

SOUTH AFRICA / JUDGMENT

De Klerk and Others v Opperman (29052/2018) [2024] ZAGPJHC 1008 (7 October 2024) [2024] ZAGPJHC 1008

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mahomed

CASE / FILE NUMBER

29052/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

7

October 2024

Case

No. 29052/2018

In

the matter between : DE
 KLERK, SHERYL N.O.
 First
 Applicant
 DE
 KLERK, SHERYL
 Second
 Applicant
 EILEEN
 OPPERMAN
 Third
 Applicant
 and
 KEITH
 OPPERMAN
 Respondent
 In

re: KEITH
 OPPERMAN
 Plaintiff
 and
 EILEEN
 OPPERMAN
 First
 Defendant
 SHERYL
 DE KLERK N.O
 Second
 Defendant
 MASTER
 OF THE HIGH COURT (JOHANNESBURG)
 Third
 Defendant

JUDGMENT

LEAVE TO APPEAL

MAHOMED AJ

The first and second defendants in the trial in this matter, are now the first, second and 3rd applicants, who seek leave to appeal the whole of the judgment I delivered on 11 June 2024. I will refer to the parties by name for convenience. The parties’ legal representatives are as they were at the trial of this matter. Keith Opperman opposes this application. Having considered the documents before me and having heard the oral evidence at the trial over 28 days, I found that the deceased’s first will , which he signed in 1995 together with his codicil signed in 1998, is his last will and testament. [1]

1. The applicants in the main fault my judgment on the basis that I accepted the evidence of Prof Potocnik, who was biased throughout the proceedings. Mr van der Merwe for Sheryl De Klerk, the deceased attorney and executor on the last will, submitted that the court misdirected itself, and that without Potocnik's evidence the plaintiff could not have succeeded nor discharged his onus. It was submitted that Potocnik accepted all of Keith's "fabricated facts," he failed to interrogate the incidences, which Keith related to him. It was argued that Potocnik himself conceded that "he would do things differently" in the future. Mr van der Merwe submitted that Dr Kopenhager's evidence must be accepted, as she found in June 2010 at Ronald's first visit to her clinic, that he understood the complex consent form and therefore it was contended that he had contractual capacity on the day. Counsel argued he could not have been seriously cognitively impaired as opined by Potocnik, even Ronald's general practitioner, Dr Parrot, found nothing wrong with him, and therefore did not think it necessary to refer Ronald to a specialist. It was argued that Keith himself conceded that his father could have changed his mind and there was nothing unusual if he left all his estate to Eileen, because Keith and his brother were already financially well off, and it was Eileen who was dependent on Ronald. Mr van der Merwe submitted that Potocnik was not a reliable expert, because he refused to consider facts may have the potential to change his opinion, he proffered that it is problematic, because an expert must be open to consider other facts. The arguments before me in this application were raised at the trial and have been addressed in the judgment, I shall refer to the relevant paragraphs later.
2. I found Potocnik's report balanced and logical, his relied on several sources for his diagnosis, which was significantly backed up by the reports and test results from the Appollo Clinic. Furthermore, Kopenhager herself needed to consider the history of the patient and assessed him within that context. The defendant's experts adopted a narrow approach by relying only on his test results, allegedly to avoid relying on hearsay evidence. In my view, their approach failed to provide a context of a patient suffering from a mental illness, whose general behaviour and history must surely be the best way to assess his condition. Potocnik opined Ronald was dementing from about 2006, and Eileen reported to Kopenhager in 2010 that she noted about 5 years prior, that Ronald was repetitive, he suffered memory loss, he had lost much of his dexterity, and he had by 2010 become "very dependent on her". Potocnik relied on this evidence, to confirm a pattern of behaviour he regularly identified in his AD patients. He reported that AD is a degenerative disease and one with an insidious onset, it makes sense that by 2010 he would have been at a moderate level. His test scores, which were common cause, and based a universally accepted medical and scientific scale, he was placed at a moderate level of AD in 2010. It is a disease often confused with the aging process. I agree with Mr Mastenbroek, comparatively Potocnik was a giant of an expert in the field, Brown wrote one paper on the subject and explained that he focused on other areas, whilst Dr Pearl did not hold herself out to be any expert in AD. The applicant's submissions that he was biased is without merit and I am of the view that his comment "will do things differently" is taken out of context. Having observed the witness and considered the line of cross examination, the witness was irritated at a point, when it was suggested that

he could change his view on the facts before him. Potocnik chose not to speak to Eileen as he had already noted after he read her affidavit in earlier related proceedings, that she lied that Ronald suffered dyslexia, he found no evidence of this in Ronald's test results, Kopenhager did not find this either nor was it recorded in 2010, obviously because it was an afterthought. Counsel's reliance on Ronald's signature on a complex consent form equated to contractual capacity, is opportunistic. In my judgment I addressed this point, that the form was signed always with the assistance of a carer or the like, and I noted in my judgment that "to both applicants, a signature meant, Ronald consented and knew all that he was doing." In this regard, although I made no finding, the facts regarding undue influence and collusion provide a particularly useful context, for my finding on his last will.

3. It is probable that by 2007 Ronald was already dementing, and in paragraphs 249 and 250 of the judgment, I set out with reference to the approach of our courts, that Ronald appeared not to have made rational and reasoned decisions when he signed the 2007 will. At paragraph 251 of the judgment, I consider the comparative approach to assessing testamentary capacity and noted Dr Pearl's view in paragraph 258 of the judgment regarding his having lost his volition early on in his mental deterioration.
4. Upon an analysis of the facts before and my reasons for my findings as appears at paragraphs 262 to 267 and 269 to 270 of the judgment, I am of the view that the applicants have not satisfied the requirements for leave as set out in s17(1)(a)(i), another court would not arrive at a different decision.[2]
5. The judgment is attacked for the court having accepted hearsay evidence, regarding a note recorded by a locum doctor in Ronald's patient file. This point was addressed in the judgment and am of the view that the failure to call the witness is of no more, it would have been unreasonable to expect him to testify to anything more than that which he had recorded, some 20 years earlier. I found that it was in the interest of justice that the evidence be allowed, given the nature of the evidence, its purpose and that Dr Parrot founding nothing unusual in the note, doctors are known to employ locums in their practice from time to time and the author could never have contemplated any AD and related dispute to testamentary capacity when he recorded the facts at the time.
6. Advocate Postumus for Eileen, argued that Keith's evidence on various incidences was unproven and at odds with Potocnik's

testimony, I am of the view that the test on probabilities assists the plaintiff's evidence, as viewed against the conspectus of the evidence, the medical evidence, and the fact that both Eileen and Sheryl evidence was unreliable. He remained consistent in his contentions, he relied on his memory and on the best evidence available to him, however as Potocnik maintained, one cannot rely on incidences in isolation, rather a global approach presents the full story. Furthermore, Mr Postumus argued that none of the incidences were reported to Kopenhager, which he argued is odd, he proffered they in fact did not happen. I am of the view that although Eileen differed in her views on the incidences, she was aware of many of them, she just proffered a view that suited

her case, to cast as much doubt on the plaintiff's version. Mr Postumus's argument that Kopenhager was not told, must be interpreted in the context in which the parties engaged with the medical experts. Kopenhager needed information to assess if the patient would qualify to be admitted on the trials, the exercise was new to both Eileen and Keith, neither was required to prepare a case as a witness for trial, the purpose of her inquiry was different from that of Potocnik and Keith cannot be faulted if he made general statements to Kopenhager as opposed to more specific information to Potocnik. Mr Mastenbroek correctly argued that there is nothing to gainsay the occurrence of the incidents, except for Eileen's denials and she was found to be an unreliable witness, on the objective facts. Counsel submitted that a court of appeal will consider the way in which Potocnik addressed

the various incidences he learnt of from Keith and his family and will arrive at a different conclusion, there application must be granted.

7. I agree with Mr van der Merwe that Keith and Eileen's evidence on the incidences differed, Eileen denied much of the evidence by Keith. Counsel's submission that none of the incidence occurred is noteworthy, however Eileen in her evidence responded to and engaged with each incidence, albeit that she proffered different explanations, but I am of the view that many of the incidences did occur, as I set out in the judgment. I do not propose to repeat them but must state that she was misleading on material points including her dismal attempt at vindicating herself when she introduced Document X. Ms De Klerk was unreliable, regarding the marital status of her long time client Mr Ronald Opperman, the judgment sets out the details on her reliability as the executor of the deceased estate.
8. The applicants have raised several other grounds of appeal, and discrepancies in the facts recorded, it will serve no purpose to canvass them all, as I agree with Mr Mastenbroek, the diagnosis of a moderate level of Alzheimer's in 2010, based on the test results is an objective fact. Dr Kopenhager found Ronald incapable of managing his affairs, and on the same date, Ronald stated he felt nothing was wrong with him, on the day his results demonstrated that he was disorientated and his condition through the following weeks was testimony of his poor health, no appeal court can differ on his condition in 2010, as was proven.
9. In the judgment I noted Dr Brown's view that more brain power will be required in a complex situation, and that in 2007 and 2009, Ronald moved to a simple will, he did not require much brain power. Regard must be had of the fact that in 2007 he "moved from a complex will, he by Dr Brown's reasoning, must have required more brain power, to move away from it." The judgment traverses the case law that the circumstances of how an instruction to change was given, the setting in which instructions were given, the outcome of the enquires made by the solicitor, assume importance.[3]
10. I am of the view that the application cannot succeed another court on the facts would not arrive at a different conclusion.

Accordingly, I make the following order:

1. The application for leave to appeal is dismissed.
2. The applicants are to pay the wasted costs of the application on a party party scale.

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 7 October 2024.

Date of Hearing: 23 August 2024

Date of Judgment: 7 October 2024

Appearances:

For Applicant 1 and 2 Instructed by: Adv H van der Merwe Andersen For applicant 3 Instructed by: Adv I Postumus Lindeque & Van Heerden Attorneys For Respondent Instructed by: Adv R Mastenbroek Eugene Maritz Attorneys

- [1] CL 000-99 Judgment paras 269 and 270
- [2] MontChevaux Trust v Goosen 2014 JDR 2325 (LCC) par 6, there must be a certainty that another court will differ from the judgment appealed.
- [3] CL 000-88 para 251 read with para 262 and 264

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Prepared on 10 October 2026 · Esheria