



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

NOT REPORTABLE

Case no: 4430/2024

In the matter between:

JEANNETTE O'MOORE

First Applicant

ARTHUR ANTHONY BARROW

Second Applicant

and

**THE MASTER OF THE HIGH COURT
EASTERN CAPE DIVISION
GQEBERHA**

First Respondent

(Estate references: 2116/2023 & 345/2024)

**THE EXECUTOR / EXECUTRIX IN THE ESTATE
LATE JOHN WINSON BARROW**

Second Respondent

(Master reference no: 2116/2023)

(in the estate late John Winston Barrow,

Identity number: 4[...])

LATE MARLENE ELLALEEN CHANNON

Fourth Respondent

(Master reference no: 345/2024)

(in the estate late Marlene Ellaleen Channon,

Identity number: 4[...])

JUDGMENT

Govindjee J

Background and facts

[1] The late John Winston Barrow (the deceased) was diagnosed with prostate cancer during November 2022. On 6 December 2022, he consulted with Dr GJ Pilcher and complained about memory loss, unsteadiness and tiredness. Further tests revealed advanced inoperable brain cancer. The deceased's condition worsened during December 2022. He could not walk, struggled to stay upright, could not feed himself and required assistance from his partner (Channon), assisted by the applicants, who are two of three surviving biological siblings of the deceased. By 18 January 2023, the deceased was wheelchair bound, unable to talk or communicate, physically compromised and demonstrating significant and visible neurocognitive deterioration. According to a letter by Dr Pilcher:

‘In that condition on 18 January 2023 I doubt it very much whether he was in a mental condition (not compos mentis) to sign any documents. I cannot give my opinion what happened between 13 December 2022 and 18 January 2023 as far as his mental condition was concerned.’

[2] The deceased had executed a will six days earlier, on 12 January 2023 (the will) and passed away on 24 February 2023. In terms of the will, Channon was nominated as executrix and the bulk of the estate was bequeathed to her. Only a bakkie, woodworking equipment, wood and R200 000 was left to the applicants. The

will was accepted by the first respondent (the Master) and letters of executorship issued in favour of Channon, who has since passed away.

[3] This is an application to declare the will invalid and of no force and effect, together with related relief. The applicants stand to benefit should the application succeed, in that the administration of the estate will be registered and administered in terms of the Intestate Succession Act, 81 of 1987.

[4] The third respondent, who is the agent for the executrix in Channon's estate and is also cited as the fourth respondent (the respondent), relies on affidavits filed by Reverend Bruce Woolard (the reverend) and by both witnesses to the will in opposing the application.

[5] Both witnesses are members of the St Davids Congregational Church (the church) and the reverend is the pastor of the church. The deceased and Channon were also members of the church. Both witnesses had agreed to witness the execution of the deceased's will, having been requested to do so by the reverend. Both confirm that the reverend read the contents of the will to the deceased twice, in their presence. The deceased was asked whether he understood the nature of the document he was about to sign and whether he agreed with the contents. On each occasion, the deceased answered in the affirmative and gestured by giving the 'thumbs up' sign. He then signed the will in the presence of the two witnesses, who then appended their signatures before the reverend signed in the capacity of commissioner of oaths. Both witnesses state that they had no reason to doubt that at the time the deceased signed the will he was fully aware of what he was doing and understood his actions. Both aver that they would have voiced concerns had they been uncertain at the time and would then not have signed as witnesses.

[6] The reverend's affidavit supports this explanation of events. The Reverend has extensive experience in attending to the execution of the wills of the church's congregants. He requested the witnesses to assist, and then read the contents of the will to the deceased twice, in the presence of the witnesses and Channon. The deceased was asked to confirm that he understood and agreed with the contents of the document. He answered by nodding his agreement and gestured with the

‘thumbs up’ sign. He then signed the will in the presence of the witnesses, who appended their signatures before he commissioned the document. The reverend confirms that the deceased was fully aware of what he was doing and understood his actions at the time, and that he would not have proceeded had he been uncertain of this. The will also reflects the following wording above the signature of the reverend:

‘I certify that this Last Will and Testament was signed by John Winston Barrow in my presence and I am satisfied that at the time of such signing he knew and understood the contents of the document.’

The legal position

[7] The court is called upon to consider whether the will complied with the formalities and requirements prescribed by the Wills Act, 1953.¹ The main question to be determined is whether the deceased was of sound mind and capable of executing a valid will on 12 January 2023. Section 4 of the Act provides that:

‘Every person of the age of sixteen years or more may make a Will unless at the time of making the Will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest upon the person alleging the same.’

[8] The following test for testamentary capacity is settled law:²

‘The testator must ... be possessed of sound and disposing mind and memory. He must have a memory; a man to whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever; or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons or the families of those with whom he had been intimately acquainted ... and yet his understanding may be sufficiently

¹ Act 7 of 1953.

² *Tregea v Godart* 1939 AD 16 at 50.

sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?’

[9] The real issue is whether the deceased was, at the time the will was executed, mentally capable of appreciating the nature and effect of his act. Ultimately, this is a question of fact to be determined based on appreciation of the evidence. The following principles, emanating from decided cases, are also relevant to the issue at hand:³

- 1) There is authority that it is not essential that a testator had the capacity to read, and by reading to digest and understand the contents of the will.
- 2) A will would not be rendered invalid if, for example, the provisions of the will were carefully and fairly explained to such a testator in a manner which ensured that the testator understood the effect of what he or she was signing.⁴
- 3) A valid will may also be made by a mentally incapacitated person during a lucid interval.⁵
- 4) The test for mental capacity is related to the will in question, so that whether it is framed in simple terms becomes relevant.⁶

³ These cases are drawn from Hofmeyr and Paleker *The Law of Succession in South Africa* (3rd Ed) (2023).

⁴ *Essop v Mustapha and Essop* 1988 (4) SA 213 (D) at 222B–C. Under the Wills Act, a deaf-mute is not precluded from making a will unless mentally incapable of appreciating the nature and effect of their act: Hofmeyr and Paleker above n3 at 130.

⁵ Voet 28.1.34.

5) Disease may produce changes in the emotions which may affect a testator's judgment. In such a case, the question would not simply be whether the testator understood the will but whether there was such an alteration of the testator's personality, emotions and affections as to have diminished the testator's powers of judgment and discrimination so that the testator could no longer be said to possess a sound disposing mind.⁷

6) As to the incidence of the onus of proof, while the test remains the same for all civil cases, the onus must be discharged in the clearest manner.⁸ In order to show that the testator did not have the necessary mental capacity, it must be shown that the testator did not understand the nature of the testamentary act and its consequences, or that the testator could not remember what he or she possessed and, therefore, did not know what he or she was disposing of, or that the testator could not differentiate between the claims of persons who would ordinarily have a claim upon their estates.⁹

Analysis

7) Despite the obvious dispute of fact, the matter is capable of determination on the papers, and without referral to oral evidence, by applying the rule expressed in *Plascon-Evans*.

8) The high point of the applicants' case is Dr Pilcher's letter, and absent a confirmatory affidavit, explaining the deceased's condition on 18 January 2023. It may be accepted that at that stage the deceased was in no position to attest to a will. But Dr Pilcher was unable to express an opinion on the deceased's state of mind six days earlier. Given the wording of s 4 of the Act, this is the material point in time. The available evidence as to the events of that day emanate from the affidavits of the two witnesses and the reverend. There is no basis for rejecting this evidence. From this it is evident that the deceased was unable to communicate verbally and could not read

⁶ *Smith v Strydom* 1953 (2) SA 799 (T) at 802H–803A.

⁷ *Lewin v Lewin* 1949 (4) SA 241 (T) at 264–5.

⁸ *Kunz v Swart* 1924 AD 618 at 692.

⁹ *Cloete v Marais* 1934 EDL 239 at 250.

the will himself on 12 January 2023. I am nonetheless satisfied that the provisions of the will, which was couched in simple terms, were carefully and fairly explained to him in a manner designed to ensure that he understood the effect of what he was signing. The deceased was physically strong enough to attend at the church and then appended his signature to the will personally. That he agreed with its contents and understood the implications of what he was signing may be inferred from his use of two different forms of non-verbal communication to express his assent.

9) It is unnecessary to speculate whether this was a lucid interval or whether his condition had simply not yet deteriorated to the extent observed by Dr Pilcher a few days later. It is noted that, on the applicants' own version, while the deceased was physically compromised a few weeks earlier, during December 2022, there is nothing on the papers to suggest that he was not of sound mind at that time.

10) Considering the evidence of the witnesses and the reverend, the applicants have failed to demonstrate that the deceased did not understand the nature of his testamentary act or its consequences, or that there is any other basis for declaring the will invalid. On the probabilities, the conclusion is that the deceased's mind and memory were sufficiently sound to enable him to know and understand his conduct in executing the will at the time this occurred. It is unnecessary, in the circumstances, to consider whether the applicants' alleged acceptance of their respective bequests constitutes a further basis for dismissing the application.

11) Counsel for the applicant submitted that a punitive costs order was warranted based on the applicants' failure to make basic enquiries that might have avoided the litigation. The applicants exercised their right to challenge the validity of the will based on their own impressions and the observations of Dr Pilcher. In the circumstances, there is no good reason to deviate from the ordinary approach in respect of the costs of the application, with costs of counsel awarded on Scale B.

Order

12) The following order is issued:

1. The application is dismissed with costs, with the costs of counsel to be taxed in accordance with Scale B, set out in rule 69(7) of the Uniform Rules of Court.

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Heard: 14 August 2025

Delivered: 19 August 2025

Appearances:

For the Applicant: Adv S Stadler

Instructed by: Madelaine Kruger Attorneys
Centurion
c/o Schoeman Oosthuizen Attorneys
Gqeberha

For the Third and Fourth Respondent: Adv G J Gajjar

Instructed by: Nelson Attorneys
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