



REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 10631/06
& 8951/06**

In the matter between:

FLORIS BURGER

1st Plaintiff

MARIE HEYNS

2nd Plaintiff

And

**THE EXECUTOR OF THE ESTATE OF THE LATE
ELIZABETH MAGDALENA MALAN N.O.**

1st Defendant

THE MASTER OF THE HIGH COURT

2nd Defendant

JEANETTE VAN DER MERWE

3rd Defendant

THE BIBILE SOCIETY OF SOUTH AFRICA

4th Defendant

STRAND DIENSSENTRUM

5th Defendant

CHRISTELIKE MAATSKAPLIKE RAAD

6th Defendant

Coram: Yekiso J
Dates of Hearing: 16, 17, 19 & 30 November 2009, 1, 2 & 3 February 2010, 12 April 2010
21 & 22 September 2010, 16 September 2015
Date of Judgment: 20 January 2016

Summary

Conflicting opinions of expert witnesses: resolution thereof; principle applied and approach followed in deciding which opinion is preferable; principle applied and approach followed reaffirmed.

JUDGMENT

YEKISO, J

[1] Elizabeth Magdalena Malan (“Malan”) died on 10 November 2004. On 21 May 2003, and at the Strand, Malan executed a last will and testament. In terms thereof Malan bequeathed her property situate at and commonly known as number 17 Jacoma Court, Coast Road, Strand to Jeanette van der Merwe (“Van der Merwe”). In the same will Malan made a further bequest of an amount of R10 000 to the Bible Society of South Africa; a further bequest of an amount of R5 000 to the Strand Service Centre; and a further bequest of an amount of R5 000 to the Christian Social Council. The residue of her estate was to devolve to Marie Heyns and Floris Burger, her niece and nephew, respectively, in equal shares.

[2] Shortly after the death of Malan a further will, ostensibly executed at the Strand on 22 September 2004 (“the disputed will”), surfaced. In terms of the disputed will Malan bequeathed to Van der Merwe an amount equivalent to the amount which would be due and owing to Malan, ostensibly arising from an acknowledgment of debt executed by Van der Merwe in favour of Malan on 14 September 2004. On 14 September 2004 Van der Merwe executed an acknowledgement of debt in favour of Malan. In terms of that acknowledgement of debt Van der Merwe acknowledged being truly and lawfully indebted to Malan in an amount of R690 000 arising from a sale of the property situate at and commonly known as number 13 Jacoma Court, Coast Road, Strand, for an amount of R735 000 less renovations and improvements in an amount of R45 000 effected thereon.

[3] The rest of the beneficiaries in the disputed will are the same as those indicated in an earlier will executed on 21 May 2003 except that, in the case of Van der Merwe, what was bequeathed to her in terms of the disputed will is the amount which would have been due and owing to Malan by Van der Merwe, arising from an

acknowledgement of debt executed on 14 September 2004 by Van der Merwe in favour of Malan as opposed to the initial disposition to her (Van der Merwe) of the property situate at and commonly known as 17 Jacoma Court, 8 Coast Road, Strand.

[4] On the death of Malan the executor of her will, Sanlam Trust Limited, forwarded the disputed will to the Master of the High Court, Cape Town, who accepted the disputed will as Malan's last will and testament. The plaintiffs allege that the signature of Malan, as well as the signatures of the witnesses, appended on the first page of the disputed will, had been forged; and that the first page of the disputed will was not validly signed and, thus, stands to be declared invalid. Once the first page of the disputed will is declared invalid, the remainder of the disputed would be rendered meaningless and, thus, stand to be invalidated as a whole.

[5] On 3 October 2006 Floris Burger and Marie Heyns (the plaintiffs) instituted an action out of this court, as plaintiffs, in which they seek an order declaring the will of Malan executed on 22 September 2004 null and void; an order that the will of Malan executed on 21 May 2003 be declared to be Malan's last will and testament and that the Master of the High Court accepts it as such; and costs of suit only against those defendants who would defend this action, jointly and severally, the one paying the other to be absolved.

[6] Van der Merwe, the third defendant in the action, opposes the relief sought. First, second, fourth, fifth and the sixth defendants abide the decision of this court. Thus, the dispute between those parties involved in these proceedings is a question as to whether the signature of Malan and the witnesses, appended on the first page of the disputed will, are those of Malan and the witnesses. E Visser and W S Thatcher signed as witnesses.

[7] At an ensuing trial which commenced on 16 November 2009 the following witnesses testified in the plaintiffs' case, these being, Floris Burger, the first plaintiff; Lohan Burger ("Lohan"); Marie Heyns, the second plaintiff; Ms Maria Magdalena de

Lange (“Ms De Lange”); Maria Johanna Steenkamp (“Steenkamp”); and an expert witness in the person of Ms Yvette Palm (“Palm”). The following witnesses testified in the third defendant’s case, these being, Gert Jacobus Burger (“Burger”); Ms Jeanette Catherina van der Merwe (third defendant); Hendrik Ludolf Neethling Joubert (“Joubert”); and Willem Johannes Fourie (“Fourie”).

LAY WITNESSES IN PLAINTIFFS’ CASE

[8] The first witness to testify in the plaintiff’s case was the first plaintiff in the person of Floris Burger. The first plaintiff verified the handwriting of Malan in the two cards which were addressed to him by Malan during her lifetime. The handwriting so verified was amongst the documents examined by Palm, the plaintiffs’ expert, in compiling her report and the conclusion drawn arising from such an examination. Malan was an aunt of the first plaintiff.

[9] Lohan Burger was the second witness to testify in the plaintiff’s case. Malan was the sister of Lohan’s paternal grandmother. Lohan verified Malan’s handwriting on an envelope addressed to him by Malan in her lifetime. He also verified the signature of Malan on a birthday card he received from her. The aforementioned documents were also amongst documents examined by Palm in compiling her report and her conclusions arising from such examination. The evidence of Lohan Burger was not challenged.

[10] The third witness to testify was Marie Heyns (“Heyns”), the second plaintiff. Malan was the sister of the second plaintiff’s mother. The second plaintiff verified Malan’s handwriting on an envelope, a letter and a note in a book, which was amongst the documents examined by Palm in compiling her report and the conclusion arising therefrom. Similarly, the evidence of Heyns was not challenged.

[11] The fourth witness to testify in the plaintiff’s case was Ms De Lange. Ms De Lange knew Malan from their involvement in the Strand Service Centre. The centre provides social services to elderly persons. Ms De Lange verified Malan’s signature on

the indemnity forms issued by the Strand Service Centre, signed by Malan in Ms De Lange's presence. Similarly, Ms De Lange's evidence was not challenged.

[12] The last lay witness to testify in the plaintiff's case was Ms Steenkamp. Steenkamp also knew Malan through her involvement in the Strand Service Centre. Steenkamp verified Malan's signature on indemnity forms issued by the Strand Service Centre signed by Malan in her presence. Steenkamp knew Malan up until the year 2000, the latter being the year Malan ceased rendering a service to the Strand Service Centre. Similarly, Steenkamp's evidence was not challenged by way of cross-examination.

THE WILL OF 22 SEPTEMBER 2004

[13] Malan, ostensibly with the assistance of Van der Merwe, moved out of her flat at number 17 Jacoma Court into Ametis Old Age Home, Strand on 1 April 2003. Van der Merwe, together with her husband, moved into Malan's flat on 1 May 2003. Before then, Van der Merwe had stayed in a penthouse in Jacoma Court. They moved into that penthouse during December 1999. Whilst residing at Malan's flat, at number 17 Jacoma Court, Van der Merwe, together with her husband, effected certain improvements and renovations therein. The earlier will of 21 May 2003 was executed by Malan at a stage when Van der Merwe together with her husband had already moved into Malan's flat, having moved in on 1 May 2003. In terms of that will Malan bequeathed to Van der Merwe her flat, being flat number 17 Jacoma Court. Hardly a month had elapsed of the occupation of her flat by Van der Merwe and her husband that Malan made the bequest. It is ostensibly on the basis of this bequest that Van der Merwe and her husband effected improvements and renovations in Malan's flat.

[14] After about a year of taking occupation of Malan's flat, Van der Merwe and her husband, offered to purchase a bigger flat in the same block. The bigger flat that they had intended to buy is situate at and commonly known as number 14B Jacoma Court. Malan's flat in respect of which they were in occupation was still registered in Malan's name. It would appear that an arrangement was made in terms of which Malan's flat be

sold and the proceeds arising from such a sale be utilised to purchase the flat at 14B Jacoma Court.

[15] A deed of sale was drawn. In terms of the deed of sale Malan's flat was to be sold to one Willem Adriaan Fouché for an amount of R735 000. That deed of sale was signed by Malan at the Strand on 15 July 2004 whilst the purchaser, the said Willem Adriaan Fouché, signed the same deed of sale at Vredendal on 17 July 2004. Although the deed of sale was signed by the seller and the purchaser at different places and on different dates, witnesses to both the seller and the purchaser's signatures are the same. The power of attorney to effect a transfer of the property from Malan to Willem Adriaan Fouché was signed on 31 August 2004.

[16] Whilst the process of disposal of the property by way of a sale was in progress, Van der Merwe was advised of an alternative process which would achieve the same result, a process that would be cost effective and would have less onerous tax implications than would be the case in the normal transfer of the property. This could be achieved by way of execution of an acknowledgment of debt by Van der Merwe in favour of Malan purporting that Van der Merwe is truly and lawfully indebted to Malan in an amount of R735 000 less an amount of R45 000 being in respect of improvements and renovations effected on Malan's property. The acknowledgement of debt further records that the provisions thereof would be binding on the parties' executors and that, in the event of the indebtedness arising from the acknowledgment of debt not being discharged before the death of Malan, that the debt would be liquidated as provided in Malan's last will and testament. The reference to Malan's last will and testament in the acknowledgment of debt is ostensibly a reference to the disputed will executed on 22 September 2004, a period of somewhat eight days after execution of the acknowledgment of debt. The acknowledgment of debt was signed on 14 September 2004.

[17] To complete the process, Malan was required to consent to the proceeds of the sale of her property, less the costs of the renovations and improvements effected

thereon, being utilised towards the purchase of the flat at 14B Jacoma Court. The consent was similarly signed on 14 September 2004.

[18] On 22 September 2004, Malan executed a further last will and testament (the disputed will) containing the same provisions as in the earlier will executed on 21 May 2003. The only difference between the will executed on 21 May 2003 and the disputed will is that, whereas the bequest in terms of the will executed on 21 May 2003 is in the form of Malan's flat, being flat number 17 Jacoma Court, Strand, the bequest in terms of the disputed will are the proceeds of the sale of flat 17 Jacoma Court, less costs of improvements and renovations effected thereon. The signature of Malan, as well as that of her witnesses, appended on the first page of the disputed will, is challenged on the basis that those signatures were forged. It is the validity of Malan's signature, as well as the witnesses' signatures on the first page of the disputed will, which is challenged by the plaintiffs on the basis that all the signatures appearing on the first page of the disputed will are a consequence of forgery which, if proved, has an effect of rendering the disputed will invalid.

[19] Willem Johannes Fourie is a financial advisor at Sanlam since 1997. Malan was one of his clients. He could not remember when he first met Malan but was involved in the drafting of three previous wills executed by Malan, the first such will having been executed on 12 May 1999; followed by the one dated 27 January 2003; and the one dated 21 May 2003. He signed as a witness in all the aforementioned wills. Fourie drafted the will dated 22 September 2004 (the disputed will) but was not involved in an arrangement for the signature thereof.

[20] Fourie testified that when a client signs a will, he would provide the client with two unsigned wills for the client to sign. The client would then be required to sign both documents. Once signed, he would keep a copy of the client's will in his file and send the original will to Sanlam Trust for safekeeping. According to Fourie, Malan returned to his office with both signed originals. Once the signed originals were returned to him he merely checked the signatures on the document. He could not recall whether he

checked if there were any alterations to the contents of the will. He returned one of the signed originals to Malan to keep and kept the other original for onward transmission to Sanlam Trust.

[21] Van der Merwe testified that she was present when Malan, and the two witnesses, E Visser and W S Thatcher, signed the disputed will. Once the will was signed, according to Van der Merwe, she returned both signed originals to Fourie. Fourie kept one signed original and instructed her to give the other signed original to Malan. Visser and Thatcher did not testify in this trial. The explanation given was that they were too frail to come to court to testify.

[22] The plaintiffs allege in their particulars of claim that the will purportedly executed by Malan on 22 September 2004 is invalid. The allegation is made on the basis that the signature of Malan appended on the first page of the disputed will, as well as the signatures of the witnesses, had been forged. In making this allegation, the plaintiffs rely on the opinion of a handwriting expert, in the person of Yvette Palm.

[23] On the other hand, the third defendant, in her plea, denies the allegation of fraud. The third defendant contends that all the signatures appended on the first page of the disputed will are those of Malan as well as the witnesses. She states in her evidence that she was present when Malan signed the disputed will in the presence of two witnesses. In advancing the contention that the will was properly executed, the third defendant further relies on the opinion of a handwriting expert in the person of Gert Jacobus Burger.

[24] There was thus tendered in these proceedings the direct evidence of Van der Merwe, the third defendant in these proceedings, that the signatures appended on the first page of the disputed will are those of Malan and the two witnesses, who all signed the document in her presence, and the conflicting opinions of the two handwriting experts in the persons of Palm and Burger, Palm being of the view that the signatures appearing on the first page of the disputed will are a consequence of a forgery, whilst

Burger, on the other hand, does not share Palm's view and opines that the signatures appearing on the first page of the disputed will, are not a consequence of any form of forgery.

[25] The evidence of Van der Merwe is the only direct evidence relating to signature by Malan and the two witnesses of the questioned document. I think it is proper for me, to first attend to the evaluation of the conflicting opinions of the two expert witnesses before proceeding with the evaluation of the evidence of Van der Merwe.

[26] It is on the basis of the evaluation of the totality of this evidence that I am called upon to make a determination whether the signature of Malan, together with the signatures of witnesses in the persons of E Visser and W S Thatcher were validly executed.

VALUE OF EXPERT EVIDENCE

[27] Ramsbottom J in *R v Jacobs* 1940 TPD 142 at 146 -147, made an observation that expert witnesses are not the judges of fact in relation to which they express an opinion, and that judicial officers should be careful not to allow the opinion of witnesses to take the place of their own finding of fact. What is required in the evaluation of the evidence of an expert nature is to determine whether and to what extent the opinions advanced by an expert is founded on logical reasoning. In a case such as the one before me, where experts differ and, in line with the observations made in *S v Malindi* 1983 (4) SA 99 (T) 104–105, the court must decide which of the competing experts is the most credible. Factors such as reputation and experience play an important role in the course of such a determination. In the ultimate analysis what is required in the evaluation of expert evidence is to determine whether and to what extent the opinion advanced is founded on logical reasoning.

[28] In *Michael & Another v Linksfield Park Clinic (Pty) Ltd & Another* 2001 (3) SA 1184 (SCA) at [39] the Supreme Court of Appeal made the following observation:

“... It would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide ‘the benchmark by reference to which the party’s conduct falls to be assessed’.” (See also *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) at [27])

[29] Finally, in regard to this topic, Zeffertt & Paizes: *The South African Law of Evidence* at p329 observe that expert scientific witnesses tend to assess likelihood in terms of scientific certainty and that is different from what is required for judicial proof. A court does not ask whether a particular scientific thesis has been proved or disproved. In civil proceedings the court asks where the balance of probability lies on a conspectus of the totality of the evidence.

EXPERT WITNESS, YVETTE PALM

[30] Yvette Palm testified that she is a forensic document and handwriting examiner. By that she means she examines documents, not only pertaining to a piece of paper, but any surface that has legible writing on it. She examines documents in order to determine the history of the document, as for an example, ink analysis or the handwriting analysis in order to determine authorship of a specific document.

[31] The *curriculum vitae* of Palm has been filed of record. The salient features thereof are that she started her internship in 1996 at the Questioned Document Unit of the Forensic Science Laboratory of the SA Police. In 1998 she completed an Advanced Programme in Forensic Criminalistics with the University of South Africa. She attended various seminars, courses and conferences both in South Africa and internationally. She did a seminar at the South African Bank Notes Company which was specifically directed at the unique characteristics and the manufacturing of South African bank notes. She also attended a United States Secret Service Counterfeit Forensic course which was presented by the United States Secret Service Forensic Laboratory.

[32] She did a course in printing processes through the South African Printing Company in Honeydew. She attended an international conference of the American

Society of Questioned Document Examiners in Michigan, USA, where 101 experts from around the world attended the workshop. She also attended a seminar on the latest technology and trends in the handwriting analysis. She has had an uninterrupted practical experience since 1996 in the questioned document examination field. She also did numerous pre-trial consultations, examinations and court cases in high courts, lower courts in South Africa as well as in Hong Kong and Botswana.

[33] Palm concludes her evidence on her credentials by stating that she is a signed off independent expert. To be signed off as a handwriting examiner means that the person concerned has completed all six levels of training. The six levels of training referred to would involve the examination of bank notes; security features; document examination; indentation and alterations on documents; handwriting analysis; and analysis of signatures. Once you have completed training on these levels one becomes an expert forensic document examiner who can testify on all six levels upto the level of signatures analysis and thus be competent to testify on all those aspects.

EXPERT EVIDENCE OF PALM

[34] Palm testified to a considerable length about the approach and the principles applied in the process underlining handwriting and signature identification. She stated in her evidence that the identification and examination of handwriting and signature is a process encompassing the analysis, comparison and evaluation of discriminating elements and a study and comparison of writing habits. In the instance of an analysis of the document, the unknown item as well as the known item must, by analysis, examination or study, be reduced to their discriminating elements. These she calls habits of behaviour or of performance.

[35] Citing Huber & Headrick in their work: *Scientific Examination, Facts & Fundamentals*, she refers to two principles based on what the learned authors refer to as principles of Habituation and Variation. By habituation is meant, so Palm explained in the course of her evidence, that people are different because of their different collection of habits. This manifests in individuality of a person's handwriting, resulting in

handwriting identification being unique to a person. Variation in handwriting would occur by the very fact that habitual handwriting contains elements of variation. She cites, as an example, the fact that a forger may imitate one's handwriting perfectly but, in doing so, would not be able to get the variations right. It is these variations that the handwriting examiner will focus on. It is a collection of these habits, coupled with variations thereof, that set people apart from each other, that is, individuality of handwriting or, what is also often referred to as handwriting identification.

[36] And then there is a process of comparison. This entails the discriminating elements identified in the analysis and examination process being compared with the known and unknown writing. In the evaluation process, similarities or dissimilarities in the discriminating elements are identified and, these similarities and dissimilarities, in themselves, carry a certain value due to their cause, independence or likelihood of occurrence. The weight or significance of the similarities or dissimilarities of each identified element must be considered and the explanations for their occurrence explained.

[37] Palm received instructions from the plaintiffs to examine and determine the authenticity of the disputed will dated 22 September 2004 which, at that stage, had already been filed with the Master of the High Court and had been accepted as such. In the course of executing her instructions, Palm examined and photographed the document at the master's office for purposes of compiling her first report which she produced on 1 May 2006. At that stage Palm had already been provided with novelty cards written by Malan. Over and above the disputed will dated 22 September 2004, Palm was further provided with specimen signatures of the following documents, these being, a last will and testament of Malan executed during May 1999; a further last will and testament by Malan dated 27 January 2003; and a further last will and testament dated 21 May 2003.

[38] Over and above the specimens referred to in the preceding paragraph, Palm was also provided with specimen writing and signatures of J K van der Merwe (the third

defendant) on a note written "Hallo Willie" on both sides; and (5 x) Absa cheques bearing numbers 0189, 0190, 0192, 0194 and 0195 in respect of account number 0712867965 and had individually marked these specimens "F1" to "F6".

[39] The novelty cards as well as the three previous wills executed in May 1999; 27 January 2003; and 21 May 2003, all containing specimen signatures by Malan, provided Palm with a standard comparison to look at and to compare these with the signatures appearing on the three pages of the disputed will. Malan's signatures on all the specimens provided bear legible characteristics simply written as "E M Malan".

[40] For purposes of tendering her evidence Palm prepared a court chart consisting of all the questioned or disputed signatures at page 1 of the disputed will. The disputed signatures relating to the signature purportedly executed by Malan bears legible characteristics of "E M Malan"; the one of E Visser also bears legible characteristics of "E Visser"; and, the one of W S Thatcher, similarly bears legible characteristics of "W S Thatcher".

[41] Palm broke down all the signatures at page 1 of the disputed will into discriminating elements. In respect of Malan's disputed signature at page 1 of the disputed will, Palm broke this down into 12 discriminating elements and so were Malan's signatures at pages 2 and 3 of the disputed will. Malan's disputed signature at page 1 of the disputed will is marked "Q1a"; the undisputed signature at page 2 of the disputed will is marked "Q2a"; and the similarly undisputed signature at page 3 of the disputed will is marked "Q3b". As has already been pointed out these signatures, that is, Malan's signatures at pages 1, 2 and 3 of the disputed will, were each broken down into 12 discriminating elements.

[42] Based on the discriminating elements referred to in the preceding paragraph Palm proceeded to analyse, compare and to evaluate the letter "E" in Malan's signature bearing, as it does, legible characteristics of "E M Malan". The capital letter "E" of the disputed signature at page 1 in the disputed will is created with a large loop to the inside

of the body of the capital letter “E” as opposed to the initial stroke (outside) of the letter “E” without a loop as is evident if one compares it to signatures at pages 2 and 3 of the disputed will. The discriminating elements marked 2 and 3, at the bottom portion of the letter “E”, is created with a vertical flattening discernible at the discrimination element marked 2 and terminates in a prominent waved line discernible at the discriminating element marked 3 of the signature at page 1 of the disputed will.

[43] The letter “E” in the signature “E M Malan” is followed by a point. In the disputed signature at page 1, the point is placed far from the letter “E” whereas in the undisputed signatures at pages 2 and 3 of the disputed will, as well as all other three previous wills, the point is placed nearer to the letter “E”. In as far as the letter “M” is concerned, the last vertical stroke thereof is in a crooked line in the disputed signature whereas the same vertical stroke constitutes an inward curve terminating to the right in the undisputed signatures.

[44] Palm, in the course of the examination of Malan’s disputed signature at page 1 of the disputed will, compares the disputed signature with those signatures at pages 2 and 3 of the disputed will. A similar exercise is followed as regards the discriminating elements marked 4 to 12 in the signature “E M Malan”. Her examination ultimately reveals that Malan’s signatures, at pages 2 and 3 of the disputed will, are not only consistent with each other but are also consistent with all the other specimen signatures provided to Palm for purposes of comparison, these being, amongst others, the novelty cards and the three previous wills. Her examination reveals that the signature “E M Malan” appearing at page 1 of the disputed will is different to the signatures “E M Malan” appearing at pages 2 and 3 of the disputed will. Arising from this examination, Palm concludes that the signature of Malan appearing at page 1 of the disputed will is a forgery.

[45] The signature of E Visser, in line with the methodology adopted by Palm, is similarly broken into six discriminating elements marked 13 to 18 whilst that of W S Thatcher is broken into 14 discriminating elements marked 19 to 32. At pages 25 to 29

of bundle “B” Palm provides a comprehensive description of each discrimination element commencing with the signature “E M Malan”, “E Visser” and, ultimately, proceeding to that of “W S Thatcher”. Bundle “B”, as also pages 25 to 28 thereof, consisting of the comprehensive analysis of discrimination elements in respect of each disputed signature, is part of the record so that it is not necessary to repeat the analysis thereof in this judgment. That analysis of discrimination elements identified in respect of each of the disputed signatures, inclusive of elements of style and execution, forms a significant part of Palm’s evidence.

[46] In as far as the signatures “E Visser” and “W S Thatcher” are concerned, and these are the two witnesses who purportedly signed all three pages, Palm found that both witnesses’ signatures at page 1 of the disputed will contain inconsistencies with signatures on the second and the third page of the disputed will. Palm testified in detail with regards to her comparison of the characteristics and discriminating elements of witness E Visser at pages 1, 2 and 3 of the disputed will and similarly comes to the conclusion that, in all probability, the signature “E Visser” at page 1 of the disputed will leans more towards forgery.

[47] Palm comes to a similar conclusion as regards the examination of the signature and the evaluation of the signature “W S Thatcher” and this is what she had to say in her evidence:

“Once again I cannot exclude the possibility that this is a forgery. My evidence again indicates that the evidence suggest that it is a different author that wrote that specific signature. So, on a balance of probabilities, once again leaning towards forgery more than it leads to a genuine signature.”

[48] With regards to the original at the Master, the examination thereof reveals that page 1 of the original will stood out and was inconsistent with indentations at pages 2 and 3 thereof. Palm could not find adequate indentations at page 2 of the original will, but she was able to lift indentations on page 3 of the original will.

[49] Palm also examined the phrase “geteken te Strand op hierdie, 22 September 2004” written at the bottom of page 3 of the disputed will. She compared this to the specimen handwriting and signature on cheques signed and written by J K van der Merwe, the third defendant. Arising from this examination, Palm concludes that the writing and the signature on the cheques is consistent with the phrase “Geteken te Strand, op hierdie 22 September 2004”. Her conclusion is that the writing on the cheques and the writing of the phrase “Geteken te Strand, op hierdie 22 September 2004” at page 3 of the disputed will was written by the same author, this being J K van der Merwe, the third defendant in these proceedings.

[50] The presentation of Palm’s evidence on the basis of the court chart was supplemented by a very enlarged video presentation of all the discriminating elements identified. Based on this presentation one could see, with the naked eye, those aspects of the variation on all the disputed signatures that could not be regarded as natural changes but an earnest attempt at imitation.

EXPERT WITNESS, GERT JAKOBUS BURGER

[51] Gert Jakobus Burger (“Burger”) is a retired brigadier in the S A Police Service. He commenced service with the then S A Police in 1966. In the course of his service he received training as a handwriting and fingerprint expert . He holds a National Diploma in Police Administration. In October 1966 he was transferred to the Questioned Document Department where he started his internal training. In 1985 he was transferred to the S A Police, Cape Town where he was in charge of the fingerprint office until 1988 when he was transferred to Pretoria to be in charge of the Criminal Record Centre. He retired during 1992. In 1993 he commenced practice in the private sector as a handwriting and questioned document examiner.

[52] Burger’s report is contained at pages 34(a) upto page 36 of bundle “B”. It sets out a series of specimen documents furnished to him which, amongst others, include the three previous wills executed by Malan together with the disputed will purportedly executed on 22 September 2004. His examination seems to have been focused more

on points of similarities between the specimen signatures furnished to him and the disputed will purportedly executed on 22 September 2004.

[53] Annexed to Burger's report is annexure "B" which bears the heading "Beskrywing: Ooreenstemmings Naamtekeninge E M Malan"; a further annexure thereto which also bears the heading "Beskrywing: Ooreenstemmings Naamtekeninge E Visser"; and a further annexure which similarly bears the heading "Beskrywing: Ooreenstemmings Naamtekeninge W S Thatcher". The examination and the evaluation of the disputed signatures, based on several specimen documents furnished to him, seems to have been more focused on similarities between the disputed signatures and the signatures appended on specimen documents furnished to him. There is no evidence to suggest that Burger made any focus on elements such as style and execution relating to design, line continuity and writing movement as is the case in the examination conducted by Palm. Arising from the examination of such documents, Burger came to the conclusion that there is no indication of forgery amongst the documents he examined and that, whatever differences there are between the disputed signatures and the specimen documents, are as a consequence of natural variations. Burger's report did not yield much detail other than points of similarities pointed out in his report.

THE EVIDENCE OF VAN DER MERWE

[54] I have already made a point in paragraph [25] of this judgment wherein I pointed out that I will deal with the evaluation of the evidence of Van der Merwe once I shall have made an evaluation of the other evidence including the evidence of the expert witnesses. Van der Merwe testified that she met Malan during May 1990. Shortly thereafter Van der Merwe and Malan became friends. At that stage Van der Merwe stayed in a house across the street from Malan's flat. During December 1999 Van der Merwe moved into a penthouse in the same block of flats where Malan's apartment was. Van der Merwe was subsequently appointed a supervisor in the same block of flats. She was appointed during the year 2000. According to Van der Merwe, she and Malan, as friends, were in constant contact almost on a daily basis.

[55] Van der Merwe states that she assisted Malan in getting into an old age home. Malan moved into the old age home on 1 April 2003. Once Malan moved into the old age home, Van der Merwe and her husband, with Malan's permission, moved into Malan's flat. They moved in on 1 May 2003, exactly a month after Malan moved into the old age home. On 23 May 2003 Malan bequeathed her flat to Van der Merwe.

[56] Whilst staying in Malan's flat Van der Merwe purchased flat situate at number 14B in the same block of flats. There was subsequently an attempt to sell Malan's flat but to no avail. Van der Merwe had anticipated that she would pay the purchase price of Flat 14B Jacoma Court out of the proceeds of the sale of Malan's flat. It was whilst this transaction was still in progress that Van der Merwe was advised of an alternative process in the form of an acknowledgement of debt to be executed by Van der Merwe in favour of Malan. As has already been pointed out, in that acknowledgement of debt Van der Merwe acknowledged herself to be truly and lawfully indebted to Malan in an amount equivalent to the purchase price of flat 14B. Malan similarly signed a consent consenting to the proceeds of sale of her flat being utilised towards the purchase of Flat 14B. What needed to follow was that Malan's will had to be changed to accommodate that transaction. The transaction was formulated in such a way it became binding on Malan's executor. The end result of this alternative process was that a bequest of a flat to Van der Merwe was changed to a bequest to Van der Merwe of the proceeds of sale. The acknowledgement of debt, as well as consent by Malan for the proceeds of a sale of her flat being utilised towards payment of the purchase price of flat 14B, was signed on 14 September 2004. The acknowledgement of debt contemplates the inclusion of the provisions thereof into Malan's will and that the provisions of the acknowledgement of debt be binding on Malan's executor. That will, incorporating the provisions of the acknowledgement of debt as it does, was purportedly signed on 22 September 2004. That will was drawn by Fourie, Malan's then insurance broker.

[57] Fourie did the draft of the will and, once the draft was ready for signature, Fourie gave it to Van der Merwe for the latter to take it to Malan to sign. Fourie had

signed as a witness in all of Malan's previous wills except the one executed on 22 September 2004. Van der Merwe stated in her evidence that Malan signed the will in her presence and in the presence of two witnesses. Once the will was signed Van der Merwe inserted the date on which the will was signed at the bottom of the last page thereof. In the course of her evidence, Van der Merwe's legal team had to withdraw due to conflicting instructions resulting in the postponement of the matter.

[58] The evidence of Van der Merwe is the only direct evidence relating to signature of the will executed on 22 September 2004 by Malan in the presence of two witnesses. However, Van der Merwe's evidence cannot be viewed in isolation. Her evidence has to be analysed and evaluated on a conspectus of the evidence as a whole. Van der Merwe testified that Malan signed the will executed on 22 September 2004 in the presence of two witnesses, these being E Visser and W S Thatcher. These are the two witnesses who could not come to court to testify due to their frailty. The fact that the two witnesses could not come to court to tender their evidence, does not assist Van der Merwe's cause.

[59] I accept that Van der Merwe and Malan met during 1990 and that, shortly thereafter, they became friends. I further accept that, in the course of such friendship, Van der Merwe assisted Malan in being admitted at Ametis Old Age Home, Strand on 1 April 2003. I further accept the fact that Van der Merwe, together with her husband, moved into Malan's flat on 1 May 2003 was as a consequence of the friendship that existed between Van der Merwe and Malan. I am even prepared to accept the fact that Malan bequeathed her flat to Van der Merwe was as a consequence of the existence of a bond of friendship between the two of them.

[60] Once Van der Merwe was nominated as an heir to Malan's estate, Van der Merwe acquired what the Romans used to call *spes successionis* (an expectation of inheritance). That expectation could only be realised on the death of the testatrix and, in the instance of this matter, on the death of Malan. Once Van der Merwe had purchased flat 14B, it would appear, the expectation of inheritance had to be

metamorphosed into the acquisition of a benefit arising from such expectation which had to be realised in Malan's lifetime. Suddenly a need arose for Van der Merwe to accelerate into fruition what initially was an expectation of inheritance into a right to acquisition of inheritance in Malan's lifetime. The first attempt to do so was by way of an attempted sale of Malan's flat and, when that could not be achieved, by way of an acknowledgement of debt by Van der Merwe in favour of Malan. Arising from the whole of this, the bequest to Van der Merwe of Malan's flat had had to be changed to a bequest to Van der Merwe of the proceeds of sale of Malan's flat in her lifetime.

[61] With regards to the question as to whether the disputed signatures at page 1 of the disputed will are those of Malan and the two witnesses, I have before me the direct evidence of Van der Merwe and the conflicting evidence arising from the opinions of the two experts in the persons of Palm and Burger. *Abdo N.O. v Senator Insurance Co Ltd* 1983 (4) SA 72 (E) provides an elaborate exposition of the way in which opinion evidence must be handled in a civil case when there are mutually destructive accounts about the issue in dispute. In that case it was said that the court must first look at the direct evidence; if that is unacceptable, the court must decide which opinion is preferable and base its decision on it. (See Zeffert & Paizes: *The South African Law of Evidence*, supra, at 329).

[62] It is quite evident in the instant of this matter that Van der Merwe has an interest in the matter in dispute and her evidence, and the evaluation thereof, has to be handled in the light of this fact. In the instance of this matter I cannot, on the basis of Van der Merwe's evidence, find that Malan's signature, as well as the signatures of the two witnesses, at page 1 of the will dated 22 September 2004, are not a forgery, particularly in the light of the demonstrable evidence of Palm that Malan's signature, as well as the signatures of the two witnesses, are a consequence of forgery. As for the opinions of the two experts, clearly the opinion of Palm and the evidence emanating therefrom, is preferable to that of Burger for the reasons stated in paragraph [50] and [53] of this judgment. In view thereof I do find that the plaintiffs have succeeded to make out a case for the relief sought in prayers (a) and (b) to the plaintiffs' particulars of claim.

[63] And, then of course, there is a question of wasted costs arising from the postponement of the matter on 3 February 2010 and 12 April 2010. The blame for wasted costs arising from these postponements clearly has to be laid at the door of Van der Mewe, the third defendant. The third defendant should, therefore, be held liable for costs arising from those postponements.

[64] In the result I make the following order:

- (1) The last will and testament of the testatrix, Elizabeth Magdelina Malan, dated 22 September 2004, is declared to be null and void;
- (2) The earlier will of Elizabeth Magdelina Malan, the testatrix, dated 21 May 2003, is declared to be the last will and testament of the testatrix, Elizabeth Magdelina Malan;
- (3) The Master of this court is ordered to accept the last will and testament of the testatrix, Elizabeth Magdelina Malan dated 21 May 2003, as her last will and testament;
- (4) The third defendant is ordered to pay the costs of suit, including wasted costs arising from the postponement of the matter on 3 February 2010 and 12 April 2010 on a party and party scale, duly taxed or as agreed.

N J Yekiso
Judge of the High Court

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