

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

Case Number:3871/2017

Reportable: NO/YES

Of Interest to other Judges: NO/YES

Circulate to Magistrates: NO/YES

In the matter between:

CHARLOTTE MATTY GOUWS

Applicant

And

ANDRE HAMMAN

1st Respondent

MARRY GERTRUDE HAMMAN

2nd Respondent

THE MASTER OF THE FREE STATE

3rd Respondent

ERIC STEPHEN DU PREEZ NO

4th Respondent

SALOME LEONARA LAMPRECHT

5th Respondent

MATHILDA DU PREEZ

6th Respondent

MELANIE JONKER

7th Respondent

HEARD ON:

This application was determined on the basis of written arguments instead of an oral hearing.

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 27 June 2022.

[1] This is an opposed application for leave to appeal against my judgment and the consequent order delivered on 31 January 2022 in terms of which the will of the late Mrs Olga Valentia Gouws, dated 6 January 2017 in which she bequeathed her estate to the applicant and the fifth to seventh respondents was declared invalid and her other will signed two years earlier on 22 October 2015 in which she bequeathed her estate to the applicant, first, second, fifth and sixth respondents was declared as her Last Will and Testament. The fourth to seventh respondents were ordered to pay the costs of the action jointly and severally one paying the other to be absolved.

[2] In the main action, the first and second respondents were the plaintiffs and the applicant and the third to seventh respondents were the defendants. For the sake of convenience, the parties are referred to as cited in the main action the applicant herein as the third defendant and the first and second respondents as the plaintiffs.

[3] The application is, by consent between the parties determined on the basis of written heads of argument.

[4] The application is based on the provisions of s17(1) (a) (i) or (ii) of the Superior Courts Act 10 of 2013 which have heightened the threshold of the test applicable in applications for leave to appeal in that, leave can only be granted if I'm certain that that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard. See *Acting National Director of Public Prosecutions & others v Democratic Alliance* in Re: *Democratic Alliance v Acting National Director of Public Prosecutions & others* **(19577/09) [2016] ZAGPPHC 489** (24 June 2016); **[2016] JOL 36123 (GP)**.

[5] The onus is on the third defendant to fulfil this stringent threshold by convincing this court that she has prospects of success on appeal and that based on those facts another court would come to a different conclusion.

[6] I deem it unnecessary to repeat the background facts of this matter in this application as they are comprehensively illustrated in my main judgment, paragraphs 1 to 7.

[7] The third defendant has submitted a lengthy notice of appeal which comprises of nine (9) grounds of appeal which are essentially premised on the grounds that this court erred in declaring the will signed on 6 January 2017 invalid on the grounds that when Mrs Gouws signed the will she was mentally incapable of appreciating the nature of her actions by reason of being afflicted with dementia despite the fact that at the time that she signed the will the doctor who had apparently diagnosed her with dementia was not present.

[8] I have dispassionately considered the grounds for appeal and the written heads of arguments filed by the respective parties and conclude that in my main judgment I'm of the view that I have adequately dealt with all the aspects raised by the third defendant in the grounds of appeal.

[9] At paragraph 48 of my judgment I alluded to the fact the defendants did not lead any expert evidence to gainsay the evidence led by the plaintiffs' expert, Dr Bester to the effect that when Mrs. Gouws was admitted at the hospital on 6 January 2017 which is the day that she allegedly signed the will she was in a state of delirium resulting from respiratory distress caused by advanced dementia, lung infection and worst kind of diabetes as a result, it was impossible that barely nine (9) hours later she would have regained her cortical senses to be able to understand and appreciate the nature and effect of her actions.

[10] Dementia or any other physical ailment on its own does not reduce a testator's power to make a will provided, the testator still has the sufficient intelligence to understand the testamentary act. See *Tregea and Another v Godart*

and Another **1939 AD 16** and *Essop v Mustapha and Essop NNO and Others* **1988 (4) SA 213** (D).

[11] In this matter, it was Dr Bester's undisputed testimony that Mrs Gouw's physical ailments affected her capacity to make good, proper and informed decisions. His evidence that due to her ailments, she was also heavily medicated with antibiotics and antipsychotic medication which had an effect on her mental state was also uncontroverted. Furthermore, it was also common cause that a year before this will was purportedly signed by Mrs Gouws, on 14 November 2016 Doctor Bester had provided the defendants with a medical opinion on their request to the effect that Mrs Gouw was mentally incapable of managing her own affairs.

[12] I'm thus not persuaded that the appeal would have any reasonable prospect of success neither is there is any compelling reason why the appeal should be heard. The third defendant's application for leave to appeal stands to be dismissed.

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

1. The application for leave to appeal is dismissed, the applicant shall pay the costs.

NS DANISO, J

For the applicant:

Mr. HJ Booysen

JH Booysen Attorneys

BLOEMFONTEIN

For the respondent:

Adv. SJ Reinders

Honey Attorneys

BLOEMFONTEIN