

SOUTH AFRICA / JUDGMENT

Johnson v Johnson and Others (16626/2023) [2025] ZAWCHC 54 (19 February 2025)

[2025] ZAWCHC 54

COURT

Western Cape High Court, Cape Town

BEFORE

P D Andrews

CASE / FILE NUMBER

16626/2023

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Policy

FLYNOTES:

WILLS

AND ESTATES – Will – Testamentary

capacity –

Deceased

was elderly and suffering from Alzheimer's dementia which

was moderately advanced – Inescapable inference

from

evidence that deceased not having requisite testamentary capacity

– Respondents knew of her condition when accompanying

her to

attorney to sign will – Deceased no longer had disposing

mind at time of executing will – Will declared

null and void

– Wills Act 7 of 1953, s 4.

IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION,

CAPE

TOWN

Case

No: 16626/2023
In
the matter between: DONOVAN
DENNIS JOHNSON
Applicant
and
CARLO
JOHNSON
First
Respondent
BRADLEY
JOHNSON N. O
Second
Respondent
BRADLEY
JOHNSON
Third
Respondent
CAROL
KRITZINGER
Fourth
Respondent
URSULA
MOSTERT
Fifth
Respondent
ROBERT
MOSTERT
Sixth
Respondent
SHARIFA
MOSTERT
Seventh
Respondent
TREVOR
MOSTERT
Eighth
Respondent
GERALD
MOSTERT
Ninth
Respondent
MASTER
OF THE HIGH COURT,
CAPE
TOWN
Tenth
Respondent
REGISTRAR
OF DEEDS

Eleventh
Respondent

JUDGMENT

ANDREWS, AJ

Introduction

- [1] This is an opposed application in terms of which the Applicant seeks to inter alia, declare the purported Will executed by Marion Johnson (“the deceased”), allegedly executed on 9 February 2016 (“the impugned Will”) null and void due to the mental incapacity of the deceased. The Applicant furthermore seeks orders to set aside the transfer of Erf 1[...], Cape Town to the First Respondent (“the property”); remove the Second Respondent as Executor of the deceased’s estate and direct the Master of the High Court to appoint a new Executor.
- [2] The Applicant is the biological father of the First Respondent. The Second Respondent is the Executor of the impugned Will. The Applicant, as well as the Second to Ninth Respondents are the biological children of the deceased. The First to Third Respondents opposed the application on the basis that the deceased was mentally capable to execute the impugned Will. Fourth to Ninth Respondents each filed confirmatory affidavits in terms of which it was stated that they do not intend to oppose the application and will abide by the decision of the Court. The Eleventh Respondent filed a report confirming it had no objections to the order being granted as prayed.
- [3] For ease of references, the First, Second and Third Respondents are collectively referred to as “the Respondents” unless specifically referred to otherwise in this judgment.

Factual

Background

- [4] The deceased, who is the Applicant’s mother, executed a Joint Will on 4 September 2014 with her late husband Granville Johnson, who predeceased her on 23 October 2014. In terms of the Joint Will, they bequeathed their entire estate to the survivor of each of them. Furthermore, the Joint Will effectively provide that if they were to die simultaneously, the Applicant would inherit the property situated at 3[...] H[...] N[...] Street, Cafda, (“the property”), which is essentially the main subject matter of the underlying dispute between the parties.

[5] In, during or about September 2015, the deceased was seen by a Specialist Neurologist, Dr PM Thomas (“Dr Thomas”), following concerns pertaining to the deceased’s memory loss. The neurologic examination revealed that she scored 13/30 on the Montreal Cognitive Assessment (“MOCA”). On 4 December 2015 the deceased was seen by Dr Ahmed Parker who in his referral note, to one “Carol”, stated that the

deceased presented with cognitive decline. During or about January 2016, the deceased was seen by Psychologist, Dr Chris George (“Dr George”) who opined that the deceased was suffering from Alzheimer’s dementia, which was moderately advanced. His prognosis was that the condition would progress and not recover. He concluded that due to the mental condition of the deceased she was unable to manage her own affairs and recommended the appointment of a curator bonis.

[6] Rehana Khan Parker (“Mrs Parker”), an admitted attorney, was appointed as curatrix bonis to the deceased on 22 June 2016, under case number 3438/2016. It came to the Applicant’s attention that the deceased had signed a Deed of Sale on or about 20 November 2017. An application was launched on 9 April 2019, under case number 20533/2018 in terms of which the agreement of sale of the property purportedly entered into between the First and Second Respondents was declared null and void and set aside. The Registrar of Deeds was furthermore directed to take the necessary steps to de-register the property by removing the name of the First Respondent, such that the registration of the property and ownership thereof revert to the name of the deceased.

[7] After the passing of the deceased, on 3 March 2020, the Third Respondent lodged a Will with the Master, which was purportedly executed by the deceased on 9 February 2016 (“the 2016 Will”). In terms of the 2016 Will, the Second Respondent was nominated as the Executor. Upon his appointment, the Second Respondent proceeded to have the property transferred to the First Respondent. The Eleventh Respondent filed a report confirming that the property is, as at 13 October 2023, registered in the name of the First Respondent.

[8] The Applicant challenged the 2016 Will on the basis that the deceased lacked testamentary capacity. The Respondents’ counter argument in broad terms is that the deceased’s mental capabilities were intact. A further Will attested to by the deceased on 7 January 2015 (“the 2015 Will”) surfaced approximately 5 months prior to the hearing of the matter, the validity of which required determination as per the order taken by agreement between the parties on 22 May 2024, granted by the Acting Judge President Goliath.

Preliminary

Issues

[9] In terms of the agreed order on 22 May 2024, the matter was postponed to the semi-urgent roll for the hearing of viva voce evidence. The issues as recorded to be resolved at the hearing included inter alia:

(a) The authenticity of the alleged 2015 and 2016 Wills; and

(b) The mental capacity of the deceased to execute the said Wills.

[10] At the commencement of this hearing it was recorded that the Respondents admitted that a MOCA test was performed on the deceased by Dr Thomas and that she scored 13/30. The parties agreed that it would be unnecessary to call Dr Thomas to give evidence in order to curtail the litigation costs.

The evidence

Dr Thomas' Report

[11] The salient recordals emanating from Dr Thomas' report dated 21 September 2015, pursuant to the deceased being referred with a complaint of memory loss, included that the deceased:

- (a) had limited insight into her illness;
- (b) agreed that she was forgetful but didn't think that it impaired her in any way and
- (c) bore knowledge of her late husband's demise.

[12] On direct questioning Dr Thomas opined that it was apparent that there was a marked decline in the deceased's ability to perform her activities of daily living. Although the patient still performed grooming and dressing tasks herself, she no longer cooked or did any cleaning at home. These tasks were performed by her grand-daughter who then lived with her in the house. It was also documented that the deceased did not do any shopping and neither did she manage her finances. Dr Thomas further noted that the deceased would give her grandson her bank card and her identity document with instructions to buy groceries, draw money and pay accounts. Dr Thomas also recorded that the deceased would otherwise spend her day knitting, or watching television.

[13] Dr Thomas went on to note that the deceased had received a payment from his pension fund into her bank account, which money had been promptly withdrawn. The deceased bore no knowledge of this transaction. According to Dr Thomas, an amount of approximately R60 000 had been misappropriated.

[14] The neurological examination revealed that the deceased scored 13/30 on the MOCA. In addition, Dr Thomas noted in assessment, that the patient is known with problems which included inter alia, progressive dementia with a cognitive profile atypical for Alzheimer's disease.

[15] Dr Jeffrey Winston George ("Dr George"), testified on the virtual platform. He stated that he is a psychiatrist in private practice since 1995. He confirmed that he consulted with the deceased on 13 January 2016. He also verified the content of his report dated 18 January 2016 as well as his supplementary report dated 24 June 2024. Dr George explained that he performed various tests on the deceased and considered the background information provided to him by the Applicant and the Fourth Respondent.

- [16] According to Dr George's observations the deceased had superficial orientation and did not display an understanding that she was seeing a psychiatrist. The deceased was not orientated in respect of time and place in that she could not provide the date, day or month. She was only able to identify the year. In amplification of his conclusion that the deceased's memory was poor, he explained that she had difficulty describing her present personal state of affairs. Although she understood that she was receiving a pension, she was not aware of the amount. In addition, the deceased was unable to give an accurate account of her personal history. Although she knew that her husband had passed away, she was unable to recall when he had passed away or what his previous occupation was.
- [17] Dr George explained that the nature of vascular dementia was a slow degeneration of the small blood vessels in the brain, leading to a similar slow degeneration of the brain itself and the loss of certain faculties as a result thereof. He confirmed that at the time he consulted with the deceased she was unable to:
- (a) Appreciate the nature of the act of executing a Will and the consequences thereof, in other words, the deceased was unable to make an informed decision as to who she wanted to bequeath her assets to;
 - (b) Recall her assets that she would be disposing of in the Will;
 - (c) Unable to confirm values of assets;
 - (d) Independently recall the names of her expectant heirs; or
 - (e) Weigh the claims of her expectant heirs and make a free and uninfluenced executive decision about including them in a Will as heirs and to what extent.
- [18] He explained that the score of 13/30 in the MOCA is indicative of significant cognitive impairment. Dr George concluded that the deceased would not have had the mental capacity to execute a Will on 9 February 2016 and on 7 January 2015 respectively.
- [19] Melanie Marion Johnson ("Ms Johnson"), who is the granddaughter of the deceased, testified that she had been living with the deceased since birth. She narrated that she interacted on a daily basis with the deceased. When she fell pregnant she moved into the separate entrance on the same property. Ms Johnson observed certain changes in the deceased since about January
2015. She recounted that the deceased became very forgetful such that she would forget what she ate and how much she had eaten. She also could not remember birthdays. The deceased was unable to recall how and when her husband had passed away and what he did for a living.

- [20] Ms Johnson also orated that the deceased became disinterested in activities which she enjoyed like knitting, reading, taking walks, watching television and cooking. She stated that the deceased was disorientated. In augmentation she explained that the deceased would at times end up in the wrong room of the house when she intended to go to the lounge. Ms Johnson observed that the deceased wouldn't interact or engage in meaningful discussion.
- [21] Cecil Kamalie ("Mr Kamalie"), testified that he was a practising attorney for 26 years and conducts his practice from home. He narrated that he had consulted with the deceased who was accompanied by the First and Second Respondents. He orated that he generally exercised caution when consulting with the elderly because of the risk of influence when they are accompanied by potential heirs and / or siblings. In such instances, he would request that those heirs or family members wait in the reception but could not specifically recall if he had done so when he consulted with the deceased. He was unsure whether the family members were present during the consultation with the deceased
- [22] Mr Kamalie recounted that he had a conversation with the deceased and she was able to communicate with him. She informed him that she obtained a pension. She also spoke about her deceased husband. Mr Kamalie had a clear recollection that the deceased in fact corrected him on the spelling of her name. He further orated that he explained to her what he would include into the Will whereafter he had the Will typed up and before she signed the Will he went through the content thereof with her. Mr Kamalie and his wife were witnesses to the Will at the time. According to his observation, the deceased understood the content of the Will because she responded as a person who understood what she was signing. Mr Kamalie testified that "most" of the information was conveyed to him by the deceased.
- [23] Carlo Johnson ("the First Respondent"), testified that he is the grandson of the deceased and that the Applicant is his father. Melanie Johnson ("Ms Johnson") is his sister. He confirmed that he is residing at the property that forms part of the dispute in these proceedings. The First Respondent narrated that he was raised by his grandparents since he was an infant. In 2014 he moved back to take care of his grandparents. He stated that the deceased and the Applicant did not have much of a relationship and that the Applicant would only visit when he needed something. He described that the deceased was fond of Ms Johnson, but claimed that because she had bad manners, a temper

and a party lifestyle, the deceased could not deal with it. He explicated that Ms Johnson resided in the separate entrance and

hardly came into the main house. According to the First Respondent, she mainly visited the deceased on Sundays which was her day off from work. The extent of Ms Johnson's contribution or interaction with the deceased was described as her doing things for the deceased now and again.

- [24] The First Respondent elucidated that the deceased had expressed her wish to leave the property to him at a family meeting held after the passing of his grandfather. The Applicant was, however, disapproving thereof as he believed that he should inherit the property. The Applicant got angry and got into a fight with the Third Respondent.
- [25] The First Respondent narrated that the deceased was taken to an attorney at as she was desirous to “do her Will”. The First and Third Respondent accompanied the deceased to the attorney where the deceased informed the attorney what her wishes were. The First Respondent gave an account of what transpired at the attorney’s office. The attorney at some point during the consultation called the Third Respondent to assist him with information concerning the deceased’s assets which remained after his grandfather had passed on as the Third Respondent was the Executor of his grandfather’s estate.
- [26] The First Respondent was referred to the Court Order granted by Justice Binns-Ward on 22 June 2016 in terms of which Mrs. Parker was appointed as the curatrix bonis to the deceased. He stated that he was unaware thereof until 2018 when an application was launched to reverse the transfer of the property and the sheriff served the papers on him. He explained the context under which the sale agreement came about. The First Respondent stated that the deceased expressed her desire for him to receive the property while she was alive and not when she “closes her eyes”. This was because she didn’t want to see him on the street and because his father and his uncle both owned their own respective properties.
- [27] He furthermore explained that the agreement was finalised at a meeting at Manson Tobin Attorneys in Durbanville where he and the Third Respondent were present. The First Respondent orated that the deceased informed the attorney that she was desirous to donate the property to the First Respondent. When asked to clarify whether it was a sale agreement or a donation he responded that the deceased said she would like to transfer the property to him.
- [28] The First Respondent confirmed what was stated in the report of Dr Thomas insofar as it was recorded that the deceased would instruct him to withdraw money for her. He was asked about his sister’s testimony regarding the deceased’s waning interest in activities. To this, he responded that the deceased had spine cancer and moved slowly. He recounted the activities of the deceased which included the times when the Third Respondent would drop her off at the station and she would go to town and come home with her daughter. He explained that the deceased was capable of doing “her own things” and only when she would be in pain would she lay down. The First Respondent administered the deceased’s medicine and also frequently took her out. He also related that the deceased liked “eating out”. Furthermore, he stated that the deceased was good at remembering names but struggled with remembering places. According to him, she had an awareness of where she was and recognised her interlocutor.
- [29] In addition, he testified that he discovered another Will which was executed by the deceased in 2015 approximately 5 months prior to the hearing.

The Applicant's principal submissions

- [30] The Applicant submitted that the medical expert opinion of Dr George confirmed that the deceased could not have the requisite mental faculties in place in order to execute the respective Will dated 7 January 2015 or the impugned Will. It was contended that the evidence presented by Melanie Johnson was supported by the opinion of Dr George, which was submitted as not having been seriously challenged during the hearing by the Respondents. The Applicant furthermore asserted that the Respondent's own version, which was elicited through the cross-examination of the First Respondent and Mr Kamalie, confirmed that the deceased did not have the requisite mental capacity to execute a Will.
- [31] The Applicant contended that if regard were to be had to the unexplained and suspicious manner of execution of the alleged 2015 Will, coupled with the circumstances pertaining to the 2016 Will and the purported sale of the property by way of the 2017 Deed of Sale, all formed part of an ongoing attempt by the First Respondent to get his hands on the property by exploiting the dementia of deceased.

The Respondents' principal submissions

- [32] The Respondents contended that the Applicant had not discharged his onus to prove on a preponderance of probabilities, that any of the deceased's Will is susceptible to invalidity as a result of mental incapacity or undue influence upon the deceased. The Respondents denied that the deceased did not possess the mental capacity to execute the 2016 Will.
- [33] They suggested that the application is primarily motivated by the Applicant's immaterial belief that, because his parents had initially favoured him in terms of their initial Will, he and the rest of his siblings ought not to have been excluded as beneficiaries of the deceased's estate. The Respondents argued that Dr George could not conclusively make a determination on the deceased's state of mind at the time when the 2015 Will was concluded. They suggested that Dr George's expert testimony, if measured against the undisputed evidence, does not justify a conclusion that the deceased was either lacking the capacity to make a Will or was unduly influenced by the Respondents. They deny the impression sought to be imputed by the Applicant to the expert reports as if there is justification for a conclusion that the deceased had no mental capacity.
- [34] In addition, it was submitted that the Second Respondent has carried out his responsibilities as the Master's representative and therefore which does not justify a conclusion that the Second Respondent should be removed as the Executor.

Applicable legal principles

- [35] It is trite that there is a presumption that a Will which appears regular and complete on the face of it, is valid until its invalidity

has been established on a balance of probabilities by the person alleging its invalidity.[1]

[36] Section 4 of the Wills Act[2] (“the Wills Act”) deals with the competence of a person to make a Will and states as follows:

‘Every person of the age of 16 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.’ [my emphasis]

[37] The onus therefore rested on the Applicant to prove that the deceased was mentally incapable of attesting to a Will as aptly enunciated in the seminal judgment of *Kirsten and Others v Bailey and Others*[3] where the court distilled the test to be applied as follows:

‘The test to be applied in deciding the question of testamentary capacity is whether the testatrix was at the time of sufficient intelligence, possessing a sufficiently sound mind and memory, for her to understand and appreciate the nature of the testamentary act in all its different bearings.’[4]

Failure to cross-examine

[38] The Applicant submitted that the First Respondent claimed to have instructed his Counsel with all the facts relevant to his version in detail. It was however elucidated that his version was not put to either Dr George or his sister, Ms Johnson and neither was there evidence challenged during cross-examination. Furthermore, certain aspects of the evidence provided by Dr George and Ms Johnson regarding the cognitive functioning of the deceased went unchallenged during cross-examination. For instance, it was never put to Ms Johnson that her version regarding the lack of memory of the deceased and her disorientation within her own home was denied, nor were the allegations that would follow by the First Respondent put to her to enable her to respond thereto whilst in the witness box.

[39] The matter of *President of the Republic of South Africa v SARFU* [5] is the locus classicus on cross-examination where the Constitutional Court stated as follows:

‘[61] As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination, showing that the imputation is intended to be made and to afford the witness an opportunity, whilst still in the witness-box of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s evidence is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but “is essential to fair play and fair dealing with witnesses”. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

- [63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'
- [40] It is therefore trite that the unchallenged evidence becomes common cause as the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This in essence defeats the very purpose of cross-examination as crystallised by academic writers and a plethora of case authorities on point.[6]
- [41] Thus, it follows that Section 15 of the Civil Proceedings Evidence Act[7] finds application which states as follows:
- 'It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.'
- [42] The implied common cause evidence is analogous to a formal admission in the pleadings or one made during the course of a trial. It is then not competent for a party to subsequently lead evidence that contradicts this. In upholding the principle and standards of fairness regard must be had to the potential prejudice if the rule is not adhered to. More especially as the party accepting the correctness of the version of a witness due to the lack of cross-examination on a topic, may have found it unnecessary to lead further evidence in proof thereof or to call further witnesses in support thereof prior to closing his or her case.
- [43] During the trial, Counsel on behalf of the Respondents admitted that Dr Thomas conducted a MOCA test on the deceased and that the result was 13/30. The consequences of such a low score were never challenged either during the cross-examination of Dr George or by any rebuttal evidence from another expert witness.

Evaluation of evidence

- [44] The Respondents' challenge essentially went to the content of Dr Thomas' report wherein the activities of the deceased were noted. They argued that the tasks identified in Dr Thomas' report which the deceased is credited as having been capable of performing, are not tasks that would ordinarily be expected from a person, who, at that critical moment was mentally incapable of making decisions including a decision relating to how her estate should devolve. Furthermore, it was argued that in investigating whether the person had the mental capacity to execute a Will, one has to consider whether at the time when that Will was executed, there is evidence that the testator would probably have been mentally incapacitated.

- [45] The Applicant argued that the evidence of Dr George and Ms Johnson overwhelmingly proved that the deceased did not have the requisite testamentary capacity to execute either of the two Wills in question. If regard is had to the version of the Respondents' witnesses regarding the execution of the 2016 Will, it too proves that the deceased did not have the requisite mental capacity to execute the Will. In augmentation of this assertion, the Applicant contended that:
- (a) The deceased could not independently recall all her assets. The assistance of the Third Respondent had to be relied upon in this regard. It became manifest that the Mercedes Benz motor vehicle was not included which it was argued, the deceased would have been expected to remember, had her memory been intact;
 - (b) The information given to Mr Kamalie was inaccurate insofar as she was unable to recall where her late husband worked and inaccurately mentioned that he worked for Telkom instead of SA Post Office.
- [46] The Respondents zoned in on the date that Dr George had examined the deceased, namely 13 January 2016. They highlighted that Dr George did not have any information concerning the deceased's state of mind a year earlier when she executed the 2015 Will or at the time when the deceased's husband died on 23 October 2014. The Respondents rely on the concession made by Dr George that it is possible that the deceased's Alzheimer's condition, if it already existed in January 2015, would not have been of the same level as when it was when he examined the deceased in 2016.
- [47] The Respondents placed reliance on the matter of *Essop v Mustapha Essop NNO and Others*[8] where the court confirmed that the decisive moment for establishing the competence of the testator is the time when the Will is made. In applying this legal principle, the Respondents contended that the evidence of Dr George falls to be rejected as his findings were not based on any objective evidence based on any assessment. This, they say, is because there was at least a period of 11 months from the time when the deceased had executed the 2015 Will to the time when the deceased was examined by Dr George in 2016. In this regard, it was argued that it is probable that the deceased may not have had dementia at that stage or it may have been at an insignificant level that did not impact any of her decision-making abilities.
- [48] The Respondents further suggested that Dr George's evidence revealed his own biases when he testified during cross-examination that he did not believe that the deceased would have chosen to deviate from the contents of the Joint Will and decide to bequeath her property to one person to the exclusion of all her children. They fortify this assertion on the basis that it aligns with the Applicant's view that there was no reason for the deceased to disinherit any of their children especially in favour of the First Respondent.
- [49] In my view, there is no notable indication of bias as Dr George was called as an expert witness. The questions posed during cross-examination invited him to share his viewpoint, and he gave his response. It can therefore hardly be argued that a solicited view elicited

during cross-examination is tantamount to bias, given the stage of the proceedings at which such opinion was extracted. To reiterate, the MOCA score of 13/30 in and of itself is telling and clearly supported by additional considerations and not purely based on an opinion, highlighted in isolation.

- [50] It is trite that a court, in evaluating all the evidence must distinguish probabilities and inferences from conjecture or speculation. To my mind, the Respondents have produced no evidence in rebuttal of the testimony and reports of the expert witnesses to gainsay the conclusion that the deceased was indeed suffering from Alzheimer's dementia, which was moderately advanced. The report of Dr George must be considered in the milieu of all the evidence including that of Ms Johnson, who in opinion, made a good impression on the court and remained steadfast despite being thoroughly cross-examined. Her version is supported by the independent and unchallenged report of Dr Thomas. Significantly, Dr Thomas noted the decline in the deceased's interests and activities which corroborates the testimony of Ms Johnson in this regard. The independence of Dr Thomas' report is underpinned by the fact that Ms Johnson was not present at the examination. Dr Thomas' conclusion was informed by another collateral source, more specifically "one of her sons", together with the further investigation of her cognitive decline when she was admitted to hospital over the period 28 – 29 September

2015.

- [51] The chronology of events is a critical consideration. In this regard, the impugned Will is dated 9 February 2016. Dr George's report is dated 18 January 2016, after having consulted with the deceased on 13 January
2016. The deceased was referred by the curatrix bonis for a psychiatric evaluation because she could not manage her affairs. Mrs Parker was appointed as such on 22 June
2016. The deceased, barely one month after consulting with Dr George, who recommended the appointment of a curator bonis, is then taken to an attorney to attest to a Will in circumstances where she was found to be incapable of managing her financial affairs and had displayed cognitive decline. Furthermore, R60 000 was recorded by Dr Thomas to have been misappropriated.
- [52] To my mind, the deceased would have failed the test even without the expert opinions of Dr Thomas and Dr George, as Ms Johnson and the First Respondent confirm that the deceased was displaying signs of forgetfulness. To some measure, the First Respondent's concession that the deceased was a bit forgetful corroborates the experts' findings. Although the First Respondent held the view that Dr George exaggerated the extent of the deceased's mental abilities, the First Respondent conceded that he was aware that the deceased had consulted medical practitioners regarding her possible dementia. The First Respondent was therefore not forthright with Mr Kamalie regarding the Respondent's cognitive decline.

[53] To add to the further suspicion, Mr Kamalie testified that the deceased spoke about her late husband being employed at Telkom. This is factually incorrect as confirmed by the First Respondent that his grandfather was in fact employed at the SA Post Office. This factual error, in my view, is material and speaks directly to the testamentary capacity of the deceased. Furthermore, a recommendation for the appointment of a curator bonis was made by Dr George on 18 January 2016, prior to them visiting the Attorneys, based on his finding that the deceased was unable to manage her own affairs. The First Respondent's claim not to know about this appears implausible as this court is beholden to weigh the evidence in its totality. In other words, evidence must be viewed holistically. Therefore, these factors considered

cumulatively, to my mind, on a balance of probabilities, lead to the inescapable inference that she would not have had the requisite

testamentary capacity to execute the 2016 Will, bearing in mind that the test required that:

- (a) She should be of sufficient intelligence;
- (b) Possess a sufficiently sound mind and memory;
- (c) For her to appreciate the nature of the testamentary act in all its bearings. [my emphasis]

[54] Consequently, based on the objective facts proven, the 2016 Will falls to be declared null and void. Should I be wrong, it behoves me to consider the suggestion that she was unduly influenced in executing the 2016 Will.

Undue influence

[55] It is trite that the expression of a testator's last wishes must be the result of the exercise of his or her own volition. Any impairment to the free expression of the testator's wishes at the time the will is made may result in a will being declared

invalid.[9]

[56] In dealing with the deceased's susceptibility to being influenced, the Applicant contended that at her advanced age of 84 years, in 2016, and with the deceased having been diagnosed with dementia, it would have been easy for the deceased to be influenced into executing a Will and signing a Deed of Sale. The suspicious and unexplained circumstances surrounding these events lend credence, it was argued, to this inescapable inference. The Applicant contended that it is thus reasonable to conclude that this is nothing other than an opportunistic and underhanded attempt by the Respondents to have the property transferred to the First Respondent. To cement this argument, it was highlighted that the Third Respondent conducts a business from the property.

[57] The Respondents argued that the Applicant's claim that the deceased could not have made a Will without knowing what she was doing or through undue pressure is not supported by probable evidence. It is however noteworthy that during cross-examination, Mr Kamalie

stated that he did question the deceased as to why she wanted to bequeath the immovable property to her grandson to which she responded that it was because he looked after her. This explanation was also given by the First Respondent during his testimony. He further stated that the deceased reasoned that the Applicant and the Third Respondent own their own immovable properties respectively and she did not want to see him on the street.

- [58] Mr Kamalie during his testimony could not recall whether they spoke about movable assets. It is noteworthy that the Third Respondent, included in the Liquidation and Distribution Account that the estate owned a Mercedes Benz motor vehicle to the value of approximately R20 000. It was pointed out to the First Respondent that the deceased did not mention this vehicle in her 2016 Will. It is also notable that the only persons named as beneficiaries in the 2016 Will are the First and Third Respondents, to the exclusion of the Applicant and the remainder of the siblings. It therefore beckons the question whether it is coincidental that the two persons who accompany the deceased to the attorneys, are the same persons who had knowledge of her medical assessment and the recommendation of a curator bonis are the only persons named in the deceased's Will. Moreover, the only person's identity document number included in the 2016 Will is that of the Third Respondent who is also the nominated Executor of the estate.
- [59] Mr Kamalie's testimony that he would generally ask those accompanying a testator not to speak, contradicts his evidence that "most" of the information was elicited from the deceased upon an analysis of the content of the 2016 Will. Essentially, under the paragraph headed "heirs and beneficiaries", the First Respondent is named the sole and universal heir of the deceased's estate. The Third Respondent is named as the beneficiary of shares held by the deceased in Public Companies. It is hardly likely for the deceased to have had knowledge of this fact and that there was still funds due to her from her late husband's estate which is bequeathed to the First and Third Respondents equally. Again, this must be viewed against the evidence concerning the deceased's "forgetfulness" coupled by the fact that Dr Thomas' report mentioned that the deceased had no knowledge of movement of certain funds.
- [60] Mr Kamalie was unaware that the deceased had consulted with a psychiatrist and neurologist. This fact ought to have been disclosed to Mr Kamalie by the First Respondent, who during cross-examination, confirmed that he had knowledge that the deceased was taken to a neurologist and had consulted with Dr George. To my mind, both the First and Third Respondents had to have been aware of this fact as the deceased had an in-hospital assessment. When this was disclosed to Mr Kamalie, he remarked during cross-examination, that had he known the deceased had been diagnosed with dementia or consulted a psychiatrist for dementia, he would not have assisted her in executing the Will because the validity thereof would be challenged.
- [61] I am therefore fully persuaded, that the Respondents who accompanied the deceased to Mr Kamalie's office would have been aware of her cognitive decline, as the First Respondent resides on the property and the Third Respondent conducts a business from the property. Furthermore, the fact that the appointment of a curator bonis was recommended because

the deceased was found not to be able to manage her own affairs, should have been brought to the attention of Mr Kamalie, who was clearly unsuspecting. Therefore, it would not be far-fetched to infer that there may have been an agenda

as alluded to by the Applicant in argument.

- [62] The First Respondent refuted the notion that the deceased was afraid of him and stated that she was fond of him that is why he was the one called upon by his grandparents to help them and look after them. It is my view that the Respondent's argument regarding the undue pressure in the context of the relationship she had with the First and Third Respondents is misplaced as it is apparent that the deceased was vulnerable.
- [63] In my view, it was the deceased's state of mind that was taken advantage of and not that she was pressurised in the context of being forced to leave the property to the First Respondent. There is no evidence that the deceased was mistreated. On the contrary, it is clear that she had a good relationship with her family, more specifically the First Respondent.
- [64] The timing of the 2016 Will being subsequent to the medical diagnosis and curator bonis recommendation, becomes a crucial consideration. Inasmuch as Mr Kamalie may have formed the view, based on his observations and interactions with the deceased as to the capacity to execute a Will, he was unaware of the deceased's medical diagnosis. He cannot be faulted for proceeding to draft the Will on what appears to be partial instructions obtained from the deceased and the errors and omissions alluded to earlier in this

judgment.

- [65] It would however be remiss of the court not to restate the trite legal principle that a testator is free to dictate the direction which her estate should take upon her death. This is however not unqualified as the person making the Will must be mentally capable of appreciating the nature and effect of his or her act, which in my view, wasn't the case with the deceased, based on the contextual narrative together with the expert testimony and reports.
- [66] Though it was argued that there is nothing to suggest that the First Respondent is not worthy of inheriting the deceased's estate, the Respondents fail to appreciate that the primary consideration is, in fact, whether the deceased was capable of executing the Will in 2016 and 2015, respectively. This court has no doubt that the deceased had a close bond with the First Respondent, but this, in and of itself, is not sufficient to conclude that the deceased had the mental capacity to appreciate the nature and effect of her act. This court is, after all, enjoined to correctly apply the legal considerations, which should not be overshadowed by considerations of the heart.
- [67] The test distilled in *Banks v Goodfellow*[10], remains locus classicus:

‘The testator must ... be possessed of sound and disposing mind and memory But his memory may be very imperfect ... and yet his understanding may be sufficiently sound for many of the ordinary transactions ... were his mind and memory sufficiently

sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?’

[68] Without rebuttal evidence regarding the deceased’s mental capacity, I am satisfied, on a conspectus of the evidence that the deceased no longer had a disposing mind at the time of executing the Will in 2016. Consequently, on a balance of probabilities, I am of the view that the deceased was at the time of executing the 2016 Will unable to:

- (a) Appreciate her actions;
- (b) Recall her property and interests;
- (c) Recall and/or identify her potential heirs and the claims of her other children and
- (d) Make her own informed executive decision regarding the terms of the Will.

Removal as Executor

[69] Section 54, of the Administration of Estates Act[11] stipulates as follows:

‘54 Removal from office of Executor

(1) An Executor may at any time be removed from his office-

(a) by the Court-

(i)

(ii) if he has at any time been a party to an agreement or arrangement whereby he has undertaken that he will, in his capacity as Executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or

(iii) if he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as Executor or to effect or to assist in effecting such recommendation; or

(iv) if he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or

(v) if for any other reason the Court is satisfied that it is undesirable that he should act as Executor of the estate concerned; ...’ [my emphasis]

- [70] The Applicant placed reliance on *Van Niekerk v Van Niekerk and Another* [12] (“*Van Niekerk*”) to underscore the manner in which an Executor is to exercise its powers and functions. In this regard, an Executor is obliged to exercise his or her powers bona fide and with a measure of objectivity. It is trite that it is undesirable for a person to act as Executor if inter alia:
- (a) there is a conflict of interest between the personal interests of the Executor and the estate[13];
 - (b) the Executor is incapable of behaving in a fair and impartial manner towards creditors and/or heirs in the estate[14];
 - (c) It is apparent from the Executor’s conduct that it is their purpose and intent to use their office to resist all claims, or all claims from a particular source, irrespective of their merits and without any fair-minded consideration thereof;[15]
 - (d) the Executor conducted him or herself in such a manner that it actually imperils his or her proper administration of the estate.[16]
- [71] Whilst these aforesaid principles do not constitute a closed list, it is noteworthy that the Second Respondent was not called to testify during the proceedings. As previously stated, no expert evidence in rebuttal was led by the Respondents to gainsay the evidence of Dr George, coupled with the fact that the MOCA test result was not placed in dispute.
- [72] The Applicant submitted that the Second Respondent must have been aware of the mental capacity of the deceased, and notwithstanding supported and perhaps advised the First Respondent in the various attempts to secure the property for the First Respondent. In addition, it was contended that the Second Respondent is faced with a serious conflict of interest in that the future housing of his business is under threat. Evident from the Liquidation and Distribution Account compiled for the joint estate, it was highlighted that there are little or no cash assets available to cover the administration thereof. It is the Applicant’s contention that the Respondents are in cahoots and have acted in an underhanded manner, which renders it undesirable for the Second Respondent to continue with the administration of the estate of the deceased.
- [73] It is however apposite to state that the Second Respondent was duly appointed by the Tenth Respondent which appointment was not challenged by any of his seven siblings. The Respondents contended that the Second Respondent had no motives to influence the deceased.
- [74] The matter of *Pexmart CC and Others v H. Mocke Construction (Pty) Ltd and Another*[17] is instructive on the aspect of a litigant’s failure to call available witnesses.

‘It is true that this court in *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624B-F, enunciated that its earlier decision in *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A), did not lay down a general and inflexible rule to be applied without more in every case, that an

adverse inference is to be drawn where a party fails to call as a witness one who is available and able to elucidate the facts. Whether such an inference is to be drawn will depend on the facts peculiar to the case in which the question arises. In Munster this court had regard to the circumstances which justified the adverse inference. During the course of the plaintiff's case it was indicated that the witness would be called. This court held that to say that the witness was 'equally' available, was to ignore the realities, particularly if the association was taken into account. The witness not called was also clearly able to elucidate the facts. He was the most knowledgeable of the plaintiff's representatives on a material aspect. This court also took into account that, during the course of the plaintiff's case, contradictory evidence had been led which could have been clarified had the witness been called. It held that the probable reason for not calling him as a witness was that it was feared that his evidence would expose facts unfavourable to the plaintiff's case.'[18]

- [75] In casu, there was no indication that the Second Respondent was not available to testify. The Third Respondent in his capacity as Executor, (the Second Respondent), holds a fiduciary duty to act in the best interest of the estate and its beneficiaries. Therefore, the Second Respondent is to be held to the highest fiduciary standard of care. Given the highlighted discrepancies elucidated during the hearing, it would have been expected of the Second Respondent to provide explanations.
- [76] The person best placed to assist the court in this regard would be the Second Respondent himself. The Respondents incorrectly, in my view, identify the challenged conflict of interest to suggest the Applicant's disagreement "with how the Second Respondent proceeded with the winding up process".[19] My understanding of the Applicant's argument goes to the fact that it is uncontroverted that the Third Respondent conducts his business from the property in question which implies that he may have a vested interest to the extent that there is a conflict of interest.
- [77] Furthermore, the Second Respondent too in my view, had to have been aware of the deceased's visits to the doctors and significant memory loss. The mere fact that the appointment of a curator bonis was recommended because the deceased could no longer manage her own financial affairs is a critical factor in my view. The Third Respondent assisted Mr Kamalie in identifying the deceased's assets as it was evident that she was unable to recall the same. This, the Respondents argued was because the Third Respondent would have been privy to or required verification from the Third Respondent, who was also the Executor of the deceased's late husband's estate.
- [78] Though this may be true, his presence during the consultation with Mr Kamalie and the deceased should have triggered an alarm when the deceased incorrectly stated that her late husband's place of employment was Telkom and not SA Post Office. The Mercedes Benz motor vehicle appears to not have featured during the consultation, based on Mr Kamalie's evidence and the notable absence of the asset in the 2016 Will. As an Executor, the Second Respondent is legally obliged to exercise due care and diligence by avoiding any actions that could put the estate at risk. His fiduciary obligation enjoins him to be impartial. Thus, his

silence at the Attorneys office regarding the deceased's memory loss and curator bonis recommendation, in my view, had to be explained.

[79] The authorities are clear that an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available to elucidate the facts. The court in *Shishonga v Minister of Justice and Constitutional Development and Another* [20] made it abundantly clear 'that this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him'. [21]

[80] It is trite that the court's approach regarding an application for the removal of an Executor is premised on the interests of the estate and those of the beneficiaries. [22] It is settled law that sufficient cause must exist for the removal of an Executor. It must therefore be apparent that the

particular circumstances of acts complained of are as contemplated in Section 54 (*supra*).

[81] The aforementioned aspersions that were cast on the Second Respondent, in my view, demonstrate sufficient cause to justify a court-ordered

removal of the Second Respondent as the Executor. [23] However, a decision in this regard is rendered moot if the 2016 Will is declared invalid as the decision in this regard falls to the Master. In light of the conclusion to which I have come, the Second Respondent should hold the further administration of the estate in abeyance, pending the appointment of a new executor for the deceased estate as the effect of the outcome of this matter will have changed the status of the deceased estate.

The setting aside of the 2015 Will

[82] The viva voce evidence of the First Respondent revealed that he was requested by his legal representative, during a consultation, to hand in any documents that would relate to the matter, which led to the discovery of the 2015 Will, approximately 5 months prior to the hearing. The Applicant, as part of the relief sought, requested that the court declare under alternative relief in prayer 2 of the notice of motion, the alleged Will of 7 January 2015 invalid. This court is required to make a determination on the authenticity of the alleged 2015 Will as well as the mental capacity of the deceased to execute the said Will as per the order taken by agreement between the parties on 22 May 2024.

[83] The Respondents claim that it was at all times the intention of the deceased that the First Respondent should inherit her property as she had on 7 January 2015, executed an earlier Will wherein the same intention was recorded. They contended that even if there was evidence to discredit the 2016 Will, there would still be no legal justification for an order that the deceased died intestate, because prior to executing the 2016 Will, the deceased had executed the 2015 Will.

- [84] In considering the authenticity of the 2015 Will the testimony of the First Respondent is pivotal. During cross-examination, the First Respondent was referred to the Joint Will which was executed by the deceased and her late husband on 4 September 2014. He was requested to compare it with the Will of the 7th of January 2015. After performing this exercise, he conceded that the main subject matters contained in both Wills followed categorically and that the wording was substantially similar, notwithstanding the fact that the Joint Will was drafted by Attorneys and the 2015 Will was overtly drafted by a layperson. The Applicant reasoned that this means that the drafter of the 2015 Will must have copied the layout and wording of the Joint Will with minor deviations.
- [85] Furthermore, it was also illuminated during cross-examination that even on a layperson's examination of the purported signature of the deceased appended to the 2015 Will, it looks significantly different to that in the Joint Will. It was submitted that no explanation was proffered by the First Respondent in this regard. The Applicant contended that the Respondents' involvement in drafting the 2015 Will is supported by the fact that their identity numbers are included therein. Although it was pointed out that the signatures to a layperson's eye, looked different, the Applicant failed to challenge same by way of a handwriting expert. Of further significance is the proposition that was put to the First Respondent to the effect that it would logically follow that the only ones that would have drafted the 2015 Will and caused the deceased to sign it would have been those who stood to benefit from it. This suggestion was vaguely denied by the First Respondent.
- [86] It is noteworthy that Dr Thomas, at the end of her report penned an addendum wherein it was recorded that 'Mrs Johnson was admitted for the duration 28/09/2015 to 29/09/2015 for further investigation of her problem of cognitive decline.' The following recordal as a comment under, "special investigations" pursuant to the MRI brain scan was made:
- 'No lobar strophy. Diffuse which matter features suggest small vessel insufficiency – in the appropriate clinical context, these changes may be consistent with multi-infarct dementia. No structural pathology or collection...' [my emphasis]
- [87] Dr Thomas concluded that given the profile of the MRI, the patient likely had cognitive decline due to small vessel disease. She further opined that the dementia is irreversible but further decline can be halted by optimising blood pressure control and treating diabetes (if present). Dr George also opined that the same loss of mental capacity that was present in 2016 would have been prevalent in January 2015 due to the slow degenerative nature of vascular dementia.
- [88] The First Respondent conceded that the deceased could not have been the drafter of the 2015 Will as she did not have access to a computer or typewriter. In fact, it came to light that there was no computer or printer in the home and neither could the deceased type the Will. The First Respondent conceded that there was no indication that the document was prepared by a professional.

- [89] I am therefore of the view that the authenticity of the 2015 Will was not proven. In terms of the mental capacity of the deceased as at 2015, Ms Johnson's evidence, which stands unabated suggested that the deceased's cognitive decline was already evident in January 2015 subsequent to her late husband's passing. This is supported by the independent experts whose evidence now stands as common cause admissions, more particularly the MOCA score of 13/30. It was also evident that her late husband handled all the household affairs while he was alive. These considerations collectively, bring into question the authenticity and the mental capacity of the deceased at the time of executing the 2015 Will.
- [90] Should I be wrong in coming to this conclusion, I am of the view that the court's approach in *Kirsten v Bailey* (supra) finds application. In that matter, a testatrix made three Wills. In the first and third, Bailey was nominated as the sole beneficiary of her estate; in the second will, Kirsten was nominated as the sole beneficiary. Kirsten challenged the validity of the third will. The court held that Bailey had led the testatrix to believe that he would leave her unless she appointed him her sole heir. Thus, Kirsten had proved that the testatrix was unduly influenced and accordingly lacked the requisite capacity. The testatrix therefore was held to have died intestate. The effect of the ruling is that if a court declares the last in a series of wills to be invalid ab initio, the deceased is deemed to have died intestate. The court will not give effect to an earlier will, as it had already been revoked.
- [91] In casu, the 2016 Will would have revoked all former Wills and Codicils. Therefore, by declaring the 2016 Will as being the last in a series of Wills to be invalid ab initio, the deceased is deemed to have died intestate.

Setting aside of the Transfer of the property

- [92] It is noteworthy that the First Respondent initially spoke about the property being donated, but the First Respondent confirmed that a deed of donation was not concluded. The First Respondent confirmed that a Deed of Sale containing a purchase price was concluded, which purchase price was never paid.
- [93] When questioned regarding whether the First Respondent still had a copy of the actual agreement, he indicated that he would have to look for it and that it should be amongst his other documents at home. These documents were never produced. He was unable to say whether the documents were attached to the application papers for the setting aside of the transfer.
- [94] It is noteworthy that the Agreement of Sale which was entered into between the deceased and the First Respondent on 20 November 2017, was declared null and void and set aside on 9 April 2019, by Justice Boqwana, as she then was, under case number 20533/2018. The Registrar of Deeds was directed to take the necessary steps to de-register the property by removing the name of the First Respondent, such that the registration of the property and ownership thereof revert to the name of the deceased.

[95] According to WinDeed, the property was registered in the name of the First Respondent on 16 September 2021.[24] The Eleventh Respondent reported that as at 13 October 2023, the property was registered in the name of the First Respondent. The property is still currently registered in the name of the First Respondent.

Conclusion

- [96] For the reasons already stated I find, on a balance of probabilities that the deceased did not have the mental capacity to appreciate the nature and effect of her act when executing the Wills in 2016 and 2015 respectively. Both Wills are accordingly declared void ab initio. In any event, in applying the reasoning of *Kirsten v Bailey* (supra), the 2015 Will and all other Wills preceding the 2016 Will, were already revoked by operation of the 2016 Will at the time when it was executed. The effect of this ruling is that the deceased is now deemed to have died intestate.
- [97] To my mind, this would be a sensible and just outcome in what can only be described as the “Battle of the Wills”. The principle of fairness, ought to be applied which in my view will best serve the interest of the estate and the beneficiaries by declaring the deceased estate to be administered in terms of intestate succession.
- [98] The effect of this order requires that the status quo ante be restored. It therefore follows that the transfer of Erf 1[...] Cape Town to the First Respondent that took place on 16 September 2021, must be set aside. Since the deceased is now deemed to have died intestate, I am of the view that the Second Respondent should be removed as the executor by the Master of the High Court as Section 54(1)(b)(i) of the Administration of Estates Act therefore finds application.[25] The intestate heirs of the deceased estate will in due course be called upon to nominate an Executor of their choice.

Costs

- [99] It is trite that costs ordinarily follow the result. However, in light of the conclusion to which I have come, I deem it appropriate that each party bears their own costs.

Order

- [100] Having heard viva voce testimony, Counsel for the Applicant and Counsel for the Respondents, and having read the papers filed of record, the following order is made:
1. The Will of Marion Johnson executed on 9 February 2016 is hereby declared null and void;
 2. The transfer of Erf 1[...] Cape Town to the First Respondent on or about 16th September 2021, is hereby set aside;
 3. The estate of the late Marion Johnson is to be administered in terms of intestate succession;
 4. The Tenth Respondent is directed to appoint a new executor of the deceased estate;

5. The Second Respondent shall hold the further administration of the estate of the deceased in abeyance pending further directives of the Master of the High Court;
6. A copy of this order is to be served on the 10th and 11th Respondents, within seven (7) days from the date of this order;
7. Each party is directed to bear their own costs.

P D ANDREWS

Acting Judge of the High Court of South Africa Western Cape Division, Cape Town

APPEARANCES:

Counsel for the Applicant:

Advocate A Walters

Instructed by:

MZ Solomon Attorneys

Counsel for the 1st, 2nd & 3rd Respondents: Advocate B Ndluli

Instructed by:

Legal Aid South Africa

Heard on: 12 November 2024

Delivered: 19 February 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email.

[1] Kunz v Swart and Others 1924 AD 618.

[2] The Wills Act 7 of 1953.

[3] 1976

(4) SA 108 (C).

[4] See also Banks v Goodfellow 1870 LR 5 QB 549 and Naidoo NO & Another v Crowhurst NO & Others 2010

(2) All SA 379 (WCC) where the court held: 'The main element of the test for deciding the question of testamentary capacity that emerge are the following: at the time of making the will the testator must have been capable of comprehending the nature and extent of his property, of recollecting and understanding the claims of relations and other upon his favour or upon his property and of forming the intention of granting each of them the share in the property set out in the will or excluding them from any share of his property as the case may be.'

[4] See also *Banks v Goodfellow* 1870 LR 5 QB 549 and *Naidoo NO & Another v Crowhurst NO & Others* 2010

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[5] 2000

(1) SA 1 (CC) at paras 61 – 63.

[6] Marnewick SC, ‘Litigation Skills for South African Lawyers’, (4th Ed.) LexisNexis (2019) at page 343; Pretorius, ‘Cross-Examination in South African Law’ Butterworths

(1997) at pages 89 – 92.

[7] Act No. 25 of 1965.

[8] 1988

(4) SA 213 (D)

[9] *Spies NO v Smith en Andere* 1957

(1) SA 539 (A).

[10] 1870 LR 5 QB 549.

[11] Act 66 of 1965.

[12] 2011

(2) SA 145 (KZP), para 11.

[13] *Grobbelaar v Grobbelaar* 1959

(4) SA 719 (A); *Reichman v Reichman and Others* 2012

(4) SA 432 (GSJ).

[14] *Van Niekerk*, para 25.

[15] *Van Niekerk*, para 12.

[16] *Oberholster NO and Others v Richter* 2013

(3) All SA 205 (GNP) at para 17.

[17] (159/2018)

[2018] ZASCA 175; [2019] 1 All SA 335 (SCA); 2019 (3) SA 117 (SCA) (3 December 2018) at para 69.

[18] See also, PJ Schwikkard et al 'Principles of Evidence, Second Edition', (2002) at page 513: "A party's failure to call available witnesses may in exceptional circumstances lead to an adverse inference being drawn from such failure against the party concerned. The extent to which such an inference can be drawn will depend on the circumstances of the case. The Court should, inter alia, consider the following: Was the party concerned perhaps under erroneous but bona fide impression that he had proved his case and that there was therefore no need to have called the witness? Is there a possibility that the party concerned believed that the potential witness was biased, hostile or unreliable?"

[18] See also, PJ Schwikkard et al 'Principles of Evidence, Second Edition', (2002) at page 513:

"A party's failure to call available witnesses may in exceptional circumstances lead to an adverse inference being drawn from such failure against the party concerned. The extent to which such an inference can be drawn will depend on the circumstances of the case. The Court should, inter alia, consider the following: Was the party concerned perhaps under erroneous but bona fide impression that he had proved his case and that there was therefore no need to have called the witness? Is there a possibility that the party concerned believed that the potential witness was biased, hostile or unreliable?"

[19] Respondents Heads of Argument, para 38, page 11.

[20] 2007

(4) SA 135 (LC).

[21] At para 112. "The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witnesses have a public duty to testify."

[21] At para 112.

"The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witnesses have a public duty to testify."

[22] Die Meester v Meyer en Andere 1975

(2) SA 1 (T) at 17F; Constitutional Court in *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at para 56.

[23] *Katz and Another v Katz and Others* [2004] 4 All SA 545 (C).

[24] Application Bundle, Annexure “A11”, pages 43 – 47.

[25] ‘... (b) by the Master— (i) if he has been nominated by will and that will has been declared to be void by the Court or has been revoked, either wholly or in so far as it relates to his nomination, or if he has been nominated by will and the Master is of the opinion that the will is for any reason invalid’

[25] ‘... (b) by the Master—

(i) if he has been nominated by will and that will has been declared to be void by the Court or has been revoked, either wholly or in so far as it relates to his nomination, or if he has been nominated by will and the Master is of the opinion that the will is for any reason invalid’

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