

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2582/2012

In the matter between:-

<u>MR WESSEL JOHANNES SCOTT</u>	First Applicant
<u>ME MELANIE ANN SCOTT</u>	Second Applicant
<u>ADV DEBUYS WESSEL SCOTT</u>	Third Applicant
<u>ME RACHÉ DU TOIT</u>	Fourth Applicant
<u>ME DESIREE BOSHOF</u>	Fifth Applicant

and

<u>MASTER OF THE HIGH COURT, BLOEMFONTEIN</u>	First Respondent
<u>MR PETRUS JACOBUS KOTZE N.O.</u>	Second respondent
<u>ME ELSIE HENDRIKS</u>	Third Respondent
<u>RUSOORD AFTREEOORD</u>	Fourth Respondent
<u>JOHN</u>	Fifth Respondent
<u>STOFFEL</u>	Sixth Respondent
<u>MICHAEL</u>	Seventh Respondent
<u>MERJIM</u>	Eighth Respondent
<u>SOUTH AFRICAN CANCER ASSOCIATION</u>	Ninth Respondent

<u>HEARD ON:</u>	20 SEPTEMBER 2012
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<u>DELIVERED ON:</u>	11 OCTOBER 2012
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JUDGMENT

K.J. MOLOI, J

- [1] This is an application on notice of motion. The validity of the Last Will and Testament (the will) of one De Buys Scott (the deceased) made on 4 October 2011 (annexure “D”), is being challenged by his son, Wessel Johannes Scott as the first applicant, the latter’s wife as second applicant and three of his children as third, fourth and fifth applicants respectively (the applicants).
- [2] The application was directed against the Master of the High Court, Bloemfontein, as the first respondent; the attorney, Petrus Jacobus Kotze, who drew up the will and was appointed the executor of the estate by the first respondent in terms of the said will as the second respondent; Elsie Hendriks, the deceased’s sister as the third respondent; Rusoord Aftreeoord, a retirement village in Brandfort as the fourth respondent; and four farm workers of the deceased as the fifth, sixth, seventh and eighth respondents, respectively and the South African Cancer Association as the ninth respondent.

- [3] The validity of the said will was challenged on the basis that when the deceased (testator) made and signed it, he was mentally incapable of doing so and could consequently not appreciate the nature and effect of his conduct. In support of this allegation the applicants relied firstly, on the first applicant's observations at the time he visited the deceased at the old age home where the deceased spent the last days of his life. According to the first applicant the deceased would search for a light which was not there; his speech was confused; he kept on ringing the bell; was not able to conduct a meaningful discussion; would make ridiculous demands that his electric wheelchair be placed on top of a cupboard where there was no space for it; he would indicate the wall on which there was no light switch and ask that the light be switched on and in the last few months he did not react at all when told about his family. The first applicant further questioned the signature of the deceased on the will in question and alleged it "appears to be fairly shakily and does not really resemble the signature any more of his deceased father". In his previous wills which were attached to the founding papers, the deceased said nothing about the farm Helderfontein, which was at all times in the name of the

first applicant, but suddenly bequeathed it to the applicant in the disputed will. Furthermore, the applicant accused the deceased of abusing alcoholic beverages and argued that this might have affected his mental state as well. He concluded that:

“... op daardie tydstip volgens my beste herinnering was hy nie meer in staat om enige sinvolle gesprek te voer nie...”

How these observations affected the mental capacity of the deceased, if at all, is not explained. Neither is it explained under what circumstances did these take place, especially now that it is not stated when the observations were made, least of all what the deceased's condition was between 2 October 2011 and 4 October 2011.

- [4] The applicants support this conclusion by attaching a document that purports to be a bed chart of the old age home where the deceased lived and died. The document remarks that:

On 30 September 2011

- At 17:40 "Inwoner vreeslik deurmekaar – soek lig wat daar nie is nie en praat deurmekaar. Weier O²."
- At 20:30 "Nog steeds deurmekaar – soek nog steeds die lig."
- At 21:30 "In bed gesit en 'n doek aan gesit – wil nog nie slaap pil drink nie – lui klok aanhoudend."
- At 22:30 "Slaap pil gegee en gesê hy moet slaap – praat nog deurmekaar. Wil nie O² op hê nie."
- At 23:50 "Slaap rustig."
- At 05:30 "Gewas, geskeer, tande geborsel en skoon aangetrek. Is nie vanoggend so slymerig nie. O² opgesit."

On 1 October 2011

- At 08:10 "Tannie Elsie het inwoner gevoed. Het glas melk en sny brood gehad. Hoesstroop 15 ml en pille is gegee."

On 2 October 2011

- At 8:10 "Gewas, geskeer, tande geborsel en aangetrek – is nie so benoud nie. Het goed geslaap."
- At 12:15 "Inwoner het ½ bord kos geëet. Brood + daarna. Sê naarheid voel beter. Het vanoggend op karretjie in huis rondgery."

No entries are made thereafter for the 3rd, the 4th and the 5th October 2011. The next entry made was on the 6th October 2011.

- At 04:45 “Gewas, geskeer, tande geborsel, hare gewas en aangetrek. Sê hy voel goed vanoggend.”

All subsequent entries repeat the same content. This, it was argued, showed such measure of confusion making the deceased incapable of making a will on the 4th October 2011.

- [5] In further support of the applicants' contention a document purporting to be a report by Dr Phoebe Nel, a medical general practitioner that attended the deceased over a period of six years at the old age home, was attached. In the document Dr Nel stated that on 08/09/2011 she treated and examined the deceased for a cardiac failure (hartversaking). On 4 October 2011 she was requested by Mr Piet Coetzee (sic), the second respondent, to compile a competency report of the deceased. No such report was attached, but she stated the following in this document:

“Ek het ‘n mini mental ondersoek gedoen en die pasiënt het tekens van dimensie begin toon, was ook met tye baie dilirius ten opsigte van ruimte, tyd en plek.

Alkohol is volgens die personeel wat verantwoordelik was vir die versorging van die pasiënt ook op ‘n gereelde basis gebruik wat dan ook bydraend was tot die beïnvloeding van die pasiënt se helderheid van verstand. Hy was dan ook ten tyde van laasgenoemde baie slaperig en nie altyd by sy volle bewussyn nie. Daarom is dit vir my ‘n gemaklike saak om tot die stelling te kom dat Mnr Scott ten tye van die skrywe van sy laaste wil en testament nie toerekeningsvatbaar en helder van verstand was tot die bekragtiging en ondertekening daarvan nie.”

[6] The following observations must be made with regards to the challenge:

- (a) Save for the allegation regarding the deceased signature, nothing further was produced to substantiate the allegation and that point was not seriously addressed during argument.
- (b) In the previous will, annexure “C”, the farm Helderfontein was never mentioned. The deceased only mentioned the farm “Mooifontein bekend as die Restant van Lusthof nr 185 groot 126 ha, distrik Winburg”, which he offered for sale to one Peter

Barend Scott for an amount of R345 000-00. The rest of his many farms, which included Helderfontein, were disposed of as the remainder of estate. When he made the contested will, annexure “D”, he specifically mentioned the farm Helderfontein, which he bought and had registered in the first applicant’s name and bequeathed that to him. This was never denied by the first applicant.

- (c) The document by Dr Nel referred to above was dated 10 May 2012 and the mini mental examination was clearly not conducted on the 4th October 2012, but some time thereafter so that the findings made, do not relate the mental condition of the deceased as on 4 October 2012. Moreover, the report of the competency determination that was commissioned, were never made available on 10 May 2012 or on the date of the hearing nor explanation given for this failure.

- [7] The second respondent stated that he visited the deceased at the old age home approximately six months prior to the signing of the disputed will. During this visit the deceased indicated to him that he was not satisfied with him in that he

(second respondent) had discussed the contents of his previous will (annexure "C") with the first applicant. He even thought the attorney/client relationship between himself and the deceased was terminated. On 2 October 2011 he suddenly received a telephone call from the third respondent, the deceased's sister, informing him the deceased wanted him (second respondent) to help him with the amendment of his will. On Monday 3 October 2011, he attended the deceased at the old age home. The deceased told him which amendments he wanted to effect to his will (annexure "C"). They were:

- (a) He, second respondent, was to be the executor of his estate instead of the first applicant.
- (b) Anna, one of his farm workers, had passed away and another farm worker, Klein John, had left the farm. The two were to be removed from the list of beneficiaries.
- (c) The deceased wanted to benefit the fourth respondent because of the good care he received from the employees of the fourth respondent and that he was disgusted with the conduct of the first respondent who neglected him and was more concerned about his business than the deceased, as a consequence the

remainder of his estate was to go to the fourth respondent.

- (d) Upon a question by the second respondent whether the first applicant would get nothing as a result, the deceased responded that the first applicant could get the farm Helderfontein, which was bought by the deceased, but registered in the name of the first applicant.
- (e) The other farms belonging to the deceased were to be sold and the proceeds be paid to the fourth respondent, because all the first respondent was interested in, was the deceased's farms and could buy them at the auction since he had made him (first respondent) a wealthy man.
- (f) The remaining workers were each to receive an amount of R50 000,00 instead of R25 000,00 as per previous will. The increased amount was provision for retrenchment packages now that he had decided to have everything sold.
- (g) His great grandchildren who were not provided for in the previous will (annexure "C") were to be benefitted as provided for in paragraph 6.2 of annexure "D".

(h) The first applicant was to receive R100 000,00.

[8] The second respondent declared that when he received the above instructions, the deceased was clear headed, knew and understood what he conveyed to him, as he had made up his mind and could motivate the rationale for his decisions. He was equally in his sound and clear senses when he checked each amendment before he signed annexure "D". In support hereof the third respondent, the deceased's sister, who called the second respondent on 2 October 2011, confirmed the troubled relationship between the deceased and the first applicant, primarily because of the pressure the first applicant placed on the deceased to benefit him substantially in his inheritance. The third respondent further confirmed that in exceptional circumstances, like when the deceased was sick and under medication, he would not be fully in control of his faculties. She stressed, however, that he was otherwise a normal person and had exceptional understanding and appreciation of what he did for a person of his age. She had no doubt that leading up to the preparation and signing of the disputed will the deceased was clear in his thoughts and conduct.

[9] Retired Reverend Petrus Gerhardus Smith had experience in dealing with elderly people whose mental faculties had deteriorated to an extent that they could not control their business and people that were clearheaded despite their advanced age. Since September 2010 he was acting as a part-time reverend of Brandfort East NG Kerk and he served as a member of the management board of the fourth respondent. He made contact with the deceased whom he later considered as a friend and shared precious moments and conversations with him. At no stage did it appear to him that the deceased was incapable of engaging in a sensible conversation nor could take well thought decisions. It never appeared to him that the deceased was incoherent nor confused or disorientated. There were no signs of dementia present with the deceased. He had a lot to do with the deceased particularly before his death and his thoughts were clear, well thought and logical.

[10] Dr Frieda Pienaar, a specialist physician with MBChB and M.Med (Intern) from the University of the Free State checked all the available medical records pertaining to the deceased with a view to expressing her opinion relating to the mental

state of the deceased when he made his will that is being contested. She concluded that:

“... Ek kon niks vind uit Dr Nel se pasiënte lêer van die oorledene wat toon dat die oorledene nie die wilsvermoë gehad het om ‘n behoorlike testament te verlei (sic) nie. Op die gegewens wat ek bekom het en op die bewerings gemaak deur Dr Nel kan ek nie ‘n bevinding maak dat die oorledene nie toerekeningsvatbaar was toe hy sy laaste testament verlei (sic) het nie.”

Contrary to what Dr Nel said in paragraph 5 hereof on 30 May 2012 she (Dr Nel) wrote the following regarding her examination of the deceased on 4 October 2011:

“Op daardie oomblik en tyd het ek aan Mnre Coetzee (sic) mondelings gesê dat sover my kennis op daardie oomblik en tyd strek die pasiënt Mnr Scott wel kompetent (sic) is ter die verandering en bekragtiging van sy testament.”

She confirmed further that she never submitted the competency report she was commissioned to compile and still failed to do so on 30 May 2012.

[11] To succeed with a challenge against the validity of a will one must prove on a balance of probabilities that a person so making a will was "... mentally incapable of appreciating the nature and effect of his act..." - section 4A(1) of the Wills Act, No 7 of 1953. The onus of proof that the testator was mentally incapable is on the person alleging the mental incapacity – **ESSOP v MUSTAPHA AND ESSOP NNO AND OTHERS** 1988 (4) SA 213 (D&CLD) at 220 *et seq.* The proof required is that the person making the will must have been mentally incapable as at the time the will was made: Sec 4A(1) of the Wills Act, No 7 of 1953.

[12] There is a clear dispute of fact in this application. This dispute of fact was not hidden but known to all the parties, particularly the first applicant and the second respondent even before the application was launched. The correspondence preceding the launch of the application and other communication bears testimony to this fact. Nonetheless the applicants approached the court for a final relief by way of notice of motion. This being so the principles enunciated in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634

– 635 find application. The long and the short of the principle is that the application be decided on the version of the respondent, taking into account those aspects that are common course between the parties.

[13] The factual dispute in this matter is substantial. The first respondent's version read with that which is common cause between him and the first applicant can only be rejected outright if it is not setting out the true factual dispute or is *"far-fetched or is clearly untenable"*: **NAIDOO NO AND ANOTHER v CROWHURST NO AND OTHERS** [2010] 2 ALL SA 379 (WCC) at 383 (a) – (d). See also **WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER** 2008 (3) SA 371 (SCA) par [12] and the **PLASCON-EVANS**-case above at 634 E – 636.

[14] The second respondent's case is that the deceased was possessed of sufficient mental capacity to appreciate the content and extent of the disputed will when he made and signed it. The relationship between the deceased and the first applicant had deteriorated to such an extent that the deceased wanted to completely change the regime he had

set in place in his previous will, annexure “C”. The deceased was aware of the farm workers that had died or left his farm. The deceased wanted to change the bequest to the remaining farm workers to provide for their retrenchment benefits for them now that he had decided to estrange his farms. The deceased could logically motivate each and every bequest he made and could remember that he bought the farm Helderfontein and had it registered in the name of the first applicant. The first applicant did not dispute this fact. The evidence of his sister, the third respondent and that of the retired reverend corroborated this unequivocally. This fact was also corroborated by Dr Nel herself on the 4th October 2011 long before she had a change of heart.

- [15] The test to be applied in determining the capacity of the testator in making a will has been set out in **SMITH AND OTHERS v STRYDOM AND OTHERS** 1953 (2) SA 799 (TPD) at 801 A – C quoting from **TREGA AND ANOTHER v GODART AND ANOTHER** 1939 AD 16 at 49 – 50. In **KIRSTEN AND OTHERS v BAILEY AND OTHERS** 1976 (4) SA 108 (C) at 109 – 110 the following was stated:

“The test to be applied in deciding the question the testatrix was at the time of sufficient intelligence, possessing a sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all different bearings.”

This approach was reiterated in **NAIDOO NO AND ANOTHER v CROWHURST NO AND OTHERS**, *supra*.

What is also relevant here is that there is absolutely no record of the condition of the deceased on the relevant days leading to the making and the signing of the will. The first applicant did not see the deceased to determine his mental capacity when the will was made; the records of the old age home show nothing on those dates, viz the 3rd and the 4th October 2011. On the contrary the record show that the last entry on 2 October 2011 he was normal, “he washed himself, shaved, brushed his teeth, dressed himself up – is nie so benoud nie. Het goed geslaap. Sê waarheid voel beter. Het vanoggend op karretjie in huis rondgery”. The trend of the entries thereafter is the same. Dr Nel herself confirmed the deceased was normal on 4 October 2011. All these factors substantiate the contention of the second respondent regarding the testamentary capacity of the deceased.

[16] When the deceased made the disputed will (annexure “D”) he was 85 years old. His general health was deteriorating. His attitude towards his son, the first applicant, had changed drastically because he realised the first applicant was more interested in the inheritance than him. The first applicant neglected the deceased and traumatised him. The evidence of the deceased's sister, which was uncontested, was that the first applicant was putting pressure on the deceased to bequeath almost everything to him and he was rude towards the deceased. The deceased had made two wills before annexure “D”: one on 21 October 2005 (annexure “B”) and one on 17 May 2010. The provisions of those two wills were different except for the appointment of the first applicant as the executor. This is indicative of the deceased's resolve to change his mind as and when the circumstances dictated. He could appreciate the changed circumstances and resolved to act the way he did.

[17] From the above and bearing in mind the principles of the **PLASCON-EVANS** decision the court cannot find that the second respondent's version is “fat-fetched or clearly untenable”. There is no evidence adduced by the applicants

that, at the time the will was made, the deceased was incapable of making a testamentary disposition of his property nor could he appreciate the consequences thereof.

[18] In this application the provisions of the will were clear and unequivocal. The challenge was not directed against the confusion caused by the will itself that could lead to reasonable litigation. The challenge was against the validity of the will in circumstances that unavoidably result in a factual dispute with no prospects of success at all.

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

19.1 The application is dismissed.

19.2 The applicants are ordered to pay the costs jointly and severally, the one paying, the others to be absolved.

K.J. MOLOI, J

On behalf of applicants:

Adv S J Reinders
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN
(Ref J H CONRADIE (SCO27/0001
(JHC/ED))

On behalf of second respondent: Adv P C F van Rooyen SC
Instructed by:
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