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

Appeal No.: 2549/2012

In the matter between:

SIDNEY HENRY MOORCROFT	Plaintiff

and

THE MASTER OF THE FREE STATE HIGH COURT, BLOEMFONTEIN	1st Defendant
MERISE MONTEZ BUCKHAM, N.O.	2nd Defendant
CORNELIUS MARTINS LUBBE N.O.	3rd Defendant
GERT FREDERIK MOORCROFT	4th Defendant
MARIA ELIZABETH ("MARIETJIE") POTGIETER	5th Defendant
WENA CONRADIE	6th Defendant
JULIANA MULLER	7th Defendant
CATHARINE MARIA ("MOLLIE") MOORCROFT	8th Defendant

CORAM: LEKALE, J

JUDGEMENT: LEKALE, J

HEARD ON: 18, 19 and 21 FEBRUARY 2014;
2 and 5th FEBRUARY 2015

DELIVERED ON: 19 FEBRUARY 2015

INTRODUCTION AND BACKGROUND

[1] This is a defended action for a declarator, inclusive of associated relief, to the effect that:

1.1 The 2010 testament is not valid due to the fact that the testatrix could not understand the nature of her actions as contemplated by section 4 of the Wills Act No 79 of 1953 (the Act)at the time when she signed the same;

1.2 The 2009 testament is the valid Last Will and Testament of the testatrix.

[2] On the 10th July 2008 the testatrix, the late Ms Naomie Meintjies, executed a Will (the 2008 testament) in terms of which she, *inter alia*, bequeathed her member's interest in a close corporation, livestock, farm accessories and implements to the plaintiff as her sister's son. She further appointed Absa Trust Limited (the Bank) as the executor. A year later on the 30th November 2009 she executed a second Will and Testament (the 2009 testament) to the same effect as the 2008 testament in so far as the bequest to the plaintiff is concerned and effectively appointed the third defendant, in his capacity as senior partner of the firm of attorneys NO Oelofse Inc., as the executor.

[3] In 2007 the testatrix suffered cerebellar stroke and, as a result of which she began showing signs of Parkinson's disease as well as dementia according to her physician. Her condition deteriorated gradually until her doctor referred her to a psychiatrist who evaluated her on the 20th January 2010 and found that, due to her medical prognosis and condition, she was not in a position to manage her own affairs and/or to

understand the implications and consequences of her actions. The specialist in question, further, concluded that her medical prognosis was not only poor but would also worsen rather than improve in the future.

[4] A *curator bonis* was appointed on the 10th June 2010 to manage the testatrix's affairs at the behest of the 4th defendant. The testatrix eventually passed away on the 23rd May 2011 and the first defendant appointed the third defendant the executor in her deceased estate in accordance with the 2009 testament.

[5] On the 24th January 2012 the first defendant notified the third defendant of the existence of a Will and Testament signed by the testatrix dated the 17 May 2010 (the 2010 testament). The Will in question appointed the Bank as the executor and, further, bequeathed the testatrix's member's interest in the close corporation to the 4th defendant as opposed to the plaintiff. The third defendant was, further, required to return the letters of executorship appointing him an executor to the first defendant for cancellation and he obliged.

[6] The plaintiff felt aggrieved by the developments and, on the 19th June 2012, instituted instant proceedings on the ground that the 2010 testament is *void ab initio* alternatively invalid because the testatrix was not capable of disposing of her estate within the contemplation of section 4 of the Act when she signed the same.

[7] The second and fourth defendants (the defendants) resist the claim and maintain that, as at the time of signing the 2010 testament, the testatrix was possessed of a sound and disposing mind and memory.

[8] The other defendants filed no papers in the action and effectively abide the decision of the court.

DISPUTE

[9] The parties are at variance on whether or not the testatrix was mentally incapable of executing a will when she signed the 2010 testament regard being had to available expert opinions on and eyewitness accounts of her condition at the relevant time.

PLAINTIFF'S VERSION

[10] In support of his claim the plaintiff tendered the evidence of five witnesses inclusive of himself.

10.1 **KATINKA BOTHA** she is a psychiatrist and holds a MMed (Psychiatry) degree. She was a general practitioner for 12 years before she took up specialisation in psychiatry. She has been in private practice since 2008 as such. She is an expert in matters of behaviour and illnesses that cause behavioural problems in patients. In her profession she is able to express opinions on the

ability of people to understand the disposal of assets by way of testaments. On the 20th January 2010 she consulted with the testatrix after the latter was referred to her by her physician, one Dr Anderson. The purpose was to determine whether or not it was necessary to appoint a curator for her in the light of her condition. The testatrix's medical history was that she suffered a stroke which led to cognitive impairment on her part. She had Parkinsonism symptoms and dementia. As at the date of consultation the testatrix had not been taking care of her own affairs for six months. She was confined to a wheelchair and was hemiplegic. During consultation the testatrix's attention was easily attracted and maintained to the extent that the impression created was that she understood what was happening. On conducting further tests it became apparent that she did not really understand what was happening. There was a significant impairment in her medium and long-term memories. She could not remember significant dates in her life, nor could she remember her (the doctors) name despite having just introduced herself. Her immediate memory was also impaired to the extent that after 10 minutes she could not recall anything that was said to her. There were no abnormalities in her speech and when she spoke she could be

understood and she herself appeared to understand what transpired around her when that was, in fact, not the case. The testatrix was scored 20 out of 30 in the Mini-Mental State Examination (MMSE) which was a significant indicator of dementia. She found that the testatrix was unable to understand or manage her own affairs and was, further, unable to comprehend the implications of certain, if not all, of her actions. She could not plan ahead and could, further, not even structure simple activities of daily life and she, thus, concluded that the testatrix needed permanent care and that a curator be appointed for her. According to her to a lay person or a person not as qualified as she is the impression might be created that a person in the testatrix's position knew what she was doing when, in fact, she knew nothing. There was no possibility that the testatrix's position would improve. In her view Dr Anderson was not in a better position to express an opinion regarding the condition of the testatrix because one needs to do objective testing in order to understand a patient in such a position. Dr Anderson, as a general practitioner, has no experience in such tests. In her opinion, the testatrix's appearance, her conversation which consisted of a normal speech and the fact that she had no hallucinations or delusions could

have led Dr Anderson to believe that she was lucid when, in actual fact, she was not. When her cognition was objectively tested it was so grossly bad that there existed no possibility that she could have any lucid moments. In a trail making test the testatrix did not even have planning ability and could not understand the consequences of anything. The testatrix appeared lucid when she was speaking to her but was grossly impaired when she tested her objectively during the same time frame. In her view when the testatrix signed the 2010 testament she would have known that she was signing but would not have known what she was signing. She emphasised that the testatrix's condition was permanent and could not have improved. In fact it would have declined.

10.2 **ILZE EISELEN**

She holds a MMed (psychiatry) degree and is currently a medical lecturer. She also does forensic work at the Free State Psychiatric Complex. After completion of MBChB degree in 2000 she worked as a general practitioner, whereafter, she went to work overseas in psychiatry for four years before she returned to the Republic of South Africa where she did MMed. She feels comfortable expressing

opinions on psychiatric issues. She did not consult with the testatrix but had the benefit of perusing and considering the report prepared by Dr Botha on her. She, thereafter, compiled a report on her (Botha's) evaluation. In the process she had sight of other documents such as an affidavit and handwritten notes of Dr Anderson. From those documents she concluded that the testatrix had vascular dementia and that her condition was permanent in that it would have deteriorated rather than improved. In her view it was extremely unlikely or impossible for her condition to improve so as to be able to execute a Will some few months after seeing Dr Botha. In her experience she has never encountered a patient with dementia and mini-mental score of around 20 improving in 5 months' time to be able to actually appreciate the signing of a testament. The MMSE is a standardised test throughout the world. A score of 20 out of 30 signifies severe dementia with severe cognitive impairment. According to literature dementia is a deteriorating illness and it does not improve.

10.3 **SIDNEY HENRY MOORCROFF**

He is the plaintiff and the testatrix was his mother's sister. In 2008 he went to stay on a

farm near the testatrix's farm so as to be able to look after her. He knows nothing about the 2010 testament. On the 17th May 2010, the day on which the testament was apparently signed, the testatrix had her domestic worker phone him in the afternoon to call him over. On arrival at the testatrix's home he was with his wife and the testatrix was very distressed and complained that she signed something but did not know what she signed. She confirmed that she was in the company of the fourth defendant and the latter's wife when that happened. He phoned the fourth defendant and let the testatrix talk to him. The testatrix talked to the fourth defendant in their presence and he could hear the latter's response when he, *inter alia*, undertook to bring a copy of the document which the testatrix signed. The fourth respondent never obliged. The domestic worker who called him could have been Lisbet.

10.4 **JOHANNA SUSANNA MOORCROFT**

She is married to the plaintiff and she knew the testatrix. She repeated and corroborated the plaintiff's evidence about how Lisbet, the testatrix's domestic helper, called them and how the testatrix was upset about having signed something the nature of which she did not know. She further testified about how her husband

dialled the fourth defendant's number for the testatrix, who asked the latter about what she had signed and requested him to bring a copy of the same over. She also confirmed how the fourth defendant undertook to bring the relevant document the following day but never did.

DEFENDANT'S CASE

[11] On their part the defendants called three witnesses.

11.1 HENRY PETER ANDERSON

He is a general medical practitioner and obtained MBChB degree in 1986. He further holds a MMed in Family Medicine which he obtained in 2001. He also has a number of certificates relating to advanced courses he attends on yearly basis in, *inter alia*, child life support. He is capable of ascertaining if a person is capable of making a testament. He came to know the testatrix as a patient at his practice in 2006. He confirmed that the testatrix suffered a stroke in 2007 and her condition gradually deteriorated until he referred her to Dr Botha, who saw her in January 2010. He thought he saw signs of cognitive impairment and felt that the testatrix needed to see an expert. It was, further, necessary to refer her in order to determine the need for appointment of *curator bonis* as she appeared not to be able to manage her own affairs. He prepared

a handwritten note at the time indicating that the testatrix was, *inter alia*, showing signs of dementia. On the 17th May 2010 he attested to the testatrix's signature on the 2010 testament after assessing her and satisfying himself that she understood that she was signing a testament. He consulted with the testatrix and did MMSE and scored her 26 out of 30 although he only kept mental notes and did not write anything down. According to his knowledge that score indicated that the testatrix was normal. The testatrix was lucid and even put clarity seeking questions to the bank branch manager, Ms Pelser who was explaining contents of the testament to her. As a general practitioner with some experience he knows that patients can have lucid moments. In medical terms it cannot be said that it is hundred percent "merely impossible" for the condition of a patient with dementia to improve as Dr Eiselen testified. In medicine nothing is ever hundred percent certain. He diagnoses patients as and when he sees them and not on the basis of previous diagnosis. He has seen patients improve cognitively. The testatrix understood the nature of her actions and had the capacity to make a Will on the day in question. Alzheimer's disease as cause of dementia is not a real disease. It goes on and off. Patients suffering from it get worse and worse but there are times when they are better in the prognosis of the condition.

11.2 **MINNIE PELSER**

She was the branch manager of Absa Bank in Senekal when the impugned Will was executed. The testatrix approached her at the bank with a request to amend her 2008 testament by substituting the name of the fourth defendant for that of the plaintiff. She did the necessary and forwarded the draft to Bethlehem for the alterations to be effected. When the altered Will came back she discussed the same with the testatrix but the latter was not happy because she wanted only the member's interest in the close corporation to go to the fourth defendant and not the farm implements and other loose assets. She remembered that the aforegoing was, in fact, the testatrix's desire when she first gave her the instruction and that it was, as such, her mistake. She did the necessary and forwarded the instruction to Bethlehem for drafting. When the altered draft came back for signing she and another branch official attended at Dr Anderson's surgery for the testatrix to sign. It was necessary for the testatrix to sign before a doctor because a *curator bonis* was in the process of being appointed for her due to her condition. The testatrix had the necessary capacity to execute the Will in that she understood the contents and the meaning thereof. She even put questions to her regarding the meaning of terms such as beneficiaries and what would happen to their bequests in the event of them predeceasing her.

11.3 **LISBET MAFA**

She was the testatrix's domestic worker during 2010 and the only times the latter used to instruct her to call the plaintiff and his wife was when she needed food. She was never instructed to call the plaintiff when the testatrix was upset or crying. Neither was she ever instructed to call the plaintiff to just make a turn on the farm.

SUBMISSIONS BY THE PARTIES

[12] In argument Mr Snyman, for the plaintiff, submits that it is clear from the evidence of the two experts that the testatrix could not reasonably possibly have had the requisite testamentary capacity when she signed the 2010 testament because she was afflicted by dementia which, as a medical condition, cannot improve but can only deteriorate. Dr Anderson contradicted his earlier deposition in favour of the appointment of a *curator bonis* in so far as he effectively testified in court that the testatrix's condition had improved as at the date of the 2010 testament whereas in his affidavit he stated that the testatrix's condition was permanent and would rather deteriorate than improve.

[13] For and on behalf of the defendants Mr Els retorts that under cross-examination the two psychiatrists did not completely rule out the possibility of a person with the same diagnoses

as the testatrix making a Will when they gave certain examples to the court. In his view the circumstances leading to the signing of the Will and the evidence of Dr Anderson, as the only practitioner who assessed the testatrix on the 17 May 2010, indicate that she was able to make a Will when she signed the 2010 testament. The impugned Will is, according to him, straightforward as opposed to being complex and this fact should play a role in determining whether or not a person was able to make a Will. The action should, thus, be dismissed with costs in his view.

APPLICABLE LEGAL PRINCIPLES

[14] The parties are correctly and effectively in agreement that the test in determining testamentary capacity is whether or not the person whose Will and Testament is in question was, at the time of executing the same, of sufficient intelligence, possessing of sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all its different bearings. (See **Naidoo NO and Another v Crowhurst NO and Others** [2010] 2 ALL SA 279 at para [16].

[15] It is, further, correct as the parties submit that, where testamentary capacity on, *inter alia,* the basis of mental incapacity is an issue the onus lies on the party asserting the same. (See Section 4 of the Wills Act No. 7 of 1953 and **Geldenhuys v Borman NO and Others** 1990 (1) SA 161 (E) at 164D – E.

[16] As Mr Els correctly reminds the court, such an onus of proving testamentary incapacity must be discharged in the clearest manner. (See **Kunz v Swartz** 1924 AD 618 at 692.)

APPLICATION OF PRINCIPLES AND FINDINGS

[17] The parties are effectively *ad idem* that as at the 20th January 2010, when the testatrix consulted Dr Botha she was afflicted by dementia after suffering cerebellar stroke in 2007. They are, further, in agreement that the condition in question rendered her long and medium term memories dysfunctional and was regarded by both her general medical practitioner and the psychiatrist who saw her as being permanent and liable to deteriorate rather than improve.

[18] Dr Anderson, in effect, does not dispute that in medical circles dementia is generally regarded as a permanent irreversible condition but holds the view that it is not 100% permanent because he has seen patients improve cognitively.

[19] The question in the instant matter is whether or not between the 20th January 2010, when the testatrix consulted Dr Botha and the 17th May 2010, when she signed the 2010 testament her condition improved to such an extent that she was mentally capable of appreciating the nature and effect of the act of disposing of her estate through a testament when she signed such a Will.

[20] Only Dr Anderson and Ms Pelser saw and had contact with the testatrix when she signed the impugned testament. They both testified that she had the requisite capacity. Pelser's conclusions are based on the testatrix's physical appearance and her interaction with the testatrix when the latter, *inter alia*, sought clarity on certain terms in the testament. Dr Anderson's opinion is also based on the testatrix's physical appearance and his interaction with her when he did the informal Mini-Mental State Examination with a view to assessing her orientation, attention, calculation, immediate and short term memory, language and her ability to follow simple commands.

[21] Dr Botha, however, warned against subjective impressions and pointed out that deeper objective tests needed to be conducted in order to fully appreciate the condition affecting the testatrix. She further pointed out that the relevant condition could mask itself with the testatrix appearing to the ordinary eye to have good mental functionality when that was, in fact, not the case. The evidence of Pelser, as a lay person, can, thus, be discounted as not reliable in so far as Dr Botha's evidence in this regard was not disputed. The defendants' position in this regard is simply and effectively that Dr Anderson, as a physician with substantial experience in dealing with patients such as the testatrix, is an expert and can, as such, determine if a person is capable of understanding the nature and effect of his actions and can even conduct the MMSE. The issue is, therefore, whether or

not his evidence on the testatrix's condition at the relevant time is reliable. I must hasten to point out that the evidentiary burden was effectiveness on the defendants to refute the plaintiff's claim that the testatrix lacked testamentary capacity at the relevant time due to her known impaired cognitive functionality. The reason why the testatrix had to sign the relevant Will before her physician was effectively because of such a known condition. Dr Anderson knew that he was required to evaluate her capacity to engage in a testamentary exercise and it was, as such, expected of him to do all that was necessary to carry out his task properly and appropriately.

[22] Dr Anderson's testimony is to the effect that he conducted an informal MMSE by only keeping mental notes and scoring the testatrix accordingly. In fact he asked her questions that he normally ask when conducting the relevant test viz MMSE. The preceding testimony was not contained in the summary of his evidence as an expert as set out in Rule 36(9)(b) notice. Even if it is accepted that he conducted the relevant test, Dr Botha's evidence is to the effect that such a test was not adequate in the case of the testatrix. Deeper objective tests known to and understood by trained psychiatrists are necessary to appreciate such a condition better and properly according to her.

[23] As Dr Anderson correctly conceded under cross-examination, it would have been advisable and he, in fact, would have referred the testatrix to a psychiatrist before she

could sign the impugned Will but for the fact that such specialists were in Bloemfontein and she was in Senekal. In my view it is strange that he never referred the testatrix to a psychiatrist after noting the fluctuations in her condition. The fact that, according to his evidence, the testatrix was sometimes lucid, should, in my view, have triggered a desire on his part to secure clarity on her condition, as a good practice, especially in the light of the fact that her dementia was associated with a stroke. Although he refers to the relevant condition as Alzheimer's dementia in his evidence, the hand written notes he sent to Dr Botha associated the dementia with a stroke. Dr Eiselen, on her part, concluded that it was vascular dementia after evaluating the findings of Dr Botha as well as the notes in question. According to medical authorities, unlike other dementing conditions such as vascular dementia or dementia due to strokes, there are stable periods or plateaus when the destructive, path of Alzheimer's disease seems to slow down or improve only for the deterioration to inevitably set in again. (See **The Complete South African Health Guide**, op cit 394; **Southern Book Publishers** – June Engel.)

[24] Dr Anderson's evidence in this regard is, with respect, not reliable regard being had to Dr Botha's explanation of the relevant condition and the fact that the parties are in agreement that as at the 20th January 2010 the testatrix's cognitive dysfunction was permanent and could only deteriorate rather than improve.

[25] On the question as to whether or not the testatrix caused a domestic worker, one Lisbet, to summon the Moorcrofts to the farm at the time when she was upset following the signing of the 2010 testament, the Moorcrofts and Lisbet are in dispute with the latter maintaining that she was always only required to call the former when the testatrix needed food and never called them when the testatrix was upset or angry. I am inclined to reject the Moorcrofts' version as false to the extent that it is in conflict or inconsistent with that of Lisbet because the latter is independent and has no interest whatsoever in the matter while the Moorcrofts, on the other hand, have direct interest in the same and, in fact, stand to benefit if the impugned Will is eventually rejected. Nothing, therefore, turns on the evidence in question.

[26] It may be true, as submitted by Mr Els, that the complex nature or otherwise of a testament may be relevant to the question whether or not the testatrix was capable of appreciating its nature and effect. Such an issue, however, does not arise for consideration in the instant matter because the same concerns cognitive impairment with the testatrix effectively found by the experts to lack mental capacity to appreciate the consequences of her actions. The effect of Dr Botha's evidence is that she would only have known that she was signing and not why, what and where she was signing.

COSTS

[27] Mr Snyman submits that the fact that the second defendant defended the action when she is actually cited in her official and representative capacity constitutes good cause for an order saddling her with costs *de bonis propriis*. Mr Els, on behalf of the second defendant, maintains that there exists no such cause.

[28] I am not persuaded that there exists cause to award any costs in the matter, let alone special costs, regard being had to the evidence of Dr Anderson, as seen in the light of the evidence of Dr Botha to the effect that the testatrix's appearance and how she spoke could convince a lay person that she had the requisite capacity in that she understood the nature, extent and effect of her actions when that was, in fact, not the case. There, therefore, existed reason for the defendants to defend the action.

ORDER

[29] In the result an order in terms of prayers 1, 2, 3, 4 and the main part of prayer 5 is granted.

L. J. LEKALE, J

On behalf of the plaintiff: Adv. C Snyman
Instructed by:

Bezuidenhouts Attorneys
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On behalf of the 2nd & 4thdefendants: Adv. J Els
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