

SOUTH AFRICA / JUDGMENT

Van Heerden and Another v Van Heerden and Others (1895/2014) [2018]

ZAECGHC 118 (22 November 2018)

[2018] ZAECGHC 118

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Plasket

CASE / FILE NUMBER

1895/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case No: 1895/2014

Dates heard:

27/3/17-30/3/17;

5/2/18-13/2/18;

25/6/18-28/6/18

Date delivered:

22/11/18

Not

reportable

In

the matter between

KAREL-WILLEM

VAN HEERDEN

First Plaintiff

CORNELIUS

STEPHANUS VAN HEERDEN

Second Plaintiff

and

ANNA

ELIZABETH FREDRIKA VAN HEERDEN

First Defendant

WILLEM

FREDERICK VAN HEERDEN

Second Defendant

ELIZABETH

FREDRIKA (HENDRIKA) VORSTER
Third Defendant
PAUL
JAKOBUS VAN HEERDEN
Fourth Defendant
KAREN
ANNELISE VAN HEERDEN
Fifth Defendant
HELOISE
VAN HEERDEN
Sixth Defendant
CHRISTINA
MARIA VAN HEERDEN
Seventh Defendant
CHRISTINA
MARIA VAN HEERDEN N.O.
Eighth Defendant
LIESEL
GREYVENSTEIN N.O.
Ninth Defendant
THE
MASTER OF THE HIGH COURT,
PORT
ELIZABETH
Tenth Defendant
THE
REGISTRAR OF DEEDS, CAPE TOWN
Eleventh Defendant

JUDGMENT

PLASKET J:

[¹] The late professor Karel-Willem van Heerden died at his home in Port Elizabeth on 25 August 2011. He had, on 16 October 2010, executed a will (the 2010 will) which differed significantly from a previous joint will that he and his wife had executed on 10 December 2004 (the 2004 will). In particular, his grandsons, Mr Karel-Willem van Heerden and Mr Cornelius van Heerden, who had previously stood to benefit, were no longer beneficiaries. They are the first and second plaintiffs in this matter.

- [2] They instituted an action against their grandmother, Mrs Anna van Heerden, their father Mr Willem van Heerden, four aunts and an uncle, as well as the duly appointed executor of their grandfather's estate in terms of the 2010 will, the Master of the High Court, Port Elizabeth and the Registrar of Deeds for an order declaring that the 2004 will was the last will of professor van Heerden, as well as associated relief, more fully set out below. Of these defendants, only Mrs van Heerden and her children, apart from Willem, oppose the claim. [1]
- [3] In essence, the plaintiffs' case is that the 2010 will is invalid because at the time of its execution, their grandfather lacked the capacity to execute a will.
- [4] In this judgment I shall refer to the members of the Van Heerden family, except for the late professor van Heerden and his widow, Mrs Anna van Heerden, by their first names. I shall do so solely for the sake of convenience and to avoid confusion.
- [5] Although Willem is cited as the second defendant, he made common cause with his sons Karel-Willem and Cornelius and gave evidence in support of their case.

The 2004 and the 2010 wills

- [6] The 2004 will was a joint will executed by professor and Mrs van Heerden. The will provided, inter alia, for the massing of their joint estate. Clause 2 provided that, in the event of Mrs van Heerden dying first, professor van Heerden would be her universal heir. In the event of professor van Heerden dying first, limited rights were granted to Mrs van Heerden, including a usufruct over the entire estate until her death.

- [7] The will provided in clauses 4 and 5 as follow:[2]

'4. Ons bemaak aan ons kleinseun Karel Willem van Heerden ons plase Avondgloor (ongeveer 172 hektaar), Eureka en Dennepark (ongeveer 714 morge), Dagbreek (ongeveer 205 morge) en The Vlei

(ongeveer 600 morge). Hierdie bemaking is onderhewig aan die vruggebruik van ons seun Willem Frederick van Heerden. In ooreenstemming met paragraaf 3(b)(v) van hierdie testament sal die lewensreg van Willem Frederick van Heerden eers na die afsterwe van beide die Testateur en Testatrise in werking tree en eindig met sy dood.

5. Ons bemaak aan ons kleinseun Cornelius Stephanus van Heerden ons plase Lombardy (ongeveer 172 morge), Mispah saam met Droogfontein (ongeveer 720 morg) en Eesteling (ongeveer 648 morg). Hierdie bemaking is onderhewig aan die vruggebruik van ons seun Willem Frederick van Heerden. In ooreenstemming met paragraaf 3(b)(v) van hierdie testament sal die lewensreg van Willem Frederick van Heerden eers na die afsterwe van beide die Testateur en Testatrise in werking tree en eindig met ons seun Willem Frederick van Heerden se dood.'

- [8] In other words, in terms of the 2004 will, Karel-Willem and Cornelius stood to inherit the farms, subject to a life usufruct in favour of their father, Willem. The purpose of this arrangement was to protect the farms from Willem's creditors.[3] That was made clear in clause 6 of the 2004 will which stated that Willem's usufruct would be cancelled immediately if it was attached.
- [9] Clause 7 granted Willem an option to lease the farms from his mother as usufructuary at a rental that was agreed to by them.
- [10] Clause 10 left the remainder of the estate to Willem's siblings in equal shares, subject to the life usufruct in favour of Mrs van Heerden.
- [11] In 2010, professor van Heerden and Mrs van Heerden each made a will in which they each repealed all earlier testamentary instruments. These wills are the mirror-image of each other. It is of course, the validity of professor van Heerden's 2010 will that is in issue in this trial. Its provisions that are relevant are short and clear.
- [12] In clause 1, he bequeathed his estate to Mrs van Heerden. In terms of clause 2, if Mrs van Heerden either pre-deceased him, died simultaneously with him or died within 30 days of him, he left his estate to his children. For the rest, the will deals with an eventuality that did not come to pass – one of his children predeceasing him – and related issues, as well as the nomination, in clause 7, of Christelle and any director of the attorneys firm Greyvensteins as executors. The effect of the 2010 will, if it is valid, is that Mrs van Heerden inherited professor van Heerden's entire estate and, on her death, all of her children will inherit her estate, including her inheritance from professor van Heerden.
- [13] From a comparison of the two wills, the following emerges: first, Karel-Willem and Cornelius, having been left the farms in the 2004 will, stood to inherit nothing in the 2010 will; secondly, Willem lost his life usufruct over the farms and his option to lease the farms from his mother during her life time; thirdly, Willem and his siblings stood to inherit equal shares of the entire estate, including the farms, whereas in the 2004 will, his siblings would have only inherited what remained of the estate after the farms had been left to Karel-Willem and Cornelius.

The pleadings

- [14] It was pleaded in the particulars of claim that on 10 December 2004 professor Van Heerden and Mrs van Heerden executed a joint will. The execution of the 2004 will and its provisions are not in dispute, and have been set out above.
- [15] When professor van Heerden died on 25 August 2011, the particulars of claim proceed, Mrs van Heerden failed to lodge the 2004 will with the Master and instead lodged the 2010 will. That document, it was pleaded, was not professor van Heerden's will because, when it was executed, he was incapable of acting; of 'producing spoken and/or written words and did not have the ability to communicate effectively'; was of 'unsound mind and incapable of understanding and/or appreciating the nature, contents and/or the effects of his actions';

was ‘mentally impaired, to such an extent that he was deprived of his reasoning and/or cognitive functioning’; was ‘no longer capable of understanding or appreciating the nature and/or effect of his actions’; was ‘incapable of expressing his will to a third party and/or to provide instructions to a third party’; had had ‘a number of transient ischemic attacks and/or strokes, which caused a disruption of cerebral blood flow, and ultimately led to expressive dysphasia and permanent brain damage’; and ‘took prescription medicine and various other drugs on a daily basis, which deprived him of his reasoning and/or cognitive functioning, and/or his mental capabilities’.

[16] It was further pleaded that, on the strength of the 2010 will, the Master issued letters of executorship to Ms Christina van Heerden (known as Christelle), a daughter of the Van Heerdens, and Ms Liesel Greyvenstein, an attorney. They took control of the estate, administrated it and produced a first and final liquidation and distribution account which was submitted to the Master.

[17] Following the Master’s endorsement of the liquidation and distribution account, Christelle and Ms Greyvenstein caused the farm Avondgloor to be transferred to Willem and the remaining farms to be transferred to Mrs van Heerden. The basis of the transfer of Avondgloor to Willem will be explained below.

[18] The relief that Karel-Willem and Cornelius claim comprised of orders:

‘19.1 declaring the joint, mutual will of the 1st defendant and Karel Willem van Heerden (obiit), executed on 10 December 2004, the last will and testament of Karel-Willem van Heerden (obiit);

19.2 the 10th defendant is ordered and directed to re-open the estate of Karel Willem van Heerden (obiit) (estate number: 5309/2011);

19.3 the first and final liquidation and distribution account of the deceased estate of Karel Willem van Heerden (obiit), prepared by the 8th & 9th defendants, dated 16 March 2012 be set aside;

19.4 the 10th defendant is ordered and directed to administer the estate of Karel Willem van Heerden (obiit) in accordance with the joint, mutual will of the 1st defendant and Karel-Willem van Heerden (obiit), executed on 10 December 2004;

19.5 the 11th defendant is ordered to register a Caveat against the properties listed in paragraphs 13.7 and 13.8 supra to prohibit the 1st and 2nd defendants to encumber, alienate, sell, subdivide, consolidate, let and/or sublet the said properties pending the finalization and administration of the re-opened deceased estate;

19.6 the 1st, 8th and 9th defendants is ordered to pay the costs of suit, jointly and severally, the one paying the other to be absolved.’

[19] In their plea, those defendants who opposed the claim admitted that professor van Heerden and Mrs van Heerden executed the 2004 will. They also admitted the content of that will.

- [20] In answer to the attack upon the validity of the 2010 will, the opposing defendants admitted that professor van Heerden executed the will. They admitted only that he had had ‘a number of transient ischemic attacks, which caused disruption of cerebral blood flow and permanent brain damage and as a result of which the deceased had developed expressive aphasia’; and that he had ‘taken prescription medication and other medication from time to time’. For the rest, the opposing defendants denied the allegations that professor van Heerden was of unsound mind when the 2010 will was executed.

Background

- [21] Professor van Heerden was an educationalist, having lectured at both the University of the Free State and at the University of Venda. In addition, he appears to have taught at a number of schools. He also had a life-long interest in farming.
- [22] Professor van Heerden’s father had first purchased land near Hofmeyr in the Eastern Cape. He left that land to professor van Heerden, who added to the landholdings with further purchases. In his retirement, however, he lived with Mrs van Heerden in Port Elizabeth.
- [23] In 1990 professor van Heerden concluded a lease agreement with Willem, in terms of which he let to Willem five of his farms. It was at this stage that Willem, also an educationalist, left his teaching post in Port Elizabeth and moved with his family – Karel-Willem had just been born – to the farms near Hofmyer.
- [24] In 1999, professor van Heerden sent Willem a letter in which he demanded payment of rent in respect of the farms from the commencement of the lease until 31 July 1999. (This was an amount of R165 101.59.) When Willem was unable to pay, professor van Heerden applied successfully for his sequestration. Willem testified that his sequestration was a so-called friendly sequestration.
- [25] This event was to have a number of consequences. First, Willem and his family moved to the farm Lombardy, which was also owned by professor van Heerden. Secondly, the farm Avondgloor, which Willem had purchased, was auctioned. Professor van Heerden purchased it and agreed to sell it to Willem after his rehabilitation for the amount that he had paid for it. (That amount was R50 000.) After professor van Heerden’s death, Willem bought Avondgloor from the deceased estate for R50 000. Thirdly, Willem’s sequestration led to professor and Mrs van Heerden altering their wills in order to safeguard the farms from Willem’s creditors.
- [26] In wills preceding Willem’s sequestration, a similar pattern was followed: the farms, or the bulk of them,[4] were left to Willem, the eldest son, while the other children were bequeathed equal shares of the residue of their parents’

estate. As has been seen, the 2004 will differed from those earlier wills by bequeathing the farms to Karel-Willem and Cornelius, with a life usufruct in favour of Willem.

- [27] Ms Karen van Heerden, the fifth defendant, testified that as early as 2005, the relationship between her father and Willem had begun to sour, although it is not clear precisely why. Karen said that professor van Heerden had, in 2005, asked her to investigate the possibility of selling the farms to the State, a possibility that did not sit well with Willem. She also spoke of Willem having sold some of his father's cattle without his consent. Willem denied all of these allegations.
- [28] It is not necessary to make findings on these issues because they are collateral to the issue of relevance, namely that, as early as 2005, professor van Heerden had begun to speak about changing the 2004 will to make provision for all of the children benefitting equally. Karen's evidence in this regard is unchallenged. From her evidence, it is also clear that there was a realisation on the part of professor and Mrs van Heerden that Mr Piet Coetzee of Cradock, the family's attorney of long standing, was not the appropriate person to draft a new will: he was, for all intents and purposes, Willem's attorney, and thus had a conflict of interest. To compound the problem, in July 2006, the Van Heerdens were presented with a will drafted by Mr Coetzee that aimed at changing the 2004 will to provide that Willem, rather than his sons, would inherit the farms. Professor and Mrs van Heerden refused to sign this will as it did not reflect their wishes and had been drafted without their instructions.
- [29] It is for these reasons, it would appear, that Ms Amanda Nieman, a financial advisor, was drawn into the picture. On 3 September 2007, she met with Mrs van Heerden, who sought her advice on the meaning and implications of the 2004 will. Mrs van Heerden later indicated that she wished to change her will. She signed a new will on 12 September 2007.
- [30] On 28 May 2009, Ms Niemand consulted with professor and Mrs van Heerden. At this consultation, Mrs van Heerden signed yet another will, which she had earlier instructed Ms Nieman to have prepared. She also discussed the amendment of the 2004 will, professor van Heerden having indicated that he wished to change it.
- [31] On 5 April 2010, Ms Nieman was contacted by Mrs van Heerden who told her that she and professor van Heerden wished to change their wills. She took instructions from them, prepared drafts and consulted with them on the drafts a few days later. On 16 April 2010, professor and Mrs van Heerden signed their wills in the circumstances that I shall describe below.

The issue

- [32] The issue to be decided is easy enough to define but a great deal more difficult to determine. It is whether Karel-Willem and Cornelius have discharged the onus that rests on them to prove that professor van Heerden lacked testamentary capacity when he executed the 2010 will. If they discharge that onus, it will follow that the 2010 will must be declared to be invalid.

- [33] A great deal of evidence was led to prove and disprove professor van Heerden's testamentary capacity. That evidence can be categorised into four interlocking compartments. First, background evidence was given by members of the Van Heerden family and others concerning events leading up to the execution of the 2004 and 2010 wills; secondly, evidence was led as to the decline in health of professor van Heerden; thirdly, a great deal of lay and expert evidence was led concerning the mental status of professor Van Heerden from a few years prior to the execution of the 2010 will until his death; and fourthly, detailed evidence was led about the drafting of the 2010 will and the circumstances in which it was executed by professor van Heerden.
- [34] I have set out the background to the dispute. In doing so, I have focused on evidence that was either common cause or not disputed. I have avoided some of the hotly contested evidence concerning the relationship between Willem, his parents and siblings, and the disputes that appear to have been generated over the years concerning Willem's occupation of the farms (which culminated in an application, brought by his mother, for his and his family's eviction). In my view, it is not necessary to determine those disputes because they are not relevant to the core issue that I have identified. Furthermore, no allegation is made of professor van Heerden having executed the 2010 will as a result of undue influence.[5]

Professor van Heerden's declining health

- [35] Medical records in respect of professor van Heerden's treatment over the period from 2006 to 2010 were used as the basis for the expert evidence of doctors Justin Basson, a neurosurgeon, Odette Guy, a speech therapist, Johan Smuts, a neurologist (all called by the plaintiffs) and Simon Kessler, a neurologist (called by the defendants). None of these witnesses examined professor van Heerden, and their opinions are based solely on the sparse medical records that exist. In addition, a number of other medical professionals testified, some of whom treated or examined professor van Heerden at one or other time.
- [36] The earliest medical records relating to professor van Heerden are those of Dr Johan Leipoldt, who treated him for a relatively short period from 18 May 2006 to 23 September 2006. No mention was made in Dr Leipoldt's notes of professor van Heerden having suffered a stroke or having any risk factors associated with strokes. It would appear that professor van Heerden was able to give a full medical history to Dr Leipoldt. On 24 June 2006, three days after professor van Heerden had undergone eye surgery, Dr Leipoldt treated him for a possible respiratory tract infection.
- [37] On 29 June 2006, professor van Heerden was admitted to Saint George's Hospital in Port Elizabeth suffering from confusion and a wheezing chest and in a dehydrated state. The cause of the confusion, according to doctor David Stickells, a specialist pulmonologist who treated him initially, was an infection and dehydration. Dr Stickells found no evidence of him having suffered from a stroke. He treated professor van Heerden with, inter alia, a broad spectrum anti-biotic and this treatment appeared to bring about what he described as a 'marginal improvement in his general condition'. He

nonetheless referred professor van Heerden for a CT scan.[6]

[38] Although no image of the scan has been found, Dr Sandra Basson, the radiologist who performed the procedure, wrote a report, which she confirmed in her evidence. The report stated that ‘age-related parenchyma volume loss can be clearly noted’, that a ‘few ischemic infarctions can be noted’ and that ‘[n]o mass occupying lesions can be noted’. In her evidence she said that what she saw was ‘basically just age related volume loss of the

brain’ and that ‘his brain was looking like I would have expected a patient of that age to look, but I also mentioned that he did have a few [ischemic infarctions] and if I say that, I mean small vessels, otherwise I would have [said] big [inaudible]’.

[39] After professor van Heerden’s discharge from hospital on 6 July 2006, Dr Leipoldt saw him at home for minor complaints from time to time. The last time he saw professor van Heerden was on 23 September

2006. According to his notes, professor van Heerden was ‘confused, irritable and semi-comatose at times’; and Dr Leipoldt recommended that he be hospitalised and referred to a specialist. (It would appear that his advice was not followed.) There is no record of

professor van Heerden being treated or of his condition between 23 September 2006 and 1 December 2006.

[40] Dr Johan Burger then took over the treatment of professor van Heerden. He is a specialist general practitioner who has a diploma in family medicine, having specialised in sports medicine, chronic diseases, such as hypertension, diabetes and strokes, and psychiatry. He had been Mrs van Heereen’s doctor and began to treat professor van Heerden on 1 December 2006.

[41] Dr Burger saw professor van Heerden once in 2006. That was on 1 December 2006. His contemporaneous note records that professor van Heerden had a TIA – a temporary ischemic attack[7] – and that he would keep an eye on the situation. The next time he treated professor van Heerden was 9 February 2007, more than two months later.

[42] The notes establish that Dr Burger dealt with professor van Heerden in one way or another eight times in 2007, five times in 2008, four times in 2009, six times in 2010, including his attendance on 16 April 2010 when the 2010 will was executed, and four times in 2011, culminating in professor van Heerden’s death and Dr Burger’s signing of the death certificate.

[43] The large majority of entries are not relevant to the issue at hand. They relate to Dr Burger’s treatment of a range of maladies, including an eye infection, stomach problems, sore toes, chest problems and so forth.

[44] Only three mentions are made of TIA’s. The first has been mentioned above. The second was recorded on 28 July 2009. The entry states:

‘Huisbesoek en weer TIA – sê dat seer as regs draai en ook r been optel – klinies net spasma.’[8]

The third entry post-dates the execution of the 2010 will. On 22 August 2011, three days before professor van Heerden’s death, Dr Burger recorded:

‘doen huisbesoek – ? semikoma na tia – neem nie meer ete/ pille en sukkel met vloei stowwe . . .’[9]

[45] Pressure sores are mentioned twice in the notes. The first mention was recorded on 19 December 2007 when Dr Burger wrote that pressure sores were developing on professor van Heerden’s scapula. The second mention was on 28 July 2009. Dr Burger recorded:

‘sê maag gaan goed en geen druksere nie.’[10]

[46] When Dr Burger was present for the execution of the 2010 will, he recorded what appears to be a summary of professor van Heerden’s state of health at the time. His note, apart from giving detail of his understanding of the terms of the 2010 will, stated:

‘Oom ekspressiewe disfasie – laaste ongeveer 4 jr na cva en spasties – dus duimafdruk gekry – dit kom voor asof hy verstaan, maar druk hom moeilik uit.’[11]

[47] Mention must now be made of the letter that Dr Burger wrote on or about 15 October 2008. He testified, and his clinical notes confirm, that he was asked by Mrs van Heerden to write a letter, presumably to the Master of the High Court in Bloemfontein, to motivate for professor van Heerden to be relieved of duties as a trustee. He wrote the following (with reference to professor van Heerden):

‘Hiermee word bevestig dat bg. ‘n pasient van my is en dat dit my opinie is dat hy weens mediese redes (vaskulêre demensie) nie meer medies geskik is om as trustee op te tree nie.’[12]

[48] When Dr Burger testified, he disavowed the contents of this letter. When asked about the mention of vascular dementia, he said that that was not in fact a true medical reason. He explained:

‘I did no test to confirm that. I wrote that section to make it sound more serious. Because in your normal thing of development of strokes, one can eventually get vascular dementia. But I never had any evidence, any proof, anything for that. I wrote it to make it sound more [serious].’[13]

[49] Dr Burger stressed that he had no proof at any stage that professor van Heerden suffered from vascular dementia. When asked what, with the benefit of hindsight, he ought to have written, he said:

‘Just what I saw. Stroke, expressive dysphasia and spasticism. That would have been clinically more correct at this stage with hindsight.’

[50] Dr Burger’s misrepresentation of professor van Heerden’s state of health is to be deprecated in the strongest terms: I would expect of any doctor in the position that Dr Burger was in that he or she would be scrupulously honest, that he or she would tell the truth and would

avoid exaggeration. Dr Burger fell woefully short of this standard. That said, however, the fact remains that it must be accepted that he never did any tests that could have established that professor van Heerden suffered from vascular dementia and that he never made a diagnosis to this effect.

- [51] Dr Burger's assessment of the state of health of professor van Heerden is summarised in a letter he wrote to the plaintiffss' attorneys on 10 September 2013. In it, he said that although professor van Heerden had experienced TIA's, was bedridden and became increasingly spastic, requiring care from his wife and caregivers, at the time that the 2010 will was executed, he understood what he was doing, even though as a result of expressive aphasia, he could not express himself properly.

The expert witnesses

- [52] The opinions expressed by Drs Guy, Basson, Smuts and Kessler were based on the limited medical information that I have outlined above. I believe that the joint minute compiled by Drs Smuts and Kessler fairly draws together an accurate summary of professor van Heerden's decline over the years. They agreed as follows:

- Prof van Heerden suffered an acute illness in June 2006 which was characterised by fever and confusion. He was hospitalised at St Georges Hospital under the care of Dr Stickels.
- Dr Stickels diagnosed a urinary tract infection.
- A CT brain scan was reported to show age related atrophy and "a few ischaemic infarctions can be noted". The report is substandard and not much can be inferred from this with regard to prof Van Heerden's cognitive functioning at the time. The original examination is not available for evaluation.
- Over the following four years he deteriorated and at some time suffered an acute stroke resulting in a predominantly expressive aphasia. He may well have suffered further strokes and/or transient ischaemic attacks.
- He became largely bedridden and dependent.'

- [53] Dr Basson agreed that from Dr Burger's note of professor van Heerden's state of health on 16 April 2010, it could be postulated with reasonable certainty that professor van Heerden had suffered a middle cerebral artery cerebrovascular accident at some stage.

- [54] Drs Smuts and Kessler differed in the conclusions that they drew from the information available to them. Dr Smuts was of the opinion that 'given the totality of the history of stroke with aphasia and the likelihood of further cerebro-vascular events, that it is unlikely that Prof van Heerden had sufficient cognitive ability [to] fully understand and execute the will of 2010'. He took into account, in forming this opinion, Dr Burger's mention of vascular dementia in 2008 and said that '[g]iven the progressive nature of his illness . . . his cognitive abilities would have deteriorated and in 2010 would not be such as to understand the content of the will he signed'.

[55] By and large, the opinions expressed by Drs Basson and Guy follow much the same process of reasoning. For instance, Dr Basson's conclusion to his report is the following:

'Wyle KW van Heerden was in 2006 gediagnoseer met vaskulêre demensie. Dit is 'n onomkeerbare en progressiewe toestand. Daar is bewys dat hy verskeie beroertes gehad het en tussendeur verbygaande isgemiese insidente (TIAs) gehad het. Hy was bedlêend met spastisiteit en 'n afasie. Hy was sorgafhanklik vir alle basiese behoeftes, moes hulp kry om van posisie te verander, ten einde bedserie te voorkom en het verskeie komplikasies sekondêr tot immobiliteit gekry.

Dit is uiters onwaarskynlik dat KW van Heerden se kognitiewe funksie van so 'n aard was dat hy testeerbevoeg was ten tye van die verlyding van die testament gedateer 16 April 2010. In ag genome die inligting tot my beskikking, is dit my opinie dat KW Van Heerden nie testeerbevoeg was nie.

Die evaluasie van KW Van Heerden se testeerbevoegdheid op 16 April 2010 bewys nie die teendeel nie.'[14]

[56] Dr Kessler, on the other hand, took into account that there had never been a 'formal evaluation of Prof van Heerden's language difficulty or his cognitive function over the years before the signing of the will' and that there was 'considerable anecdotal evidence of a level of understanding at the time of the execution of the will'. On this basis, he was 'unable to offer an opinion one way or another, based on the available evidence'.

[57] All of the medical experts were of the opinion that the medical records that had been made available to them were inadequate and, in particular, that the report of the CT scan of 30 June 2006 lacked detail. In his report, for instance, Dr Basson said that it was 'onvolledig ten opsigte van die aantal, omvang, spesifieke areas van die brein en moontlike ouerdom van die isgemiese infarksies (beroertes)'. [15]

[58] The experts were also in agreement that anecdotal evidence as to professor van Heerden's functioning was of considerable importance. Indeed, Dr Smuts conceded that because no neuropsychological assessment had ever been done on professor van Heerden, the only evidence as to his cognitive functioning was the lay evidence of family and friends who had contact with him. It is to that evidence, and particularly the evidence concerning the lead up to and execution of the 2010 will, that I now turn.

The evidence of family and friends

[59] Karel-Willem, Cornelius and Willem all testified about visits to professor van Heerden over a period of a few years. According to Willem, professor van Heerden's decline began when he was admitted to hospital in June

2006. He testified that by the end of 2007, professor van Heerden was bedridden and unable to talk.

- [60] He claimed to have seen his father regularly between 2008 and 2010. In March 2008, he, his siblings and Mrs van Heerden had met to discuss the financial affairs of professor and Mrs van Heerden. (It was at this meeting that it was resolved that Willem should begin to pay rent for the farms.) Professor van Heerden did not attend the meeting because, Willem said, 'hy kon nie verstaan nie, hy kon nie praat nie, hy was nie in 'n toestand om die vergadering te kom bywoon nie'. [16] Indeed, Willem testified that on his arrival, he had gone to greet his father who did not even recognise him.
- [61] Willem spent a week at his parents' home later in 2008. His father was in much the same state as earlier. In addition, however, Willem said that he now could no longer watch television. He visited his parents again in March 2009 in order to negotiate the rental of the farms. When he and his attorney went to greet professor van Heerden, he was unable to recognise either of them.
- [62] He testified that he saw his father in April 2010, shortly before the execution of the 2010 will. When he was asked about his father's condition, he said:
- 'Nee, daar is nie 'n manier gewees hoe hy my kon herken nie, hy het net daar gelê, daar was geen reaksie gewees nie, niks, hy kon my glad nie herken nie.' [17]
- [63] He also saw his father shortly after the 2010 will had been executed. He said that on 18 May 2010 he had travelled to Port Elizabeth to speak to his mother. When he arrived, he went to greet his father, who was unable to respond to his greeting. When he spoke to his mother, she informed him that 'ek het die testament verander' and that 'jy kry niks'- 'geen grond, niks'. [18] When he asked about his sons' position, she told him that they had been disinherited.
- [64] The evidence of Karel-Willem and of Cornelius was to much the same effect – that from as early as 2008, their grandfather could not talk or communicate, that he could not recognise people and that he suffered from spasticity.
- [65] Four other witnesses were called by the plaintiffs to testify about professor van Heerden's state of health. Ms Erina Roux is an old family friend of Willem and his wife. She had also known professor van Heerden for a number of years. She testified that she last saw him on 15 March 2010. She said that when she greeted him, he did not respond in any way at all.
- [66] Mr Cyril Niit had known, and had been friendly with, professor van Heerden for many years. Apart from their backgrounds in education, they shared an interest in veteran motor vehicles. After professor van Heerden's decline in health, Mr Niit occasionally saw him when, for instance, he went to the Van Heerden's home to do odd jobs. The last time that he saw professor van Heerden was in March or April 2010. One afternoon, when he was at the Van Heerden's home, he asked to see professor van Heerden. He was taken to his room, where he lay on the bed. Mr Niit greeted professor van Heerden but got no response even though professor van Heerden was awake.

- [67] Ms Ronel van der Kolf also testified about her experience of professor van Heerden's condition. She had known the Van Heerden family for many years, having gone to school with, and played tennis with, Karen. In addition, her late mother and Mrs van Heerden had been very close friends. She had, she said, spent a lot of time with professor van Heerden talking to him about their shared interests – the state of education, the state of the country and rugby. In 1997, she had become a member of her church council. Professor van Heerden was a long serving member of that council. They served together on it until 2005 when she resigned from it.
- [68] She testified that when she visited the Van Heerden home with her mother during 2007 and 2008, she would always go to greet professor van Heerden. He had always recognised her and greeted her by name. He was able to sit upright in his chair and watch television. It appears that she did not see the van Heerdens at all for some time, while her mother was being treated elsewhere for cancer.
- [69] She saw professor van Heerden again during 2009. (Her evidence about precisely when in 2009 she saw professor van Heerden is not clear.) His condition, she said, had deteriorated. He was still able to greet her but was not able to conduct a conversation. His condition deteriorated further in 2010 and 2011.
- [70] While Ms van der Kolf's evidence is far from clear as a result, in the main, of her inability to stick to the issues at hand, it appears to me that it amounts to this: it became progressively more difficult to hold a conversation with professor van Heerden and by 2009, his responses to anything said to him had become short; by the end of 2010 or the beginning of 2011, he could not answer at all and he was not able to recognise Ms van der Kolf at all.
- [71] Dr Leon Steenkamp was a minister of religion and it was in that capacity that he first met professor van Heerden in 1994. Professor van Heerden was a congregant of Dr Steenkamp and also a member of the church council.
- [72] From 2006 to 2010, Dr Steenkamp visited professor van Heerden regularly. As far as professor van Heerden's cognitive condition was concerned, he said that he had always been respectful but his thought processes were no longer in place. He said that by 2010, professor van Heerden was not able to converse meaningfully, he was confused and sometimes spoke of irrelevant matters. He recounted, for instance, that once professor van Heerden recognised him but was not able to connect him to his role in the church. Instead, he spoke to him about sheep farming.
- [73] The last time he saw professor van Heerden was in 2011. His experience of him was much the same – of professor van Heerden giving out of context answers – but that his health had deteriorated and it was difficult to hear what he said.

[74] A number of witnesses testified about professor van Heerden's condition on behalf of the defendants. The first I shall deal with is Dr Burger, whose evidence concerning his clinical notes has been set out above. He also made a number of observations about professor van Heerden's state of health in general, and I shall revisit his evidence when I deal with the execution of the 2010 will.

[75] Dr Burger had treated professor van Heerden for about four years by the time the 2010 will was executed. When asked about his view of professor van Heerden's mental state immediately prior to 16 April 2010, he said:

'Mentally I thought he was *compos mentis*. There was no sign of dementia but physically if you look at him he had signs of a stroke with expressive dysphasia and spasms making it difficult to communicate directly with him.'

As far as the effect of the expressive dysphasia was concerned, he said that while professor van Heerden 'couldn't express himself 100%, he would always express himself appropriately'.

[76] He explained that while he tended to obtain details of professor van Heerden's condition, on his house calls, from Mrs van Heerden, principally to save time, professor van Heerden was able to respond, was attentive and interacted with him. This evidence is supported by the clinical notes in a number of instances. Indeed, throughout the clinical notes mention is made of professor van Heerden communicating with Dr Burger.

[77] Dr Burger assumed from professor van Heerden's spasticity and expressive dysphasia that he had suffered a stroke at some stage. He was sure that when he recorded that professor van Heerden had suffered a TIA, he had been correct in his diagnosis because he always recovered – 'the next day [he] might be 100% again, then I know it's a TIA' or perhaps something else like an infection or dehydration.

[78] Dr Burger's opinion of professor van Heerden's state of health was summarised in a letter dated 10 September 2013 that he wrote to the plaintiffs' attorneys. He said:

'Die oorledene het TIA gekry (tydelike isgemiese aanvalle) en was bedlêend en met die tyd al meer spasties geraak. Hy was deur sy vrou en helpers versorg. Ten tye van die gemelde testament ondertekening/verandering het hy aan ekspressiewe disfasie gelei. Hy weet wat hy wil sê, maar kan homself nie behoorlik uitdruk nie. Hy het verstaan wat om hom aangaan.'[19]

[79] Finally, Dr Burger made it clear in his evidence that, despite his erroneous and ill-considered letter of 15 October 2008, there was nothing that he saw that suggested to him that professor van Heerden suffered from dementia; and that during the period from December 2006 to April 2010, professor van Heerden's condition remained the same – he was '*compos mentis* for me, difficult to express himself but alert'.

- [80] Ms Tercia Cowley shared an interest in embroidery with Mrs van Heerden. As a result, they became firm friends in 2004. They spent time together at the Van Heerden's home three or four times a week. Professor van Heerden would spend time with them before they retired to the sewing room.
- [81] Ms Cowley said that at first, professor van Heerden was able to talk with them and could walk without difficulty. At some stage, however, a systematic process of physical deterioration began. His speech was also affected. He began to speak slowly and he struggled to form words. He was, nonetheless, able to express himself in sentences that could be understood.
- [82] In 2009, when her marriage broke down, she moved in to the Van Heerden's house. She boarded there from August 2009 until June 2012, some time after professor van Heerden's death. By the time she moved in, professor van Heerden required assistance when he walked.
- [83] Every morning, she would go to his room to say good morning and to chat with him. He would greet her and respond to what she had said. He spent most of the day in a reclining chair and the rest of the time in bed. Their conversations tended to be about matters that he had seen on television or issues he had read about in the newspaper. Ms Cowley said that professor van Heerden read the newspaper until he was no longer able to hold it. This occurred in November or December
2009. Thereafter, Mrs van Heerden would read the newspaper to him. He would react to articles of interest to him and would express views on them. He enjoyed watching quiz shows on television. Ms Cowley said that most of the time he gave correct answers to questions, often before the participants had answered. She described professor van Heerden as a clever, intelligent and learned man whose knowledge
- covered a wide spectrum. She testified to him being charming at times and of his sense of humour.
- [84] When it was put to Ms Cowley that Willem, Karel-Willem and Cornelius had testified that by 2008, professor van Heerden was unable to speak, she disputed this. She also disputed their evidence that when people greeted him he would stare at them unable to recognise them. She said that he had been able to communicate and to watch television until the end of 2010. Although he spoke in short sentences, one could understand what he was saying. Ms Cowley was present when the 2010 will was executed and was one of the witnesses to it. I shall revert to her evidence when I deal with the events of 16 April 2010.

- [85] Ms Karen van Heerden testified that after professor van Heerden had been discharged from hospital in early July 2006, he was 'fine' and was able to walk unassisted. He also 'spoke to us like normal'. She confirmed the evidence of Dr Leipoldt that he had made a house call on 23 September 2006 because professor van Heerden had been confused. Dr Leipoldt had considered hospitalising him but he had recovered the next day. Karen said that he had had 'a bad day' but 'the next morning he was fine again'.
- [86] Within a few months of professor van Heerden's discharge from hospital, however, carers were employed to look after him and Karen and her sister Christelle took turns to spend alternate two week periods at the Van Heerden home from then until 2009. At that stage arrangements were made with their siblings, apart from Willem, to take turns spending weekends there. That arrangement was in place until professor van Heerden's death in 2011.
- [87] Karen testified that professor van Heerden's health deteriorated progressively after his hospitalisation in mid-2006: he became weaker; he later required assistance to walk; he then needed a wheelchair. But, she said, 'mentally Dad was fine' and he 'communicated in short sentences right through to shortly before his passing'. She added that even though he became spastic, 'there was absolutely nothing wrong with his mind'. He read the newspaper until the end of 2009 when the spasticity prevented him from being able to hold it. By that stage he also could not write for the same reason. When he was no longer able to read the newspaper himself, Mrs van Heerden, Karen or one of the carers would read it to him.
- [88] Throughout her evidence, Karen testified to conversations of substance with her father that went beyond formal greetings and small-talk. For instance, she testified about discussions she had had with her parents in about July 2006 when Mr Piet Coetzee, the Cradock attorney, had presented them with a draft will to replace the 2004 will. Professor van Heerden made it very clear that he had no intention of signing the draft will because it was not what he wanted and he had not instructed Mr Coetzee to draft the document. He expressed a desire, at the same time, for all of his children to inherit equally.
- [89] After the family meeting on 30 March 2008, it appears that there were ongoing efforts to reach some sort of an accommodation with Willem about the payment of rent for the farms. Karen testified that she discussed with her parents the possibility of speaking to Mr Coetzee to speak to Willem about the issue. When these efforts came to naught, Karen undertook to make good the shortfall in the finances of the Van Heerdens. She testified that her father had said that Willem would not pay rent because he was insolvent. This occurred during 2009.
- [90] Karen also testified about a property she had bought in about March 2009. Her father was concerned about how she had financed the purchase and felt that it had not been sound. As a result, as she put it, 'he took me on'. When she had explained her reasoning, he understood what she had done and was satisfied with her explanation.

[91] More generally, she testified that she and her father often spoke about sport, politics and history, subjects of great interest to professor van Heerden.

[92] When asked to comment on the evidence of Willem, Karel-Willem and Cornelius that from about 2008, professor van Heerden had been unable to communicate at all and could not recognise people who he knew, she said:

‘That’s nonsense. I spent a lot of time with Dad and he communicated and spoke with me until shortly before his passing three or four weeks. He became spastic, yes but he knew exactly what was going on and up to shortly, he spoke in short sentences.’

[93] The evidence of Dr Burger, Ms Cowley and Karen is supported by Ms Amanda Nieman and Ms Liesl Greyvenstein. I shall deal with their evidence in more detail below in the context of the preparation and execution of the 2010 will.

[94] Ms Nieman, a financial advisor who had known professor van Heerden since the 1990s, and who consulted with him in 2009 and 2010, testified to him being able to communicate with her in relation to a power of attorney and the 2010 will, and expressing independent and rational views. She consulted with him about the 2010 will for the last time on 9 April 2010 and she said of her observations of him that day:

‘Hy het geweet wat hy wil hê. Ek het terug gegaan en gesê dit is wat mevrou wil hê, tannie wil hê en sy het gesê ja en ek het gesê oom hier is jou testament en dit is hoe jy dit wil hê en hy het vir my gesê ja dit is wat ek wil hê.’[20]

[95] In cross-examination, she explained that as from 2007, professor van Heerden had communicated with some difficulty, that he spoke softly and slowly, but she could understand what he said. She said that his spasticity had got worse over time so that by the time the power of attorney was to be signed, it was clear that he could not sign it in the normal way. She was, however, steadfast in her view that mentally, professor van Heerden was alert.

[96] Ms Liesl Greyenstein is the ninth defendant in her capacity as joint executor of professor van Heerden’s estate in terms of the 2010 will. She is the attorney who drafted the powers of attorney signed by the Van Heerdens on 25 November 2009 and the 2010 will, having received instructions to do so from Ms Nieman. She was present and, for all intents and purposes, in control of events when the powers of attorney and the 2010 will were executed.

[97] On 25 November 2009, she was introduced to professor van Heerden, who was seated in a chair. When asked if she had had any ‘verbal contact’ with him after the introduction, she said:

‘Yes definitely. He was pleasant, he was – I recall him being a gentleman. He’s Afrikaans like I am. We exchanged pleasantries and ja. Although he wasn’t overly talkative, he certainly expressed himself, he was friendly and we had a definite conversation. It wasn’t one-way traffic.’

[98] That it was not 'one-way traffic' appears to have been confirmed for Ms Greyvenstein when she went over the power of attorney with professor van Heerden, paragraph by paragraph. From his responses, she 'understood that he understood the document and that this was in fact his instructions, that this was what he wanted'.

[99] Ms Greyvenstein testified that on 16 April 2010 when she entered professor van Heerden's room, he was sitting upright in a chair. She had entered the room to greet him on her arrival at the Van Heerden home. She exchanged pleasantries. She thought that he remembered her. He was 'comfortable and he was pleasant'. She explained the purpose of her visit. When asked how he had participated in the conversation with her, she said:

'He was completely responsive. I never got the impression that like I said earlier that there was one-way traffic. He was friendly and he would nod, after I started going through the will now which I'll get to, he would nod and speak in Afrikaans. Short sentences but certainly not unresponsive.'

Her impression of professor van Heerden was that he was an intelligent man.

The preparation and execution of the 2010 will

[100] From the evidence of Karen it appears that as early as 2005, professor van Heerden had begun to think about changing the 2004 will. He expressed this desire in clear terms in June 2006 when he was admitted to hospital. This is not necessarily as strange as it may appear: the Van Heerdens changed their wills a number of times over the years. Apart from the 2004 will and the 2010 wills, they executed joint wills in 1978, 1982, 1986, 1990, 1994, 1997 and 2000.

[101] In 2007 the first steps were taken that eventually resulted in the 2010 will (and a mirror-image will executed on the same day by Mrs van Heerden). The process started with consultations between Ms Nieman and Mrs van Heerden who did not properly understand the 2004 will. It would appear that she executed a will of her own on 12 September 2007 and informed Ms Nieman that she intended discussing it with professor van Heerden. Thereafter, Ms Nieman appears to have undertaken an estate planning process on behalf, principally, of Mrs van Heerden. On 28 May 2009, Mrs van Heerden signed another will, in which Greyvensteins was nominated as executor.

[102] This was discussed with professor van Heerden in his room on that day. During this consultation Ms Nieman also discussed the 2004 will with the Van Heerdens. She advised them to mandate their daughter Christelle, by means of powers of attorney, to manage their financial affairs. She was told that they wished to discuss her proposals and would revert to her. Professor van Heerden told her that he also wanted to talk to her about changing his will. Her file note of the consultation reads in part:

'Tannie sal my laat weet nadat hulle dit bespreek het. Oom verstaan maar wil praat oor sy testament wat ook moet verander.'[21]

He expressed a desire to have a will in the same terms as Mrs van Heerden, which had bequeathed her assets to the children equally.

[103] Ms Nieman was duly contacted by Mrs van Heerden who said that she and professor van Heerden were ready to sign their powers of attorney. On 18 June 2009 she consulted with them. Mrs van Heerden signed her power of attorney but professor van Heerden said that he was not ready to sign his, he wanted to think about it and he would contact her when he was ready. She said of him:

‘Hy is nie gereed om nou te teken nie en dit was vir my interessant want dit is hoe ek die oom ken. As hy nie ‘n ding wil doen nie het hy dit nie gedoen nie. As hy wil dink oor ‘n ding sal hy daaroor dink. Hy sal ‘n ding doen wanneer hy dit wil doen.’[22]

[104] Ms Nieman was contacted by Mrs van Heerden who told her that professor van Heerden was ready to sign his power of attorney, but with one amendment: he wanted Mrs van Heerden, in addition to Christelle, to be empowered to represent him. She also said that she did not think that professor van Heerden would be able to append his signature to the power of attorney in the normal way. As a result, Ms Nieman decided to request Ms Greyvenstein to manage the process.

[105] Ms Greyvenstein testified that, on Ms Nieman’s instructions, her firm had drafted the powers of attorney and she was present on 25 November 2009 when it was executed by professor van Heerden. She explained the content of the power of attorney to him, paragraph by paragraph, checking that he understood as she did so. When he indicated that he was ready to sign the document, he gave her his hand, she rolled his thumb on her ink pad and appended his finger print to the document on each page. She signed it as commissioner of oaths. (Ms Nieman testified that professor van Heerden was ‘redelik vies op die einde, want sy duim was vuil en toe wil hy net hê die tannie moet daardie duim nou skoon maak.’[23])

[106] In respect of professor van Heerden’s condition when the power of attorney was executed in this way, Ms Nieman said:

‘Hy het geweet wat aangaan. Hy het geweet. Hy het geantwoord op die vrae wat ons vra. Hy het nooit, ek het nooit die indruk gekry maar hierdie, hy weet nie wat aangaan nie, dis nie wat hy wil doen nie. Hy was helder.’[24]

[107] Ms Nieman was contacted again by Mrs van Heerden who said that she and professor van Heerden wanted to consult her about changing their will. She consulted with them on 5 April 2010 in professor van Heerden’s bedroom, where he was sitting in his chair. Mrs van Heerden told her that she and professor van Heerden had decided to change their will so that on the death of one of them, the other would inherit everything; that in the event of their simultaneous deaths, their children would inherit their entire estate equally; and that the children would inherit equally on the death of the last dying. Ms Nieman testified that professor van Heerden said that this was what he wanted to do.

[108] She then went over the 2004 will with them to ensure that they were clear about wanting to change it. She recorded in her file note that '[o]om wil nie so hê nie'[25] – that he did not, in other words, want the 2004 will any longer. Instead, he said he wanted a will in the terms they had

earlier outlined to her. She undertook to have the two wills drafted in those terms – one for professor van Heerden and one for Mrs van Heerden.

[109] She returned to the Van Heerdens with the draft wills on 9 April 2010. She read the wills to them and both said that their respective wills were in accordance with their wishes. She said, in particular, that professor van Heerden knew what he wanted and that he had said what he wanted. Mrs van Heerden said, however, that she wanted Greyvensteins to be nominated as executor of their estates because of their earlier dealings with that firm. Ms Nieman told them that she would instruct Greyvensteins to attend to the final drafting of the wills and to their execution.

[110] Ms Nieman instructed Ms Greyvenstein and left the matter in her hands as she was going to be away for the following two weeks. She confirmed that the 2010 will was in the terms that she had discussed with professor van Heerden on 9 April 2010.

[111] Karen testified that she was asked by her mother to arrange for a commissioner of oaths to be present when the wills were to be executed on 16 April 2010. (This was necessary so that professor van Heerden's mark could be certified to be his.[26]) She contacted a friend in the South African Police Service (SAPS) who arranged for Lieutenant-Colonel Abri Badenhorst to attend. He arrived with a colleague, Lieutenant-Colonel Johan van Greunen, who witnessed the will. Karen testified that Dr Burger was also in attendance and that she was surprised to see him there. She assumed that her mother had requested him to be present.

[112] Dr Burger testified that when he arrived at the Van Heerden's home on 16 April 2010, he and Mrs van Heerden entered professor van Heerden's bedroom. He was sitting in his chair. He greeted professor van Heerden who responded appropriately. He explained why he was there and professor van Heerden indicated that he understood. They spoke for a while about professor van Heerden's state of health since Dr Burger had last seen him about six weeks before – to make sure that 'he didn't have a stroke and suddenly now he's not compos mentis or that he is more confused'.

[113] Dr Burger concluded from speaking to professor van Heerden that he was 'perfectly compos mentis' and was 'alert without talking that much'. He stressed that he had treated professor van Heerden for some time and so he knew him. He was of the view that there was no need to conduct any tests with regard to professor van Heerden's cognitive capacity because he was satisfied that 'he understands what's going on'.

[114] Dr Burger then left the room where he saw Ms Greyvenstein. He told her that she could proceed with the execution of the will. He, and others, stood in the corridor where he heard Mrs van Heerden say that he was now going to execute his will as they had discussed. He heard professor van Heerden say: ‘Gaan so voort.’[27] From this he understood that professor van Heerden had a full understanding of what he was about to do.

[115] Later that day, Dr Burger received a certificate drafted on a Greyvensteins letterhead. He signed it and returned it to Ms Greyvenstein. The certificate read:

‘I, the undersigned,

JOHAN BURGER

A medical practitioner practising at 74 5th AVENUE, NEWTON PARK, PORT ELIZABETH, has satisfied myself as to the identity of the Testator and that the accompanying Will is the Will of the Testator, KAREL WILLEM VAN HEERDEN.

I have further satisfied myself that the Testator is of sound mind and that he understands the contents of the Will at the time [of] signature thereof. The Will has been initialled by me for identification purposes.’

[116] On the morning of 16 April 2010, Karen had tea with her parents. She said of her father that he was ‘fine’, that he spoke to her and ‘was in good spirits’. When Ms Greyvenstein arrived, she entered professor van Heerden’s bedroom with Mrs van Heerden and explained the will to professor van Heerden. After the explanation, she heard her father say: ‘Gaan so voort’. The will was then executed.

[117] Ms Greyvenstein’s evidence dovetails with that of Ms Nieman and Karen. She testified that she entered professor van Heerden’s bedroom and exchanged pleasantries with him. She then proceeded to read the will paragraph by paragraph, not leaving anything out. At the end of each paragraph, professor van Heerden either nodded his head or, if she asked whether he understood, answered in the affirmative. She gained the impression that he ‘wanted to get on with it’ but she took her time to make sure that he understood the contents of the will. (She made the point, however, that the 2010 will was a very simple document and professor van Heerden was a very intelligent man.)

[118] She was asked what she would have done had she had any doubts about professor van Heerden’s ability to understand the will. She answered:

‘I would certainly not have commissioned the document, I have no reason to force anyone to sign a will. It was clear to me that this is what he wanted and that these were his instructions. I have no doubt about that.’

[119] She testified that after she had gone over the will with professor van Heerden, Colonel Badenhorst entered the room and spoke to professor van Heerden. He made sure that professor van Heerden understood the will and was happy with its contents. He then commissioned the will after he had assisted professor van Heerden to make his mark. The

witnesses – Colonel van Greunen and Ms Cowley – had been present throughout. They signed the will in the presence of professor van Heerden and Colonel Badenhorst. (Mrs van Heerden’s mirror-image will was signed later the same day.)

- [120] Ms Cowley testified that on 16 April 2010 when she went to greet professor van Heerden (as she did every morning) he had conversed with her and told her that he had slept well. She was then told that the Van Heerdens were going to sign wills and she was asked to be a witness.
- [121] When everyone had arrived, Ms Greyvenstein and Colonel Badenhorst had entered professor van Heerden’s bedroom. She was called in by Colonel Badenhorst who asked her to stand close to them because professor van Heerden was going to execute his will. After professor van Heerden’s mark had been placed on the will, she and Colonel van Greunen signed the will as witnesses. She then left the room but the two policemen remained.
- [122] Colonel Badenhorst testified that he had been asked by a colleague in the SAPS to assist with the execution of a will at the Van Heerden’s home. He did not know the Van Heerdens at all. He agreed to help and went with his friend, Colonel van Greunen.
- [123] On arrival at the Van Heerdens home, they found a number of people present. All of them, with the exception of Ms Cowley, were strangers. When he met Ms Greyvenstein she told him that as a result of professor van Heerden’s physical condition it was not possible for him to sign his new will in the conventional way and he would have to do so by appending his fingerprint. He also spoke to Dr Burger who assured him that professor van Heerden knew what he was about to do.
- [124] When he entered professor van Heerden’s bedroom, he was accompanied by Colonel van Greunen, Ms Cowley and Ms Greyvenstein. He met Mrs van Heerden inside the room. Professor van Heerden was sitting in a chair. When he entered the room, professor van Heerden’s turned towards him and looked at him. He introduced himself to professor van Heerden and told him why he was there. Professor van Heerden confirmed that he understood by saying ‘ja, ek weet’.[28] He asked professor van Heerden if, when placing his fingerprint on the will, he could use his right hand. Professor van Heerden replied in the affirmative. He also asked professor van Heerden to relax his hand when he was placing his fingerprint on the will. He testified that professor van Heerden’s hand ‘was absoluut toetaal en al ontspanne terwyl ek die proses deurgegaan het om sy vinger afdrukke op die testament te bring’.[29]
- [125] He confirmed that after he had placed professor van Heerden’s fingerprint on the will and had signed as commissioner of oaths, Colonel van Greunen and Ms Cowley, who had been present throughout, signed as witnesses. He confirmed too that he had satisfied himself of professor van Heerden’s identity by looking at his identity document.

[126] When he had completed the process, he thanked professor van Heerden for his cooperation and professor van Heerden responded by saying 'ja, dankie vir julle'. [30] He never spoke further to professor van Heerden but Colonel van Greunen had a conversation with him about rugby for five to ten

minutes.

[127] When asked what he would have done if professor van Heerden had not answered him when he had told him why he was there, he said:

'Wel as Mnr van Heerden nie gereageer het op die manier waarop hy gereageer het toe ek die kamer ingekom het deur onmiddeelik na my te kyk en my terug te antwoord en my te gevolg het omtrent met alles wat ek gedoen het nie sou ek definitief nie 'n vinger afdruk op daardie bladsy gesit het nie.' [31]

From professor van Heerden's responses, he considered that he was aware of everything that Colonel Badenhorst had done and understood what he had signed.

[128] Colonel van Greunen's testimony was supportive of the evidence of Colonel Badenhorst in every material respect. Not surprisingly, given the passage of time, there were minor discrepancies of detail here and there – but these are of no moment in the greater scheme of things. He said that when the execution of the will had been completed, he had engaged in conversation with professor van Heerden. They spoke for five to ten minutes. He said that they had enjoyed a good chat and that professor van Heerden knew what he was talking about.

[129] They spoke about rugby, more particularly, about Northern Cape rugby and about men who had in the past played there. His evidence about the quality of the conversation was that professor van Heerden knew what he was talking about and was focused. His thoughts did not wander onto other topics. Colonel van Greunen concluded by saying:

'Die oom is by sy volle verstand hy praat nog, hy weet waaroor hy praat. Dit is nie dat hy goed praat waarvan hy nie weet nie. Hy het heeltemaal, hy was heeltemaal by sy volle verstand toe ek met hom gepraat het.' [32]

Evaluation – the law and the facts

[130] The purpose of the Wills Act 7 of 1953 is, according to its long title, to 'consolidate and amend the law relating to the execution of wills'. To this end, s 2 stipulates formalities that must be complied with to validly execute a will including, as in this case, when a testator signs a will by making a mark. Section 4 concerns the freedom and the competency of persons to make wills. It provides:

'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.'

[131] The law operates from the assumption that a will that is, on its face, regular, is valid unless the contrary is established.[33] Section 4 of the Wills Act makes it clear that the onus of establishing a lack of testamentary capacity rests on whoever alleges that. In this, the section is, for the most part, consistent with the common law position that applied prior to its enactment.[34] Whether a person has testamentary capacity is essentially a question of fact, the question, at its most basic being whether on the accepted facts, ‘there was or was not, in the testator, that degree of understanding required by the law to make a valid will’.[35]

[132] In *Kirsten & others v Bailey & others*[36] Viviers AJ formulated the test to be applied as being ‘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’. In *Tregea & another v Godart & another*[37] Tindall JA adopted the formulation of the test for testamentary capacity in *Banks v Goodfellow*,[38] in which it was held:

‘The question is not so much what was the degree of memory possessed by the testator, as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will?’

[133] The position was succinctly summarised thus by Griesel J in *Katz & another v Katz & others*: [39]

‘Furthermore, the test of a person’s mental capacity is specific to the task or decision to be carried out. In the words of section 4 of the Act, the testator, in making a will, must be capable of understanding “the nature and effect of his act”, ie the act of making the particular will in question. Put differently, a person may be incapable, due to diminished mental powers, to enter into a complicated commercial transaction and yet be capable of performing other juristic acts, eg to conclude a contract of purchase and sale; to marry; or to execute a will. What is required in order to satisfy the test is the ability “to understand and appreciate the testamentary act in its different bearings”. This entails, first, an appreciation of the nature of the transaction itself, ie the act of disposing of one’s property to named beneficiaries after one’s death and appointing one or more executors to oversee the process; secondly, the ability to distinguish between potential heirs and to make a rational and reasoned decision as to their respective claims to the testator’s assets; and finally, the ability to appreciate in broad terms the nature, extent and value of the testator’s estate.

[134] While the measure of proof is, as in all civil proceedings, a balance of probabilities, the nature of the enquiry tends to render the discharge of the onus difficult.[40] Steyn J, in *Smith & others v Strydom & others*,[41] made the point that it is extremely difficult, if not impossible, to determine the precise degree and level of an impaired testator's

cognitive functioning in the absence of scientific investigation, a difficulty that falls on the shoulders of the person alleging

testamentary incapacity.

[135] In *National Employers' General Insurance Co Ltd v Jagers*,[42] Eksteen J said of the discharge of an onus in civil proceedings:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[136] The opinions of the expert witnesses who were called by the plaintiffs – Drs Justin Basson, Guy and Smuts – were to the effect that professor van Heerden's condition would have deteriorated to the point that he was incapable of appreciating the consequences of executing the 2010 will, and that he thus lacked testamentary capacity when executing that will.

[137] I have difficulty with their evidence for a number of reasons. None of them ever examined or spoke to professor van Heerden. To a large extent, their opinions were predicated on Dr Burger's unfortunate false statement made in 2008 that professor van Heerden suffered, at that stage, from vascular dementia. When that is removed as a fact, the postulate that professor van Heerden's condition must have deteriorated still further by 16 April 2010, to the point of him lacking testamentary capacity, loses a great deal of its force. I say this because, based on the vague, sparse and inadequate medical records that exist, the plaintiffs' expert witnesses have no way of quantifying any deterioration in professor van Heerden's cognitive functioning. In the circumstances, it seems to me, their opinions that he lacked testamentary capacity, based on the information available to them and having

discounted Dr Burger's false statement, is speculative.

[138] I prefer the opinion expressed by Dr Kessler that because of the inadequacy of the medical records, and the anecdotal evidence that points in both directions, it is not possible to reach a conclusion as to professor van Heerden's testamentary capacity one way or the other.

[139] The function of an expert witness, Addleson J said in *Menday v Protea Assurance Co Ltd*, [43] is 'to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide'. It often plays a valuable role in uncovering where the truth lies but, at the same time, its utility has limits. The reliability of the opinion of an expert witness will often be reliant on the accuracy of or adequacy of the input information that form the premises of the expert's evidence.[44] In *Motor Vehicle Assurance Fund v Kenny*[45] Eksteen J, in the context of a motor vehicle accident, held:

'Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles. Tompkins' concession, therefore, that there are too many unknown factors in any collision to warrant a dogmatic assertion by an expert as to what must have happened seems to me to have been a very proper one. An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct

evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view.'

[140] The same approach to a conflict between expert evidence and direct evidence was taken in *Essop v Mustapha and Essop NNO & others*,[46] a case, like this one, involving whether a testator had the necessary capacity to execute a will. Evidence had been given by a specialist who had treated the testator some time before the execution of the will. Evidence was also given by an old school friend of the testator, who happened to be a doctor. He had testified that the testator and he had held a 'perfectly normal conversation'

and even chatted about their school days. In these circumstances, Friedman J held:[47]

'The picture presented by the deceased to Dr Jeewa senior was not that of a person whose memory and intellect were failing and who was of unsound mind. It seems to me, therefore, that the opinion of Mr Usdin [the specialist] , bona fide as I accept it to be, cannot be accepted without qualification in the light of this direct and acceptable evidence of the condition of the deceased nearer the time he made his will than the time at which Mr Usdin saw him.'

- [141] While, as I have said, the plaintiffs' expert witnesses based their opinions on the inadequate medical records that exist, there is a great deal of direct evidence (as well as the expert evidence of Dr Burger) concerning professor van Heerden's cognitive capacity over the period from 2006 to 2011. All of the expert witnesses conceded the importance of the evidence of those who had day-to-day contact and interacted with professor van Heerden. It is to an assessment of that evidence that I now turn.
- [142] The evidence of Karel-Willem, Cornelius and Willem was to the effect that, by the end of 2007, professor van Heerden was bedridden and unable to talk, and that by 2008 he was not able to recognise people whom he knew. Their evidence is not consistent with the evidence of their own witnesses, who located professor van Heerden's decline later than 2008. For instance, both Ms van der Kolf and Dr Steenkamp testified that professor van Heerden was still able to speak during 2010 and 2011 respectively. The evidence of Karel-Willem, Cornelius and Willem is also at odds with the objective evidence of the contemporaneous clinical notes of Dr Burger and file notes of Ms Nieman. These documents record instances, later than 2008, of professor van Heerden communicating with them and expressing firm and definite views at times.
- [143] Even though Dr Burger may be criticised for his misrepresentation of professor van Heerden's state of health in 2008, his evidence, for the rest, was clear and consistent. Ms Nieman, an independent witness, was in my opinion, a most impressive witness. Her evidence dovetailed with her contemporaneous file notes and it is clear that she took great care in her professional dealings with the Van Heerdens from 2007 to 2010. Her evidence was that professor van Heerden was able to communicate his intentions clearly and understood the process with which he was involved. The last time she consulted with him – about the contents of the 2010 will – was on 9 April 2010, a week before the will was executed.
- [144] The evidence of Dr Burger and Ms Nieman is corroborated by the evidence of those who had regular contact with professor van Heerden, such as Karen and Ms Cowley, by people who had less contact with him, such as Ms Greyvenstein, and by strangers – Colonel Badenhorst and Colonel van Greunen – who met him only once.
- [145] In my view, the contact that Karel-Willem, Cornelius and Willem had with professor van Heerden was occasional. This is not surprising as they lived a few hundred kilometres from Port Elizabeth. When viewed in the context of all of the other evidence, it seems to me that their evidence as to professor van Heerden's state of health is exaggerated. It is more probable that by the time the 2010 will was executed, professor van Heerden was still able to communicate, albeit softly and with a measure of difficulty. That conclusion is consistent with the objective evidence of Dr Burger's clinical notes and Ms Nieman's file notes.
- [146] The events of 16 April 2010 – the execution of the 2010 will – must not be viewed in isolation. By the time professor van Heerden said 'gaan so voort' he had consulted with Ms Nieman about the will on a number of occasions and with Ms Greyvenstein. The evidence

that was adduced on behalf of the defendants paints a picture of a person in possession of his faculties (as Colonel van Greunen put it) who was bringing to a conclusion a process that had begun some time before. In my view, the evidence concerning the events of 16 April 2010 of Dr Burger, Ms Greyvenstein, Karen, Ms Cowley, Colonel Badenhorst and Colonel van Greunen is consistent and unimpeachable.

[147] In particular, Colonel Badenhorst and Colonel van Greunen did not know the Van Heerdens at all. They were completely objective witnesses with absolutely no interest in the matter at all. Ms Greyvenstein too, apart from her professional responsibility not to be party to the execution of an invalid will, had no interest in the matter and was also an objective witness whose evidence cannot be criticised.

[148] In my view, the evidence of these witnesses, taken in the broader context of the lead-up to the execution of the will that I have detailed, establishes an outward manifestation on the part of professor van Heerden that he had testamentary capacity when he executed the 2010 will. The plaintiffs have failed to discharge the onus that rested on them to prove that professor van Heerden lacked testamentary capacity, with the result that their action must fail.

The order

[149] The action is dismissed with costs.

C Plasket

Judge of the High Court

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- [1] On 23 March 2017, Weinkove AJ, in the Western Cape High Court, Cape Town appointed Ms Jolene Bernstein, an advocate practising in Cape Town, as curator ad litem to Mrs van Heerden to do all things necessary on her behalf in respect of this matter. The necessity for the appointment of a curator ad litem delayed, unavoidably, the commencement of the trial for a few days.
- [2] Clauses 4 and 5 are constructed in precisely the same way. They differ only insofar as the names of the beneficiary and of the farms are concerned. Clause 4 reads as follows in English: ‘We bequeath to our grandson Karel Willem van Heerden our farms Avondgloor (approximately 172 hectares), Eureka and Dennepark (approximately 714 morgen), Dagbreek (approximately 205 morgen) and The Vlei (approximately 600 morgen). This bequest is subject to the usufruct of our son Willem Frederick van Heerden. In conformity with paragraph 3(b)(v) of this will, Willem’s life-long right shall only come into effect after the death of both the Testator and Testatrix and shall end on our son Willem Frederick van Heerden’s death.’ (My translation. All other translations from Afrikaans to English in this judgment are also my translations.) Clause 5 bequeaths the farms Lombardy, Mispah, along with Droogfontein, and Eersteling to Cornelius.
- [3] The 2004 will was essentially similar to a joint will dated 29 March 2000 and an earlier one dated 30 July 1999.
- [4] In one will, dated 14 November 1986, the farms Misbah and The Vlei were left to Willem’s younger brother, Paul. That was altered by a later will.
- [5] Undue influence was originally pleaded by Karel-Willem and Cornelius but this ground was later abandoned.
- [6] This is a computerised tomography scan of the brain.
- [7] A TIA may be defined as a brief episode of ‘neurological dysfunction resulting from focal cerebral ischemia not associated with permanent cerebral infarction’. I have taken this definition from the report of Dr Justin Basson. The experts appear to agree that the effects of a TIA last less than 24 hours and are, as the name suggests, temporary in nature. It was suggested by at least one of the experts that referring to a TIA as a ‘mini-stroke’, as is sometimes done, is not accurate.
- [8] ‘House call and TIA again – says sore when turns to the right and also [when] lifts r[ight] leg – clinically only a spasm.’
- [9] ‘do house call – ? semi-coma after tia – no longer taking food/ pills and struggles with liquids’.
- [10] ‘says that stomach is fine and no pressure sores.’

- [11] ‘Uncle [has] expressive dysphasia – approximately last 4 years after cva and spastic – therefore thumbprint taken – it appears that he understands, but expresses himself with difficulty.’ The reference to a ‘cva’ is a reference to a cerebrovascular accident – a stroke.
- [12] ‘It is hereby confirmed that above named is a patient of mine and that it is my opinion that as a result of medical reasons (vascular dementia) he is no longer medically fit to act as trustee.’
- [13] The last word of the quote in the typed record is ‘sense’. That does not fit, given the context. This is an obvious typing error. My notes of Dr Burger’s evidence are to the effect that the word he used was in fact ‘serious’. That makes sense when the passage is read in context. I have therefore taken the liberty of changing the quote to reflect the correct position.
- [14] ‘The late KW van Heerdeen was diagnosed with vascular dementia in 2006. It is an irreversible and progressive condition. There is evidence that he had various strokes and in between these had temporary ischemic incidents (TIAs). He was bedridden with spasticity and aphasia. He was reliant on care for all basic needs, had to obtain assistance to change position, in order to prevent bedsores and had various complications secondary to immobility. It is extremely improbable that KW Van Heerden’s cognitive function was of such a nature that he had testamentary capacity at the time of the execution of the will dated 16 April 2010. Taking into account the information at my disposal, it is my opinion that KW Van Heerden lacked testamentary capacity. The evaluation of KW Van Heerden’s testamentary capacity on 16 April 2010 does not prove the contrary.’
- [14] ‘The late KW van Heerdeen was diagnosed with vascular dementia in 2006. It is an irreversible and progressive condition. There is evidence that he had various strokes and in between these had temporary ischemic incidents (TIAs). He was bedridden with spasticity and aphasia. He was reliant on care for all basic needs, had to obtain assistance to change position, in order to prevent bedsores and had various complications secondary to immobility.

It is extremely improbable that KW Van Heerden’s cognitive function was of such a nature that he had testamentary capacity at the time of the execution of the will dated 16 April 2010. Taking into account the information at my disposal, it is my opinion that KW Van Heerden lacked testamentary capacity.

The evaluation of KW Van Heerden’s testamentary capacity on 16 April 2010 does not prove the contrary.’

- [15] . . . Dr Basson said that it was ‘incomplete in respect of the number, effect, specific areas of the brain and possible age of the ischemic infarctions (strokes)’.
- [16] ‘. . . he could not understand, he could not talk, he was not in a condition to attend the meeting’.

- [17] 'No, there is no way that he could have recognised me, he just lay there, there was no reaction, nothing, he could certainly not recognise me.'
- [18] . . . she informed him that 'I have changed the will' and that 'you get nothing' – 'no land, nothing'.
- [19] 'The deceased had TIA (temporary ischaemic attacks) and was bedridden and with time became increasingly spastic. He was cared for by his wife and helpers. At the time of the signing/amendment of the mentioned will he suffered from expressive dysphasia. He knew what he wanted to say but could not express himself properly. He understood what was going on around him.'
- [20] 'He knew what he wanted. I went back and said this is what madam wants, what aunty wants and she said yes and I said uncle here is your will and it is how you want it and he said to me yes that is what I want.'
- [21] 'Auntie will let me know after they have discussed it. Uncle understands but wants to talk about his will which must also be changed.'
- [22] 'He is not ready to sign now and that was interesting for me because that is how I knew the uncle. If he did not want to do a thing, he did not do it. If he wanted to think about something, he would think about it. He would do something when he wanted to do it.'
- [23] Ms Nieman testified that professor van Heerden was 'pretty cross at the end, because his thumb was dirty and so he wanted the auntie to clean that thumb'.
- [24] 'He knew what was going on. He knew. He answered the questions we asked. He never, I never got the impression but this, he does not know what is going on, this is not what he wants to do. He was clear.'
- [25] 'Uncle does not want that.'
- [26] Section 2(1)(a)(v) of the Wills Act 7 of 1953 provides that no will executed after 1 January 1954 shall be valid unless . . . 'if the will is signed by the testator by
the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies
that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies'.
- [27] 'Go ahead.'
- [28] 'yes, I know'.
- [29] . . . professor van Heerdeens hand 'was absolutely, totally and completely relaxed while I completed the process of placing his fingerprints on the will'.

- [30] 'yes, thank you to you'.
- [31] 'Well, if Mr van Heerden had not reacted in the manner in which he reacted when I entered the room by looking at me immediately and answering me back and following just about everything that I did, I definitely would not have placed a fingerprint on that page.'
- [32] 'The uncle was in possession of his faculties, he talked as well, he knew what he was talking about. It was not that he talked about things that he did not know about. He did completely, he was completely in possession of his faculties when I spoke with him.'
- [33] *Finucane v MacDonald & others* 1942 CPD 19 at 26; *Tregea & another v Godart & another* 1939 AD 16 at 27; *Kunz v Swart & others* 1924 AD 618 at 650.
- [34] See Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2 ed) at 77; See too De Waal and Schoeman-Malan *Law of Succession* (5 ed) para 3.2.2.1.
- [35] *Tregea & another v Godart & another* (note 33) at 35.
- [36] *Kirsten & others v Bailey & others* 1976 (4) SA 108 (C) at 109I-110A. See too *Essop v Mustapha and Essop NNO & others* 1988 (4) SA 213 (D) at 221A-B.
- [37] Note 33 at 49.
- [38] *Banks v Goodfellow* 1870 LR 5 QB 549 at 568.
- [39] *Katz & another v Katz & others* [2004] 4 All SA 545 (C) para 22. See too *Smith & others v Strydom & others* 1953 (2) SA 799 (T) at 802D-G; *Spies NO v Smith & andere* 1957 (1) SA 539 (A) at 543F-G.
- [40] *Katz & another v Katz & others* (note 39) para 24. See too Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2 ed) at 77.
- [41] Note 39 at 800H-801A.
- [42] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440 D-G.
- [43] *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569B-C.
- [44] See for instance, *MV Banglar Mookh: Owners of MV Banglar Mookh v Transnet Ltd* 2012 (4) SA 300 (SCA) paras 50-51.
- [45] *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) at 436H-437B. See too *Representative of Lloyds & others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 60; *Roux v Hattingh* 2012 (6) SA 428 (SCA) para 20.
- [46] Note 36.
- [47] At 223G-H.

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