IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3871/2017
Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

ANDRE HAMMAN	First Plaintiff
MARRY GERTRUDE HAMMAN	Second Plaintiff
And	
THE MASTER OF THE HIGH COURT	First Defendant
ERIC STEPHEN DU PREEZ NO	Second Defendant
CHARLOTTE MATTY GOUWS	Third Defendant
SALOME LEONARA LAMPRECHT	Fourth Defendant
MATHILDA DU PREEZ	Fifth Defendant
MELANIE JONKER	Sixth Defendant

HEARD ON: 10,11,13 August & 5 October 2021

WRITTEN HEADS OF ARGUMENT

DELIVERED ON: 8, 11 & 13 October 2021

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 31 January 2022.

[1] On 22 October 2015 the late Mrs. Olga Valentia Gouws ("the deceased") executed a will ("the first will") in which she bequeathed her townhouse situate at number […] E[…], Brampton road, Bloemfontein to the plaintiffs. The rest of her estate to devolve upon her domestic helper, niece and sisters the third to fifth defendants.

[2] The deceased passed away on 9 January 2017. She was divorced and had no children of her own. Subsequent to her death another will drafted by the second defendant the nominated executor and dated 6 January 2017 ("the second will") was lodged with the first defendant ("the Master") as her Last Will and Testament.[1] In this will the deceased bequeathed her estate her sisters and her niece, Ms Jonker the sixth defendant.

[3] In this action the plaintiffs seek an order declaring that the second will is not valid on the grounds that at the time the deceased signed the said will she was afflicted with dementia which impaired her mental capacity to execute a valid will, the first will is the Last Will and Testament of the deceased and the Master be ordered to accept the first will as the Last Will and Testament of the deceased.[2]

[4] The Master abides by the decision of the court.

[5] The rest of the defendants resist the plaintiff's claim. In their provisional counterclaim they likewise dispute the validity of the first will on similar grounds, that the first will is also invalid because at the time the deceased signed it she suffered

[1] Annexure "B" and "C" of the plaintiff's particulars of claim.
[2] Paragraph 14 to 17 of the plaintiffs' particulars of claim.

from the ailments referred to by the plaintiffs therefore the deceased died intestate.

[6] For the sake of convenience the second defendant shall be referred to as the "executor" and the rest of the defendants as the "deceased's relatives."

[7] The following facts are not in dispute. The plaintiffs were the deceased's neighbours and associative family during her lifetime. On 22 October 2015 the deceased executed a will in terms of which the plaintiffs, the deceased's domestic helper Ms Nmasebolai Thinyane, Ms Charlotte Pietersen, Mr Ruhan Kleynhans and her sisters are named as beneficiaries. The second will was signed on 6 January 2017 whilst the deceased was admitted at the ICU of the Rosepark Hospital. In this will only the deceased's relatives are named as beneficiaries.

[8] It is trite that a will executed by a person who is mentally incapable of appreciating the nature and effect of his/her act is invalid.[3] The onus is on the plaintiffs to prove on a preponderance of probabilities that at the time the deceased executed the second will she was so ill to the extent that she was not capable of appreciating the nature and effect of making a will.[4]

[9] In their quest to prove that the second will is not an expression of the true intentions of the deceased the plaintiffs led the evidence of the second plaintiff Mrs. Hamman and Dr Frederik Christopher Johannes Bester.

[10] Mrs Hamman relayed the events leading up to the hospitalization of the deceased. She testified that she is married to the first plaintiff. They came to know the deceased in August 2007 when they moved into a townhouse next to hers. The deceased lived alone and for about nine years except for two telephone calls the deceased received from the eldest sister Charlotte none of the deceased's relatives visited the deceased.

[11] The deceased became part of her family. She treated the plaintiffs like her own children and their two sons as her own grandchildren. The plaintiffs visited her

[3] Section 4 of the Wills Act 7 of 1953.
[4] Kunz v Swartz 1924 AD 618 at 692.

daily, spent all special holidays with her, birthdays, braais and also catered for her needs by driving her to the shops for grocery shopping, paying her bills, driving her to doctors' appointments and visited her whenever she was admitted in hospital.

[12] She stated that on 28 May 2016 the deceased was admitted at a hospital due to some wounds on her leg. Although she called to inform the deceased's relatives about her hospital admission none of them visited. Mrs. Hamman visited the deceased and thereafter cared for her with the assistance of the deceased's domestic helper Ms. Thinyane.

[13] She told the court that she started to realize that something was amiss about the deceased's mental state on 19 October 2016 when she visited her and found her confused and hallucinating about her husband. The deceased told her that her husband was there whereas he was not. Her observations that the deceased was not of sound mind were later confirmed by Dr Bester when the deceased was required to sign and submit Pension Fund documents.

[14] On 23 October 2016 the deceased fell ill again and her doctor arranged that she must be hospitalized. Her relatives were again informed, the only reaction which came from Charlotte was merely to enquire whether everything had been prepared for the deceased's impending hospital admission. She also mentioned that she had been informed that the plaintiffs would be inheriting from the deceased's estate. At that stage the plaintiffs were not aware that the deceased had bequeathed her townhouse to them in her first will.

[15] Pursuant to the deceased's admission the affected leg was amputated and upon discharge the deceased was admitted at an Old Age Home where the plaintiffs continued to pay her visits regularly. During that time Mrs. Hamman received a series of emails from the executor. In the emails dated 27 October 2016, 25 November 2016 and 5 December 2016[5] the executor essentially informed Mrs Hamman that the deceased's relatives were far away they could not drive to Bloemfontein to visit the deceased. He later informed her that they had ultimately

[5] Trial Bundle constituting of Pleadings, Notices, deceased's medical records and correspondences between the parties.

visited the deceased and found her in a worse condition. Her medical condition had become so serious that she would no longer be able to take care of her own finances a curator should be appointed to manage her affairs.

[16] She told the court that a power of attorney in terms of which the executor was appointed to manage the affairs of the deceased was apparently signed on 21 December 2016.

[17] Dr Bester is a specialist physician with more than 20 years speciality in internal medicine and complicated diagnosis involving seriously ill patients admitted in the ICU. He testified in relation to the mental state of the deceased at the time she signed the second will.

[18] It was his testimony that on 6 January 2017 at approximately 8am he attended to the deceased at the ICU in Rosepark hospital. She had been admitted earlier at about 01h05 presenting with fever, confusion, hypertension, respiratory distress. These symptoms are indicative of advanced dementia, lung infection and the worst kind of diabetes.

[19] He found her out of breath, her lungs were wheezing and her oxygen readings were below 80% requiring 20% oxygen supplementation with an oxygen mask.

[20] The deceased was his patient for quite some time before her admission. She was diabetic and constantly suffered from lung infections. He diagnosed her with dementia on 9 November 2016.

[21] He told the court that diabetes can and it had caused extensive damage to the deceased's brain and lower extremities by restricting blood supply to the skin and this resulted in her skin breaking out with sores, open wounds and one of her leg being amputated. The deceased was also suspected of having bone marrow cancer.

[22] As regards dementia, it is a chronic condition of the brain it affects cortical brain functions such as memory, learning capacity and judgement. The deceased's confusion was as a result of respiratory distress caused by low oxygen

levels.[6]

[23] It was his evidence that the memory effect is so serious that although a person can remember people that he/she knows and properties that he/she owns the short term memory is extensively affected to an extent that the person in this state cannot even remember the room he/she was a few minutes ago.

[24] He stated that due to these ailments the deceased's cognitive function in the sense of the capability to make good, proper and informed decisions was lost and the situation was exacerbated by medication. On their own, antibiotics and antipsychotic drugs that were prescribed to the deceased cause confusion and drowsiness.

[25] Dr Bester disputed the defendants' version that when the deceased was presented with the second will to sign at about 10am of the same morning she was admitted she was of sound mind. He stated that it is impossible that the deceased would have recouped her cortical functions senses at that time because dementia is a progressive condition it does not improve but worsens.

[26] He stated that the executor was aware of this fact as he had requested a report on the prognosis of the deceased's condition about a month before the deceased executed the second will.[7]

[27] In cross-examination he was told that at the time the deceased signed the second will she was mentally capable to do so because she was conscious, she signed the admission documents, ordered a meal from a hospital menu, she understood when the will was read out to her, she confirmed the contents, was able to recognize Mrs Jonker and could also remember her assets.

[28] In response, Dr Bester was adamant that notwithstanding the fact that the deceased recognized the faces of the people around her and conversed with them she could not have been of sound mind to have made such "executive" decisions like

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[6] Pages 271 to 272 of Exhibit "C" are copies of the admission clinical records in that regard.
[7] Exhibit "B"' is Dr Bester's report dated 14 November 2016 and states thus: *"Geliewe kennis te neem dat bogenoemde gevorderde kognitiewe inkorting her en nie maar haar persoonlike sake kan behartig nie.* Sy *is voorts ook fisies afhanklik en bonidig institusionele versorging."*

signing a will.

[29] At the conclusion of the plaintiffs' evidence counsel for the defendants argued that the defendants ought to be absolved from the instance as no sufficient or *prima facie* evidence had been proffered by the plaintiffs to establish every element of the plaintiffs' cause of action.

[30] I exercised my discretion and refused absolution because mental incapacity may arise due to the fact that the testator is of unsound mind or as a result of a disease. In this matter the evidence tendered by the plaintiffs' medical expert that at the time that the deceased purportedly signed the second will she was suffering from dementia as a result she could not appreciate the nature and effect of making a will was uncontroverted. It is also trite that the fact that a testator may have been conscious and approved the contents of a will does not necessarily mean she was of sound mind she may have still lacked the mental capability necessary for the execution of a valid will. See *Harlow v Becker NO and Others* **1998 (4)** SA 639 (D) at 644A.

[31] Mr. Gerrie De Lange and Mrs. Melanie Jonker testified for the defendants' case on the circumstances surrounding the signing of the second will.

[32] Mr. De Lange testified that on 6 January 2017 he was on duty at Rosepark hospital where he worked as a supervisor for Federal Parking Services. He was responsible for managing the parking pay points at the hospital's premises. Mrs. Jonker approached him and asked him to sign a will as a witness, he agreed. They went to the deceased's ward and found her lying on the bed with an oxygen mask over her face. She greeted him as usual and she could also remember his name. She did not look confused at all.

[33] It was his evidence that in the deceased's ward there was also another lady present. She read the will to the deceased who responded by saying "that's what I wanted." He then signed the will and left before witnessing either the deceased or the other witness signing the will.

[34] It was Mr. De Lange's testimony that it was the first time that he met Mrs Jonker on that day. After she had asked whether he would be willing to sign a will as a witness he told her he would, provided he won't get into trouble as he had previously signed his uncle's will under similar circumstances and the validity of that will was later disputed.

[35] He said Mrs. Jonker informed him that the doctors and the nurses had refused to witness the will and that he must first speak to the deceased to certify that she was able to understand and speak normally.

[36] He stated that when he observed that the deceased was in ICU he thought that could have been the reason why the nurses and doctors refused to sign the will and if he had been aware that the deceased had been diagnosed with dementia he would not have signed the will.

[37] Mrs. Jonker is the deceased's niece. During October to November 2016 she received a call from an aunt who lives in Mpumalanga informing her that the deceased was very ill she must try and go see her.

[38] She went to see the deceased a day after her leg was amputated thereafter she visited her daily until she passed away. She said at all the times that she visited the deceased was able to recognize her, she had a good memory and regaled her with family stories and she was also able to give her instructions regarding her assets by telling her which assets she wanted to keep at the Old Age Home and which assets could be sold.

[39] After the deceased was discharged from the hospital the family took a decision that she must be accommodated at the *Ons Tuiste Old Age Home* as she still needed care.

[40] She confirmed that there was indeed an incident when she noticed that the deceased was confused and could not recognize her. She took her to hospital where it was discovered that she had high fever.

[41] The executor is her uncle and the drafter of the second will on the instructions of the deceased. On the day the second will was executed she went to the hospital and found the deceased sleeping. She could see that she was critically ill. She woke her up with a touch the deceased asked her what was she doing there. She responded by informing the deceased that she was in possession of the will that had been drafted by the executor enquired whether the deceased was willing to sign the will. The deceased asked for her eye glasses in order to read but was unable to because of the face mask. Mrs Reeder then read it to her after that, the deceased confirmed the contents and signed the will. The deceased signed first followed by Mrs. Reeder then lastly by Mr. De Lange.

[42] When asked by counsel for the plaintiffs why she insisted on having the deceased sign the will despite the fact that she was critically ill and in ICU she said she worked long hours and the executor had said if while she visited the deceased she found her to be in a good state she must get her to sign the will.

[43] She admitted that she was aware that the deceased had been diagnosed with dementia though she had no knowledge of what the condition entailed. According to her, the deceased was lucid and not confused at all.

[44] As regards the counterclaim, Mrs Jonker stated that she did not see the deceased in 2015 therefore she could not allege that at the time the deceased signed the first will she was not mentally fit to execute the will. She was not even aware that there was a counterclaim instituted on the defendants' behalf and on that basis.

[45] It was her testimony that she knows Dr Bester very well as she is also his patient. She holds him in high regard as far as his expertise are concerned.

[46] Thus is in short the summary of the facts before this court. On the facts germane to this matter it has been established that the deceased had executed two wills the first one on 22 October 2015. The other will was executed on 06 January 2017. The validity of the first will is no longer in dispute. The only issue that I have to determine is whether the deceased was mentally competent to execute the second will.

[47] I have found no reason not to accept Mrs. Hamman's evidence. The significance of her testimony is that during her lifetime the deceased enjoyed a meaningful and close relationship with the plaintiffs. She regarded them as her family. In my view, this is a strong indicator that the first will expresses her true wishes, namely, to bequeath part of her estate to the plaintiffs.

[48] As regards Dr Bester's testimony, I have found no evidence to gainsay his evidence that he is qualified to express an opinion on the medical condition of the deceased. His expertise as a specialist physician in the field of internal medicine and complicated diagnosis of critically ill patients is uncontroverted and in fact confirmed by Mrs Jonker who is also one of his patients.

[49] My conclusion that his opinion is not merely premised on pure theory or general knowledge is fortified by the fact that he had examined the deceased approximately two hours before she signed the purported second will, he had been her physician for quite some time before her confinement and he is the one diagnosed her with dementia a month before her confinement. I'm satisfied that he provided an unbiased and valuable opinion in this regard.

[50] On the other side the defendants had sought to rely on the evidence of Mr De Lange and Mrs Jonker to prove that when the deceased signed the second will there was nothing untoward about her mental capabilities.

[51] Given the contradictions between Mr De Lange and Mrs Bester's evidence with regard to the circumstances under which the second will was signed I was asked by counsel for the defendants to disregard Mr De Lange's evidence.

[52] I'm in agreement with the submissions by the defendants' counsel however, Mrs Jonker's evidence also does not take the defendants' case any further in that besides the fact that she is not a medical doctor to have been able to assess the deceased's mental capabilities to execute a will her conclusion that the deceased was mentally capable because she was not confused and was able to respond when spoken to is refuted by medical evidence which its effect is that due to being afflicted

with dementia and other chronic mind dilapidating conditions the deceased was not mentally cable to execute a will.

[53] As I have already pointed out in paragraph [30] above, the fact that the deceased was conscious and lucid does not necessarily mean she was of sound mind.

[54] It is also important to note that on the available evidence the deceased could not read the will as she was unable to see without her eye glasses and she could not wear the eye glasses due to the mask covering her face. Someone else read it to her. Therefore, it cannot be said that when she signed the will she knew what she was signing and that she appreciated the nature and effect of her actions.

[55] I am satisfied that the plaintiffs have proved on a balance of probabilities that at the time the deceased signed the second will she was mentally incapable of appreciating the nature and effect of her actions.

Costs

[56] On the facts of this matter nothing militates against the general rule that costs should follow the result.

[57] In the premises, I hereby make the following order:

1. The will signed by the deceased on 06 January 2017 is invalid.

2. The will signed by the deceased on 22 October 2015 is declared valid.

3. The first defendant is ordered to accept the deceased's will dated the 22nd October 2015 as the Last Will and Testament of the deceased.

4. The second, third, fourth, fifth and sixth defendants to pay the costs of this action jointly and severally one paying the other to be absolved.

5. The counterclaim is dismissed with costs.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Plaintiff:	Adv. SJ Reinders
Instructed by:	Honey Attorneys
	BLOEMFONTEIN
Counsel on behalf of 2nd to 6th Defendants	Adv. HJ Booysen
Instructed by:	Patrick Stilwell Attorneys
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