

SOUTH AFRICA / JUDGMENT

Froud NO v Lewitt and Others (18987/2005) [2009] ZAGPPHC 272 (22 September 2009) [2009] ZAGPPHC 272

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

18987/2005

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE:

22/09/09

CASE

NO.:18987/2005

In

the matter between:

LINDA

NATALIE FROUD

N.O.....PLAINTIFF

And

MARC

BRANDON LEWITT

.....1ST

DEFENDANT

LLOYD

BRADLEY FROUD

.....2ND

DEFENDANT

MASTER

OF THE HIGH

COURT.....3RD

DEFENDANT

JUDGMENT**RAULINGA. J****Introduction:**

The plaintiff instituted an action against the defendant for an order declaring a purported will invalid on the basis that the signature on the purported will is false.

Alternatively, the plaintiff claims that, since the will was not signed by the testatrix in the presence of two competent witnesses, the will is invalid in terms of the stipulations of section 2(1)(a)(ii) and (iii) of the Wills Act, 7 of 1963 (“the Wills Act”).

The first defendant (the only defendant) who contests the action admits that the will was not signed in the presence of two witnesses, and the formalities for the execution of wills as contemplated in section 2(1) of the Wills Act, were not complied with.

The first defendant denies, however, that the will itself is forgery and counterclaims that the court should declare the document to be the will of the testatrix in terms of section 2(3) of the Wills Act.

It transpired as the trial commenced that the second defendant Lloyd Bradley Froud did not intend opposing the action. At the time of the trial the second defendant was living in England and this information was sent per letter dated 13 April 2009 exhibit “A”.

Prior to the adducing of evidence, it was agreed between the parties as per pre-trial minutes that the plaintiff would carry the onus to show that the will was a forgery. The first defendant would carry the onus to show that the purported will was the last will and testament of the testatrix. It was also agreed that the first defendant would adduce evidence first.

The following bundles and documents were produced as exhibits; the trial bundle including the purported last will, liquidation and

distribution account, the pleadings, the Rule 35 bundle, Rule 36 bundle and Rule 37 bundle. A transparency reflecting the signature of the testatrix referred to as a “standa” as well as a family tree of the plaintiff’s and testatrix’s family.

Before embarking on the evidence as tendered by the witnesses, it is prudent to explain the relationship of the parties testatrix and the witnesses as reflected on the family tree exhibit.

The plaintiff and the deceased Marina Charlotte Vieira (testatrix) are half-sisters, they share a mother. Marina is 17 years younger than the plaintiff. The plaintiff and the second defendant

Lloyd Bradley Froud are brother and sister - they share both parents. The first defendant (Mark Lewitt) and Marina were long time lovers who lived together. The first defendant and Gillian Gabriel Ehlers are brothers-in-law - Ehlers is married to the first defendant's sister one Tanya. Ehlers is an attorney who drew the purported last will on behalf of Marina. Having sketched out the family tree I now turn to the evidence tendered on behalf of the parties.

The Evidence

First Defendant's Evidence

Mr Ehlers testified that he is a criminal law attorney who practices in Centurion. He is not an expert on drawing of wills. The matter of drawing a will was discussed with Marina during a social afternoon when they had gathered to watch rugby. Both the first defendant and Tanya were present at this gathering. This was followed up by a telephonic instruction from Marina as to the detail of the content of the will. The prepared will was typed by his wife Tanya at their home. On 1 July 2004 when he had a case at the Johannesburg Magistrate's Court he met Marina there when Marina read and signed the document in his presence. However, his wife Tanya signed it at home in the absence of the testatrix.

At the bottom of the page containing the purported will the following statement appears above his signature and that of his wife.

"Attestation and witness:

Signed by the testatrix in the presence of both of us being present at the same time and attested by us in the presence of her and each other."

He admits that his wife was not present and also that the statement is false. He, however, claims that he is not an expert in civil law and as a result he did not know that the absence of the second witness (ie his wife) was wrong.

He further testified that the letter contained in pages 6 to 12 of annexure "B" (of the "trial bundle") were also handed over by Marina to him at the same time. He handed the purported will and the letters to the plaintiff after the death of Marina on 12 August 2004 before the funeral.

Mr Ehlers admitted that he had done a course in administration of estates, but he did not have detailed knowledge about how wills are drawn.

Marina was diagnosed with cancer (leukaemia) and would succumb to cancer after a nine months battle against it.

He could advise the testatrix (Marina) with ease because he himself was once diagnosed with cancer. The deceased (Marina) requested him to hand over the will and the letters to Linda once she died. He did not discuss the fact that two witnesses had to be present when a will is signed with his wife. He never discussed the contents of the will with his brother-in-law (Mr Lewitt). He met with Marina several times before she died. He had also met with the plaintiff before. It was the second defendant who gave him the plaintiff's telephone numbers before he phoned her after

the death of Marina. The signature that appears on the will is that of Marina, however, the place where the will was signed is not reflected on the will.

He kept copies of the letters. At one stage or another he faxed the will to somebody at ABSA.

Mark Lewitt Brandon testified that he and the deceased (Marina) were long time lovers. They lived together from February 1998 until August 2004 when she died. In December 2003 Marina was diagnosed with leukaemia.

Although the relationship was a long one it had its ups and downs. There were times when they separated albeit living in the same house. In 2002 he asked the deceased to move into another bedroom in the same house. They reconciled in 2003 but Marina did not move back to the main bedroom. After her diagnosis with cancer she went for chemo-therapy several times. She succumbed to the decease on 6 August 2004 while undergoing treatment for Septicaemia. Marina was employed and she managed to make some savings. She kept her affairs separate. He did not know about her funds and policies.

However, under cross-examination he admitted that he knew about two policies. When she was at the hospital it was he who paid part of the medical bills. His father also assisted her with some payments. He had first said that Linda never paid anything but under cross-examination he changed and said she made one payment when she was at the hospital. Linda and Mynon also went to see her. Her mother never came to see her when she was ill. Her mother lives in England. Linda never acted like a mother to Marina, although she had signing powers and was entrusted with her financial matters. Marina consulted with Linda on major decisions on finances.

He had intended to propose to Marina at Autonique Mountains and he bought a ring for the occasion but this was never to be. At one stage Marina told him that there were letters she had written to several people. Although he had enquired from her about a will, she never discussed the purported will with him. He only knew about the will on a Saturday after Marina's death. The documents on page 13 of the trial bundle were found by him in the deceased's bag (after her death). It was a list of things that she owned. He called these documents a "makeshift will". This he found a week after her death. He only saw the letter on page 12 of exhibit "B" on the day of the funeral.

Kruger National Park was Marina's favourite place, particularly Satara. Her ashes were scattered at Satara.

Although the will was signed on 1 July 2004 his sister Tanya never told him until he discovered same on 7 August 2004. There are a lot of things he did not know about Marina because she was a secretive person. The signature on the purported will looks like that of Marina. Marina took a policy that covered her decease. At that stage there was no need for anybody to make a contribution towards her medical bills. He did not collude in the manufacturing of the will after Marina died.

Plaintiff's Evidence

The plaintiff called the following witnesses in support of its case.

Linda Natalie Froud testified that she is the plaintiff in the matter and executrix of the estate. Marina is her half-sister. She and Marina are of the same mother but different fathers. There is a 17 year age gap between the two of them. She took care of Marina from her birth. After her mother left she lived with Marina and her stepfather (Marina's father) in her house at Westernaria. She continued to look after Marina even when Marina was working. She helped her financially.

The relationship between Marina and the first defendant was not a happy one. She was scared of Mark because he was possessive of her. However, Mark was always there when Marina was sick. Marina died at the age of 27.

She had signing powers on the ABSA bank account of Marina which she opened for her. She acted as her financial adviser. She helped her buy a car and she generally managed her affairs. She was logically the person to be approached to draft a will for the deceased. Marina had an Old Mutual policy which paid out R300 000.00 in January 2004 after her diagnosis with cancer. She had applied for this policy on behalf of Marina. Marina signed for the benefits in her presence. She once advised Marina to draw a will when she visited her at the hospital. When she talked to her, Marina had no knowledge of a will. She also advised her to nominate a beneficiary. She did this for the benefit of Marina. Marina never told her about another will that she had already made. After Marina died she called the first defendant to her house to discuss the funeral arrangements.

When Mr Ehlers told her that he was in possession of Marina's will she could not believe it because Marina would have told her about it. When she read the purported will she immediately told Sean that it was not Marina's signature. She then decided that the matter should be referred to experts. She knows Marina's signature very well she cannot mistake it for any other.

Her mother and herself are beneficiaries in the will. Although she did not like the way Mark treated Marina, she would never bother if he were to benefit from the will - that would be Marina's wish. She found it strange that Marina would have chosen Mr Ehlers instead of her. At the time the purported will is alleged to have been signed, Marina was sick and very weak. She read the letters to herself, her mother and brother. Marina was angry when she wrote the letters. The letters are not disputed.

She submitted her appointment as executrix to the Master because that is a standard procedure.

She and her mother are beneficiaries on the Sage policies. There is no nominated beneficiary on the Old Mutual policy. She has no problem if Mark (the first defendant) gets the rest of the estate, however, the signature on the purported will is not that of Marina. There was conspiracy in the construction of the will by the people who witnessed the will. She does not know if Mark was part of the conspiracy. Marina was right-handed. She approached two experts - Mr Uwe Otto and Mrs Grandin. Mr Otto received twelve documents whereas Mrs Grandin received four documents. She submitted originals to Mrs Grandin. She does not know what happened to them. She submitted the will in September 2004.

The plaintiff then called a handwriting expert Ms Silvana Grandin who testified that she holds the following qualifications and experience:

She is a graduate of the basic and advanced courses in Forensic Documents Examination, which course is conducted by Andrew J Bradley and Associates.

She has been practicing in the field of Document Examination for approximately twenty five years and as a professional handwriting

analyst for some thirty years and has covered +/- 4000 cases on document examination.

She is a professional member of Associazione Grafologica Italiana (A.G.I.) Italy and profession (certified) member of the American

Association of Handwriting Analysts, Chicago.

Her routine work consists of the verification of signatures and handwritings on questioned documents such as wills and testaments,

bank deposit slips, identity and credit cards as well as a variety of other documents. Included in her work is the task of identifying

authors of anonymous letters and compiling a personality profile on the basis of the handwriting.

She uses the latest technology including stereoscopic microscopes, powerful magnifying glasses, calibrated plates, ultraviolet lights

and photographic equipment.

She has examined the questioned document in this matter and has the necessary qualifications and experience to enable her to render an expert opinion regarding the authenticity of the signature on the questioned document.

She has thoroughly examined the questioned document in order to establish whether the signature on the questioned document is that of the late Marina Charlotte Vieira.

In compiling her report dated 10 September 2004 in analysing ST1-/ST-12 she used genuine documents. The original magnified transparent report is available. The documents were given to her by the plaintiff (ST1-ST12). The magnified signatures are only from ST1-ST8.

The pen-motion is the same - there is no change of the structure of the signature (ie set of the connecting parts). There will always be variations but they do not affect the structure. Irregular alignment may be defined as prescribed lines and imaginary lines

- ie the alignment of each letter. The deceased had an irregular alignment. The downward stroke is stronger whereas the upward stroke is lighter (darker and lighter strokes). There exists a slanting tendency - starting on the baseline going upwards (above the baseline).

Questioned signatures - QA and QB.

The two signatures are almost identical - that refers to peculiarity. Each letter rests on the prescribed baseline. The M and V of the signature are drawn and not written. The V is heavy on all sides - the sides are straight - they are slow and not quick. They sit on the baseline faithfully. The "i" dots are well placed - which indicates slowness rather than speed.

There are no traces of forgery caused by nervousness. The pen-lifts are different. The blunt-endings are a sign of control rather than fly-end.

Technical comparison - the witness referred to two books by ... Hilton "Scientific Examination of Questioned Documents" - Revised edition page 173 and W Harrison - "Suspect Documents"

- page 298 on similar signatures.

The two authors confirm that where there is nervousness there is a lot of control exercised in making the design. This is what happened in the signature in question. This is a simulated signature by a person who studied the design and tried to replicate same.

The letter i next to the V is always done in two movements - down and up. The "i" looks like an V. This is not present in QA and QB. The third signature looks alike - this is an indication that they were done one after the other. Under QA and QB the two strokes of the V are lower or the second V is slightly lower. In the Standa signature the first stroke of the V is lower than the second stroke - there is speed of execution. (It is a very immature movement) (ie under QA and QB). There are so many elements of control and variations as well. It can be accepted, however, that signatures cannot be performed with much precision.

There is a starting stroke under QA and QB signatures. (At this stage the transparencies were produced as exhibit "D") QA and QB are not really identical - it is, however, peculiar that there are natural variations. There is a natural variation between standa

and 6 which were signed on the same day, whereas under QA and QB there are unnatural variations. (The witness refers to a book by Osborne - "Problem of Proof" second edition - chapter 17 and again to Albert - "Questioned Documents" page 270.) It can therefore be concluded that the questioned signatures are simulated. The QA and QB signatures are not written in a free and natural manner.

(The witness was then referred to the Rule 37 Bundle) - Mr Greenfield) (The line quality was then explained.) The fact that the line quality is good does not mean that there is no forgery. Missing a letter is blatant - there is an "i" missing and also the connection to "r". When the person who signed simulated the signature he/she applied pressure and as a result missed the letter "i".

Conditions and circumstances need to be defined. If it be true then the deceased (Marina) was suffering from cancer, she could not have aligned the letters as she is purported to have done. The two signatures could not have been more or less similar. The line quality would have been poor.

Under cross-examination

The line-quality is good although this was signed nineteen days after she had purportedly signed the will. Even if she could have received the originals, that would not change her conclusion. However, she looked at the originals which were handed to her by the other experts.

One must look at the overall picture, because according to literature a forger may concentrate on something else and as a result make a mistake. A forger is unlikely to make a blatant error such as the omission of the “i”. The general model was faithful to the signature. She does not think the forger was careless. This is an isolated instance.

She had an abundant documentation to compare. She had four documents of the original signatures. The conclusion would depend on the quality of the signatures.

The different signatures of the deceased have a lot of similarities in their structure. The habitual characteristics are the same. She was given the specimen and she was satisfied with the quality. If there were a wide range of natural variations, one would have needed more than one specimen.

The purpose of her examination was not to prove that Mr Ehlers forged the signature. She did not even know that the deceased suffered from leukaemia. She is a neutral and independent handwriting expert.

The forger tried to simulate the deceased's signature by using a free hand. Both questioned signatures are slowly written. Even if one is slow one will not leave out important characteristics. There were two omissions; the “i” and the gap between the letters. The down stroke on “i” would not be an “i”.

(The witness then went on to explain the standa - in particular ST10 and ST16. In comparing questioned signatures, it would not matter whether one is left or right-handed. She examined Mr Otto's report. (The witness was referred to exhibit E which she explained thoroughly.)

The plaintiff closed its case.

Evaluation

In its submissions the first defendant raises an argument that the nature of the allegations in the particulars of claim and the plea to the counterclaim are such that the plaintiff must be accusing someone of fraud. The first defendant referred the court to the case of *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A) at 858 in which the court quoted a passage from *Gates v*

Gates 1939 AD 150 at 155 where WATERMEYER JA remarked as follows:

“In certain cases more especially in those in which charges of criminal or immoral conduct are made ... the reasonable mind A is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.” See also Loomcraft Fabrics CC v Nedbank Ltd and Another 1996 1 SA 812 (A).

I must hasten to say that although the plaintiff (Ms Froud) herself does not name the person who might have simulated Marina's

signature she categorically stated that her sister's signature was forged. Her evidence is corroborated by Mrs Grandin who said that the forger simulated Marina's signature. There was no need for them to name the forger. I am convinced that this accords with the particulars of claim and the plea to the counterclaim.

The dictum in *Regional Magistrate du Preez v Walker* 1976 4 SA 849 (A) 855(G) may not always hold water. As it is clear from the statistics that we have, there are a number of officers of the court who have been found wanting, albeit the number is very insignificant. There is no need to deal with the detail of this issue. This does not at all affect the good office and conduct of Mr Ehlers whose good character has not been directly challenged. I remain impartial on this issue.

The first defendant admits that the will was not signed in the presence of two witnesses and therefore the formalities for the execution of wills as contemplated in section 2(1)(a)(ii) and (iii) of the Wills Act, 7 of 1953, were not complied with.

Section 2(3) was promulgated to ameliorate the hardships and injustice occasioned by insisting on strict formalities in all cases and to reaffirm the sanctity of the testator's last wishes, however, in doing so it made it clear that this purpose had to be served within the framework of the following three requirements: there had to be (1) a document (2) drafted or executed by a person who had died

since the drafting or execution and (3) who intended the document to be his will - *Ex Parte Williams: In Re Williams' Estate* 2000 4 SA 168 (T) 172D-E.

In the ordinary parlance of interpretation of wills this offers no difficulty. However, in *casu* one is dealing with a purported will the authenticity of which is challenged by the plaintiff. There are allegations that the signature on the purported will was simulated. Ordinarily, once the abovementioned requirements are met, the draft will be regarded as a will. The courts in interpreting a draft may disregard some of the formalities and declare the draft a will. In doing so the court approaches the matter objectively. It is not a forgone conclusion that every draft where one or some formalities have not been met will be declared a valid will.

In instances where the signature on a purported will is challenged, the first entry of analyses will be to deal with authenticity and thereafter examine the formalities. If authenticity is approved then the easier the requirements will succeed. However, if authenticity is not approved the more difficult it will be to condone any of the requirements.

Is the purported "will" a valid will?

In *Kunz v Swart and Others* 1924 (A) 618 - the matter concerned the validity of a will and in particular the fact that it was allegedly

forged. The court held that the onus of proving that the will was a forgery lay upon the plaintiff, and that as he had failed to

discharge that onus he was not entitled to succeed in his claim. In casu the defendant argues that in order for the plaintiff to succeed in her action she must prove fraud, because the onus lies on her to do so. However, in the Kunz case supra at 652 SOLOMON JA quoted Voet (5.3.4) treating of the hereditatis petition, says:

“For the rest, he who sues for an inheritance ab intestate is not bound to prove that the deceased died intestate; it is sufficient if he has proved that he is the nearest and therefore the heir according to law. When that has been done, the whole foundation of the action has been established and defendant will then have to prove his exception by what testamentary disposition he contends that the heir whom the law recognises has been excluded. For without any doubt the onus is upon the defendant to prove his exception, not upon the plaintiff whose declaration cannot be affected by any exception.”

The petition hereditatis in Roman Law was an action brought by the heir of the deceased, whether under a will or ab intestato, to recover the estate from someone who was in possession of it. Under that law, upon the death of any person his estate devolved upon his heir, who was his universal successor. The converse is applicable in casu in that the plaintiff is one of the heirs to Marina's estate. It therefore holds that in arguing the issue of onus and in his reference to the Kunz case, the first defendant was not candid with the court in failing to explain the minute detail of its implications. I say this against the backdrop that the parties agreed that the plaintiff carries the onus to show that the will was a forgery. In my view, it is sufficient for the plaintiff to discharge the onus without naming the forger.

What can be gleaned from the Rule 36 bundle is that reports of three experts were obtained and submitted. Silvana Grandin and Uwe Otto for the plaintiff are ad idem that their expert opinion is that the signature on the questioned document is not that of the testatrix whereas the expert opinion of Cecil Greenfield is in the contrary. Only Silvana Grandin was called by the plaintiff to testify. The defendant called no expert witness.

In Annama v Chetty 1946 AD 142 at 174, the court confirmed the function of a handwriting expert as follows:

“His function is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regards to the significances of these factors.”

I can add that in a trial the court will also draw inferences from the demeanour of the witnesses, as well as any observations that it notices during the trial. The court must be satisfied on a balance of probabilities that the contents of the will do truly represent the testator's intention. This is the standard that the courts require in order to arrive at a proper conclusion - Fuller v Strum 2001 EWCA-CIV 1879 at 109E-J.

In *Mapota v Santam Versekerings Maatskappy Bpk 1977 4 (AA)* the court held that the . medical evidence could only refute the strong and otherwise acceptable and corroborated evidence of appellant if that evidence unquestionably showed that the reasonable possibility did not exist that the accident could have occurred as described by the appellant.

I must immediately mention that there are a number of reasonable possibilities and probabilities in this case.

Mr Ehlers, is a brother-in-law to Mr Lewitt, it being that Mr Lewitt is a brother to Mr Ehlers' wife, Tanya. There is no need to question their close relationship taking into account that sometime before Marina "signed" the purported "will",

they were together at a social gathering. My guess is that whatever Marina discussed with Mr Ehlers which in turn was discussed with his wife Tanya who signed as a witness, must have been discussed with Mr Lewitt.

I am not saying it is so, but that probability cannot be excluded.

Marina "signed" the will on 1 July 2004, and she died on

August

2004. Mr Ehlers hands over the "will" and letters to her

sister, the plaintiff, immediately thereafter. After a week Mr Lewitt hands over the "make-shift" will (the other documents).

Mr Lewitt had been living with Marina for about six years. He knew about Marina's preferences and dislikes. He even knew about the differences between Marina, her mother and her siblings. Probabilities exist, by way of inference that he stumbled upon the

letters and the "make-shift will" when Marina was still alive or immediately after her death. He was aware that there was an Old Mutual policy for which there was no beneficiary. After all Marina was too sick to control certain of her belongings. He was living with her and he was the one closest to her. Marina was an extrovert as put by the first defendant, she could have told the plaintiff where to get when the plaintiff approached her about the will.

The probabilities are that at the time when Marina was suffering from leukemia and had undergone chemotherapy, she would have needed her sister (the plaintiff) dearly for advice. Although she had lived with the first defendant for about six years, one should remember that there were times when they separated and they would not even talk to each other. Her sister was her financial adviser who at that time could have been her sanctuary for a will. There are no convincing reasons why she could have chosen Mr Ehlers instead of the plaintiff.

Mr Ehlers is a trained lawyer. If he realized that he was not adequate enough to deal with the “will” (because he confesses to be a criminal lawyer) he could have approached a colleague who could have advised him accordingly. One does not understand why Marina for so many years of knowing Mr Ehlers, she would so late in their relationship only then choose him as her confidant.

The first defendant was a bit generous when he testified. However, in so doing he contradicted himself. He testified that Marina had a lot of secrets but at the same time he said she could say anything - she was an extrovert. He admits that Marina would approach the plaintiff for advice but then he further said that Marina did not like the plaintiff. He tried to paint a picture that the plaintiff did not visit Marina regularly at the hospital, he then changed and said she visited her. The plaintiff proved otherwise. He also conceded that there were times when he quarreled with Marina to an extent of separation.

In my view the plaintiff had a duty to protect the interest of her sister’s estate. She was appointed as an executrix and she therefore was obliged to submit all the documents pertaining to the estate to the Master including the purported will. Her evidence is satisfactory in all material respects.

Mrs Silvana Grandin was the only expert witness who testified. She was cross-examined extensively and she did not contradict herself except for minor discrepancies which are a norm in matters of this nature. The reports of the other two experts were not examined nor did the experts testify. There is no need for me to regurgitate Mrs Grandin’s evidence.

She is a competent expert who gave satisfactory evidence. She gave evidence of comparison to similarities and differences. The court

itself was able to make the necessary comparisons and managed to access the cogency of her evidence. Handwriting samples were produced

from which the court could make conclusions on the genuineness thereof. Mrs Grandin has special skills as an expert. Her resume and experience of many years bear testimony to this. She has for more than thirty years covered +/- 4000 cases on document examination.

Mrs Grandin’s assistance as an expert is therefore very important. Expert evidence on handwriting has advanced to an extent that the value and weight thereof can no longer be doubted.

The court also relied on circumstantial evidence as well as viva-voce evidence by both the plaintiff and Mrs Grandin. It was apparent from their evidence as well as the observations made by the court that similarities and dissimilarities exist on the questioned signatures and the original signatures of the deceased.

Mrs Grandin referred to authors whose arguments sustain her conclusions. It can therefore be held that the signatures appearing on the purported will are simulated.

In casu the opinion of Mrs Grandin was not challenged by any other expert.

In Diehl and Others v Master of High Court Pretoria and Others 2008 (4) All SA Reports 430 (T) 448 para 56.1 LEGODI J found that the witness for the plaintiff contradicted herself. This is in sharp contrast to this case where no material contradictions are present. Further at page 449 para 57 the evidence of the expert witness for the plaintiff was strongly contested by the evidence of the expert witness for the defendants, this is absent in the present case. While I align myself with the decision of LEGODI J, I, however, find that the facts and the evidence in the two cases differ.

A point was raised that Mrs Grandin did not compare the original signatures to the questioned signatures. However, to the contrary she testified that she looked at the originals of Mr Otto and Mr Greenfield. She had four originals herself. She reviewed a number of documents which were handed to her by the plaintiff. She further testified that it was not necessary for her to enquire into the condition of the deceased. She explained the variations.

It can be confirmed that after scrutinizing the stand and observing her in the witness box I am convinced that her demeanor accorded that of an expert who knew and understood what she was testifying about.

I have already indicated that the validity of the will or not based on lack of formalities is dependent on the authenticity or not of the signature. If the authenticity is not approved it follows that the formalities which were not met in terms of section 2(1)(a)(ii) and (iii) cannot be condoned. In casu, the first defendant admits that the will was not signed in the presence of the two witnesses and therefore the formalities for the execution of the Wills Act were not complied with. Further, the place at which the will was signed is not mentioned. The first defendant also concedes that the statement appearing above the signatures of Mr Ehlers and his wife is not a true reflection of what happened. The statement reads as follows:

Signed by the testator in the presence of both of us being present at the same time and attested by us, in the presence of her and each other.”

Although the failure to comply with the formalities falls under the alternative claim, this is evidence that supports plaintiff's

case that the deceased's signature was forged.

Conclusion

The purported will is declared invalid on the basis that the signature is false.

In the premises I would make the following order:

1. The plaintiff's claim is granted with costs.
2. The first defendant's counter-claim is dismissed.
3. The first defendant is ordered to pay the costs.

T J RAULINGA

JUDGE OF THE NORTH GAUTENG HIGH COURT

18987/2005/sg

Heard on:

For the Plaintiff: Adv

Instructed by: Messrs

For the Defendants: Adv Instructed by: Messrs

Date of Judgment:

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