

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No. : 1462/2012

In the matter between:-

**J[...] C[...] S[...] AND**

1<sup>st</sup> Applicant/1<sup>st</sup> Defendant

**J[...] C[...] F[...]**

**S[...] NNO**

(in their representative capacities as trustees of the D[...] Trust)

**JOHANNES STEPHANUS HUGO**

2<sup>nd</sup> Applicant/2<sup>nd</sup> Defendant

*and*

**M[...] M[...]**

1<sup>st</sup> Respondent/1<sup>st</sup> Plaintiff

**C[...] M[...]**

2<sup>nd</sup> Respondent/2<sup>nd</sup> Plaintiff

(Formerly M[...] J[...] M[...] NO)

**HEARD ON:** 13 JUNE 2014

**JUDGMENT BY:** KRUGER, J

**DELIVERED ON:** 19 JUNE 2014

**JUDGMENT ON LEAVE TO APPEAL**

[1] This is an application for leave to appeal against the judgment of Ebrahim J of 28 November 2013. The acting judge president requested me to deal with this application at 09:00 on 13 June 2014, the date and time for which the application was set down for hearing, because the judge who gave the judgment was not available.

[2] The judgment was given after a trial which took place on 17, 18 and 20 September 2013. The application for leave to appeal was filed on 3 December 2013.

[3] In the trial the plaintiffs contested the validity of the will of the deceased dated 20 August 2001

wherein the deceased left R20 000 to the children of her son, M[...] and C[...] M[...], the two plaintiffs and the remainder of her estate, comprising farms, to the first plaintiff in her capacity as trustee of the D[...] Trust. At the trial the second plaintiff (second respondent herein) testified, as well as W[...] O[...], whose brother had been married to the second plaintiff. Lena Kokoropo, the person who took care of the testatrix on the farm before she went to the old age home also testified for the plaintiff. On behalf of the defendants only the second defendant, attorney Hugo, testified. He had been practising as an attorney for 20 years at that time. He testified that he was called to the old age home by the testatrix about two months after she had been admitted there. She told him that she wanted to change her will. He had an interview with her and explained to her that farm property could not be subdivided and would therefore have to be left to a trust if she wanted various persons to benefit. He was satisfied that she was capable of making a will.

[4] The test at this stage is whether the applicants can satisfy the court that they have a reasonable prospect of success on appeal (**Afrikaanse Pers Beperk v Olivier** 1949 (2) SA 890 (O) at 892 – 893; **Capital Building Society v De Jager and Others. De Jager and Others v Capital Building Society** 1964 (1) SA 247 (A)).

[4] The trial court took the view that the probabilities were overwhelming that the testatrix was mentally incapable of executing a will on 20 August 2001. Mr Van Rooyen, for the applicant points out that the evidence was that the condition of the testatrix deteriorated while she was on the farm, but after she went to the old age home, and got her medication regularly and was cared for properly, her condition improved, as was confirmed by Kokoropo. He says another court can reasonably find that the testatrix made the will during that period of improvement. The court did not find attorney Hugo an untrustworthy or unreliable witness. Mr Van Rooyen says that there are reasonable prospects that another court can find in favour of the defendants that the will was valid.

[5] Mr Duvenhage for the respondents conceded that the declaration in the judgment that the deceased died intestate was incorrect, because if the will of 20 August 2001 is set aside, the will of 2 May 2001 revives. In the judgment the trial court ordered the costs to be paid jointly and severally by the first and second defendants. The second defendant is the attorney who drew up the will, and the plaintiffs sought no costs order against him in the particulars of claim.

[6] There was sufficient evidence to give rise to a reasonable possibility that another court can come to a different conclusion and find in favour of the applicants. There are reasonable prospects of success on appeal.

## **ORDER**

1. Leave to appeal is granted to the applicants to appeal to the full court of this division against

the judgment and order made.

2. Cost of this application to be costs in the appeal.

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**A. KRUGER, J**

On behalf of applicants: Adv P.C.F. van Rooyen SC

Instructed by:

Phatsoane Henny Attorneys

BLOEMFONTEIN

On behalf of respondents: Adv N. de V. Duvenhage SC

Instructed by:

Eugene Attorneys

BLOEMFONTEIN