IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 814/2022**
In the matter between:

SABELO ALIE MAKHANYA **Applicant**
And
ANNASTACIA NOMSA SIMELANE **1st Respondent**
THE MASTER OF THE HIGH COURT
(ESTATE LATE EM 71/2022) **2nd Respondent**

THE ATTORNEY GENERAL **3rd Respondent**

Neutral Citation: *Sabelo Alie Makhanya vs Annastacia Nomsa Simelane and 2 Others* (814/2022) [2023] *SZHC* 81 (17/04/2023)

Coram: **K. MANZINI J**

Date Heard: 10 November, 2022.
Date Delivered: 17 April, 2023.

SUMMARY: *Civil procedure – Law of succession – Formalities for a valid Will in terms of the Wills Act, 1955 – Application for Declaratory Order invalidating a Will on account of the testator appending initials on first page of a two page Will, and only signing the last page.*

Held: *Formalities of a valid will in terms of the Wills Act, 1955 have been complied with. The application is hereby dismissed.*

JUDGMENT

K. MANZINI – J:

[1] The Applicant herein is Sabelo Alie Makhanya, an adult LiSwati male who is resident at Ka-Shali, Manzini, within the District of Manzini.

[2] The 1st Respondent is Annastacia Nomsa Simelane, an adult LiSwati female who resides at Ngwane Park, Manzini, in the Manzini District.

[3] The 2nd Respondent is the Master of the High Court, cited herein in his official capacity, and based at Miller's Mansion, Mbabane, Hhohho District.

[4] The 3rd Respondent is the Attorney General, cited herein as the legal representative of all Government Departments, and based on the 4th Floor, Ministry of Justice Building, Mhlambanyatsi Road, Mbabane, Hhohho District.

[5] The Applicant herein instituted the current proceedings on the 6th of May, 2022, and applied for an order of this Court in the following terms:

5.1 Declaring the Last Will and Testament of the late Michelle Gugu Shabangu as invalid.

5.2 Costs of suit in the event of opposition.

5.3 Further and/or alternative relief.

[6] The case of the Applicant is that he and the 1st Respondent are the only biological children of the late testator Michelle Gugu Shabangu, whose death was reported to the Master's Office, in Manzini. The Testator's estate was registered under **Estate Number EM 71/2022** (paragraph 6 Founding Affidavit). It was further averred by Applicant in the Founding Affidavit that at the meeting of the next of kin, he learnt for the first time of the existence of a Will which was allegedly executed by his mother. He

pointed out that the very contents thereof did shock him, but sought legal advice when he was further perturbed by its appearance. According to the Applicant's averments in paragraph 7, he was advised after seeking such legal opinion, that the document was invalid. The reason for the alleged invalidity, according to Applicant is that the Will, though consisting of two (2) pages, these pages were not all signed by the Testator, or by the witnesses. He averred that rather, the Will was initialled on the first page, and only the last page was signed by the Testator, as well as the witnesses. He averred further that he was advised, and verily believes therefore that this is not in accordance with the law (paragraph 7 founding Affidavit)), in particular the **Wills Act, 1955**, and therefore the estate of their deceased mother ought to be distributed in terms of the law of Intestate Succession on account of the invalidity of the Will.

[7] It was the contention of Applicant's Counsel herein that indeed the Will herein is invalid for lack of compliance with the Wills Act, 1955. He opined that the Will herein is invalid because it does not conform with the dictates **of Section 3 (d) of the Wills Act (*supra*).** He pointed out that **Section 3** provides the following regarding the formalities of a valid Will, in paragraph 6 of his Heads of Argument:

"Formalities required for the execution of a Will.

3 (1) Subject to this Act no Will executed in/or after the first day of March, 1955 shall be valid unless:

(a) The Will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and

(b) 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

(c) 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

(d) If the Will consists of more than one page, each page is so singed by the testator or by such other person and by such witnesses; and

(e) If the Will is signed by the testator by the making of a mark, or by some other person in the presence and by the direction of the testator, an administrative officer, justice of the peace,

commissioner of oaths, or notary public certifies at the end thereof that the testator is known to him and that he has satisfied himself that the Will so signed is the will of the testator, and if the will consists of more than one page, each page is signed by the administrative officer, justice of the peace, commissioner of oaths, or notary public who so certifies."

[8] It was contended by Counsel herein that *ex facie*, and from viewing the very first page, the testator did not only not sign the page, but none of the witnesses signed same. He opined that the fact that the first page was only initialled by the testator and the witnesses is not in compliance with the Act, hence this renders the Will invalid (due to non-compliance with Section 3 (d)).

[9] Citing South African case law, the Applicant's Counsel fervently argued that the position in Eswatini on this point was not clear, but he opined that this Court ought to be persuaded by the position as settled by the **South African Supreme Court Case of Gregory David Harper N.O. v Govindamall and Another 730/91 (SC)**. According to Counsel for Applicant this is the most exhaustive of all of the South African cases, and

it holds the leading position in this area. On paragraph 10 of his Heads of Argument the decision is summarized as follows:

> ***"The deceased had signed a document ("Will") bequeathing his estate to his five children. After his death that document was accepted by the Master as the will of the deceased. It consisted of the second page, also bore the signature of two witnesses, but those signatories did not appear on the first and crucial page of the will. It had, however, been initialled by the witnesses. Because of that alleged deficiency the respondent in this appeal brought an application in the Durban and Coast local Division. She sought an order setting aside the will. Her interest in the application stemmed from her capacity as an intestate heir of the deceased. The Court a quo (Howard JP) allowed the application but granted the major children and the appellant leave to appeal to this court. Relying mainly on the Judgment in Melvill v The Master 1984 (3) SA 387 (C), Howard JP found that the writing of initials does not qualify as a signature for the purposes of Section 21 (1) (a) of the Wills Act 7 of 1953. That subsection provides that no will executed on or after 1 January 1954 shall be valid unless certain formalities are complied with. So, for instance, the will must be signed at the***

end thereof by the testator (or by another person acting on his direction), and two or more competent witnesses must attest and sign will. Section 2 (1) (a) (iv) then prescribes that if the will consists of more than one page, each page other than the page on which it ends, must also be signed by the testator (or by the above person) and by such witnesses anywhere on the page. These provisions must be read with the definition of "sign" in S1. In terms of that definition the word "includes in the case of a testator the making of a mark, but does not include the making of a mark in the case of a witness". And if a testator signs his will by making a mark on it, S2 (1) (a) (v) requires that it be certified by a magistrate, justice of the peace, commissioner of oaths or notary."

[10] It was pointed out by Applicant's Attorney that CORBETT CJ, EKSTEEN, JA and KRIGLER, AJA all concurred to the Judgment and VAN HEERDEN JA who held as follows:

10.1 *"The requirement for signatures of witnesses to a will provides a main safeguard against the perpetration of frauds, uncertainty and speculation.*

Disputes regarding the validity of a will can arise only after the death of a testator, which may occur many years after it was executed. Ordinarily the only persons other than the testator who are likely to have knowledge of the circumstances of the execution of a will are the witnesses who, being present, personally saw or perceived it, and can testify in that regard. That purpose fails when the witnesses cannot be identified. It may be impossible to identify a witness who has signed by initials only. In the present case, if the signature of Soobramoney had been the letter S as written on the first page of the will or the signature of S.R. Pillay had been the hieroglyph on the first page, it seems clear that there would have been difficulty in identifying these witnesses. The virtue of the signature lies in the fact that no two persons have the same handwriting, with the result that signatures are difficult to forge. Initials, by contrast, can often, with a little practice, be readily and convincingly copied. In my opinion, therefore, if there is a doubt as to the meaning of the word "sign" it should be interpreted so as to exclude signing by initials."

[11] The Counsel for Applicant further cited the case of **Dempers & Others v The Master and Others (1) 1977 (4) SA 4 (SWA), Neivilli and Another v The Master & Others (1984) SA 387** to buttress his submissions that initials do not constitute a signature, and this was premised on the South African **Wills Act No. 7 of 1953**, which he argued is in *pari materia* with our **Section 3 (d) (Wills Act, 1955** of Eswatini). He pointed out that he is aware that our own Courts of Eswatini have held that a will that is initialled by witnesses is indeed valid, but he urged the Court not to align itself with these decisions. He gave the example of the **Manyatsi and 2 Others v Jameson Gudu Vilakati N.O. and 3 Others High Court Case No. 1352/93**. Counsel herein entreated the Court to disassociate itself with these decisions on the following grounds:

11.1 In general, most of the decisions are based on dissenting Judgments, hence they remain persuasive rather than binding.

11.2 The majority of the decisions do not hold that wills were not signed but initialled by witnesses valid;

11.3 The Wills Act (supra) is specific on what is expected of the witnesses.

[12] The Applicant's Counsel maintained that the Manyatsi Case is further distinguishable from the case at hand mainly because, the grounds relied upon in the application to set aside the will was that the two (2) attesting witnesses did not sign both pages, and the testator appended his full signatures on both pages. He pointed out that *in casu*, the testator did not sign or rather did not append his full signature on the first page, but only initialled same. The Applicant's Counsel emphatically stated that it is very important that in order for a will to be valid, the testator should append his full signature to all of the pages, and more so, to the first page of the will as it is the most important page of the will.

1ST RESPONDENT'S CASE

[13] The case of the Respondent, as argued by the Counsel for this party is that the Applicant's cause of complaint is that the will offends the Wills Act in that it consists of two pages, and only the second page is signed by the testator and witnesses, whilst the first page is only initialled. The Attorney for 1st Respondent, was quick to point out that the Applicant does not

dispute that the will is that of the late Michelle Shabangu. The Respondent's Counsel further pointed out that the Applicant does not even dispute the propriety of the contents of the will, nor that it was indeed duly witnessed in terms of the law.

[14] It was argued further that **Section 3 (1) (d) of the Wills Act** of Eswatini was at the focal point of the determination in the **Phumzile Manyatsi Case** (*supra*) was similar to what is presented for determination *in casu*. The Respondents' Counsel argued that the Court in this case, though mindful of the differing decisions of the South African Courts, regarding whether or not initials should be considered to be a type of signature or a mark. He pointed out that despite the holding of the Court in the **Govindamall Case** which put to rest this debate in the South African legal arena, the Court in our own jurisdiction (Eswatini), having duly considered the South African decisions, and acknowledged the legal debate there, still arrived at a different position. The Court, per the Learned Hull CJ still held that an initial is an acceptable form of signature, and it therefore complies with the Wills Act of Swaziland (Eswatini).

[15] The Attorney for the 1st Respondent also strenuously argued that the Applicant *in casu*, has not at all disputed that the initials on the first page

of the will were indeed appended by the Testator herself. He state that for the Applicant to base its case, in seeking to impugne the will of the testator herein, solely on the fact that the will was only initialled by the testator and the witnesses on the first page, and yet it was signed on the last page by both testator and witnesses is not enough for this Court to hold that the will is invalid. According to the 1st Respondent's Counsel, the will *in casu*, does not offend the Wills Act (supra) in any way, particularly Section 3 of this Act as the issue of whether or not an initial constitutes a signature was settled by our Courts in the **Phumzile Manyatsi Case,** and settled with finality. He argued that this case has not been overturned, and the position holds true to date.

ANALYSIS AND CONCLUSION

[16] Central to the determination herein is whether the Last Will and Testament of the late Michelle Gugu Shabangu should be declared invalid as applied for by the Applicant herein. The Applicant herein has decried the propriety of fact that the Testator and her witnesses merely initialled the first page of the two page will, and only signed the last page. The argument of Counsel for Applicant was that this will offends the stipulations of the Wills Act, 1955 of this Kingdom, and it is therefore invalid for this reason.

[17] Counsel for Applicant argued that the Will of the late Michelle Gugu Shabangu violates Section 3 (1) (d) and (e) in particular. Counsel herein opined that for the very fact that the witnesses and the Testator merely initialled the first page of the Will, and signed the last page of the Will signalled that the document was invalid. He relied heavily on the **South African Supreme Court Case of Gregory David Harper N.O. v Govindamall and Another 730/91**. This case, according to Counsel held that initials do qualify as a signature for the purposes of Section 2 (1) (a) of the Wills Act 7 of 1953, which is paramateria with our own Section 3 of the Wills Act of Swaziland. The case further held that the South African Act requires that if the will consists of more than one page, then each page ought to be signed by the testator and witnesses (See Section 2 (1) (a) (iv) of the South African Act, and that this applied with equal force to all pages, including the one where the will ends. The finding made in this case was also that initials were tantamount to the making of a mark, and if a testator signs his will by making a mark on it, Section 2 (1) (a) (v) requires that the will should be certified by a magistrate, justice of the peace, commissioner of oaths, or a notary public.

[18] It is trite that the Wills Act of Eswatini (formerly Swaziland) contains provisions that are quite similar to those of the South African Wills Act.

Our Wills Act, 1955 makes provision for formalities for the execution of wills as follows:

" 3 (1) Subject to this Act no will executed on or after the first day of March, 1955, shall be valid unless:

a) *The will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and*

b) *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*

c) *Such witnesses attest and sign the will in the presence also of such other person; and*

d) *If the will consists of more than one page, each page is so signed by the testator or by such other person and by such witnesses; and*

e) *If the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, an administrative officer, justice of the peace, commissioner of oaths, or notary public certifies at the end thereof that the testator is known to him and that he has satisfied himself that the will so signed is the will of the testator, and if the will consists of more than one page, each page is signed by the administrative officer, justice of the peace, commissioner of oaths, or notary public who so certifies."*

[19] The legal debate on whether or not initials constitute a signature when appended to a will was soundly dealt with by our own Courts. The Court in **Phumzile Manyatsi and 2 Others v Jameson Gudu Vilakati N.O. and 3 Others, High Court Civil Case No. 1352/93** did this decisively. The Learned Hull CJ (as he then was) did state the following:

"In ordinary language, I would myself understand a signature to consist, at the choice of the person giving it, of his name in full, his Christian initials and his surname, or simply his initials." (page 5)

[20] The finding by the Learned Hull C.J. in this regard cannot be understood to mean anything else, other than the fact that despite the legal debate that existed in the South African legal sphere, which was settled by the 1991 decision of Govindmall (*supra*), the Chief Justice in this regard, and having full cognisance of the law in Swaziland (now Eswatini) at the time, found that a testator may use initials to sign a will. He went further to state the following:

> ***"Under the Wills Act 1955 a mark alone, or is not however sufficient in the case of a witness. That is a statutory modification of the ordinary meaning of "to sign" and its cognate expressions. No doubt a reason for that is that while the legislature acknowledges the need to facilitate the making of wills by testators, it considers that stricter requirements are reasonable and desirable for persons acting as witnesses. I do not think it follows at all, however, that because the statute precludes the signature of a witness by means of a mark, it also precludes his signature by means of initials alone. If a mark is a sufficient signature, then I agree that a fortiori initials must be so. The converse, however, is not true".***

[21] The Learned CJ also went on to explain that there are certain legislative *"special provisions"* where the testator signs by means of a mark, (that is, the requirement for the mark to be certified where the testator uses a mark to sign his will. He did point out however that it is only a testator who is by law, permitted to sign by way of making a mark, and this is not permitted in the case of witnesses. The position of the law therefore is that in Eswatini, the use of initials is recognised in our legal sphere as being tantamount to the appending of a signature (page 6). Indeed the Learned CJ proceeded to state the following:

> ***"I do not think it means anything more than that, and I do not think it has any real implications as to the adequacy of initials, per se, as a method of signature."***

[22] In view of the Applicant's failure to challenge that it was indeed the Testator and the witnesses *in casu*, who actually initialled the first page of the will, or that the document was indeed duly witnessed in terms of the Act of 1955, this Court finds that the will of the late Michelle Gugu Shabangu is valid. The Court herein also finds that the Will was properly executed in terms of the Wills Act, 1955. This Court finds no reason to align itself, or to be bound by the South African decision of the Supreme

Court of South Africa, specifically the **Govindamall case** (*supra*). This case remains merely of persuasive value to this Court, and is not at all binding.

ORDER

[23] In the premises, the application is hereby dismissed. Costs herein follows the event.

K. MANZINI
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: MR. T. FAKUDZE (FAKUDZE ATTORNEYS)

For the Respondents: MR. M. MAGAGULA (ZONKE MAGAGULA ATTORNEYS)