the deceased’s handwriting which Peculia found. The workbook was introduced into evidence as exhibit “B.”

[56] She identified some distinctive features in the deceased's handwriting in the workbook.¹⁴

[57] The workbook contained amongst others personal information concerning the deceased's attempts to conceive a child, such as the names and contact telephone numbers of doctors. The deceased had discussed her inability to fall pregnant with Peculia.

[58] She identified the signature on the Smart ID as that of the deceased.

[59] In the Journal too she identified some distinctive features of the deceased's handwriting.¹⁵

[60] Peculia was taken through several pages of the Journal and the contents thereof. She identified the handwriting and signatures in the Journal as those of the deceased.

[61] The witness was taken to an entry in the Journal on 3 October 2016 at 5h25 which reads:

"sister I cant [sic] sleep, if I think about you..."

The [sic] is no life without Pecuna Pershy"

[62] She was asked in her examination in chief what "*Pecuna Pershey*" referred to. She responded that because she and the deceased had grown up together their separate names were conjoined, and they were referred to by the conjoined name. She said they "*were even punished as 'Pecu Pershey'*". Peculia continued to say that two

¹⁴ The capital letter "R" looked like the numeral "8". The head of an arrow (denoting bullet points) looked like the capital letter "D" as opposed to taking the form of a triangle.

¹⁵ The capital letter "R" looked like the numeral "8". The head of an arrow (denoting bullet points) looked like the capital letter "D" as opposed to taking the form of a triangle.

days before the deceased's death, the deceased informed her and other members of the family that her organs were failing. The witness encouragingly said to the deceased that "*there can't be a Pecunia without a Pershey.*"

[63] Under cross examination the witness conceded that the deceased did not show the contents of the Journal to her. However, the Journal was always with the deceased and she opened the deceased's Journal after her death. She also said that at some point she saw the deceased writing in the Journal and added that she did not "*peep into private information.*" According to her, considering that the Journal was always next to the deceased's bed, no one else could have written in it.

[64] Much of Beverley's and Pecunia's cross examination was focused on the deceased's relationship with the defendant for instance (i) whether the defendant paid towards the deceased's tertiary education; (ii) the number of occasions the defendant visited the deceased in hospital; (iii) whether the defendant visited the deceased during the second hospitalization; (iii) that after the deceased had been discharged, after her first hospitalization the defendant went to Salome's house to visit the deceased, and took food along with her for the deceased.

[65] Pecunia, was also cross examined on her knowledge of the deceased's efforts at seeking treatment for infertility.

[66] What was neither put nor suggested to Beverley or Pecunia was that the Journal was a forgery or that the scribe was someone other than the deceased.

(iv) *The evidence of Moses Rikhotso, the fourth plaintiff*

[67] The plaintiffs' last witness was the deceased's brother, Moses Rikhotso who resides in Tzaneen.

[68] He testified that he had a good relationship with the defendant when he was growing up. This endured until he was in standard 8 or standard 10. After this the

defendant started fighting with him. It seems to me that the defendant, who has throughout her life been a domestic worker, was not able to afford things the witness wanted. He said that he did not take umbrage because he understood that she was a domestic worker.

[69] Moses had lived on a property owned by the defendant in Tzaneen. The defendant agreed to him improving the property and he did so. However there was discord thereafter seemingly because the defendant asked him to leave the property and did not want to compensate him for the improvements.

[70] Moses and his mother appear to have mended the relationship. He said he confronted his mother about denying his parentage, but she denied that she had done so.

[71] Moses confirmed that the deceased and the defendant had a strained relationship. He said that they were fighting. He added that the defendant can sometimes be good and sometimes not. He said he does not know what her problem is. He conceded in cross examination that there were occasions when the deceased told him that things were "okay" between her and the defendant. Later he said that their relationship was on and off, but there were good times.

[72] He visited the deceased thrice during her first hospitalization. He did not see the defendant when he visited. He knew she was at work.

[73] He stayed for three days after the deceased was hospitalised for the second time. He and Beverley were the only ones at the hospital during those three days.

[74] He recognised the handwriting in the Journal as that of the deceased. He testified that he was able to do so because he had helped her write her homework. She had also filled in forms for him for a certificate for which he was applying.

[75] He testified that he had seen the deceased's Journal under her pillow on the hospital bed a day before she died. He next saw the Journal at his uncle's house in Soweto when it was shown to him by either Peculia or Violet. He looked at the first and second page and saw the deceased's handwriting.

[76] It was put to Moses that the defendant denies that the Journal belonged to the deceased and that the signatures therein are the deceased's signatures. Moses denied that this was correct and said that he was familiar with the deceased's signature because when he was attending to the transfer of a vehicle on the deceased's behalf, he saw forms which were signed by her.

The evidence of Margaret Rikhoto, the second defendant

[77] The defendant testified that she was a domestic worker since 1982 and has been the sole breadwinner. She sent money to her children every month while they were at school. She continued to give money to the deceased for food, clothes and feminine hygiene products after the age of 18. She and the deceased's father had also sent her money after she had finished school.

[78] The defendant denied that she and the deceased fought or had disagreements. (This version had not been put to any of the plaintiffs' witnesses). The only problem she had with the deceased was that the deceased was staying with a boyfriend whilst she was still at school. The defendant said that she did not know why the deceased was with a boyfriend if she was still at school. She and the deceased however sat down and discussed this in 1996.

[79] She testified that Beverley, Moses and the deceased were disrespectful towards her and called her names. For this reason, the relationship with her sons was strained. When probed in chief how her relationship with the deceased could have been good if the latter had insulted her, the defendant responded that it was because she was the parent, and the deceased was a child. She said that at the time of the deceased's death

they had a good relationship. She mentioned that in December 2014 the deceased took her to see her new home.

[80] As far as her visits to the deceased in hospital were concerned, she visited the deceased every month from March to August, save for September when she was ill. She visited the deceased during the week as well as on Saturdays and Sundays. Salome, Zanele and Violet were always there when she visited. Peculia on the other hand was not always there.

[81] The defendant conceded that p. 3 of exhibit “B” was a photo copy of the deceased’s Smart ID. She said she had never seen the workbook (exhibit “B”-pp 5-44) and could not say whether it belonged to the deceased or not. She denied that the first and second pages of the workbook were in the deceased’s handwriting because the handwriting “*did not appear to be the handwriting*” she knew.

[82] Exhibit “C” which was introduced into evidence by the defendant is a photo copy of (i) a student card (or library card) bearing a photograph which UNISA issued to Miss P Rikhotso on 1 December 2020; and (ii) a page from a notebook (or perhaps a diary or journal) which is smaller in size than an A4 size page. At the bottom of the page from the notebook the following is written in hand on pre-printed lines:

“Patience Rikhotso Tel [...]

Acc [...] 1. Tel [...]

Branch 2749 [writing obliterated by scratching with pen on written words]

Tzaneen [writing obliterated by scratching with pen on written words]

Standard Bank”

[83] The defendant identified the handwriting on the page from the notebook as the deceased's handwriting when she was at school. She referred to the pre-printed lines as a "form" filled in by the deceased with her banking details by her and handed to the defendant. (This was not put to any of the plaintiffs' witnesses)

[84] In her examination in chief she conceded that pages 4(a), 4(b) and 6(a) and 6(b) (of Exhibit A) were written by the deceased and were her wishes on the distribution of her assets on her death.¹⁶ Under cross examination she conceded that she had had an opportunity to look through Exhibit A (a copy of all the pages in the Journal) and that the handwriting was the deceased's handwriting.

[85] She said the deceased signed her name as depicted on the student card (Exhibit "C"). I understood her testimony to be that the signature on the student card was authentic and because the signatures in the Journal differed from the signature on the student card, she doubted the authenticity of the signatures in the Journal. (This version too was not put to the plaintiffs' witnesses).

[86] The defendant however conceded that the signature on the "student card" looked different from the signature on the copy of the deceased's Smart ID (Exhibit "B" at p.3) and further conceded that Smart ID was a more recent sample of the deceased's signature. She persisted though that the signatures in the Journal looked different from that on the Smart ID.

[87] The reason she refused to concede that the signatures looked the same was because she had "*concerns about the signature.*" However, when asked under cross examination whether it was her case that someone else had appended the signatures that appeared in the Journal, she responded that that was not what she was saying. She said what she was saying was that the signatures in the Journal did not look the

¹⁶ These were not her precise words. She expressed that she saw that the deceased mentioned what she "wanted to give."

same as other signatures. It therefore seems to me that she was just not satisfied that the signatures in the Journal were those of the deceased.

[88] Later after she was asked to compare the signature on p. 4(b) in Exhibit A (a page in the Journal) with the signature on the Smart ID card (exhibit B3) she conceded that the signatures looked the same. She furthermore conceded that Peculia and Moses were better placed than her to identify the deceased's writing. She also conceded in her evidence that she cannot dispute that the signatures in the Journal are the deceased's because she was not present.

[89] Surprisingly, even though it had been accepted when the diary was inspected in June 2021 that no pages had been removed from the Journal the defendant insisted that there had only been 6¹⁷ pages in the Journal.

[90] Under cross examination, and without being questioned thereon, she volunteered that during a visit to the deceased in Soweto, the deceased told the defendant not to go to her funeral. This incidentally is consistent with the wishes recorded by the deceased in the Journal. The following entry was made by the deceased on 25 September 2016:

“Don’t write of [sic] the program that I was daughter of Margaret plz plz. When she comes to funeral plz block her She must not be part of anything.”

[91] The defendant denied that the relationship between her and her children was bad. To rebut the evidence that she had not assisted the deceased financially, she testified that she had bought a fridge from Russells which was delivered to the deceased when she working in Mossel Bay.

[92] She was cross-examined on her visits to her daughter in hospital with the aim of showing that she was untruthful in her evidence.

¹⁷ These were pp 4(a), 4(b), 6(a), 6(b), 7(a), and 7(b).

Analysis

[93] During the defendant's testimony it became apparent that there was no real dispute to try. The defendant admitted that pages 4(a), 4(b), 6(a) and 6(b) of exhibit "A", namely the Journal, were written by the deceased. She said she was however not satisfied that the signatures in the Journal were those of the deceased. She conceded however that Peculia and Moses were better placed than her to identify the deceased's signature.

[94] The evidence of Moses and Peculia proves a close relationship between the deceased and her siblings, and especially with Peculia with whom the deceased shared the intimate challenges she was facing. Not only did the deceased have a close relationship with for instance Peculia, that relationship started when they were children and endured until the deceased died at the age of 35.

[95] I find no reason to disbelieve the evidence of Moses or Peculia that they are familiar with the deceased's handwriting and that the Journal was written by her and contains her signatures; and none was advanced by the defendant in argument. Peculia was able to identify characteristics or features in the deceased's handwriting that only a person who was familiar with the handwriting of the author would recognise.

[96] Furthermore the Journal contains detailed information on various matters. The amount of information and the detail in which it has been written, points to the deceased as the source thereof. This considered against the evidence of both Peculia and Moses together with the fact that some of the entries were in the early hours of the morning and minutiae provided especially regarding the state of her health from day to day and hour to hour, I am satisfied that on the probabilities the Journal was created by the

deceased personally.¹⁸ This satisfies the requirement in section 2(3) that the document must have been drafted by the deceased.

[97] The only issue that remains is whether the Journal was intended by the deceased to be her will. The defendant did not dispute that it was an expression of how the deceased desired her estate to be distributed. However I am not convinced that such a concession by a defendant or respondent in proceedings brought in terms of section 2(3) of the Will Act is sufficient.

[98] Section 2(3) imposes upon the court the duty to satisfy itself that the document relied upon was intended by the deceased to be his/her will. The court cannot simply accept what the parties believe the deceased intended. It has been held that section 2(3) as far as it concerns determining a deceased's intention is concerned must be strictly interpreted because "*it remains of the utmost importance that there is no scope for the fraudulent introduction of a document in a situation where its supposed author is in the nature of things unable to verify the document.*"¹⁹

[99] What I must decide is whether the deceased's Journal "*constitutes the [deceased's] final instructions with regard to the disposal of [her] assets.*"²⁰ This calls for an examination of the Journal and also of the document in the context of the surrounding circumstances. In the interests of brevity I do not intend to deal with all the instructions contained therein.

¹⁸ Bekker v Naude en Andere 2003 (5) SA 173 (SCA; Van Wetten and another v Bosch and others [2003] All SA 442 (SCA) para 14.

¹⁹ Ndebele NO and Others v The Master of the Supreme Court and another [2000] 1 All SA 475 (C) at para 31 and *cf.* Theron and another v Master of the High Court [2001] 3 All SA 507 (NC) para 19.

²⁰ Letsekga v The Master 1995(4) SA 731 (W).

[100] The first entry in the Journal is dated 25 September 2015²¹ (Exhibit A, p.4(a)). This was a date before the deceased fell ill and was diagnosed with cancer. In my view the entry was written in 2016 because she states in this specific entry that she left the employ of Afrox in September 2015 and joined Gayatri paper. She was there from December 2015 to February 2016 when she started experiencing symptoms of cancer and was diagnosed on 8 March 2016. On the probabilities the entry was made in 2016 because she referred to events that occurred after 25 September 2015.

[101] According to the evidence the deceased was hospitalized for the second time in September 2016 and died in October 2016. At this time she was aware of her mortality, she knew she was going to die soon. And she recorded this in the Journal entry on 25 September 2016. She wanted to provide for members of her family, her fiancé and his family all of whom had either been good to her or had tended to her during her illness. This was something that occupied her mind.

[102] She was clearly trying to sort out her affairs while she was alive and expressed what should happen not only to her estate when she dies but also what should happen for instance to her facebook account. Her Journal contains instructions about matters apart from, and in addition to, the disposal of her estate. She recorded instructions²² such as amongst others:

- (a) The deactivation of her Facebook profile. To this end she provided two alternative pin numbers to access the facebook account,
- (b) her two cell phones must not be turned off. A pin number to access the phones is provided. Additionally she requests that all the contacts on her cell “know,” presumably of her death;
- (c) the house in Tzaneen should be painted before her funeral;

²¹ The last entry is at 10h15 on 3 October 2016, four days prior to her death.

²² These instructions are also proof that the deceased created the Journal.

- (d) a tombstone should be erected and that the money in the FNB 32 day notice account would be enough for this and should be used for this purpose;
- (e) there should be flowers for her funeral.

[103] The password and username to access her laptop is written in the Journal as well as her g-mail email address as well as the pin to access the account.

[104] Peculia was instructed to take care of the deceased's laptop. The reader of the Journal was informed that a lot of picture memories can be found on the laptop for the whole family to enjoy. She refers what should appear and not appear on the written program for the funeral, as well as the participation of persons in the funeral program.

[105] She lists individuals (together with mobile numbers) who should be informed of her death.

[106] In her Journal the deceased mentions her immovable property and her bank accounts, the cash she holds in the bank, insurance policies and her personal belongings. She lists the credit cards and store cards she holds and where they can be found and what should be done about that.

[107] She is very specific about who should receive what. These were decisions on the disposal of her estate after her death.

[108] She wanted the house in Windmill Park (a property which appears to have been owned by her) to be for the benefit of the entire family. She refers to a life insurance policy issued by Old Mutual. It seems that from the manner in which it is expressed in the Journal that it may have served as security for a debt (perhaps a mortgage bond) in the event of the deceased's death. However Moses was the beneficiary of the proceeds of the life insurance policy.

[109] She wanted "everything" in the Dawnpark house in which she lived (which appears to have been owned by the sixth plaintiff) to be left where it is for the benefit of

the sixth plaintiff, her partner/fiancé. All the “catering stuff” was also left to him so that he can continue the business they had started together. In addition to these, she gave to the sixth plaintiff the option to choose whatever of her belongings he wanted.

[110] She also discusses how her other assets and other belongings should be disposed of. While Zanele is the beneficiary of the Polo vehicle, it remains a “family car.” Her clothing to be distributed among Khethelo, Shivula, Victoria and “other family members if interested [)].” All designer jeans and fancy clothes, as well as the sewing machine, to be given to Kethelo.

[111] The X-box to Sisekelo, the 32²³ TV to be given to Bonga. The bed in Dawnpark has to be taken to Windmill

[112] As far as Peculia is concerned she made the following entry, which is not the only entry:

“Peculia I nominate you [sic] are a state representative If all my stuff that might [sic] signatures (Please don’t disappoint) [sic] Laptop to be with you sistaz.”

[113] These are all final instructions issued by a person who is preparing not only for death in the uncertain future, but by someone who was facing looming death.

[114] She expresses her intentions as to the distribution of her assets directs and identifies where documents relating to her financial matters can be found. She mentions files which contain policy numbers and directs that the sixth plaintiff should be asked to point out where they can be found. These are all strong indications of a person who is conscious of what may be required in order for her estate to be disposed of. She wanted documents that may be required to distribute her estate to be accessible.

²³ Probably meant the 32 inch TV.

[115] From the contents of the Journal, the conclusion on all the probabilities is that the Journal constitutes the deceased final instructions regarding the disposal of her assets.

[116] It is not necessary for me to make any findings regarding the relationship between the defendant and the deceased. The emotions which the deceased expressed in the Journal regarding her mother may explain why she disinherited her mother, regardless of whether they are true or not, they are irrelevant to the question whether the Journal should be accepted as the deceased's will.

[117] This brings me to the question of costs. I find no reason why the costs should not follow the result.

[118] In the result the following order is made:

1. The Master must accept for purposes of the Administration of Estates Act, Act No 66 of 1965 the Journal (or diary) (annexure "D3" to the plaintiff's declaration) submitted to the Master (and rejected by the Master on 10 October 2019) as the will of Patience Rikhotso although it does not comply with the formalities for the execution of wills referred to in section 2(1) of the Wills Act, Act No 7 of 1953.
2. The defendant is to pay the plaintiffs' costs, including the costs reserved on 9 June 2021.

S K HASSIM AJ

Acting Judge: Gauteng Division, Johannesburg

(electronic signature appended)

16 September 2022

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the plaintiff's 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 16 September 2022.

Appearances:

Dates of hearing: 9 June 2021, 5 June 2022- 8 June 2022

For the plaintiffs: Adv Nhutsve

For the first defendant: Adv Naude