

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2017/00030

In the matter between:

**WERNER SCHKADE**

**APPLICANT**

and

**DAVID GREGORY N.O**

**FIRST RESPONDENT**

**VERONICA KATIKU GREGORY N.O**

**SECOND RESPONDENT**

**MASTER OF THE HIGH COURT**

**THIRD RESPONDENT**

**FRANCOIS ANDRIES PRETORIUS**

**FOURTH RESPONDENT**

**Neutral citation:** *Schkade v Gregory N.O* (HC-MD-CIV-MOT-GEN-2017/00030)  
[2018] NAHCMD 235 (9 August 2018)

**Coram:** MASUKU, J

**Heard on:** 28 March 2018

**Delivered:** 9 August 2018

**Flynote:** Applications – Validity of Will – Forgery Alleged – Dispute of fact – Whether the nature or extent of the deceased’s infirmity or the medication he was on as a result thereof, at the time of drafting the disputed Will had affected his motor and cognitive state and function – Expert Report Confirming the allegation of Forgery – Witnesses in the disputed Will deposed to affidavits that the deceased signed the disputed Will in their presence – Doctors on opposite sides have conflicting opinions – None of the witnesses stand to gain anything from either Will being accepted as the last Will and testament of the deceased – Glaring dispute of fact which should have been reasonably foreseen before the application was lodged – In view of the application held not to be one of review of administrative action by a public official – held that the issue of unreasonable delay in launching the application does not apply in the instant case – Rule 65 (7) requiring applicant to submit application in respect of a estate is peremptory.

**Summary:** This is an application wherein the Applicant challenges the validity of a Will on grounds that the deceased signature on the disputed Will is forged – The Respondents hold the firm view that the signature is not forged and that the medication the deceased was on due to his infirmity as well as the stage to which the cancer had developed at the time the disputed Will was executed and the signature may not resemble the deceased’s previous signatures. The Applicant has submitted a report by a handwriting expert, which confirms the allegation of forgery. The Respondents on the other hand have in their corner the witnesses who witnessed the disputed Will in the presence of the deceased and of each other. The Respondents raised three *points in limine* namely; firstly, that the application was a review application and should have been brought in terms of Rule 76 and not Rule 65; secondly, that there was an inordinate or unreasonable delay in bringing this application and thirdly, that there are disputes of fact which cannot be resolved on application proceedings and that the applicant ought to have proceeded by way of action proceedings.

Held; that the application was brought in terms of the correct Rule of court as it seeks a declarator that the Will accepted by the Master was invalid;

Held further; that the application is not for review but for a declaration that the Will is invalid and therefor was an application to which the issue of inordinate delay applicable to applications for review does not apply;

Held; there were clear disputes of fact from the onset, which cannot be decided solely on the papers without more. In this regard, the applicant ought to have foreseen that these disputes could not be resolved on application proceedings.

Held further; that the provisions of Rule 65(7) requiring an applicant in connection with matters in connection with a deceased estate are peremptory and non-compliance therewith is fatal and may result in the application being struck from the roll.

In the result, the application was struck from the roll with costs and regarded as finalised.

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**ORDER**

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1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.
3. The order in paragraph 2 above, is without prejudice to the right of the Applicant to institute action proceedings in this matter, if so advised.

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## JUDGMENT

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MASUKU, J:

### Introduction

[1] Death, devastating as it is, is wont to leave pandemonium in its wake. It is therefor not an unusual phenomenon for a deceased person's life's toils, acquirements, bequests and dispositions left behind when he or she transcends to the celestial jurisdiction, namely the grave, to become the subject of serious disputation, contention and disharmony. At times, even the drafting of a testamentary disposition provides no full proof protection in this regard. In some cases, even family and friends are not spared the resultant recriminations. This case is no different.

### Relief sought

[2] This is an application instituted in terms of Rule 65(4) of the Rules of this court in terms of which the applicant seeks an order in the following terms:

1. Declaring the last Will and Testament of the late Klaus Peter Herman Deite ('the Deceased) dated 08 December 2015, invalid for non-compliance with s 2(1) (a)-(iv) of the Wills Act, 7 of 1953;
2. Declaring the last Will and Testament dated 10 September 2015 of the late Klaus Peter Herman Deite as the valid and enforceable Testament of the deceased;
3. That the Third Respondent be directed to accept the Last Will and Testament dated 10 September 2015 as the valid and enforceable Testament of the deceased for purposes of the Administration of Estates Act, 66 of 1965;

4. That the First and Second Respondents be interdicted and restrained from interfering in the administration of the estate;
5. That the First, Second and Fourth Respondents fully account and return assets taken into their possession to the Master of the High Court, alternatively the executor of the Estate or his lawful agent as per the Last Will and Testament dated 10 September 2015;
6. That, in the event of the Respondents opposing this application, the Respondents pay the costs of the application, the one paying the other to be absolved;
7. That only Applicant be appointed as sole executor and Fourth Respondent be interdicted and restrained to act as a co-executor in the Estate late K. Deite.
8. Further and/or alternative relief.'

### The parties

[3] The applicant is Mr. Werner Schkade, a major male person and co-heir and executor testamentary of the estate of the late Mr. Laus Peter Herman Deite, (the 'deceased') in terms of the deceased's earlier Will dated 10 September 2015.

[4] The first and second respondents are Mr. David Gregory *N.O.* and Ms. Veronica Katiku Gregory *N.O.*, respectively. They are the sole heirs and executors of the deceased's estate in terms of the disputed Will, mentioned in paragraph 1 of the notice of motion quoted above.

[5] The third respondent, is the Master of the High Court, who accepted and registered the disputed Will as the last Will and Testament of the deceased, in terms s 8 (3) of the Administration of Estates Act,<sup>1</sup> (the 'Act').

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<sup>1</sup> Act No. 66 of 1965.

[6] The fourth respondent is, Mr. Francois Andries Pretorius, who was appointed to act as an agent of the first and second respondents in the administration of the deceased's estate.

[7] It is important to state for the record that only the first and second respondents have opposed the application. They will, for ease of reference, be referred to as 'the Respondents', in this judgment.

#### Brief factual background

[8] On 18 December 2015 and at Tsumeb, the deceased succumbed to death. After his passing, it was discovered that he had left behind two Wills, dated 10 September 2015 and 08 December 2015, respectively.

[9] It would appear that the deceased, with the assistance of the fourth respondent, executed the Will dated 10 September 2015. In terms of this Will, the deceased bequeathed his entire estate to the applicant, save his German book collection, to his fiancé at the time. She is not a party to these proceedings.

[10] Subsequent to this Will, the deceased executed the second Will dated 08 December 2015. In terms of this latter Will, the deceased bequeathed his entire estate to the respondents. They were also, in the said Will, appointed as executors and trustees of the deceased's estate. This latter Will shall be referred to as 'the disputed Will' in this judgment.

[11] On the instructions of the respondents, the fourth respondent lodged the disputed Will with the third respondent in terms of s 8(1) of the Act. The third respondent accepted this Will in terms of s 8(3) of the Act. Thereafter and in terms of s 14(1)(a) of the same Act, the Third Respondent appointed the Respondents as executors of the deceased's estate. The two subsequently, appointed the Fourth Respondent as their agent.

[12] The applicant, aggrieved by the acceptance and registration of the disputed Will and the subsequent steps taken on account of that acceptance, applied to this court in terms of Rule 65(4) of the Rules of this court, seeking an order *inter alia* invalidating the disputed Will, for non-compliance with s 2(1)(a)-(iv) of the Wills Act.

[13] The respondents raised three points of law *in limine* in this regard. These are firstly, that the applicant brought this application in terms of Rule 65(4) and not Rule 76; secondly, the inordinate delay by the applicant in lodging this application; and thirdly, that the applicant should have instituted action rather than application proceedings, as there were disputes of fact, which cannot be properly resolved on the papers filed of record.

#### The applicant's rendition of events

[14] The account of events rendered by the applicant is the following: The deceased and the applicant were best friends since 1990. Their friendship was in the mould of David and Jonathan in the Bible, as it were. Whenever the deceased, who was ordinarily resident in Tsumeb, visited Windhoek, he would stay at the applicant's house and the applicant enjoyed the same privilege when in Tsumeb.

[15] The applicant was diagnosed with lung cancer. This necessitated that he comes to Windhoek occasionally for medical treatment, including chemotherapy. Whenever the deceased was in Windhoek for medical sessions, the applicant would occasionally accompany the deceased to chemotherapy sessions. According to the applicant, the relationship between the deceased and the respondents was simply non-existent.

[16] The deceased succumbed in his fight against lung cancer and departed to the celestial on 18 December 2015. Before his demise, he was being treated by Dr. H. Basson. Dr. H. Basson as seen in annexure 'WS6', had treated the deceased during the last nine months preceding his death. He opined that the medication administered to the

deceased for the last six months of his life had not had the debilitating effect of impairing his cognitive state. According to him, the deceased was of a sound and 'clear mind'.

[17] It would seem, that the backbone of the applicant's case is that, in light of the fact that the deceased's cognitive state had not been affected by the medication he was on, his signature could not have been affected thereby. As such, it was vehemently contended, the signature on the disputed Will is a forgery.

[18] During February 2016, the disputed Will was accepted and registered as the deceased's last Will and testament. The applicant only got word of the deceased's passing on 24 December 2015, whilst in South Africa. During February 2016, he came to know of the existence of the disputed Will. After becoming aware of the letter of executorship awarded to the Respondents, he approached his legal practitioners, as he only knew of the Will dated 10 September 2015, in terms of which he was a co-heir and executor testamentary of the estate. According to a letter authored in June 2016, it appears that the applicant's legal team received a response from the office of the third respondent, informing them that they have no knowledge of the disputed Will.

[19] The applicant challenges the authenticity of the signature on the disputed Will and in that regard, submitted a report by a handwriting, document and fingerprint expert, one Lt. Colonel Gerhard M. Cloete. This report appears, on the face of it, to confirm the applicant's contention that the signature of the deceased on this Will, was forged.

#### The Respondents' rendition of events

[20] The respondents' version is a horse of a different colour. According to them, they and the deceased were best friends since 2008 to the date of his last breath. It was their version that whenever the deceased was in Windhoek, the first respondent would book the deceased in at Arebush Travel Lodge. If need be, he would accompany the deceased to chemotherapy sessions.



[21] The respondents accordingly deny that the Will dated 10 September 2015, is the deceased's last Will and testament as contended by the applicant. According to them, the deceased had executed the disputed Will and that the signature thereon is that of the deceased. The signature, they contend, may seem irregular on the face of it, but that is solely due to the medication administered to the deceased for lung cancer and which affected his neurological system, as well as his cognitive and motor function. For this assertion, the respondents rely on a note by Dr. D. H. S. Badenhorst.

[22] According to the respondents, in addition to Dr. H. Basson, Doctors A. Zietsman, D. H. S. Badenhorst administered medical treatment to the deceased. They contend that the applicant neglected to mention the latter doctors because, their evidence would have ruled out forgery and would have confirmed that the medication and the illness, affected the cognitive and motor performance of the deceased. Further, the Respondents filed affidavits deposed to by the witnesses in the disputed Will.

[23] Furthermore, the respondents depose that the deceased executed a promissory note in favour his fiancé, in terms of which he donated N\$ 50 000 to her. It does not make sense, according to the respondents, that the deceased would donate N\$ 50 000 to someone who would inherit his entire estate as recorded in the Will relied on by the applicant. The promissory note is dated 05 May 2015.

[24] It was accordingly strenuously argued that the applicant ought to have foreseen that there are genuine and irresolvable disputes of fact attendant to the application and should have therefor approached the court by way of action proceedings. Whether, the deceased was in his sound mind and his cognitive faculties unaffected either by the lung cancer or the medication he was on, is a question that can only be answered after leading of evidence and cross-examination of witnesses, they further contend. The question whether the applicant's expert's opinion would still be the same after acquiring the knowledge of the deceased's illness and the effects of the medication he was on,

can only be determined after the expert testifies and is cross-examined, the further respondents contend.

[25] I now turn to deal with the points of law raised *in limine* by the respondents. I will begin with the one relating to whether the applicant was correct on approaching the court in terms of rule 76, as opposed to rule 65.

Should the application have been brought in terms of Rule 65 or 76?

[26] The first argument advanced by the respondents is that the applicant should have approached this court in terms of Rule 76 and not Rule 65. The respondents argued that the third respondent, was acting in terms of the Administration of Estates Act, when she accepted and registered the disputed Will. It was their further contention that the third respondent is an administrative official, who when she accepted and registered the disputed Will, was performing an administrative action, which action now stands to be challenged.

[27] For this reason, the argument ran, the application should thus have been brought in terms of Rule 76. Heavily relying on *The Inspector General of the Namibian Police v Dausab*,<sup>2</sup> it was submitted on their behalf that as a general rule, all applications for review of administrative action must be brought under Rule 76, failing which the application will be a nullity.

[28] On the other hand, it was submitted on behalf of the applicant, that the application proceedings in terms of Rule 65 were employed as the said rule is couched in wide terms and is capable of covering all forms of relief other than those specifically provided for elsewhere. It was further submitted that whenever Wills are sought to be set aside, the court is approached in terms of Rule 65 and not 76. Mr. Brandt, in argument, referred the court to page 2 of his heads of argument in this regard, but this

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<sup>2</sup> *The Inspector General of the Namibian Police v Dausab* [2015] NAHCMD 25 (29 January 2015) para. 17.

page merely discusses the presumption of validity of a Will that is complete and regular on the face of it and has nothing to do with the issue at hand.

[29] It is appropriate to mention at this juncture that stripped to the bones, the applicant is actually challenging the validity of the disputed Will and not necessarily the decision by the Master to accept and register the said Will as the last Will and testament of the deceased. In terms of s 95 of the Act, 'Every appointment by the Master of an executor, administrator, tutor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be.' (Emphasis added).

[30] In *Liberty Life Association of Africa v Kachelhoffer*<sup>3</sup>, the court differentiating between an appeal and a review explained that 'Review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness or otherwise of the decision that is being assailed on appeal (see *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 46H, 48E).'<sup>4</sup>

[31] I am of the considered view that had the applicant challenged a procedural defect or the decision to accept and register the disputed Will, as such, then the respondents' argument would be justified and would hold water. However, in the present matter the applicant is not challenging the decision of the Master, nor the procedure employed by her in accepting the disputed Will. What is being challenged is, whether the signature on the disputed Will is indeed that of the deceased, it being alleged that the signature appended thereto is a fraud, hence the declarator sought from the court.

[32] This is a matter that the Master cannot, even with all the powers at her disposal, resolve and must necessarily be one apt for the court to speak the last word on. This

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<sup>3</sup> *Liberty Life Association of Africa v Kachelhoffer* 2001 (3) SA 1094 (C).

<sup>4</sup> *Liberty Life Association of Africa v Kachelhoffer* 2001 (3) SA 1094 (C) at 1110-1111.

application, properly characterised, regardless of how the notice of motion reads, is thus not one brought in terms of the Administration of Estates Act and is certainly not an application challenging any administrative action by an administrative official. It is one to do with the validity of the Will and over which the Master has no control or wherewithal to resolve, as stated earlier. In this regard, the Respondents' contentions are totally misplaced.

[33] In para 12 of his founding affidavit, the applicant states that 'I verily believe the necessary lodging documents were submitted at such time and the Master of the High Court proceeded to accept annexure 'WS2' as the Last Will and Testament of the deceased'. Nowhere does the applicant challenge the fairness or reasonableness of the procedure employed by the Master, nor the correctness of the Master's decision in that regard.

[34] In the premises, I am of the considered view that the applicant was correct to lodge this application in terms of Rule 65. The challenge raised by the respondents, however convincing, as it may have seemed at first blush, should accordingly fail.

#### Inordinate delay in bringing the application

[35] It was argued on behalf of the respondents that the applicant's one-year delay in bringing this application was unreasonable and should result in the applicant being non-suited therefor. There is no contestation that the disputed Will was lodged with, accepted and registered by the third respondent in February 2016. Thereafter, the Respondents appointed the fourth respondent to act as their agent in the winding up of the estate. The applicant however, only lodged this application in February 2017, a period of one year from the registration and lodgement of the disputed Will.

[36] This was so despite the fact that in June 2016, the applicant had already started harbouring doubts about the validity of the said Will. It was further argued that, the applicant, having been aware of the existence of the Will dated 15 September 2015, should have taken same to the third respondent for registration, as required by s 8(1) of

the Administration of Estates Act. The applicant does not seek condonation for the delay and as such, same should not be given.

[37] It was argued, on behalf of the applicant, that the applicant was desirous of having the signature on the disputed Will investigated for possible forgery, before lodging an application challenging the said Will. Other than that, the rest of the submissions are about how respondents did not meet deadlines for filing their answering affidavit, which quite frankly does not advance the case of the applicant.

[38] I am of the considered view that this argument must be dismissed without further ceremony. I say so for the reason that I have already held, for reasons furnished above, that this was an application in terms of rule 65 and not one for review in terms of rule 76. It is well to consider that the rule regarding the inordinate delay in filing of proceedings being a possible bar to the relief sought on review applies to *bona fide* applications for review and not to ordinary applications for relief other than review of acts of administrative officials.<sup>5</sup>

[39] That being the case, I am of the considered view that this, not being an application for review proper, there is no basis to interrogate and decide the issue of delay as it is not a material consideration in matters such as the present. I will therefore say nothing more of the issue, save to say that the argument by the respondents is misplaced having regard to the true nature and character of the current proceedings, particularly considered in the light of the papers filed of record and the relief sought.

#### Whether action rather than motion proceedings had to be instituted?

[40] It was argued on behalf of the applicant that the existence or otherwise of disputes of fact, should be determined when the merits are dissected. In the answering affidavit, the respondents raised the point that whether the deceased's cognitive and

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<sup>5</sup> *South African Poultry Association and Others v The Minister of Trade and Industry and Others* SA 37/2016 (delivered on 17 January 2018); *Ebson Keya v Chief of the Defence Force and Others* (Case No. A 29/2007).

neurological state was affected by the lung cancer and/or the medication, which was being administered to him at the material time, is a question that can only properly be canvassed and decided in a trial.

[41] It was further argued on behalf of the applicant that the report by his handwriting expert, in the absence of a counter expert report by the Respondents, clearly excludes the possibility of any factual disputes. Does this argument pass muster?

#### *Common cause facts*

[42] It is not in dispute that the deceased had been diagnosed with lung cancer and was receiving chemotherapy, before he succumbed to the infirmity. During the few months preceding his demise, it is common cause that the deceased appears to have executed two Wills. One of these two Wills was lodged, accepted and registered by the third respondent. The validity of the signature on the disputed Will is the crux of this application.

[43] It is further not disputed that the signature on the disputed Will appears to be different from the signature of the deceased on other documents or as seen on previous occasions. The applicant accordingly challenges the signature appended on the said Will on the basis that it is a forgery. Conversely, the third respondent avers that the signature on the Will is indeed the signature of the deceased and the difference in its appearance is nothing else but the result of the malady that affected by the deceased, coupled with the medication that was administered to him as a result.

#### *Disputed Facts*

[44] On a proper reading of the papers, it is disputed, that the lung cancer and/or the medication administered to the deceased as a result of the infirmity, affected his cognitive function and neurological system and that same resulted in the deceased signature appearing different. Whereas Dr. H Basson, indicated that the deceased was

in his 'clear mind' and that the medication the deceased was on, 'never' affected his cognitive state, Dr. BHS Badenhorst on the other hand stated a contrary opinion.

[45] Furthermore, the applicant also challenged the validity of a promissory note made in favour of the deceased's fiancé by the applicant, as same is not included in the deceased's last Will and testament. In this regard, the respondents submitted confirmatory affidavits, in which the witnesses in the disputed Will confirm the allegation that the deceased signed the disputed Will in their presence and that they signed as witnesses, in each other's and the deceased's presence.

### Analysis and discussion

#### *Signature on the disputed Will*

[46] The applicant appears to be convinced beyond a shadow of doubt that the signature on the disputed Will, is forged. To this end, he heavily relies on the opinion of a medical practitioner and an expert report by a handwriting expert, both of whom, in no uncertain terms, confirm the applicant's suspicion. Another red flag for the applicant appears to be the fact that the disputed Will was unknown to the legal practitioners who assisted the deceased in drafting the earlier Will.

[47] In an attempt to tilt the scales, the respondents maintained that the signature on the disputed Will is indeed that of the deceased and is therefor not a forgery as alleged by the applicant. In support of this assertion, the respondents laid much store on the opinion of a doctor who treated the deceased and two individuals, who deposed to affidavits, wherein they confirmed witnessing the disputed Will in the presence of the deceased and of each other.

[48] The million dollar question that must be confronted is this – in the light of the disputes that are apparent, as canvassed above, and regard had to the disparate positions of the protagonists in this matter, was this a proper case in which to approach

the court for the relief sought on motion proceedings? Maybe more pointedly, were the disputes of fact not foreseeable to the applicant at the time he launched the application? If not, did they not become evident once the respondents filed their answering affidavits?

[49] In *Groening v Standard Bank of Swaziland*,<sup>6</sup> the Industrial Court of Appeal of Swaziland dealt with the issue of disputes of fact in motion proceedings and opined that:

[24] It is then, in my considered opinion, that an informed decision can properly be made as to whether in all the circumstances, a dispute of fact is likely to arise. In this regard, the applicant must, using reasonable foresight, act as a reasonable man, as the *diligens paterfamilias*, would. An applicant should not, at that stage, shoot from the hip as it were and institute application proceedings, resting on the forlorn hope and deep intercessory prayer that a dispute, though foreseeable, does not actually arise.

[25] I may add in this connection that such proceedings would also be inappropriate if it can be reasonably foreseen that some of the issues likely to arise would inevitably require to be resolved by oral evidence. It would therefore follow that in the ordinary cases, where a dispute of fact is foreseeable, the Court is likely to dismiss the motion proceedings. In this regard, it would appear that the law applicable to disputes of fact as interpreted in relation to Rule 6 (17) of the High Court Rules would, *mutatis mutandis* apply herein.' (Emphasis added).

[50] I fully embrace the remarks stated in the above case, as they accurately reflect the correct position in this jurisdiction as well. I am of the considered view that the dispute of fact was apparent right from the beginning and that is why the applicant found it proper to seek the assistance and guidance of experts, who filed the report on which the applicant's case is predicated. This was, it must be mentioned, even before the respondents had been served with any papers.

[51] No authority needs to be cited for the proposition that fraud, if alleged, is not easily proved. For that reason, application proceedings are not at all suited for dealing

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<sup>6</sup> *Groening v Standard Bank of Swaziland* (01/11) [2011] SZICA 7 (23 March 2011) at paras. 24-25.



exhaustively with fraud cases. As intimated above, the applicant went to great lengths to obtain an expert opinion in support of his case. Such expert report could only be introduced and properly relied upon by the court consequent upon following certain procedures open only in action proceedings.

[52] In this regard, the court would have to be satisfied in the first instance, that the person identified by the applicant as an expert is indeed one. His qualifications, expertise and experience would have to convince the court as meeting the requirements and this could only be done in a trial, where the respondents can, for their part question the expert on his qualifications, experience and expertise, if need be.

[53] Once that hurdle is crossed, the expert would then have to adduce evidence of his investigations, findings and conclusions on why he opines that the document is forged. The court is, in this connection, entitled to a full explanation of the procedures, tests carried out, where applicable, and how the conclusions and opinion were ultimately reached. Needless to mention, once this route is intimated, the respondents are entitled to find their own expert who could deal with and even challenge the correctness of the applicant's expert's findings and conclusions. More importantly, the respondents could, via cross-examination, seek to weaken, challenge and cast doubt on the correctness of the applicant's expert witness' evidence, its plausibility and acceptability.

[54] These issues, cumulatively considered, impel me to come to what I consider as the inexorable conclusion that this case, viewed in its entirety, cried out with all its sinews and fibres, for a trial, in which the engine of cross-examination would be unleashed at full throttle. As to how the expert report could, in the context of an application be dealt with, in the absence of an agreement between the parties and acceptance of the expert report by the court, be introduced in application proceedings, particularly in view of the discordant evidence at the respondents' disposal, remain a monumental mystery.

[55] To illustrate the points I have tried to make above, in *Holtzhausen v Roodt*<sup>7</sup> the general principles as regards the admissibility of expert evidence were set out as follows:

'(ii) The Courts are accustomed to receiving the evidence of psychologists and psychiatrists, particularly in the criminal courts. However, the expertise of the witness should not be elevated to such heights that sight is lost of the Court's own capabilities and responsibilities in drawing inferences from the evidence.

(iii) The witness must be a qualified expert. It is for the Judge to determine whether the witness has undergone a course of special study or has experience or skill as will render him or her an expert in a particular subject. It is certainly not necessary for the expertise to have been acquired professionally.'

[56] The present matter was set down for hearing only after the full set of papers had been filed and before set down, the applicant could reasonably be expected to have foreseen that there was a genuine dispute of fact, if he had failed to foresee this before the launch of the application. The two doctors on opposing sides hold different opinions. Although the respondents had no expert report, there were two confirmatory affidavits deposed to by individuals who confirmed witnessing the disputed Will being signed by the deceased, which throws the gates of a dispute very wide open indeed.

[57] In light of the glaring disputes of fact, the applicant nonetheless proceeded undeterred by way of motion proceedings. Even if he may not have foreseen the dispute at the beginning, and which I have discounted, in the face of what I have stated previously, the moment he received the answering papers of the respondents, he should have acted accordingly and sought to deal with the matter as an action. Had the applicant acted as a diligent reasonable person in the circumstances, he would, at the latest, after receipt of the answering papers, have realised that motion proceedings were inappropriate to properly ventilate the issues in dispute between the parties. That he did not make the proper call must now return to haunt him.

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<sup>7</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W) at 767 H-I.

[58] By persisting with motion proceedings yet relying on the strength of his expert report, the applicant is essentially imposing the competence of his expert upon the court without further ado and more importantly, the conclusions made by his expert on the court, thereby ultimately deciding his own case, at it were. This approach cannot and will not be sanctioned by this court. Justice dictates that the court must be satisfied that the person postulated as an expert is indeed an expert. The purpose of the expert evidence is to render assistance to the court and not to usurp the functions of the court, leaving the expert to decide the matter for the court.

[59] I should mention, in this regard, that even after becoming aware of the dispute having been pronounced after the filing of the answering affidavits, the applicant did not apply to the court to refer the disputes to oral evidence, which he could have. He persisted, as stated above, in maintaining that this is a matter that can properly be disposed of in application proceedings, a position that has been shown to be incorrect in the circumstances.

[60] In coming to the above conclusion, I have not closed my mind's eye to the requirement of judicial case management, namely, to deal with matters expeditiously, and as cost-effectively as possible and on their true merits. That notwithstanding, I am of the considered view that the particular circumstances of this case do not require that I refer the disputes to oral evidence. The applicant should have been aware of the looming dispute immediately when he chose to rely on fraud as a basis for his claim.

[61] Furthermore, once served with the answering affidavits, he became aware of the existence and true nature and boundaries of the dispute of fact but chose to deprive this court, of the opportunity to hear oral evidence and the respondents an opportunity to challenge the applicant's evidence through cross-examination. The applicant also deprived itself of the same privilege, of controverting the evidence of the respondents under cross-examination. For this reason, the application must be dismissed, as I hereby do, in terms of rule 67 (1) of this court's rules.

### The Master's report

[62] There is one last issue of grave concern. Rule 65(7) provides that 'A person who makes an application to the court in connection with the estate of a person deceased or alleged to be a prodigal or under any legal disability, mental or otherwise must, before the application is provision filed with the registrar – (a) submit the application to the master for his or her consideration and report; and (b) likewise submit any suggestion to the master for a report, if any person is to be proposed to the court for appointment as curator to property, but this subrule does not apply to an application under rule 72, except where that rule otherwise provides.' (Emphasis added).

[63] This provision, which is couched in peremptory terms, requires that a party, which seeks to make application to the court connected to the estate of a deceased person, must, before filing the application with the registrar, submit that application to the Master for consideration and making a report thereon to the court. This means that a party may not choose to depart from this prescribed path for any reason whatsoever.

[64] Despite a diligent search, I have not found any evidence of the application having been submitted to the Master. There is also no report from that Office, pointing to the likelihood that the applicant did not follow this peremptory provision. Non-compliance with this peremptory Rule, before the application is lodged with the Registrar is fatal. In this regard, I cannot over-emphasize the imperative need for the applicants to studiously comply with this requirement. The Office of the Master is pivotal in the administration of deceased persons' estates and must be allowed to impart relevant information to the court; offer whatever assistance or guidance to the court that it can, as envisaged by the Legislature.

[65] That this matter has been adjudicated in the absence of evidence of compliance with the said provision must not be viewed as setting a precedent that compliance with this peremptory requirement does not matter. This is an issue that became apparent after the hearing of argument but which cannot be left unmentioned. In future, the court,

as is expected, will insist on compliance with this provision, at the pain of striking offending applications from the roll.

Conclusion and order

[66] In the premises, I am of the considered view that the following order is condign:

1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded finalised.
3. The order in paragraph 2 above, is without prejudice to the right of the Applicant to institute action proceedings in this matter, if so advised.

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T S MASUKU  
Judge

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