



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 39708/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<u>20/06/2024</u> <u>[REDACTED]</u>	
DATE	SIGNATURE

In the matter between:

GAVIN SEAN GENLLOUD

First Plaintiff

SHARON RUTH FFLOULKES

Second Plaintiff

NICOLA JAYNE SINCLAIR

Third Plaintiff

KYLE BRENT GENLLOUD

Fourth Plaintiff

TEGAN CAI GENLLOUD

Fifth Plaintiff

ROBYN JEAN SINCLAIR

Sixth Plaintiff

ALASDAIR LESLIE SINCLAIR

Seventh Plaintiff

and

HERMAN VAN DER MERWE N.O

First Defendant

JOHN BRUCKMAN N.O

Second Defendant

GRAHAM ANDREW GELLOUND

Third Defendant

CRADLESTONE DEVELOPMENT

Fourth Defendant

MASTER OF THE HIGH COURT

Fifth Defendant

REGISTRAR OF DEEDS

Sixth Defendant

RICHARD GRAHAM GENLLOUD

Seventh Defendant

AYSHA-LEIGH GENLLOUD

Eight Defendant

SHAUN CHARLES GENLLOUD

Ninth Defendant

CANDICE COHOE

Tenth Defendant

ORDER

1. The Plaintiffs case is dismissed with costs. The Plaintiffs are ordered to personally pay the costs of suit jointly and severally including the costs of counsel.

JUDGMENT

MOILA, AJ

Headnote: Whether the testatrix and the testator were of sound mind when executing their Wills, Codicils, and Cradlestone Agreement.

Introduction

[1] This is a legal action in which the Plaintiffs seek to have Joyce Genlloud (testatrix) and Leslie Genlloud (testator)'s joint Will, Leslie Genlloud's Will and a Codicil declared invalid because they lacked testamentary capacity. In addition, the Plaintiffs seek an order that the court must set aside the testator's Cradlestone Agreement.

[2] For completeness, The Plaintiffs seek the following relief in the summons:

2.1 An order declaring that:

2.1.1 The joint Will signed by the testatrix and the testator in June 2009 was invalid.

2.1.2The late Joyce Genlloud died intestate.

2.1.3 The Rietvallei properties shall devolve upon the lawful heirs of the late Joyce Doris Genlloud in accordance with the law of intestate succession.

2.1.4 An order re-opening the estate of the late Joyce Doris Genlloud and appointing an executor to re-open, administer, and wind up the estate and granting such executor all necessary powers in law that he or she requires to do so.

2.1.5 File a further liquidation and distribution account in terms of which all the property of the late Joyce Doris Genlloud devolves upon her heirs according to the laws of intestate succession.

2.1.6 Authorising and empowering such executor to take all steps necessary to demand, claim, and recover any property belonging to the late Joyce Genlloud that has devolved in accordance with the testatrix's invalid Will and to take steps to make sure there is a proper devolution of the testatrix's property in accordance with the laws of intestate succession.

2.1.7 An order setting aside the transfer of portions 23 and 27 of the farm Rietvallei 180, Registration division IQ, Province of Gauteng, from the estate of the late Joyce Doris Genlloud to the estate of the late Leslie Richard Genlloud.

[3] Alternatively, the Applicants sought a declaratory order that:

3.1.1 The first Will dated 13 December 2012, the second Will, dated 21 December 2012, and the Codicil, dated 19 September 2013, of the late Leslie Richard Genlloud, be declared invalid.

3.1.2 The late Leslie Richard Genlloud is declared to have died intestate.

3.1.3 The Rietvallei properties shall devolve upon the lawful heirs of the late Leslie Richard Genlloud in accordance with the laws of intestate succession.

[4] Relief regarding the Cradlestone Agreement:

4.1.1 Declaring the fourth Defendant to have breached and/or repudiated the agreement entered into on or about 19 September 2013 between the late Leslie Richard Genlloud and the fourth Defendant.

4.1.2 Declaring the Cradlestone Agreement as void, or voidable, and/or invalid, alternatively to have been validly cancelled.

4.1.3 Ordering the second Defendant forthwith to cancel the Cradlestone Agreement.

4.1.4 Setting aside the Cradlestone Agreement

[5] The third, fourth, seventh, and eighth Defendants opposed the Plaintiffs' claim and raised the following defence:

5.1.1 Plaintiffs' main claim has prescribed.

5.1.2 The Plaintiffs' failed to prove that the testatrix and the testator had no mental capacity when they executed the relevant Wills and signed the Cradlestone Agreement and the Codicil.

5.1.3 The Plaintiffs' failed to prove that the testator and the testatrix were unduly influenced, although the Plaintiffs did not plead this issue, and it was only introduced during cross-examination.

5.1.4 The Cradlestone Agreement is still valid and not impossible to perform.

Parties to the dispute

[6] The first (Gavin Genlloud), second (Sharon Ruth Ffoulkes), and third (Nicola Sinclair) Plaintiffs are the children of the testator and the testatrix.

[7] The fourth to seventh Plaintiffs are the grandchildren of the testator and the testatrix. All the Plaintiffs are beneficiaries of the testator's Will.

[8] The first Defendant (Herman Van Der Merwe) was appointed as the executor of the testatrix's estate.

[9] The second Defendant (John Bruckman) was appointed executor of the testator's estate.

[10] The third Defendant (Graham Genlloud) is the testator and testatrix's son.

[11] The fourth Defendant is Cradlestone Development Pty (Ltd), a company duly registered and incorporated according to the laws of the Republic of South Africa.

[12] The fifth Defendant is the Master of Gauteng High Court.

[13] The sixth Defendant is the Registrar of Deeds.

[14] The seventh to tenth Defendant are the grandchildren of the testator and testatrix.

[15] The third, seventh, eighth, ninth, and tenth Defendant are also beneficiaries of the testator's Will.

Plaintiffs case

[16] In this case there were so many witnesses called to testify. For the purposes of this judgment, I will summarise the evidence of the witnesses and I will not repeat their evidence verbatim.

[17] In support of the Plaintiffs claim, the first witness was Natalie Genlloud.

[18] In her testimony, she confirmed that she is married to the first Plaintiff and a beneficiary of Leslie Genlloud's first and second Wills. The first Will was dated 13 December 2012, and the second Will was dated 21 December 2012. According to her she is entitled to benefit, from the Will because she is married to Gavin Genlloud.

[19] They were staying at the farm belonging to the testatrix (Joyce Genlloud) and moved out because Graham and the testator physically assaulted her son. She further testified that she was not in a good relationship with Joyce Genlloud and Leslie Genlloud.

[20] On the farm, there was a main house and three cottages. Her family occupied one cottage, Graham and his family occupied the second cottage, the third cottage was rented out, and the testator and testatrix stayed in the main house.

[21] She and her family moved out of the farm in 2005 before the Wills were entered into, and they did not visit the farm that often. On 26 June 2006, the testatrix entered into a Nelesco Agreement with Graham and Mr van der Merwe. In the Nelesco Agreement, the testatrix sold the Rietvallei properties to Nelesco 486 (PTY)

Ltd. In 2012, she requested a copy of the Nelesco Agreement from the first and third Defendant, but the request was refused. In 2018, the first defendant advised her and other plaintiffs that the Nelesco Agreement had been cancelled and documents had been destroyed.

[22] The testator and testatrix were old, in their eighties, and frail. She is a veterinary Doctor with no medical background regarding mental capacity. She confirmed that Sharon Ruth Ffoulkes (husband's sister) assisted with arranging caregivers for both Joyce and Leslie.

[23] She further testified that Joyce, the testatrix, was admitted in 2007 suffering from Aneurysms. There were no medical records for 2009 when the joint Will was executed. The testatrix was hospitalised again in 2012 for a broken femur and replacing the catheter. After the death of Joyce in August 2012, Leslie was an heir to the estate of the testatrix. He inherited portions 23 and 27 of the farm.

[24] After the death of Joyce, Leslie could not take care of himself. He often smelled urine. The caretakers, however, continued to take care of Leslie.

[25] During cross-examination, she admitted that Joyce and Leslie intended to develop and proclaim the property into a township, as evidenced in the Nelesco Agreement, the joint Will, and Leslie's Wills dated 13 and 21 December 2012. The Nelesco was buying portions 23 and 27 from the testatrix. Nelesco had deposited to the testatrix and agreed to pay R20 000.00 monthly.

Sharon Ruth Ffoulkes

[26] She is one of the plaintiffs and the daughter of Joyce and Leslie. She admitted that Joyce was in good health when she entered into the Nelesco Agreement in 2006. In 2007, Joyce had an aneurysm. She recovered and was able to go shopping again. Her condition improved over time, and she was able to earn a few words and speak again.

[27] In 2007, Joyce and Leslie travelled to New Zealand. Leslie was strong and in good health when he signed the joint Will. She testified about several medical records of Joyce's admission to the hospital in 2012, three years after the joint Will was drafted. She further testified that she would assist Joyce and Leslie with their General Medical and other concerns. After the death of Joyce, she introduced John

Slyer, the financial advisor and Bryan Cheyne, to assist Leslie with entering a new Will.

[28] During cross-examination, the witness acknowledged that she was not aware of the contents of Leslie's Will. She confirmed that two independent parties, Bryan Cheyne and John Slyer, held meetings to assist Leslie in drafting his Will. She also confirmed that she was not challenging Leslie's mental capacity; she only joined the action because she felt that the Will's contents were unfair.

Giel Bezuidenhout

[29] He testified that he is a professional evaluator. He studied at S.A Technicon, now the University of South Africa, and qualified as a professional evaluator on 21 November 2013.

[30] He evaluated portions 23 and 27 of the proposed development at Mogale City. He used the comparison method and found that on 17 September 2022, the reasonable fair value was eleven million.

[31] During cross-examination, he confirmed that in 2012, it might have been worth five to six million.

Andrew Cohoe

[32] During the trial, this witness admitted that he had falsely testified (lied) in his affidavit as he could recall the incident. Natalie Genlloud had approached him to draft an affidavit, and even though he told her that he did not want to be involved in the proceedings, she forced him to do it. The witness was under immense pressure to write the affidavit. He was staying in a cottage at the farm when Sharon Genlloud requested him to witness a Will. He went to the main house, went through the Will, and signed the Will.

Kyle Genlloud

[33] He is the fourth Plaintiff and a child of Natalie and Gavin.

[34] He testified that he did not have a relationship with his granddad, Leslie. Leslie used to abuse him physically. He was given a smack because he was the oldest. He had little interaction with him.

[35] On the other hand, he testified that Leslie would play chess with him and assist him with school projects.

[36] Graham (the third Defendant) also abused him. He was still very young. No criminal case was opened. He remembered his granny in a wheelchair, and she could not talk. He would visit Richard often on the farm. He stopped when Graham and Richard made a protection order against his family.

Christian Van Wyk

[37] He is a senior town planner at Mogale City. The farm's application to develop portions 23 and 27 was completed and approved. The only issue was that the Municipality had no sewerage to accommodate that township.

[38] During cross-examination, he confirmed that it was a significant development. They can extend an application for twenty years.

Mr Van Eck

[39] He testified that he is an assistant manager working for Mogale City. He was working with water and sanitation. Around erf 23 and 27, there was no close sewer infrastructure. The developer had to propose an alternative option for the municipality to consider. He could not recall if he saw a proposal. If funding is available, the project can be finalised in five years.

[40] During cross-examination, he confirmed that if the municipality has no bulb sewerage, the developer may provide it on behalf of the city and request a payment offset.

Tegan Wentzel

[41] She is Natalie and Gavin's daughter. She works as an intermediate life support and trains as an ambulance emergency assistant for one thousand hours.

[42] She further testified that she had a good relationship with Joyce, her grandmother. They used to bake together. She had no relationship with Leslie. She went through Joyce's medical certificates, explaining what they meant.

[43] During cross-examination, she confirmed that she was not the author of Joyce's medical certificates. Her duties as a paramedic are stabilizing patients and transferring them to the hospital. She can diagnose, but the doctor must confirm it. She could not confirm if there were a medical record from 2008 to 2012 for Joyce. She admitted that a Psychiatrist, Neurologist, and Psychologist diagnose mental illness. She also admitted that if you are registered with the Health Professions Council of South Africa (HPCSA), you are prohibited from doing work beyond your scope.

Mr Bryan Cheyne

[44] He is a retired schoolteacher. Joyce was his cousin. In September 2007, Joyce suffered an aneurysm. At first, she was in ICU. Then, she was taken to a general ward. She was then transferred to a step-down facility. On her 80th birthday, she was brought in a wheelchair, and she was nonverbal. They were later told in 2012 that she had passed away. He oversaw her memorial service.

[45] He has not seen a joint Will. Leslie asked him to be the executor of his estate. He had already met with John Slyer at the memorial service. They agreed that he would call him to see the Will that Herman had prepared for him.

[46] Leslie showed him the Will. He believed it was not Leslie's intention. He contacted a Cape Town attorney to help him. The Will, dated 13 December 2012, was drafted by the Cape Town Attorney.

[47] During cross-examination, he said he never said Leslie had a mental illness. He confirmed that Gavin did not visit Leslie. Nicky was in New Zealand.

[48] He also confirmed that Joyce and Leslie intended to develop a township per the Nelesco Agreement and the Wills.

Nicola Jayne Sinclair (she testified from New Zealand)

[49] She testified that she was the Plaintiff and a beneficiary of Leslie's final Will. She resides in Wellington, New Zealand. She has been living there since 1989.

[50] Joyce visited the farm six times between 2006 and 2012 but not in 2009. In October 2011, Joyce's health deteriorated. She would turn her head and look away if she did not want to speak to you.

[51] Her mother could communicate when she was sick. She asked her, "Did you know they cut my leg." After her mother passed away, she would phone her father, and he would recognise her voice. Her father was even able to play cards. She testified she got involved with the litigation because Natalie told her to pick a side. She indicated that you are either with us or against us.

Defendants case

[52] Graham Genlloud testified that he was the third child born in Joyce and Leslie's homestead. Gavin is his younger brother, and Sharon and Nicola are his elder sisters. The other Plaintiffs are his nieces and nephews. Herman is his friend. Richard is his firstborn son.

[53] His brother Gavin lived on the farm with his family from 1988 to 2005. In 2006, he moved to the farm with his family. His parents had a joint Will dated August 1958, replaced by a joint Will dated June 2009.

[54] His mother, Joyce, was admitted to a hospital in 2007. She was suffering from an aneurysm and arrived back at the farm later in 2007. She had difficulty reading, but it improved over time. By the end of 2008, she could hold conversations, read, and feed herself. In 2009, she had no hospital admissions. She was in good health, and she only had pneumonia in 2011. She passed away in August 2012.

[55] Leslie's health during the Cradlestone Agreement and the Codicil was good. He only complained of back pain. The Mogale Municipality had approved the application to develop portions 23 and 27 of the farm. The only issue was there was no sewerage to accommodate that township.

[56] During cross-examination, he confirmed that he has lived on the farm with his family for 30 years. He stopped paying rent after his father's death and has moved into the main house. He confirmed that he and Mr. van der Merwe were not Nelesco's directors. Mr. van der Merwe paid the testatrix money from Nelesco. He does not recall any offer presented to his parents. The Codicil was signed the same day as the Cradlestone Agreement.

Sombu Elizabeth Boikanyo

[57] She was employed at the farm in 1997. She was Joyce and Leslie's domestic worker. She also became their housekeeper and caregiver. She remained at the farm until both Joyce and Leslie passed on.

[58] She further testified that Joyce was an active woman. In 2007, when she came back from home, she was told Joyce had an aneurysm. She was in a fragile condition. A doctor and nurse were hired to check her condition. Graham and Sharon assisted them. Sharon Ruth would come once a week to visit her parents.

[59] In 2009, Joyce started to be bossy again. She would select her clothes. Ms Sombu further testified that she would join Joyce and Leslie when shopping. After shopping, they would go to Wimpy, and Joyce would order her food.

[60] Leslie was also in good health. She remembers an armed robbery incident where Leslie negotiated with the robbers for their safety.

[61] During cross-examination, she confirmed that Graham and his wife were helping her look after Joyce and Leslie. Gavin was not a regular visitor. Nicola visited once when she lived in New Zealand, and Sharon visited once weekly to help them buy groceries.

Michael Fourie

[62] He is 36 years old and a family friend of Graham Genlloud. He has been friends with them since he was ten. One day, he visited Richard at Graham's place in 2012. He was asked to sign a Will. He greeted Leslie and read the Will and sign. Leslie was in good health.

Herman Van der Merwe

[63] He is a practising attorney in good standing. He became friends with Graham because their daughters were friends. In 2006, Joyce was in good health, and they entered into a Nelesco Agreement. It was a shelf company. He and Graham were shareholders. He encouraged Graham not to sell the farm to outsiders but to consider buying it. He assisted Graham in drafting the agreement, and an offer was made. Joyce intended to establish a township.

[64] Joyce received R1 130 000.00. An application to develop the farm into a township was made at Mogale City. The payment was stopped when it became clear that the project would not be finalized as agreed. The agreement was cancelled by mutual consent.

[65] He and Leslie were joint executors of Joyce's estate. Joyce passed away in August 2012. Joyce and Leslie had signed a joint Will. The property was transferred to the beneficiary, Leslie, in 2015. The liquidation and distribution were finalised in 2015. He never received any complaints about the Will.

[66] Gavin and his wife came to him in November 2012, requesting a copy of the joint Will. He did not give them one because it was only Leslie who was the beneficiary.

[67] Leslie was physically frail, but he had good mental health. He drafted the Codicil and the Cradlestone Agreement. Leslie would peruse all documents.

[68] This is, in short, evidence presented before this court.

Issues of Common Cause

[69] From the evidence presented above, this court finds the following to be common cause between the parties.

- a. The testatrix, the late Joyce, and the testator, Leslie Genlloud, were married out of a community of property.
- b. They had four children: Sharon Ruth, Alasdair Sinclair, Graham Genlloud, and Gavin Genlloud.
- c. They lived on a farm with a main house and three cottages.
- d. The testatrix was the registered owner of portions 23 and 27 of Rietvallei 180. She entered into a Nelesco Agreement with the first and third Defendants.
- e. The testator and testatrix concluded two joint Wills on 3 August 1958 and June 2009. The testatrix passed away on 27 August 2012. Her husband was the beneficiary of her Will.

- f. The ownership of farms 23 and 27 Rietvallei was transferred into her husband's name.
- g. Mr. van der Merwe and her husband Leslie were executors of the testatrix's Will.
- h. Her estate's liquidation and distribution account was laid for inspection at the Master's office, and there were no complaints. It was finalised in 2018.
- i. The testator concluded two Wills. The first was dated 13 December 2012, and the second was dated 21 December 2012. He also signed a Codicil dated 19 September 2013.
- j. The testator entered into a written sale agreement with Cradlestone Development (Pty) Ltd. He passed away on 6 June 2014, and his estate has not been finalised.

Issues in dispute

[70] The main issues are:

- a. Whether the court should declare Joyce's Will invalid, order that she died intestate, and further order that her estate be reopened?
- b. Whether the court should set aside the transfer of portions 23 and 27 of farm Rietvallei 180 from Joyce Genlloud's estate to Leslie Genlloud?
- c. Whether the plaintiffs' main claim has prescribed?

[71] Alternatively:

Whether the court should declare Leslie's two Wills and Codicil invalid and order that he died intestate?

- a. Is the Cradlestone Agreement valid?

Submissions

Plaintiffs' submissions

- [72] The Plaintiffs' counsel, Ms Brits submitted that evidence before the honourable court clearly shows that:
- [73] There exists reasonable doubt as to the mental fitness of Joyce Genlloud to execute the Joint Will, which, in any event, was not signed in the presence of the witnesses.
- [74] There exists reasonable doubt as to the mental fitness of Leslie Genlloud to execute a Will. There is reasonable doubt that Leslie Genlloud had the mental capacity to enter into the Cradlestone Agreement, given the third defendant's manipulation and isolation of Leslie.
- [75] There is no reasonable prospect of obtaining services in the foreseeable future to establish the township.
- [76] Should the court find that the Cradlestone Agreement is valid, it could not have been the parties' intention, especially Leslie, that the Cradlestone Agreement would never be perfected. It is submitted to the detriment of the beneficiary.
- [77] The actions of Herman van der Merwe are directly opposed to the ethical standards of the Legal Practice Act and have continued unabated since 2006. It is submitted that Herman van der Merwe used his position of trust as an attorney to unscrupulously draft agreements whereby elderly people, Leslie and Joyce, were duped into "giving away their assets to ultimately benefit Herman van der Merwe, the businessman." The firm of van der Merwe Greyling further benefits by generating income as a conveyancer and executor in the estate of Joyce. This conduct is deplorable and cannot continue unabated.
- [78] Mr. Van der Merwe could not have been appointed executor as he was conflicted. He was a partner in a business contract signed with the testatrix in her lifetime.
- [79] The plaintiffs' counsel further submitted that the testatrix and testator had entered into a joint Will in 1958. When they entered into another Will in 2009, the testatrix had an aneurysm and was not mentally well enough to enter into a Will.
- [80] Natalie Genlloud testified that Joe offered to purchase the farm for R19 million. Mr. van der Merwe advised the third Defendant to purchase his parents'

farm. Joe's offer was not accepted. The testatrix was influenced to sell the farm to Nelesco, in which Mr. van der Merwe and the third Defendant were shareholders. Nelesco paid a deposit of R1 130 000.00 and further paid R20 000.00 monthly to the testatrix. In 2018, the Plaintiffs were told that the Nelesco Agreement was destroyed.

[81] Evidence of Natalie Genlloud, Sharon-Ruth Ffloukes, Tegan Wentzel , Kyle Genlloud, and Brian Cheyne all stated that Joyce was not capable of understanding more than a toddler after the hospitalisation in September 2007.

[82] It is common cause that Joyce required 24-hour care, and indeed, Leslie employed two permanent caregivers who stayed in the room with Joyce. It is also common cause that Joyce wore nappies, was bed-ridden and could do very little for herself. She passed away on 27 August 2012 at the age of 84.

[83] After his wife's death, the testator inherited the farm, allegedly made two Wills, and signed two sales agreements and a Codicil. He was of poor physical health. He did all this under the influence and manipulation of the third Defendant. Leslie Genlloud was a frail 89-year-old reliant on 24-hour care living on the same premises with the third Defendant. The mental capacity was insufficient to sign the Wills and two agreements.

[84] The Plaintiffs pray for the relief as set out in paragraph two above.

Defendant's submissions

[85] The Defendant's counsel, Mr Fernandes submitted that the Plaintiffs' main claim has prescribed. Prescription begins to run from the payment date to the legatee or heir. The property was transferred from the testatrix to the testator on 4 March 2015. The Plaintiff alleged Joyce and Leslie's mental capacity as far back as 2012. However, they only sought action on the matter in 2020.

[86] The Defendants' counsel further submitted that contrary to the pleadings dealing with Joyce and Leslie's mental capacity, a claim was made against the Defendants for fraudulent behaviours and misrepresentation. The Plaintiffs also alleged Joyce's intention regarding the Nelesco Agreement was not realised, while no relief was sought in terms of the Nelesco Agreement.

[87] Mr Bezuidenhout an expert witness called to testify by the Plaintiffs testified that on 01 September 2022, he conducted a valuation of the property and found that it was valued at R11 million.

[88] Under cross-examination, he confirmed that the value of the property would have been in the region of R5 to R6 million. The testator sold the property to Cradlestone for R5 million.

[89] The mental illness of the testatrix and testator cannot be determined without specialised medical testimony done by a suitable expert practitioner (Neurologist, Psychologist, and Psychiatrist).

[90] The Wills Act 7 of 1953 (Wills Act) does not provide a maximum age at which an individual may make a Will. Testators and testatrices who are at an advanced age with chronic illness may not be deemed incapable of making a Will unless they possess the mental capacity to do so at the time of making it.

[91] On 19 September 2013, an agreement was entered into between the testator and Cradlestone Developments (Pty) Ltd. The testator clearly intends to continue selling and developing the properties. There is evidence that progress was made in establishing and proclaiming a township before Cradlestone, which is a continuation of Nelesco. It is only waiting for an acceptable solution from Mogale City regarding providing a sewerage system. Without the transfer of property, Cradlestone will not be able to proceed with the proclamation of the township. The Plaintiffs are frustrating this process.

[92] The Defendants seek that the action by the Plaintiffs be dismissed with costs on an attorney and client scale, including costs of counsel.

The laws applicable

[93] Formal requirements for a valid Will in terms of section 1 of the Wills Act is that:

- a. The Will must be in writing.
- b. The Testator must sign the Will in the presence of two or more competent witnesses.

- c. The Will must be signed by two or more witnesses who are present at the time as the testator.

[94] Section 2(3) of the Wills Act provides:

"If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof was intended to be his will or an amendment of his will, the court shall order the Master to accept the document, or that document as amended, for purposes of the Administration of Estates Act, 1965, as a will although it does not comply with all the formalities for the Execution or amendment of wills referred in subsection."

[95] In terms of section 4 of the Wills Act, every person of sixteen years or more may make a Will unless he is mentally incapable of appreciating the nature and effect of his act at the time of making the Will and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.

Aneurysm

[96] According to www.hopkinsmedicine.org, an aneurysm is a bulging, weakened area in the wall of a blood vessel that results in an abnormal widening or ballooning greater than 50% of the vessel's normal diameter. An aneurysm may occur in many areas of the body, such as the brain, neck, intestines, kidneys, spleen, and legs.

Mental illness

[97] Mental illness is a general term for illnesses that may impact a person's thoughts, perceptions, feelings, and behaviours.

[98] Psychiatrists are licensed medical doctors who have completed psychiatric training. They can diagnose mental health conditions, prescribe and monitor medications, and provide therapy.

Analysis

Joint Will dated June 2009

[99] The late Joyce Genlloud and the late Leslie Genlloud were married to one another out of a community of property. In or about June 2009, they made a joint

Will. The first dying bequeathed their whole estate and assets to the survivor. Joyce Genlloud passed away on 27 August 2012.

[100] The first Defendant and the survivor, Mr. Leslie Genlloud, were appointed executors of the estate of the first dying, Mrs Joyce Genlloud. The first Defendant was appointed to represent the testator and testatrix's estate in all legal and conveyancing matters. Witnesses Richard Cohoe and B Z Lotz signed the joint Will.

[101] The Plaintiffs called Richard Cohoe as a witness. His evidence was that he made an affidavit in 2020 in which he lied because he could not remember. He made that affidavit under pressure from Natalie, the wife of the first Plaintiff. He contended that in 2024, he remembers signing the Will but not in the presence of the testator and testatrix. He does not take the court to his confidence, which is why he remembers now after so many years. The Will was signed in 2009.

[102] Mr. Cohoe confirmed by looking at the joint Will that it did not have a date but was done in June 2009. The Wills Act does not state that a Will needs to be dated for it to be valid. Section 2(3) of the Wills Act affords a court the overriding discretion to overlook minor non-compliance with formalities, provided it is apparent or can be proved that the Will represents the testator's true intention.

[103] After the death of the testatrix, the first Defendant and her husband, Leslie, were appointed as executors. On 4 March 2015, per the L&D account, portions 23 and 27 of Rietvallei's farm were transferred to her husband's name, Leslie Genlloud. The testatrix's estate was wound up on 17 September 2018.

[104] The first witness, the first Plaintiff's wife, testified that during the funeral of the late Joyce Genlloud, Mr Van Heerden showed them the joint Will of 2009.

[105] The Plaintiffs knew about the joint Will from 2012. They elected not to object to the finalisation of the liquid and distribution account or to seek this action. It is evidence that the Plaintiffs had already alleged the testatrix's mental incapacity in 2012.

[106] The Plaintiffs' counsel submitted that the testatrix had suffered two brain aneurysms and underwent surgery in September 2007. She was 81 years old when she signed a joint Will and was not of sound mind. Therefore, the joint Will was invalid and should be set aside.

[107] Tegan, a qualified and registered paramedic, testified that she understood how brain aneurism affects the brain. That the aneurism had affected her grandmother Joyce's brain. She admitted on cross-examination that she was not an expert in the field of brain damage or mental capacity.

[108] Plaintiffs' counsel further submitted that the court could consider the medical reports in terms of section 3 of the General Law Amendment Act to assist the court in understanding Joyce and Leslie's medical condition. This only came out in the heads of argument.

[109] The Defendants' counsel submitted that the capacity to make a Will is governed by Section 4 of the Wills Act. Every person aged 16 years or more has a right to make a Will unless, at the time of making the Will, he is mentally incapable of appreciating the nature and effect of his act.

[110] The Wills Act does not provide a maximum age at which an individual can enter into a Will. A testator or testatrix who is at an advanced age or who suffers from chronic and serious illness might not be deemed incapable of entering into a Will unless they did not possess the mental capacity at the time of making a Will.

[111] He further submitted that bequests in Wills by the elderly are sometimes not what relatives and close friends had hoped for, and disappointed hopefuls often challenge Wills. See *Lipchick and Others v Master of the High Court* [2011] ZAGPJHC 49 at para 1.

[112] He also referred to *Levin and Another v Levin and Others* [2011] ZASCA 114. This case concerns the validity of the Will allegedly executed on 4 August 2002 by the late Mrs Breslawsky, who died two months later at the age of 107. The last Will she executed before the contested Will was in 2001 at the age of 106. Although the testamentary capacity was not questioned, the importance of this case is that she still had the testamentary capacity and executed a valid Will at the age of 107.

[113] I agree with the Defendants' counsel's submission that the mental testamentary capacity ought to be determined when the testator and testatrix entered into a Will.

[114] The court heard the evidence of Elizabeth Sambo, a domestic worker who stayed with the testatrix and the testator until they passed away.

[115] She testified that the testatrix, Joyce Genlloud, had an aneurysm in 2007. She was looking after her 24 hours, assisted by another caregiver. When Joyce was discharged, she was frail. It was a fragile condition. A doctor and nurse were looking after her. Her condition improved. She remembered that in 2009, she would accompany Joyce and Leslie shopping. After shopping, they would go to Wimpy, and Joyce would choose her food.

[116] She further testified that the first Plaintiff and his wife were not regulars at the farm. Natalie Genlloud confirmed this version, saying that her family had not visited the farm in two years when Joyce passed away. Graham and his wife, Sharon Genlloud, assisted them.

[117] The Plaintiff could have obtained evidence of a Doctor who was taking care of Joyce for his opinion, although there is no evidence of what type of medical doctor he was.

[118] The plaintiffs' evidence confirms the caretaker or domestic worker's evidence that there are no medical records for 2009. Joyce only went back to the hospital in 2012 to change her catheter.

[119] As discussed above, it was alleged that Joyce suffered from aneurysm. Aneurysms may be located in many areas of the body, such as the brain, aorta, neck, intestines, kidney, spleen, and legs. Aneurysms can be treated with surgery. Some people live a long life without knowing they have aneurysm.

[120] There is no medical evidence or observable facts to prove that Joyce was not in her right mind when she executed the joint Will in 2009. Challenges to a Will that, on the face of it, appears to be valid based on testamentary capacity remain an evidentiary burden for the challenger.

[121] The court, therefore, concludes that the main claim fails. No evidence suggests that Joyce was not in her sound and sober mind when she executed her last Will and testament. Furthermore, the plaintiffs' argument is speculative and not supported by medical evidence. This court is enjoined to decide cases based on evidence and not on speculation and conjectures.

[122] As discussed above, the Plaintiffs knew about the joint Will from 2012. The first witness for the Plaintiffs, Natalie Genlloud testified that Mr. van Heerden showed

them the joint Will of 2009 during the funeral of Joyce Genlloud. Joyce Genlloud passed away in August 2012.

[123] The Defendants' counsel submitted that the main claim has prescribed. The Prescription Act 68 of 1969 (Prescription Act) stipulates that debts prescribe after a three-year period. A creditor must initiate proceedings within this timeframe to prevent losing the right to enforce a claim. Section 12 of the Prescription Act outlines the calculation of the prescription period, starting from when the debt becomes due.

[124] In *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) the Constitutional Court refined the definition of "debt". It narrowe it to signify an obligation to pay money, deliver goods, or render services.

[125] I agree with the Defendants' counsel that the Plaintiffs knew about the joint Will, and they had already alleged the mental capacity of the testatrix, Joyce Genlloud in 2012. They elected not to object to the finalisation of the liquid and distribution account or seek this action. The court finds that the Plaintiffs' main claim had prescribed.

Leslie's two Wills, Codicil and the validity of Cradlestone Agreement

[126] The evidence of the following witnesses confirmed that Leslie was old but had the mental capacity to execute a Will and enter into the Cradlestone Agreement, which had the same intention as the Nelesco Agreement.

[127] Nicola stays in New Zealand. She testified that after her mother passed away, she would phone her father, and he would recognise her voice. Her father was even able to play cards. She testified that she got involved with the litigation because Natalie told her/ to pick a side. She indicated to her that she was either with them or against them.

[128] The domestic worker or caretaker testified that after the death of Joyce, she remained on the farm, taking care of Leslie. He was also in good health. She remembers an armed robbery incident; Leslie negotiated with the robbers for their safety.

[129] In *Tregea and Another Appellants v Godart and another Respondents* 1939 AD 16, Tindal JA said: "In [cases] of impaired intelligence caused by physical

infirmity, though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.”

[130] Bryan Cheyne was Joyce’s cousin. He testified that he had gifted Leslie a walker, but he looked frail. During cross-examination, he stated that he never said Leslie had a mental illness. He confirmed that Gavin did not visit Leslie; Nicky was in New Zealand. He further confirmed that Leslie acknowledged that Graham, the third Defendant, was supporting him.

[131] He also confirmed that Joyce and Leslie intended to develop a township as per the Nelesco Agreement and the Wills.

[132] The Cradlestone Agreement was also intended to develop a township. The golden rule for interpreting Wills is to ascertain a testator’s wishes. The cardinal rule is that no matter how clumsily worded a Will might be, a Will should be so construed as to ascertain from the language used the true intention of the testator in order that his wishes can be carried out. (See *Masters v Estate Cooper and Others* 1954 (1) SA 140 (C) @ 143H)

[133] The farm was sold on the Cradlestone Agreement for five million. Mr. Giel Bezuidenhout, an expert in property evaluation, testified that as of 1 September 2022, the farm’s value was eleven million. Under cross-examination, he indicated that in 2012, the farm’s value would be five to six million. Therefore, there was nothing untoward in selling the property to Cradlestone because that was the property’s value, as per the plaintiffs’ expert.

[134] Once it is clear that documents are a person’s Wills and Codicils, the person who attacks them on any ground must prove it. The law honours the deceased’s wishes, even if they result in envy among the next of kin.

[135] There is no evidence to suggest that Leslie Genlloud, the testator, was not in his sound and sober mind when he executed his last Will, Codicil, and entered into the Cradlestone Agreement.

Conclusion

[136] After considering the evidence, I find on a balance of probabilities that both the testator and the testatrix possessed the necessary testamentary capacity when they signed their Wills. As a result, I found that the joint Will, dated June 2009, Leslie's Will, dated 21 December 2012, and the Codicil and the Cradlestone Agreement were valid.

Costs

[137] It is trite that costs will follow the result of the action. In my view, the estate should not be held responsible for the costs of this litigation. Instead, the Plaintiffs, in their capacity, must pay the costs of the suit jointly and severally.

[2] In the circumstances, I make the following order:

1. The Plaintiff's case is dismissed with costs. The Plaintiffs are ordered to personally pay the costs of the suit jointly and severally, including the costs of counsel.



NL MOILA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the Plaintiffs:

Advocate Brits

Instructed by:

Friedrich Inc attorneys

For the Defendants:

Advocate Fernandes

Instructed by:

N L A legal Inc attorneys

Dates of Hearing: 04, 22, 25 and 27 March 2024

Date of judgment: 20 June 2024