

SOUTH AFRICA / JUDGMENT

Herman and Others v Wiggill and Others (EL961/2013; ECD2161/13) [2015] ZAECELLC 12 (18 September 2015)

[2015] ZAECELLC 12

COURT

Eastern Cape High Court, East London Local Court

BEFORE

T Stretch

CASE / FILE NUMBER

EL961/2013; ECD2161/13

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, EAST LONDON

Case

no. EL 961/2013

ECD

2161/13

In the matter between:

KURT
HERMAN
First
Plaintiff
MARGARET
RICHTER
Second
Plaintiff
WAYNE
HERMAN Third
Plaintiff
and
PETER
WIGGILL First
Defendant
WAYNE
CHANGFOOT
Second
Defendant
THE

MASTER OF THE HIGH COURT

Third

Defendant

LISA

HERMAN Fourth

Defendant

VERONICA

BOOI

Fifth

Defendant

RHODA

SWART

Sixth

Defendant

MBULELO

MAYEKISO

Seventh

Defendant

DUMILE

TSHALISI

Eighth

Defendant

NOMBULELA

SIYANGAPHI

Ninth

Defendant

NTOMBISE

SILWANA

Tenth

Defendant

HLENGIWE

SITYATA

Eleventh

Defendant

LISA

HERMAN

Twelfth

Defendant

MARY

LYNN

WYLDE Thirteenth

Defendant

JUDGMENT**STRETCH J:**

[1] Margaret Patricia Ann Wiggill (“the deceased”) died at her home in East London shortly after midnight on 19 May

2013. She was 60 years old.

[2] She left behind her mother Margaret Richter, her husband Peter, her two sons Kurt and Wayne from a previous union, and two wills dated 8 May 2013 (with a codicil dated 14 May 2013) and 17 May 2013 respectively.

[3] These wills are the subject-matter of this action which has sadly resulted in the deceased’s family and her closest friends splitting into two opposing camps, with the camp contending for the will of 8 May 2013 (“the first will”) consisting in the main of the deceased’s mother (the second plaintiff), the deceased’s

son Wayne (the third plaintiff), her other son Kurt who was the erstwhile first plaintiff having been released from these proceedings

before this trial commenced), and an attorney-friend by the name of Lynn Wylde (the 13th defendant), and the camp contending for the will of 17 May 2013 (“the second will”) consisting in the main of her husband (the first defendant) and another attorney friend by the name of Wayne Changfoot (the second defendant).

[4] The plaintiffs aver that the second will is invalid for lack of compliance with section 4 of the Wills Act 7 of 1953 in that the deceased, at the time of signing that will, lacked the necessary mental capacity to make a will.

[5] The plaintiffs contend that when the deceased signed the second will on 17 May 2013 she was mentally incapable of appreciating the nature and effect of her acts and was incompetent to do so in that she, at the time, suffered from terminal cancer which had affected her brain and had impaired her mental ability. In their claim, the plaintiffs describe these effects as follows:

She was not at the time of sufficient intelligence, because of terminal disease.

She did not possess a sufficiently sound mind and memory, because of terminal disease.

She did not understand and appreciate the nature of the testamentary act in all its different bearings, because of terminal disease.

Her memory was greatly impaired by terminal disease.

She lacked a disposing memory and was incapable of recollecting the property she was about to bequeath, and manner of distributing it, because of terminal disease.

Her mind and memory were insufficiently sound to enable her to know and to understand the nature of the act in which she was engaged at the time she executed the will, because of terminal disease.

Her physical infirmity had diminished her intellectual faculties and had confused her mind and memory so that she no longer possessed a disposing mind and memory required for testamentary capacity, because of terminal disease.

[6] In the alternative, the plaintiffs contend that at the time of signing the will, the deceased was subjected to undue influence brought to bear upon her by her husband Peter, and/or by attorney Changfoot, who:

Subjected [her] to pressure to sign the will, despite her mental state and inability to resist such pressure;

Because of their relationship with [her], were able to persuade her to sign the will against her better judgment and true intention and to leave the major part of her estate to First Defendant [her husband].

[7] It is accordingly contended that the second will did not express the true intention and the last will and testament of the deceased, but instead that of her surviving spouse.

[8] In the premises, the plaintiffs seek orders declaring the second will invalid and the first will to be the valid last will and testament of the deceased for purposes of the Administration of Estates Act 66 of 1965.

[9] The action is defended by the deceased's husband and attorney Changfoot who plead that the deceased revoked the first will (where attorney Wylde had been appointed as executor of the estate) when she signed the second will (appointing Changfoot as executor). In particular, it is denied that the second will does not comply with section 4 of the Wills Act, which reads as follows:

4 Competency to make a will

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 on the person alleging the same.

See: Kunz v Swart 1924 AD 618; Tregea v Godart 1939 AD 16

[10] In terms of item 19(b)(iv) of this court's rules of practice read with item 19(d), any court hearing a matter in which an order is sought declaring a document to be the last will of a deceased or whether such document is or should be regarded as a valid will, shall consist of a quorum of two judges, unless varied by the Judge President.

[11] The parties having agreed that this is such a matter and that the quorum ought to be varied to dispense with the second judge, such variation was duly obtained from the Judge President before the trial commenced.

[12] The third defendant, being the Master of this court, whilst indicating that the third defendant abides this court's decision, has put up a report pointing out that:

Both wills were registered by the Master on 10 June 2013.

The first will had been revoked by the second one.

Accordingly, only the second will was accepted by the Master upon registration and in terms of section 8 of the Administration of Estates Act.

Sister England

[14] Sister England testified under subpoena (to the extent that she did not volunteer to testify) as the plaintiff's first witness. She was 71 years old when she testified as a professional nursing sister who had qualified as a general nursing sister 49 years ago. She has extensive experience in caring for, medicating and counselling the elderly, the infirm and terminally ill patients. She has been employed with CANSA (the Cancer Association of South Africa) since 1989, in particular providing palliative care for terminally ill cancer patients. She has a diploma in oncology.

[15] She began nursing the deceased just short of a year before the deceased died. The deceased was referred to her suffering from mesothelioma which is a type of lung cancer. At this time, the deceased had already been exposed to chemotherapy and was taking analgesic drugs.

[16] She testified that from 17 January to 7 May 2013 she only had telephonic contact at intervals with the deceased as the deceased was living on a farm out of town and was in any event, doing well. On 7 May 2013 the deceased telephonically informed her that she was not feeling well, that she was in a great deal of pain, that her right eye was drooping and that she was nauseas. According to a doctor's report the cancer had metastasied causing adhesions to the brain.

[17] The deceased's oncologist had prescribed Epilum to prevent seizures, Louryka for nerve pain, Mist-Morphine for pain, Citlift for depression, Thyroxin for her thyroid and Lacsit for constipation.

[18] On 10 May she spoke to the deceased's husband on the phone, who reported that the deceased was "confused at times".

[19] On Monday, 13 May she visited the deceased who was a "little better" on that day. She was being administered one millilitre of mist-morphine

every four hours for pain. However on Thursday, 16 May the deceased was confused again and in much pain. The witness described what she meant by "confused" as follows:

‘When I said that she was confused, she would tell you, start telling you something and then ream off into something else totally different to what the situation was and she did not know what time of day it was whether it was night or day ... Also being confused she did not know if she had taken her medication or not ... She was deteriorating ... Her mental abilities [were deteriorating] ... she was becoming confused at times and also her, she could not walk properly – she could not get herself to the toilet ... At times she knew who I was ... she did recognise people at times. She knew her mom was there ... Are you talking about the 16th? ... She could understand at times yes definitely ... If she was not confused, then she could understand things... I must just tell you that I was not with this patient all day... When I go and visit I was probably there for maybe half an hour, so when I was there she was confused. If I was not there I do not know her condition during the day... I would ask her if she had taken her medication and she did not know if she had or not so in my observation – to me she was confused. And then when I asked her what all these things were in her bed she did not know how they had got there or who had put them there ... at times she knew she was confused because I said to her do you know you have not taken your medication and she says no I cannot remember, I cannot remember if I have taken it.’

[20] England said that both of the deceased’s eyes were open but one of them was bulging a bit. She had to “organise” the deceased’s medication and arrange for her mother to administer her medicine as it appeared that the deceased was unable to perform that function by herself. Her four hourly dose of mist-morphine was doubled.

[21] By Friday, 17 May the pain was still getting worse and the mist-morphine was increased to two and a half millilitres four hourly. According to Sr England this was purely to relieve pain and would not have affected the deceased’s cognitive functioning or the fact that she later on failed to respond to stimuli. The deceased had stopped eating. All her other medication was discontinued.

[22] That evening she visited the deceased and was not happy with her condition. She advised the deceased’s mother to keep her comfortable and to continue administering the mist-morphine. The deceased was unable to communicate with her, apparently due to the fact that the deceased was in a deep sleep (unlike what the witness had seen with this patient previously) and was unresponsive to having been pinched on the arm and to instructions to squeeze Sr England’s hand.

[23] It is significant that during subsequent questioning the witness testified that on this same day the deceased was confused, but still able to recognise her. During cross examination the witness presented a third version and was adamant that she did not perform tests on the deceased on that day. In particular, she did not pinch her as she stated previously. Thereafter she changed her version for the fourth time and testified that she did run her fingers across the deceased’s feet on the 17th (being a basic method for testing responsiveness).

[24] She visited the deceased again during the morning of Saturday, 18 May. She looked comfortable and her pain was controlled. According to her notes, the deceased was “not responding Saturday”.

She explained that she noted this as a result of having had no response when she spoke to the deceased and when she pinched her.

She also lifted one of the deceased’s eyelids and the pupil was unresponsive, whereas there would have been a literal flicker in the pupil of a reactive patient. When she visited that evening the deceased was “comatosed”. She explained this expression as follows:

‘... I am not a doctor. I cannot say she was actually comatose but it is just a word that the nursing sisters use. She was not responding at all and that is when you do the vital sign[s] to pinch them, and you try and talk to them, and you lift the eyelid to see, and there was no response [to stimuli] at all ... and also at the bottom of the feet you bring your finger up like that and if there is a response their toes will move and on that day there was nothing.’

[25] She was subsequently informed that the deceased died on Sunday, 19 May at one minute past one in the morning.

[26] Sr England confirmed that she did not perform any cognitive tests on the deceased, but confessed that she did not really know what this term meant. When the term was explained to her, she stated that she had checked the deceased’s cognitive functioning when she performed the clinical tests (described) on the 18th.

[27] When questioned about what she had told the plaintiffs’ attorneys (Mr and Ms Wylde), she confirmed that the deceased’s condition had deteriorated quite rapidly during the three days prior to her death. Significantly, she added the following:

‘I do not know in between, in between the times that I was not there. I was not there the majority of the time. Maybe my visits were from half an hour to an hour at the most but her condition did deteriorate in the three days.’

[28] Sr England was asked whether she would have signed the second will as a witness. She said no. Her reasons:

‘Because a will is a legal document and I am very wary of it and I do not think I would just nilly willy (sic) sign anything that I do not know anything about and I had not seen the actual will at the time.’

[29] When she was pressed for an answer about whether the condition of the deceased on the 17th would have played a role in her decision not to sign the will as a witness, she said the following:

‘It could have played a role as I said before. In my observations just the time I was there that is what I found. I do not know how her condition – if it changed or just stayed stable for the rest of the day. I was not there.’

Margaret Richter

[30] Margaret Richter (aged 83 at the time of her testimony), is the deceased's natural mother. She is also the second plaintiff. According to her evidence she moved into the deceased's home to care for her and out of concern for her safety, a week before she died. They shared the same bed. The deceased and Peter had not been sharing a bed for some time. Indeed, the deceased used to lock Peter out of her room at night.

[31] She described the marriage between the deceased and her husband, Peter, as a stormy one punctuated by allegations of Peter having physically abused the deceased, despite the fact that the deceased was the "dominant" partner, that she was "headstrong", and that she was the financial "instructor" in the marriage and in business. During cross examination she conceded however that it was like every marriage with its "ups and downs". She also conceded that one of the stressors in the marriage was the fact that Kurt had a tendency to incur debt and that the deceased invariably succumbed

to pressure from him for financial assistance. She also agreed that another stressor may have been the fact that the deceased had continued to love her sons unconditionally, despite allegations that Wayne had stolen various items of value from his parents (including tools, fishing rods and jewellery) to sell in order to feed his drug dependency. In her words "Patricia was torn between the sons and the husband" (I digress to mention that it is not in dispute that Kurt had financial problems and that Wayne had a drug problem).

[32] Richter said that she had confronted Peter about a bruise which the deceased had in the area of her left lung (according to the witness "where the cancer was") and his response (which seems to be common cause) was that it was sustained when the deceased "came for him" during an argument, and he pushed her.

[33] Richter testified that she had feared for the deceased's safety because:

'Her husband Peter adopted a completely different attitude when Patricia [the deceased] was ill. He was not as attentive as what he always was and there [was] more bickering and arguments not only from his side but from Patricia's side as well ... But that is normal with cancer patients. I mean they get very irritable and they [are] frustrated and then they take it out on the ones that are nearest and dearest to them.'

[34] She said that Peter also had no time for his step-sons Kurt and Wayne, and that the deceased's love for her sons caused arguments between the deceased and Peter. At some stage she was practically evicted by Peter when he sold the house in which she was living with him and the deceased and suggested that she should find alternative accommodation and "get a life".

- [35] When she and the deceased spoke, the deceased would say that she intended to make provision in her will for her sons, and for her husband Peter. In fact, before the deceased died she had transferred vehicles belonging to their car wash business into Peter's name so that he could run the business while she was ill. Peter would come home and discuss with the deceased what had been happening with the business and would spend some time with her in her bedroom before retiring to his.
- [36] On Tuesday, 14 May the deceased received a call from the bank reporting that a large sum of money had been withdrawn from the deceased's personal bank account. The deceased told Richter that she had no money left and summonsed Peter to come home immediately. Richter also phoned attorney Lynn Wylde (the 13th defendant). According to Richter the deceased trusted Wylde who was her best friend and like a sister to her, to the extent that the deceased gave Wylde power of attorney with respect to her business dealings.
- [37] On this occasion both Wylde and the deceased confronted Peter who explained that the deceased herself had instructed him to make the withdrawal. The deceased apparently denied having done so. Subsequently the witness corrected herself and said that when Peter was confronted about the money he just looked blank and uncomfortable. It is common cause that Wylde then threatened Peter that if he did not reverse the transaction by 14h00 that same afternoon she would obtain a court order and charge Peter with theft. During this altercation the deceased was initially tearful and upset. Richter said that she clearly remembered the deceased's actual words to Peter as having been:

'Why are you so greedy?'

Despite having vouched for her clarity of recollection on this aspect, the witness later on was not sure whether the deceased had uttered these words about the money or about a motor-vehicle which Peter had transferred from her name into his.

- [38] According to Richter, it was from this incident onwards that the deceased became withdrawn and she devolved, from having been an outgoing, talkative woman who loved to entertain when she was well in the past, into someone with no will to live.
- [39] It is not in dispute that Peter subsequently reversed the transaction. He was apparently very angry and had threatened to go and see an attorney. It is common cause that his parting words (referring to Wylde) to his mother-in-law were:

"That bitch will not get the better of me".

- [40] As I have said, according to Richter, Peter had also transferred the deceased's Kia motor-vehicle into his name shortly before her death and without her consent. She expanded on this later in her evidence when she reminded herself that when the deceased had confronted Peter about this, he replied that the deceased had instructed him to do this. During cross-examination she was handed a manuscript and badly spelt undated document purporting to reflect the deceased's signature and her consent for Peter to transfer a Kia and a Ford motor-vehicle into his name, for what that is worth. I say so because despite Peter's

counsel having cross-examined this witness at length, putting to her in detail what Peter's evidence would be, Peter Wiggill at the end of the day, stayed clear of the witness box.

[41] Richter related that on Wednesday, 15 May the deceased was very ill. She was confused and she was deteriorating, vacillating between wakefulness and sleep, and going off into "semi consciousness".

[42] By Thursday, 16 May Peter, true to his word, had been to see attorney Changfoot (the second defendant) whom the witness referred to by his first name,

Wayne. Peter woke the deceased early that morning with a piece of paper dealing with costs and death duties which was from his attorney and differed from what Wylde had reflected on certain forms. He told the deceased to "drop" the first will, which Wylde had prepared because the Wylde's were known to prey off innocent people. He said that Changfoot (the second defendant) would pay her a visit and that "she was going to draw up another will". Peter did not want the boys to inherit anything. He said that he was going to make his own will and leave what he could to the boys including "the properties and everything." When Richter had remarked that there was always a possibility of Peter changing his mind he said:

'I will never do that. I am a one woman man.'

[43] When asked to explain what she understood about the two wills the witness said that the deceased and Peter owned two fixed properties (Vincent Gardens and Ascot Road) in equal shares. According to the first will, the deceased's half share in Vincent Gardens was bequeathed to her son Kurt, and her half share in Ascot Road to her other son Wayne. In terms of the second will however, these properties would be left to Peter who in turn would leave them (and whatever was left of what he had inherited from the deceased) to her two sons in his own will. This is of course factually incorrect. The effect of both wills is that the deceased's shares in the properties were bequeathed to Peter, the only difference being that the first will (drafted by Wylde) reflected a type of resolute condition that Peter would pass these properties on to Kurt and Wayne when he died (which, with reference to Richter's fears, was no guarantee that he could not renege from this deal by virtue of his own testamentary disposition, particularly as he would then have had the full use and enjoyment of both properties during the course of his lifetime).

[44] In a nutshell it seems to me that Richter was either naïve regarding the contents of the first will, or she had been persuaded that it offered better protection for her grandchildren. In her own words, she joined as a party to the proceedings not out of concern about the monetary side of things, but because she was worried that her grandchildren would not get the properties.

- [45] Returning to Peter's early morning visit, the deceased had apparently asked if this could not wait as she was tired. According to Richter, Peter managed to make her (the witness) very angry and she was very upset but felt that there was nothing she could do. In her mind, the deceased had been satisfied with the first will. She was present when Wylde had discussed the first will with the deceased, but not when it was drawn up or signed as she felt that it was "private and personal".

However, when Peter discussed this new development with the deceased, the deceased did not respond but just lay there listening to him as she was still half asleep with it being so early in the morning. When she told Peter to leave the deceased as she was sleeping he said:

'You mind your own business. You have got nothing to do with this.'

- [46] In response to this the witness telephoned Wylde and reported to her what had transpired and that she was not happy with it. The deceased did not thereafter indicate to her that she intended signing another will. Instead, and in response to an invitation from Richter, the deceased promised to talk to Wylde before signing anything. According to Richter the deceased was still able to respond to questioning during the afternoon of the 16th.

- [47] In the interim Wylde had wasted no time in coming over. Peter showed her the piece of paper which by all accounts contained a cost comparison with respect to the first and second wills, pointing out to Wylde that "his way" was going to be "much cheaper". According to Richter Wylde went to move her car and when she returned, and because Peter was becoming quite aggressive and Wylde appeared to have thought about the proposal, she said:

'Look Peter I am done. Do it your way. I do not have to put up with all this.'

Wylde left in a huff despite Richter's attempts to persuade her to stay. Wylde was close to tears.

- [48] It is significant that, during cross examination, Richter initially denied having phoned Wylde as described in her evidence in chief. She also deviated from her evidence in chief by stating that it was only the day after the confrontation between Peter and Wylde that Peter entered the bedroom very early in the morning with two documents and explained their contents to the deceased. Towards the end of her cross-examination she changed her version again and admitted having phoned Wylde, but denied that Wylde came to the house in response to this call, because the altercation between Wylde and Peter had already transpired the previous day.

- [49] At some stage during that day Richter questioned Changfoot who had come to see the deceased and he gave her an outline regarding the destiny of the properties in terms of the proposed second will. She expressed her dissatisfaction because the deceased had told her that her half share of the properties was to go to her sons, Kurt and Wayne, if anything should happen to her. She told Changfoot that she did not trust Peter. Changfoot also had a conversation with the deceased on the 16th. When asked whether the deceased was capable of having a conversation at that stage, she said:

‘Patricia was at the stage where she was drifting in and out of consciousness and she was answering questions and just nodding her head. She was, I would say, totally confused. She was not like it was – like she was drifting you know. She actually did not care what was going on around her ... Yes from the 14th she just came down and well, what must happen must happen. That was her attitude.’

[50] It is not disputed that a conversation of this nature took place between Changfoot and Richter, but on Changfoot’s version it took place on the 17th after the deceased had signed the second will. When Changfoot’s version was put to her, she admitted that she may have said that she never wants to see Peter again, but denied having said to Changfoot:

‘I trust you Wayne.’

[51] On Friday, 17 May (the day that the second will was signed), at about midday, the deceased’s oncologist, Dr Sithlu visited together with his assistant, Amanda Bessinger. According to Richter the deceased was very fond of him. She trusted him and a friendship had developed between the two of them. Although she was not present all the time, she recalls that he sat down next to the deceased’s bed and spoke to her softly. During cross-examination it was put to her that the deceased had participated in a normal conversation with both Dr Sithlu and his assistant. Her response was that it was impossible for the deceased to have conversed sensibly in her state.

[52] Richter testified that Dr Sithlu was with the deceased for about ten minutes when Changfoot arrived for the signing of the second will. As the two of them passed each other, she heard Changfoot asking Dr Sithlu whether the deceased was in a state to be able to sign a will, to which Dr Sithlu replied:

‘...are you asking me in my personal capacity or as a doctor because I have not brought my stethoscope.’

[53] It was put to her that Dr Sithlu would deny this.

[54] Thereafter Richter, Peter, Changfoot, his wife Janet and his secretary all went into the deceased’s bedroom. During cross-examination she conceded that Changfoot could also have been there earlier that day to discuss the will with the deceased.

[55] Richter next described what transpired during this important occasion which has become the central issue of this trial. She said that Changfoot sat next to the bed, his wife sat behind him and his secretary stood near the built-in cupboard. Peter stood near the doorway. She stood near the window. Changfoot said that he had brought the will and asked the deceased whether she understood what he had brought and what they had spoken about (or words to that effect). He called the deceased by name and asked her whether she knew and understood what she was doing. The deceased’s right eye was closed because it had collapsed. Her left eye was open but she could hardly focus with it because she was “full of the morphine dosage”. The deceased nodded in response. Changfoot then held the papers for her to sign. She took the pen. Richter could see that the deceased did not know what she

was doing because “her signatures were not even on the lines”. Later on she conceded that the deceased’s

signature was also not even when she signed the first will.

[56] Richter explained that the deceased had to sign quite a few pages. When she reached the last page she signed half a signature and dropped the pen. Changfoot retrieved it. He put it back in her hand. She finished signing the last page. In this regard the last page of the second will does indeed reflect what appears to be an incomplete signature, followed by a full one.

[57] Richter explained that although the will was not read out she was of the opinion that the deceased would not have understood it in any event. She was also not capable of reading. She knew that there were people in the room and that there was movement around her. According to her recollection, Changfoot might have said a few little words here and there to the deceased relating to the will, but he did not traverse the entire document. She said it was basically –

‘ ... sign here, sign there. He was directing her.’

[58] When asked whether she heard Changfoot speaking to the deceased in legal terminology, she replied:

‘You know I did not hear anything. He might have but I could not hear anything because I was in a state of shock if you can call it that. I was very unhappy and I just could not believe what was happening....She just lay there. She was lame. She was just lame. She never spoke to anybody. She just looked as if she was so exhausted and tired that she just wanted everything over with.’

[59] Richter did not object to what was happening because she felt despondent (“moedeloos”) and helpless and she had endured much verbal abuse from Peter and did not want to get into a fight while her daughter was lying on her deathbed.

[60] The people left.

[61] Changfoot’s wife Janet (who was one of the deceased’s three special female friends, the other two having been Lynn Wylde and Marion Beukes), may have stayed behind for a bit to pray with the deceased as she had done so daily when the deceased was ill. It is common cause that the deceased had requested Janet Changfoot to arrange for her to be buried out of the Changfoots’ church and to deliver the eulogy at her funeral, and that these wishes were complied with.

[62] Richter testified (and this is common cause) that the ink had barely dried on the second will when Peter announced his intention to get to the bank (presumably to reverse the impugned transaction once again). This idea was supported by Changfoot who said:

‘...Oh yes, you must go, go and sort that out.’

Peter left and upon his return reported that he would check the following day whether the transaction had been effected.

[63] That night the deceased's brother William arrived. The deceased was able to recognise him and greet him. When he entered the room she smiled, put out her arms to him and he gave her a hug.

[64] The next day, being Saturday, 18 May, Peter was very angry as the money had not been moved, the explanation having been that it was in an "all risk account" or something to that effect. She said that Peter suspected that Wylde had had a hand in this.

[65] On that day the deceased was in and out of consciousness. She was very ill. She probably knew that they were there, and at Richter's instance Peter spent about ten minutes with his wife that day. For the rest she said:

'... he was very busy running around. I am not sure what he was doing but he [was] registering cars and seeing that things were going to be put into his name. He was very busy. I cannot say what he was busy with.'

[66] In this regard the witness had previously testified that when she had just moved in Peter had asked her who would sign the deceased's death certificate as he had to get all his ducks in a row. When she reported to Peter that the deceased had just died, he stood up from where he was watching television, stretched, and said:

'Ah, but she put up a tough fight hey.'

[67] When her version on this aspect was scrutinised she admitted that she did not know what Peter was doing on the 18th as she did not leave her daughter's bedside on that day. She said that she assumed that he was registering cars and she felt and thought to herself that he was transferring the deceased's assets into his name, but that she did not know this for a fact.

[68] Richter described her daughter's deterioration over the last five days of her life as follows:

'She just wanted to sleep. She was disinterested in her surroundings. She just seemed to be in a state where I just wished, she just wished that everything was done and I do not know how to put it ... she did not eat ... that made me very worried. She stopped because she could not really eat but she was on Ensure. But she stopped that and then she never ate the rest of those days.'

[69] She said that she nursed her husband and her two sons before they died of cancer. Her granddaughter also passed away from the same condition. From these experiences she had learnt that before these patients go into a full coma they drift in and out. She said that the deceased behaved in the same fashion and that she had to keep on calling her to see whether she was still with them. When she called the deceased's name she would answer, open one of her eyes and say "yes mommy". Then she would go back to sleep again.

[70] Throughout her evidence she referred to the first will as Pat's will (the deceased) and the second one as Peter's will. She said it was Peter's will because the deceased, who was "semi-conscious" could not have read it. Later on in her evidence she clarified this by saying that one minute the deceased was talking sensibly, whereas the next minute she would be "hallucinating".

[71] During August 2013, after summons in this matter had been issued, Peter sent Margaret Richter an sms which reads as follows:

'After all Pat and I have done for you we are going to have our day in court. She did not want to fight. She was trying to help every (sic) as Pat always did. Now I can see why she hated you so much. She always said you do not know my mother. The truth has come into the light now. You are disgusting Margs. God will have his day with you. Peter.'

[72] During cross-examination Richter denied that on the 17th she had told her friend Marion Beukes that Changfoot had been there, that he had sorted matters out, that the deceased was happy and that she (the witness) was happy particularly because Changfoot had promised to look after her. She said that Marion must have been mistaken. When it was suggested to her that acceptance of her version would mean that Marion must have been deliberately lying, her response was:

'I know what I felt and what I saw. I cannot talk for Marion ...No, I am actually very hurt about that because Marion was a good friend of mine and we have been in touch with each other through this whole proceeding. We used to phone each other and she used to phone to find out how I was ... No, I can think of no reason why she is doing what she did now ... She was a very good friend [of the deceased]. She was more like a sister. That is why this has got me completely baffled.'

[73] The witness was then cross-examined in some detail regarding the plaintiff's alternative claim. Her version on this aspect, inasmuch as it relates directly to what had transpired at the time of the signing of the second will (as pleaded) is the following:

Peter Wiggill was silent at the time of the signing of the will, because he had said and done everything he wanted to do, the day before.

She thought that Peter (and not Changfoot) had been trying to influence the deceased to change lawyers the day before she signed the second will.

Peter did not influence the deceased on the day that the will was signed but on the previous day.

No pressure was exerted on the deceased at the time of the signing of the will. However, the day before she signed the will, Peter was insensitive to her mental state and subjected her to pressure by explaining costs and death duties to her and telling her what it was going to cost to bury her.

Changfoot did not persuade the deceased to sign the will.

Peter did a lot of persuading the day before, but not at the time of the signing of the will.

Her attorneys had not approached her to obtain instructions regarding a proposal that the alternative claim against attorney Changfoot be withdrawn.

- [74] Richter admitted to having had a telephone conversation with Marion Beukes about her involvement in this case but disputed most of what was put to her about the contents of the conversation. In particular she disputed having told Beukes that the only reason she became involved in the case was because Wylde had threatened that if she did not give them (attorneys Mike and Lynn Wylde) a statement, they would summons her to court whether she liked it or not. She agreed that she had told Beukes that she did not want to be involved in this matter, but that her son had instructed her to do so to support her grandsons Kurt and Wayne. She said that Marion was a friend to both Peter and the deceased, but that she was very much closer to the deceased than she was to Peter.
- [75] According to Richter she became a plaintiff after her son Kurt withdrew from these proceedings. She said that she only saw the first will after the deceased had died, when Kurt approached her with it. However, the deceased told her what was in the first will and that she would receive R250 000 in terms thereof. She said that it did not matter to her that the deceased had, at some stage reduced this amount to R200 000 which was consistent with what was bequeathed to her in the second will. She had no idea why the bequest to the deceased's maid had been doubled in the second will, but was not adverse to this having been Peter's idea. She also did not have an inkling as to whose idea it was to leave R5 000 to each of the five car wash employees in the second will. This too, could have been Peter's idea, but she was not too concerned about these changes in the monetary bequests.
- [76] She repeatedly said, throughout her evidence, that it was the change with respect to the properties that she was concerned about. With respect to the car wash, she described the deceased as a hard taskmaster who knew what she wanted and wouldn't take any nonsense.

Lynn Wylde

- [77] Wylde is, as I have mentioned, is not only the 13th defendant. She fills various other roles. She is one of the three women referred to as the deceased's best friends. She is the wife of, and secretary to the plaintiffs' attorney. Although an educator by profession she started working for her husband 25 years ago, and to this end completed a course in the administration of estates and the drafting of wills. She drafted wills for the deceased and her husband, inclusive of the first will wherein she is also named as executor. The deceased had also given her a general power of attorney with respect to her bank accounts about a year before she died. Up until then Peter Wiggill had been nominated as the executor of the deceased's estate as she trusted him. However, according to the deceased there had been a physical altercation and a disagreement between her and Peter about money which the deceased wanted to leave to her biological family. The deceased no longer trusted Peter and nominated Wylde as the executor of her estate instead. This more or less coincided with the time that the deceased was diagnosed with cancer.

- [78] I must mention at the very outset, that she was not present when the second will was signed and accordingly cannot add value to the plaintiffs' claim that Peter Wiggill and/or Wayne Changfoot subjected the deceased to undue influence at the time of the signing of the second will.
- [79] I intend traversing her evidence only where it is relevant to the deceased's mental capability of appreciating the nature and effect of her act at the time that she signed the second will.
- [80] She described the deceased as having been a very good business woman. This appears to be common cause.
- [81] At some stage Peter had threatened to close banking accounts and to transfer vehicles into his name. Wylde expressed her disapproval of this and accused him of prioritising financial issues over his wife's health, and of "knocking her about" the day before she had had a biopsy. According to Wylde, Peter did not deny this accusation but said:
- 'Never mind, she will get over it.'
- [82] Peter then proceeded to enquire from Wylde what she would charge to do the estate. She found this absolutely despicable because all Peter was worrying about was the executor's fee and the money while his wife was suffering.
- [83] More to the point, about two weeks before the deceased died the deceased instructed her to draft a new will. The witness referred to this three page document which was handed in as an exhibit. The instructions had been written out in long-hand by the deceased. The witness herself wrote the date and the heading which reads "This is my Last Will & Testament ... This replaces all other wills previously made by me". She did so just in case the deceased "didn't make it that night" (it is not in dispute that the deceased was terminally ill and that her passing on was imminent). She also inserted the words "invest for Slade" and "R3,5 million Stanlib" on the document.
- [84] The witness had no doubt as to what the deceased's instructions were and went home to type a will for her. It is perhaps necessary at this point, to reflect on what the deceased had recorded (in her own hand), as her assets, having been married to Peter out of community of property:

A half share in 64A Vincent Gardens (the matrimonial home);

A half share in 10 Ascot Road;

A car wash and laundry with vehicles;

Motor vehicles, furniture and effects;

R3,5 cash investment.

- [85] It is clear from the handwritten instructions and the typed will (dated 4 May 2013) that the deceased's instructions had been that, with the exception of bequests to the value of R1 250 000 (made up of R500 000 for Kurt, R500 000 for Wayne's daughter Slyde to be invested with the plaintiffs' attorneys until she reached the age of majority, and a further R250 000 for the deceased's mother), the remainder of the deceased's estate (inclusive of her half shares in the fixed properties) would go to her husband, Peter Wiggill.
- [86] It is also apparent from the typed will (although not reflected in the handwritten instructions) that Wylde was appointed as the executor of the deceased's estate, that she was exempted from furnishing security and that she would be remunerated for her services in terms of the relevant provisions of the schedule to the Administration of Estates Act (it being common cause that this would be 3,5 per cent of the value of the estate).
- [87] I digress to mention that counsel for the defendant objected to the admission of this evidence on grounds of relevance. At that point in the trial I was of the view that there was merit in this contention. That view has changed. The reason for that will hopefully become apparent in what I have to say hereinafter.
- [88] In the interim I move on to what is termed the first will dated 8 May 2013. According to Wylde, Peter had instructed her on that day to draft his own separate will, leaving his entire estate (including the immovable properties) to the deceased's two sons, Kurt and Wayne. It is significant that the deceased's handwritten instructions which I have referred to clearly state, in the first paragraph, that after the deceased's half shares of the two immoveable properties had been transferred to Peter, he can dispose of them at his will, and even "sell the properties to live in a manner he is accustom (sic) to". The second paragraph of the deceased's handwritten instructions reads as follows:
- 'Anything that Peter Noel Wiggill has left in his name from the bank, property's will be left to the boys Kurt and Wayne and this will be divided by half and they will reap the benefits and rewards'.
- [89] In my view, and having regard to Peter's instructions to Wylde on 8 May 2013 (the effect of which was that his own will should reflect that he did not intend selling the properties to live a lavish lifestyle despite having had the deceased's blessing to do so) but that he intended preserving these properties and indeed his entire estate for her sons) creates two inescapable inferences to which I shall presently return:

Peter's will of 8 May is overwhelmingly strong corroboration for the contention that, 11 days before the deceased died, Peter was making serious provisions for the best welfare interests of her sons and was not conducting himself in a manner consistent with a wicked and greedy stepfather as suggested;

At least 11 days before the deceased died, she and Peter were discussing and debating their respective wills, and by all accounts

were not only ad idem as to the disposal of their respective estates, but that Peter was prepared to go the extra mile for the deceased's children,

which is wholly inconsistent with the relationship of mistrust and abuse described by the plaintiffs' witnesses.

[90] According to Wylde she then drafted a will to this effect for Peter (which forms part of the plaintiff's bundle of documents) and she also drafted what is now referred to as the deceased's first will, for purposes of this trial. Wylde read out both the deceased's first will and Peter's will to the deceased that same day. Peter was present and even went next door to get witnesses for the signing of their two respective wills.

[91] There are only two differences between the deceased's will signed on 4 May and the one signed on 8 May ("the first will):

The deceased's bequest of her half shares in the two properties to Peter are no longer unconditional, but conditional upon Peter leaving these properties to Kurt and Wayne in his will (which is indeed reflected in Peter's will);

The bequest of R250 000 to the deceased's mother has been struck out and substituted with the sum of R200 000 (according to Wylde this was done because Peter did not want Richter to get R250 000).

[92] Wylde was confident that as at 8 May 2013 the deceased knew and understood what she was doing.

[93] Unhappily, it seems that Wylde did not take kindly to Peter's modus operandi thereafter. According to her Peter (after his and the deceased's first will was signed) told her (quite innocently it seems) that he had been transferring vehicles into his name and closing bank accounts that same week. She told him that he should not have done so, and that it was wrong. She was concerned that the deceased's children would not "get anything out of the estate." However, she did not take any further steps in response to what Peter had disclosed openly to her. Her words were:

'I didn't do anything, because I couldn't prove it. Right. I was not sure. I was just upset. I was worried about it. I didn't want to tell Pat. I just left it because M'Lady when you get the certificate of balance from the bank [and] there is nothing in the estate account, and when you confront the person – you say, what happened to the money? – No, she gave it to me before she died. You cannot prove that.'

[94] On 14 May 2013 Wylde received the fatal call from Richter, by all accounts confirming her very suspicions (that funds had been

withdrawn from the deceased's bank account). The rest of her evidence as to what transpired next dovetails in most material

respects with that of Richter (with the exception of her evidence that the deceased was not slipping in and out of consciousness on the 14th as suggested by Richter).

- [95] In particular she testified that on Tuesday, 14 May the deceased knew what she was doing, she understood what was going on and they spoke. The deceased had instructed her (in Peter's absence) to draft a codicil to the first will to include an employee at the car wash by the name of Rhoda Swart, as a beneficiary of the sum of R10 000.
- [96] To my mind this disclosure is of particular significance in establishing what the deceased's state of mind was when she made the second will. I say so because the codicil to that will accurately reflects this very instruction which the deceased had given to Wylde three days previously during the course of a private conversation. For this to have happened, the deceased in my view, must have been sufficiently alert on 16 May 2013 to have repeated the instruction to Changfoot. If this is to be accepted, then Wylde's evidence (that on the morning of the 16th the deceased did not know that she was there, that she could not think for herself and was unable to communicate with her at all), is either an exaggeration of the true position, or it must be accepted that the deceased was vacillating between states of full appreciation and reduced appreciation of the nature and effect of her acts. I say this because Wylde candidly conceded that she was only at the deceased's house for about 20 minutes on that day.
- [97] Wylde's evidence was that on the 16th Peter had challenged her about executors fees and that she was fortunate to have been called away. According to her Peter had said that if things were done his way R3,5 million would be taken out of the estate, and that he implied that the reason she refused to change the will was because such a reduction of the cash asset would adversely affect her executor's fees.
- [98] During cross-examination the witness was constrained to agree that the scenario which Peter had proposed to her (that if the estate was reduced to the value of the fixed properties only there would be more available to the beneficiaries due to a substantial reduction in executor's fees and the elimination of estate duty. However, she remained adamant that this type of estate planning should not be done when the testator is dying.
- [99] When it was put to her that the R3,5 million was withdrawn from the Stanlib account in response to a signed instruction from the deceased her response was that this was not what the deceased had told her. In her view it was in any event illegal to withdraw cash from the deceased's estate before she died.
- [100] Before Wylde stepped out of the witness stand she became extremely emotional (as she had done on a number of occasions throughout her evidence) and her parting words were the following:

'M'Lady this is really wrong. She was – would never have signed that will if she knew what she was doing.'

[101] I have some difficulty in understanding this statement but assume, in Wylde's favour, that what she meant was that the deceased (albeit an astute and shrewd businesswoman) would not have been party to something illegal. Any other argument would fly in the face of the deceased's manuscript instructions which she had given to Wylde two weeks before (the upshot of which was, on a simple calculation, that the deceased was comfortable with Peter being the beneficiary of some R3 750 000 (being the balance of her R5-million estate after R1 250 000 had been bequeathed to her mother and her children). Coincidentally, this generous award bestowed upon Peter (which on Wylde's version the deceased was certain she wanted to make) is practically equivalent to what Peter would have received in terms of the second will. This is so because in terms of the second will the asset value available for distribution would have been reduced by Peter's withdrawal of the R3,5 to the value of the shares in the fixed properties only, being in the region of R1,5 million. The net estate having been reduced to below R3,5 million the estate would not only have been exempt from estate duty but it was the evidence of Changfoot that executor's fees had been waived (this is also evident *ex facie* the second will). Assuming that the fixed properties would have remained preserved to give effect to Peter's will signed on 4 May 2013, Peter would have been left with an inheritance to the value of R3 778 400 calculated as follows:

Fixed assets and cash R5 000 000

Advertising 1 000

Master's fees 600

Margaret Richter 200 000

Veronica 20 000

Rhoda 10 000

Car wash employees 25 000

Kurt 500 000

Wayne 250 000

Slayd 250 000

Balance R3 743 400

Lynette Wilhelm

[102] Wilhelm was the last witness called by the plaintiffs. She testified that she lived down the road from the deceased and that they knew each other since their early teens. She visited the deceased on the Monday, Tuesday and Wednesday directly preceding her death. On Tuesday, 14 May the deceased told her that she knew that she (the deceased) was hallucinating because she was talking to people who were not there, but that she could not help it and was worried about what her granddaughter must think. The deceased was able

to recognise people but one could not converse with her. The witness imagined that she just lay there listening.

[103] On Wednesday, 14 May the deceased was complaining of terrible pain on her side. She did not think that the deceased would have been able to sign anything that day.

[104] She described the deceased as having been a buxom, vibrant woman, a lovely girl, a goer, a fighter, an extrovert and a businesswoman who did not let the grass grow under her feet. This was before she took ill. She did not like what her sons did, but she loved them anyway.

[105] That then concluded the case for the plaintiffs whereafter the defendants' counsel successfully applied for absolution from the instance with respect to the alternative claim of undue influence.

[106] In my view the reason for that ruling is obvious. The portion of the plaintiffs' particulars dealing with this claim reads as follows:

21. At the time of signing the said Will (my underlining), the said MARGARET PATRICIA ANN WIGGILL was subjected to undue influence exerted upon her by First Defendant and/or Second Defendant:-

21.1 Who subjected MARGARET PATRICIA ANN WIGGILL to pressure to sign the Will, despite her mental state and inability to resist such pressure.

21.2 Who because of their relationship with MARGARET PATRICIA ANN WIGGILL, were able to persuade her to sign the Will against her better judgment and true intention and to leave the major part of her estate to First Defendant.

21.3 Accordingly, the said Will did not express the true intention and last Will and Testament of MARGARET PATRICIA ANN WIGGILL, but the desires of the First Defendant and was obtained as a result of actions and influence on the part of the First and Second Defendants, which in Law amounts to undue influence.

[107] Margaret Richter was the only witness called by the plaintiffs who could comment on what transpired "at the time of signing of the said will."

[108] There is nothing in her evidence to even remotely suggest that the deceased was subjected to undue influence at the time of the signing of the will on Friday, 17 May. On the contrary, her clear and unequivocal evidence was, as I have already mentioned in this judgment, that none of this happened at the time of the signing of the will. She said that Peter had subjected the deceased to pressure to change attorneys the day before, and in her opinion he was insensitive to her condition by discussing estate duty and burial costs with her the day before. Changfoot she exonerated completely.

[109] In the premises I had no alternative but to grant absolution to the first and the second defendant.

[110] The only remaining issue then, is whether the deceased was competent to make the second will.

[111] The first defendant, Peter Wiggill, did not testify.

Wayne Changfoot

[112] Wayne Changfoot (the second defendant) was 67 years old when he testified. He was admitted as an attorney in 1974 and is a partner in the local firm of Changfoot Van Breda. He intends retiring at the end of October 2015. He specialises in litigation, estate planning, the drafting of agreements and conveyancing.

[113] On Tuesday, 14 May 2015 Peter (who had signing powers with respects to the deceased's bank account), reported to him about withdrawing the deceased's

money with her consent, and about Wylde's threats. He warned Peter that despite the fact that this is a donation between spouses, the Wylde's would not hesitate to litigate. He suggested that the money should be returned and that they should try and convince "them" to allow them to free up the money. He also did an estate planning calculation for Peter on excel about what executor's fees and transfer duties would amount to if the cash money was left in the estate, and if it was drawn out. He also explained to Peter about wills and trusts, and that the money could go back into the proverbial pot after the deceased had died. It was also discussed that the deceased's son Kurt would not inherit if he was insolvent (which he apparently was at that time).

[114] Peter expressed a keen interest in planning the deceased's estate according to what Changfoot had told him, but Changfoot told him "it's not what you want, it's what Pat [the deceased] wants". They decided to speak to the deceased. Later that day Peter reported to him that he had returned the funds, and presented him with a copy of the deceased's first will and his own.

[115] On Wednesday, 15 May he was told that Wylde was not interested in this plan.

[116] On Friday, 17 May Peter told him that the deceased wanted him to draft a new will. He went to see her that morning. She was very ill. Her condition came as no surprise to him. His wife and their minister had been to see her the previous week to plan her funeral.

[117] He put to her that he understood that she wanted to change her will. She confirmed this. Changfoot explained that he had drafted many wills before but refused to do so if he could not get clear instructions from the testator. She said Kurt was in debt and she did not want his creditors or SARS to get hold of his inheritance. He explained to her that if Kurt was insolvent, the R500 000 which she had left to him in terms of the first will would go to the children. She insisted that she wanted Kurt to have the money. He explained that they could get around this by creating a testamentary trust. She took to this idea and said that the trust should last until Kurt is debt free.

- [118] He also discussed with her the fact that Kurt had previously borrowed R50 000 from her. Her instructions were that he must keep that.
- [119] They discussed the fact that in terms of the first will Wayne's daughter Slade would get R500 000 but Wayne would not get anything. Her instructions were that they should get R250 000 each, but that she did not want Wayne to "snort" the money (referring to his drug problem). He explained to her that this money could also be put into a trust. She agreed and said that Wayne had to be drug free for two years before he could get the money, and that Slade's money should remain in the trust until she was 21.
- [120] With respect to Richter's inheritance, she confirmed that it should remain R200 000 with no conditions attached. Thereafter she gave the following instructions: R20 000 must go to Veronica the maid, R10 000 to Rhoda the car wash manager, and R5 000 to each of the other five car wash employees. She could not remember their names. He assured her that if there were five, they would be easily identifiable.
- [121] Changfoot was not sure whether they discussed the issue of estate duty then as he was under the impression that she already understood that point from what Peter had told her. She did say that "Peter must move the money". According to Changfoot the deceased knew that she had to get the money out. I digress to mention that the deceased died before the money could be moved and her estate has accordingly been frozen.
- [122] Her further instructions were that the properties must go to Peter. He advised her that Peter's will would be dealt with later on. The intention was to execute Peter's will that day.
- [123] Changfoot said that both Richter and Peter were present when he discussed the deceased's will with her, but not all the time. He recalled in particular that Peter too, could not remember the names of the car wash employees.
- [124] Once he had completed the consultation he returned to his office to draft the will and to get the names of the five employees. He asked his wife and his secretary to witness the signing of the will. It is common cause that his wife and the deceased were close and had been friends for over 30 years.
- [125] Between 13h00 and 14h00 he returned with the second will. Dr Sithlu and a social worker had just visited the deceased. The doctor said: "She recognised us and we spoke with her but if you want me to test her I can." Changfoot replied that this would not be necessary because her instructions to him were quite clear. The social worker nodded in response to this.
- [126] When he entered the deceased's room she was lying down. He went through the salient points of the will with her including the bequests. He asked her if she understood what was in the will. When it came to Veronica, Peter said "Shouldn't it be R10 000" to which Richter responded "Pat said it should be R20 000". As I mentioned before, the first will left R10 000 to Veronica and the second will reflected R20 000. Changfoot was satisfied that this change reflected the instructions which the deceased had given him earlier on that day and was of

the opinion that Richter must have been present when the deceased gave him this instruction.

- [127] He explained the contents of the document to her and showed her where to sign. He was unable to say why she appears to have signed twice on the last page. He was of the opinion that she was probably not satisfied with the first signature. He did not recall her dropping the pen. He did not know whether she was able to read as she was looking at him while he explained the contents of the document to her. Peter signed his own will, drafted by Changfoot, that same afternoon.
- [128] As the executor of the second will, he reported the estate to the Master and received letters of executorship.
- [129] During cross examination Changfoot conceded that the will contained spelling errors and that it had been “sloppily” typed. He had typed it himself in a hurry from a precedent using a cutting and pasting method. It was easier for him to do it himself as he knew exactly what had to be said. The will was urgent because the deceased was dying, and she knew that.
- [130] He did explain to her that if Peter withdrew the cash it did not mean that the boys would not get their share. He was constrained to do so because she was worried that Peter would steal the money. Her response was an “Oh” and then she agreed that the money could be withdrawn. Afterwards he also saw the withdrawal form which she had signed and which was handed in as an exhibit. This form is dated 17 May 2013.
- [131] Changfoot testified that he gave the deceased the assurance that all the beneficiaries would get what was due to them, even if the properties which she had left to Peter had to be sold in the event of him not paying the R3,5 million back. He explained that the executor could take legal action against Peter if necessary.
- [132] He did not read the portion of the second will dealing with his powers as trustee out to her verbatim. However he explained to her that it gave him the power to handle the trust money as he deemed fit. His evidence was that people do not want to hear all the detail.
- [133] It was suggested to him that if the deceased was mentally capable of appreciating all this, she would not have signed the will. Changfoot disagreed with this statement and explained that a verbal agreement existed that Peter would make good any shortfall with respect to the payment of the beneficiaries. He said that even Richter had said to him afterwards: “I trust you Wayne”. However she also mentioned that when everything was over she wanted nothing to do with Peter.
- [134] Although he had taken instructions from the deceased that very morning, he nevertheless asked Dr Sithlu whether she was “compos mentis”. He, quite candidly in my view, admitted that he did so because he was worried as to what had brought about a home visit from her doctor.

- [135] When it was put to the witness that the deceased was not compos mentis that morning when he took instructions from her, the witness began to weep and said: “No, she was dying. How many people do you know dying in front of you?”
- [136] The witness remained adamant that the deceased, when she gave him instructions and when she signed the will, did not have diminished capacity and that she “knew what she wanted”. He also said that he had no doubt that he would ensure that her wishes were complied with, as they had been friends for many years.
- [137] When it was suggested to Changfoot that the only reason he wanted his wife to witness the will was to corroborate his version, he disagreed and became very angry.
- [138] The witness was also cross-examined on the actual notes which he took during his consultation with the deceased, and these too became an exhibit at this trial. According to these notes, Veronica Booi was to receive R10 000 (as in the first will). The witness recalled however that Pat had given him instructions that morning to change this to R20 000. He also recalled that during the signing of the will Peter had said: “Shouldn’t it be R10 000?” in response to which Richter had said: “That’s what Pat wants”.
- [139] As previously mentioned this is significant as to the state of mind of the deceased on that day. To double Veronica’s inheritance was clearly not an instruction that emanated from either Peter or Richter. There is no evidence to suggest that it was Changfoot’s idea. The instruction could only have come from the deceased that same morning.
- [140] The witness made it plain that he was in any event testifying about a hypothetical situation, in that the deceased had died before the Stanlib funds (R3 582 000) could be moved to avoid estate duty. At the time of his testimony, the cash funds remained available for distribution in terms of the second will.

Mariaan Beukes

- [141] Beukes testified with an air of confidence. She said that she had known the deceased for many years. On Friday, 17 May 2013 she spoke to the deceased telephonically. The deceased invited her for tea. She visited the deceased at about lunch time. The deceased instructed Veronica to make her a cup of tea and to give her some cake. She declined the cake so the deceased instructed Veronica to wrap the cake up for her to take home.
- [142] The deceased seemed fine and she was able to converse sensibly. They chatted in general. The deceased told Beukes to sit next to her and held her hand. She also told Beukes that she was feeling very happy, that everything had been sorted out, and that she was at peace. She felt that because Veronica had been her maid for many years she wanted to leave her R20 000, and that “Wayne and Janet” had been there and everything had been sorted out in connection with her will.

- [143] She spent about one and a half hours with the deceased and they “conversed to and fro”. She was lucid, She spoke about her two sons and again mentioned that she was at peace and that she “trusts Wayne and Janet”. During the visit Margaret Richter was “in and out”.
- [144] She returned later that evening (about 17h00) and the deceased had become quieter. She still wanted Beukes to sit next to her but they spoke very little. When Beukes told her that she had popped in to say goodnight, the deceased just squeezed her hand and said “okay”.
- [145] She said that the deceased was not slipping in and out of consciousness during her visits.
- [146] She visited again on the Saturday and the deceased did not talk .
- [147] In response to my questions, she said that during that period she would phone the deceased on her cellular phone, and that the deceased would answer the phone herself. According to Beukes the deceased had told her that she had drawn money out of a money market account to save fees for the estate. Beukes said that this would have been a few days before 17 May. They spoke about various things. The deceased said that she wanted to leave Veronica R20 000. She said this during the same week that she died. The deceased had also said that her biggest concern was that Wayne was addicted to drugs and she did not want him to have money until he could prove that he was drug free.
- [148] Beukes testified that Kurt was her god-child. Of Kurt the deceased had said that he had been accumulating a lot of debt and that she was concerned that his money would be “absorbed in all the debt”. The deceased told her that she wanted Kurt to be debt free before he inherited money from her.
- [149] During questioning arising from what I had put to the witness, she told by the plaintiffs’ counsel that there had been evidence that the deceased had told Peter to pay back the money which he had withdrawn from her account. In response, Beukes said the following:
- ‘I heard that. She [the deceased] said to her mother “please phone Lynn – you know what she’s like”. Pat (via Lynn Wylde) told him to bring the money back as it had been said that Peter would spend all this money.’

Dr Sithlu

- [150] As mentioned, Dr Sithlu was the deceased’s oncologist. He testified that on the morning of Friday, 17 May 2013 Peter had told him that the deceased wished to see him and the social worker to say thank-you. They paid a home visit to the deceased.

They greeted her and she acknowledged them. It was a normal social visit with “friendly banter”. It was not a medical talk. The deceased offered them tea which they declined. They spent about ten to 15 minutes with the deceased. He recalled that they asked her about the photo above her bed. She said that it was a photo of her son who had passed away in a motor-vehicle accident (it is not in dispute that the deceased and Peter had a son who had met his death in this fashion).

- [151] He had a normal conversation with the deceased. She recognised both him and Amanda his assistant. He described it as being like “a comfortable visit with a sick relative”.
- [152] During cross-examination he described it as a “non-confused” discussion on social terms. She appeared well, She answered in full sentences. On the clinical aspects, his opinion as an oncologist was that in cancer patients it was entirely possible to have a full conversation and to be dead or confused “four hours later”. He repeated that it was entirely possible for patients at the end stages of their lives to have different levels of conversation, meaning that if different witnesses experienced the deceased in different ways, it did not necessarily mean that some of them were being dishonest. His words were: “I was there and she didn’t appear to be confused, but I didn’t do a medical assessment (in the sense of performing a physical and a neurological examination to establish whether she was *compos mentis*).
- [153] He said that it was not uncommon for terminally ill patients (the deceased having died of advanced cancer) to behave like this and to have fluctuating levels of consciousness. The deceased did not have brain cancer. Cancer patients can be administered high doses of morphine of up to six milligrams and would still be sufficiently *compos mentis* to make decisions, drive cars or to consent to treatment.
- [154] That then concluded the case for the defendants.

Analysis

- [155] As I have said, the only issue left for me to determine is whether the deceased was competent to make the second will when she did so on 17 May 2013. In terms of the common law and section 4 of the Wills Act, the burden of proof that she was mentally incapable at that time, rests on the persons alleging this. In this case, the remaining plaintiffs Margaret Richter and Wayne Herman.
- [156] This lengthy judgment consists in the main of rather detailed summaries of what the witnesses have had to say, sometimes exceeding the limitations of relevance. This is deliberately so. Matters such as these are, by their very nature, sensitive. In this particular matter more so, in that even the executors of the various wills (who for all intents and purposes ought to have been independent), are emotionally involved and as a result of their intimate friendship with the deceased and her family, are naturally at times inclined to be subjective and excitable.
- [157] In my search for independent witnesses who are able to give evidence which is as close as possible to clinical neurological evidence regarding the deceased’s state of mind, I have been constrained to settle on the plaintiffs’ witness Sr England, and the defendants’ witness, Dr Sithlu, both of whom have had many years of experience working with and observing terminally ill cancer patients, and neither of whom appear to have had any hidden agendas or bias favouring one party above the other. Indeed, there is no evidence before me to suggest that that they even really knew much about the dispute concerning the first and the second will. Having said this, I am somewhat baffled by the fact that there is a dispute in

the first place. I say so because the cash asset in the estate has been preserved and by all accounts, if I rule in favour of the second will, the estate will at least not be mulcted in executor's fees. Over and above that, the education of the deceased's granddaughter will be catered for, and both her sons (but for a healthy touch of gratification delay) will get their money.

[158] It seems to me at the end of the day that this largely academic fued has been fuelled by foolhardy issues of principle instead of practicality and common sense.

[159] Returning to the facts of the case, I am of the view that a consideration of the evidence of Sr England in conjunction with that of Dr Sithlu, must, of needs be, lead to a finding that the plaintiffs have not discharged their burden of proof on a balance of probabilities. I say so for the following reasons:

Sr England has candidly conceded that she was not with the deceased all of the time. At best she spent half an hour to an hour with her on Monday the 13th, Thursday the 16th, on the evening of Friday the 17th after the will had been signed, and on Saturday the 18th.

Although she was of the opinion that the deceased was confused at times (and I have no reason to doubt this), she could not speak for the times when she was not there.

Her evidence was not, that because the deceased was confused or unresponsive in her presence, the deceased was necessarily so all or most of the time.

Significantly, when she was asked the somewhat inappropriate question as to whether she would have been happy to sign the deceased's will as a witness, it would have been extremely easy for her to say that in her opinion the deceased was not mentally capable of deposing to a will. Yet she did not.

It is common cause that Dr Sithlu had actually visited the deceased just before she signed the second will.

He described his interaction with her as having been "non-confused". She was conversant and able to speak sensibly and describe things which were objectively found to have been correctly described.

His evidence dovetails in a sense with that of Sr England to the extent that her observations when she was with the deceased, were not necessarily the same as his observations. This type of fluctuation, he said (and I have no doubt that he is qualified as an oncologist to say this) is not uncommon in terminally ill cancer patients. They are able to have perfectly lucid conversations at times, and at other times not.

[160] In my view, a reasonable possibility exists that the deceased was indeed mentally capable of appreciating the nature and the effect of her actions. This view is fortified by inter alia, the following:

That she had full and detailed conversations with Beukes at the time about how she had changed her will and how comfortable she was with the changes;

That Changfoot could not have known that she wanted to leave money to the manager of the car wash unless that instruction came from her;

That Veronica's inheritance was increased as a result of an instruction from her, which instruction she repeated to Beukes after she had signed the will;

That the second will is consistent with the type of will I would have expected an astute and confident business woman with a genuine concern for the best welfare interests of her children to have signed.

Differently put, if the deceased had signed a second will which was inconsistent with the first one so as to deprive in particular her mother and her sons of the quantum of what she intended them to enjoy in the first will, having heard the evidence of the witnesses who knew her well, I would have been concerned about her capacity at the time. But she did not.

[161] For these reasons I make the following order:

"The claim of the second and the third plaintiffs is dismissed with costs."

I T STRETCH 18 September 2015

JUDGE OF THE HIGH COURT

Appearance for the Plaintiffs: Mr R Smith

Instructed by: Wylde & Runchman Incorporated

East London

Appearance for the Defendants: Mr R Quinn SC

Instructed by: MA Fredericks & Associates

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