

**IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE No. 41815/2009

DATE:07/06/2011



DELETE WHICHEVER IS NOT APPLICABLE

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

REPORTABLE

(In the electronic reports only)

In the matter between:

GARY LIPCHICK

First Applicant

CHARLENE LIPCHICK
DESIREE HIRNER

Second Applicant
Third Applicant

and

THE MASTER OF THE HIGH COURT

1ST Respondent

NICOLE LIPCHICK

2ND Respondent

CANDICE LIPCHICK

3RD Respondent

JUDGMENT

WILLIS J:

[1] There has been tragic feud among relations which has played itself out in this case. The first respondent, who is the Master of the High Court, has been caught up in the middle. He has agreed to abide the decision of the court. The second applicant is the daughter-in-law of the testatrix. The remaining parties are the grandchildren of the late Fay Lipchick. I shall refer to her as “the testatrix”. The dispute is concerned

with the validity of testamentary dispositions by the testatrix. The testatrix died on 1 April 2009, a few days short of her ninety-fifth birthday.

[2] It is common cause that the parties have made several vain attempts to settle the matter. Unsettled, this is a dispute that will haunt the parties for years, regardless of what the correct legal determination of the matter may be. The decision of the court will determine whether the heirs of the testatrix are the applicants only or the applicants together with the second and third respondents. The value of the estate of the testatrix is approximately R3 million. At all times material to this dispute, the testatrix had been the widow of the late Israel Lipchick.

[3] The testatrix and Israel had three children. All of them were sons: Rodney, Leon and Daryl. Rodney was murdered in a robbery in 1992. As could be expected, the murder of Rodney deeply affected the testatrix. The surviving spouse of Rodney is Charlene Lipchick. She and her two children, born of her marriage to him, are the applicants in this matter. Leon predeceased the testatrix on 31 December 2004, having been terminally ill for quite some time. Leon was seriously ill at the time of the critical events in question in this particular case. Leon's children are the

second and third respondents. Darryl emigrated to Australia. He still lives there. He never married and has no children.

[4] The affidavit of Harry Heinz Schwarz, which was annexed to the founding papers, is of critical importance. The affidavit was deposed to on 11 September, 2009. The date of the present application is 29 September 2009. The contents of this affidavit are not disputed. Harry Schwarz was prominent in South Africa in political, business and professional circles in the 1970's and 1980's. He had been an advocate for some time during his career. At the time of deposing to the affidavit he was practising as an attorney in a consulting capacity. Annette Schwarz, the wife of Harry was a cousin of the testatrix. Harry Schwarz has, in the meantime, died as well.

[5] In his affidavit, Harry Schwarz describes how the testatrix had been distraught over the conduct of her son, Leon in early December 2004. Sometime between 9 and 13 December, the testatrix had discussed the situation with him. Leon had wanted the testatrix to move into a retirement home. She was adamantly opposed to this. He had been complicit in taking her motor vehicle from her. Leon had been given a power of at-

torney by her to operate her banking account. She had discovered in early December that Leon, relying on this power of attorney, had withdrawn some R700 000- from her bank account leaving her with a mere R300-. She believed that Leon had plans to sell her flat and move her out of it.

[6] The testatrix told Harry Schwarz that she wished to revoke her previous will dated 19 February 2004. In that will she had left each of her four grandchildren the sum of R50 000- and had left her flat, her motor vehicle and the residue of her estate to Leon. She had also provided, in that same document, that should Leon predecease her, then her entire estate would devolve upon her four grandchildren in equal shares.

[7] A copy of this will was handed to Harry Schwarz by one Alan Steinberg, an accountant on about 11 December 2011. This will had, in turn, been handed to Alan Steinberg by Leon, together with a codicil. The codicil purported to have been signed by the testatrix on 20 September, 2004. It provided to an amendment to the effect that in the event that Leon predeceased her, then her entire estate would devolve upon Leon's wife and failing her, Leon's two children, the second and third re-

spondents. Other than the bequest of R50 000- to each grandchild, the effect of the codicil would have been to exclude the first and the third applicants from any inheritance from their grandmother.

[8] According to Harry Schwarz, the testatrix denied having made the codicil and on 12 December 2004 wrote across it "I revoke this codicil". She signed next to these words. Her writing was given in a firm, clear, big, bold hand. Having examined her will of 19 February, 2004, the testatrix told Schwarz that she wished to make a new will. Schwarz offered to do this for her but the testatrix said she would do so herself. The testatrix went away, taking the will of 12 December 2009 together with the codicil in question with her. The testatrix wrote a new will which she later handed to Schwarz and which he filed away in his office. He did not witness the will but confirms her handwriting and that it was signed by her. The new will was dated 13 December 2004. It was signed by the testatrix but was not witnessed. The issue of the codicil is not dealt with anywhere in the affidavits filed on behalf of the respondents.

[9] The new will reads as follows:

1. I, Fay (Fanny) Lipchick make this my last will and revoke all previous wills and codicils.

2. I appoint my grandson Gary Lipchick as my executor and direct that he should not have to furnish security.

3. I appoint as my heirs the following:-

My daughter-in-law Charlene Lipchick, my granddaughter Desiree Hirner (Lipchick) and my grandson Gary Lipchick.

I have signed this will in Johannesburg on 13th December 2004.

F. Lipchick

Alongside the reference to her daughter-in-law, her granddaughter and her grandson as heirs there is an asterisk with the words "In equal shares" next to it. The will is in her own handwriting and signed by her. This appears not only from the affidavit of Harry Schwarz but also the affidavit of a handwriting expert, Cecil Greenfield. Again, as when she revoked the purported codicil, she has written in a firm, clear, big, bold hand.

[10] Harry Schwarz's affidavit is corroborated in all material terms by his wife, Annette. In her affidavit, Annette Schwarz says that the testatrix was so hurt by what she considered to be the betrayal of her by her son Leon and his family that she, the testatrix, had even refused to attend Leon's funeral.

[11] Schwarz also kept on file a copy of a letter dated 17 December 2004 which the testatrix wrote to Leon because, in her own written words, “it is difficult for us to have a discussion”. Schwarz confirms that this latter was written and signed by the testatrix. It is letter of a woman who is outraged. Indeed, she uses the term “outrage” herself. The testatrix forcefully reproaches her son Leon that he had withdrawn the sum of R699 998,80 and transferred this sum into her account without her permission. She protests that she has lost interest of R53 504,14. She remonstrates that “without my permission” (and underlining these words) her motor vehicle was removed from her garage. She protests that, as a result of Leon’s conduct, she did not have money to pay her staff their salaries or their bonuses. She complains that

It was arranged without any discussion with me to have a driver (living in Wendywood) to take me around. This driver charges R69-50 per hour. I play Bridge once a week, have my hair done once a week and shop once a week. This would cost me ± R210 a week. An outrage!! I want my car returned to me!

In this letter, she demands the return of the money taken from her and revokes the power of attorney given to Leon. There is no dispute that the second respondent made arrangements for at least R300 000 – of

the money alleged to have been withdrawn from the bank account under the power of attorney to be repaid to the testatrix.

[12] After the death of Leon, but before the death of the testatrix, there were disputes over jewellery of the testatrix which had been taken from her and were in the possession of Leon when he died. The applicants allege that some of this jewellery but not all of it was returned. As at March 2005, attorneys for the testatrix were, during her lifetime demanding the return of certain jewellery to her or payment of the sum of slightly more than R120 000- in lieu thereof.

[13] The broad outline of these facts has been confirmed in two affidavits signed by Daphne Zwirn, a neighbour of the testatrix who knew both testatrix and her husband, Israel, well. Daphne Zwirn said that she saw the testatrix on the day before she died and although she was then very frail, she was “up to the time of her death, mentally stable, mentally alert, had complete clarity of mind and showed no sign whatsoever of mental deterioration”. She described the testatrix as always having been “very intelligent” and “able to discuss –with great clarity and insight- anything from politics to environmental matters”. Another friend

of the testatrix, Julie Krossynski says that the testatrix had always appeared mentally alert to her.

[14] Hector North, an attorney who advised her on various matters from December 2004 to November 2005 pours cold water on the notion that the testatrix was of unsound mind at the time when he had dealings with her. A Dr Fred Sievers has said that the testatrix was a patient of his for many years for routine attendances and that at all times, including December 2004 she was “*compos mentis* and well able to handle her affairs”.

[15] In her answering affirmation, the second respondent says that “after the death of my father, my grandmother, the testatrix, was left to deal with her affairs by herself”. The second respondent, who is an attorney, describes how the testatrix fell in mid-2008 and it became apparent that she required assistance. According to the second respondent, the testatrix had given cash cheques to her gardener who had told the testatrix’s domestic worker and the caretaker of the building where the testatrix lived that he had won the lotto.

[16] Initially, when I came into the case, it seemed that the dispute was mainly concerned with whether the applicants had discharged the *onus* in terms of section 2 (3) of the Wills Act, No. 7 of 1953 (“the Wills Act”), to satisfy the court that the will of 13 December 2004 was indeed written by the testatrix and intended by her to be her last.

[17] Section 2 (3) of the Wills Act reads as follows:

If a court is satisfied that the document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1) .

As a result of a series of recent decisions in the Supreme Court of Appeal (“the SCA”), it has become quite clear that the essential question, when considering this section, is whether the deceased intended the document to be her will and, if this is the case, then the court has no discretion in the matter – it must make the order that the Master is to accept it as a will for the purposes of the Administration of Estates Act even

though it may be deficient in respect of certain formal requirements relating to its execution.¹ During the course of argument, it became clear that there can be no real dispute that the document in question was indeed written and signed by the testatrix on 13 December 2004 as her will.

[18] As the argument gathered momentum, it emerged that the second and third respondents' main contention is that, at the time when the testatrix signed that document on 13 December 2004, she was mentally incapable of appreciating the nature and effect of her act and that the court ought to declare the document invalid as a will in terms of section 4 of the Wills Act. This issue was not raised by the second or third respondents in their answering affidavits. It was raised for the first time in November, 2010.

[19] Section 4 of the Wills Act reads as follows:

¹ *Van Der Merwe v The Master and Another* 2010 (6) SA 5144 (SCA) at paragraphs [11] to [16]; *Smith v Parsons NO and Others* 2010 (4) SA 378 (SCA) at paragraphs [5] to [8]; *De Reszke v Maras* 2006 (2) SA 277 (SCA) at paragraph [11] and *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) at paragraphs [14] to [16].

Every person of the age of 16 years may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest upon the person alleging the same.

Mr *Hollander*, who appeared for the second and third respondents, accepted correctly that, upon a plain reading of this section (which, in any event, is a restatement of the common law), his clients bore the *onus* to show that the testatrix was mentally incapable of appreciating the nature and effect of the will which she signed.²

[20] Mr *Hollander* submitted that, as there were disputes of fact as to the soundness of the testatrix's state of mind at the time when she signed the document on 13 December 2004, I should

² Grotius, *Inleiding*, 2.15.4; *Tregea and Another v Godart and Another* 1939 AD 16 at 51: "The decision in *Kunz v Swart* shows that according to our common law the *onus* lies on a party attacking a will valid on the face of it."; *Kuntz v Swart and Others* 1924 AD 618 at 681-2: "The presumption is, therefore, in favour of the will"; *Harlow v Becker NO and Others* 1998 (4) SA 639 (D&CLD) at 647 D: "On discharge of that *onus* the person who contests the validity of the document as a will on the ground that the person who executed it did not have the requisite testamentary capacity then bears the *onus* to prove the absence of testamentary capacity on the part of such person."; *Geldenhuys v Borman NO and Others* 1990 (1) SA 161 (E) at 164 D: "Thus both under the Wills Act and under common law the *onus* is on him who asserts invalidity to prove mental incapacity at the time of making the will."; *Essop v Mustapha and Essop NNO and Others* 1988 (4) SA 213 at 221; *Kirsten and Others v Bailey and Others* 1976 (4) SA 108 (C) at 109 G: "The *onus* of proving the invalidity of a will which is regular on the face of it rests on the challenger."

refer the matter to oral evidence. Even if this were the correct order to make on the basis of there being a dispute of fact, there would be practical difficulties. A number of the critically important *dramatis personae* are dead: the testatrix, her son, Leon and Harry Schwarz.

[21] In general terms, the principles applicable to resolving disputes of fact in motion proceedings are well known: the facts as stated in the respondents' affidavits together with the admitted or undisputed facts in the applicants' affidavits form the basis for application and where the application cannot properly be decided on affidavit, then it should, in terms of Rule 6 (5) (g) of the Uniform Rules of Court, be referred either to oral evidence or to trial, whichever is more appropriate.³ Where, however, there is no real, genuine or *bona fide* dispute of fact, different considerations apply.⁴ Where the allegations or denials of the respondents are far-fetched or untenable, the court may reject them merely on

³ See, for example, *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C), *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

⁴ See, for example, *Petersen v Cuthbert & Co. Ltd* 1945 AD 420 at 428, *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5, *Da Mata v Otto* NO1972 (3) SA 858 (A) at 882D-H, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (*supra*) at 635A-C.

the papers.⁵ I accept the argument of Ms *Woodward*, who appeared for the applicants, that if one looks carefully through the various sets of affidavits filed by or on behalf of the second and third respondents, there is no dispute of fact about the critical events that took place in December 2004: all that has been given are belated, bald expressions of opinion by the second respondent on matters which she is not qualified definitively to assert. In effect, Ms *Woodward* politely, but deftly, admonished the court to “keep an eye on the ball”.

[22] I accept that, on the papers before me, there may be a genuine or *bona fide* dispute of fact as to the testatrix’s state of mind from mid-year 2008 to the time of her death in April 2009. Nevertheless it is clear that there is no dispute as to what Harry Schwarz or Daphne Zwirn, said about her in December 2004, the time when she wrote the will in question. There is no dispute that she wrote the letter to her son, Leon in the same month, December 2004, remonstrating with him in her clear, strong hand. In that letter she records details of withdrawals from her account to the last cent. She played bridge once a week at this time. Bridge playing is incompatible with being *non compos mentis*.

⁵ See, for example, *Associated South African Bakeries (Pty) Ltd v Oryx and Verenigde Bäckereien (pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G-924D, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd (supra)* at 635A-C.

[23] It is nonsense to suppose that when she wrote her will in December 2004, the testatrix was not of sound mind. Moreover, it is the second respondent's own version of events that after her father's death (which occurred approximately two weeks after she wrote her will), the testatrix "was left to deal with her affairs by herself". At no stage after December 2004 up until the time of the testatrix's death in April 2009 did the second respondent, an attorney, bring an application for the appointment of a curator in terms of Rule 57 of the Uniform Rules of Court. The second respondent's protests that the signs of the testatrix's mental incapacity are to be found in her "paranoia" about the way in which she had been treated by her son, Leon are dashed on the rocks of hard fact: it is incontestable that the testatrix was justifiably incensed with Leon in December 2004.

[24] It is salutary to bear in mind that in *Tregea and Another v Godart and Another*⁶ Tindall JA, adopted the following test for testamentary capacity referred to by Cockburn CJ in *Banks v Goodfellow*⁷:

⁶ 1939 AD 16 at p 49

⁷ 1970 L.R. 5 Q.B. 549 at p578

The testator must in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree, whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he has been intimately acquainted; he may at times ask idle questions, and repeat those which have been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this ... had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will?

[25] Mindful moreover of the *onus* which rests on the second and third respondents to show that their grandmother was of sound mind when she wrote her will, I am satisfied that there is no dispute of fact which should be referred either to oral evidence or to trial. The respondents' contention that the testatrix was not of sound mind when she wrote her will in December, 2004 is so far-fetched and untenable that it may be rejected on the papers. The applicants are entitled to the substantive relief which they seek.

[26] Counsel for the applicants has asked that the court order the second and third respondents to pay the applicants' costs of the application on an attorney and client scale, after the filing of the founding papers. Counsel has done so by reason of the second and third respondents' attempts to secure the Master's acceptance of the testatrix's previous will, well knowing, however, that this dispute awaited resolution in the court. I have been tempted to make such an order. As I have said, this has been a family feud. Leon Lipchick's conduct was primarily responsible for his mother, the testatrix, deciding to disinherit not only him but also his children, the second and third respondents, who are the grandchildren of the testatrix. Leon has long been dead and buried. A

punitive costs order will, in my view, serve only to deepen the bitterness which has ensued among the grandchildren of the testatrix. A wise exercise of a discretion, it seems to me, is to overlook, in all the circumstances, the conduct of the second and third respondents when it comes to the question of costs.

[27] The following is the order of the court:

- a) The Master of the High Court is directed to accept the handwritten will dated 13 December 2004, a copy of which was annexed to the applicants' founding affidavit as Annexure "GL1", as the last will signed by Fay Lipchick for the purposes of the Administration of Estates Act, No 66 of 1965, even though it does not comply with all the formalities for the execution of wills referred to in Section 2 (1) of the Wills Act, No.7 of 1953;
- b) The document which appears to have been a codicil dated 20 September 2004 signed by the aforesaid Fay Lipchick is declared to have been revoked;

- c) The second and third respondents are jointly and severally liable, the one paying, the other to be absolved, to pay the applicants' costs in this application.

DATED AT JOHANNESBURG THIS 7th DAY OF JUNE, 2011

N.P.WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicants: Adv. *J.A Woodward SC*

Counsel for the 2nd and 3rd Respondents: Adv. *L. Hollander*

No appearance for the 1st Respondent

Attorneys for the Applicants: Trevor Swartz

Attorneys for 2nd and 3rd Respondents: Kampel Kaufmann Rakitzis

Date of hearing: 25th May, 2011

Date of judgment: 7th June, 2011