

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2023/00164

In the matter between:

**FRANCISCUS MARTHINUS VAN DER COLFF**

**FIRST APPLICANT**

**LEONORITA CARINA VAN DER COLFF**

**SECOND APPLICANT**

and

**RAYMOND JOHN VAN DER COLFF**

**FIRST RESPONDENT**

**EDWIN CLINTON VAN DER COLFF**

**SECOND RESPONDENT**

**BANK WINDHOEK LIMITED**

**THIRD RESPONDENT**

**Neutral citation:** *Van der Colff v Van der Colff* (HC-MD-CIV-MOT-GEN-2023/00164) [2024] NAHCMD 119 (15 March 2024)

**Coram:** CLAASEN J

**Heard:** 7 December 2023

**Delivered:** 15 March 2024

**Flynote:** Estates – Subsequent last will and testament – Validity thereof – Common law – Presumption that testator/testatrix was of sound mind and competent when he or she executed the will, until the contrary is proven – Testamentary

incapacity – Dementia and Alzheimer's disease – Onus to prove testamentary incapacity – Person who alleges a reason why the will is invalid must prove his case.

**Summary:** The applicants instituted application proceedings against the respondents seeking an order to declare a subsequent will made by their late mother invalid. The applicants contend that the testatrix was mentally incapacitated at the time of executing the said will and suffered from dementia. The first and second respondents opposed the application and contended that the testatrix was in her full mental capacity when she executed the subsequent will.

*Held* – Once it is clear that a document, on the face of it, is a testament, the common law presumption arises that the testator/testatrix was of sound mind and competent when he or she executed the will, until the contrary is proven.

*Held* – The onus to prove testamentary incapacity lies on the person who attacks the will to prove the alleged ground of incapacity.

*Held* – Allegations of medical conditions and or cognitive impairment *per se* do not necessarily conclude in testamentary incapacity.

*Held* – The applicants alleged that the testatrix suffered from dementia but came to court without a formal diagnosis or solid supporting evidence on that. The court concluded that they failed to discharge the onus placed on them.

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### ORDER

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1. The application is dismissed with costs.
  2. The matter is regarded as finalised and removed from the roll.
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### JUDGMENT

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CLAASEN J:

## Introduction

[1] Sadly to say, this a dispute between siblings over the estate of their late mother. The first applicant, the first respondent and the second respondent are the biological sons of the late Frans Zedokus van der Colff and Lelina Karlina Gertruida van der Colff (hereinafter referred to as the deceased parents).The second applicant is the adopted daughter of the deceased parents.

[2] The applicants approached the court on motion proceedings for orders to declare the subsequent will made by their deceased mother invalid and to declare that the (earlier) joint will made by the deceased parents be upheld. Alternatively, the applicants pray that an order be given that the estate is to administered intestate, in the event that it is found that neither of the wills are valid. That is in addition to costs against those who oppose the matter. The third and fourth respondents did not oppose the matter.

## Background

[3] The deceased parents of the parties were married within community of property and had executed a joint will and testament on 15 September 2020. In terms of the joint will, the testators nominated the survivor of them to be the sole heir/heirress of the first dying. Should the spouses not survive each other or if one of them survives without having made a new will the shares in Kaza Fishing (Pty) Ltd (hereinafter referred to as the fishing company) was bequeathed to their three biological sons in equal portions. Furthermore, the residue in the estate has to be reduced to cash and be distributed equally amongst all the children including the second applicant.

[4] Mr Frans Zedokus van der Colff passed away on 27 June 2021 and his wife survived him. On 09 November 2021 his wife made a subsequent will, (hereinafter called the disputed will). She passed away on 20 August 2022 at the age of 81 years.

[5] In terms of the disputed will, the shares in the fishing company were bequeathed to the first respondent only. A specified residential property, located in Walvisbay, was bequeathed to the second respondent whereas the residue in the estate devolves in equal shares amongst all the children.

### Summary of evidence

#### *Applicants' case*

[6] The first applicant made certain assertions in his founding affidavit. I will summarise the averments that have bearing on the testatrix's health and mental capacity. The first applicant noticed that the testatrix had difficulty in remembering things and asked his father about it in 2020. His father replied that his mother has dementia. He stated that she would forget a conversation shortly after having it, she angered easily and became aggressive. She got lost when looking for the deponent's house, something she knew before. It worsened after the death of his late father as she also forgot to take her pills.

[7] He contends that his mother had dementia. In this regard he stated that 'on 26 October 2021 we received the first medical conclusion that my mother is showing signs of Alzheimer's/Dementia.' That was done by a general practitioner who referred his mother for occupational therapy, which evaluation occurred from 28 October 2021 until 04 November 2021. He states that the disputed will is dated 9 November 2021.

[8] The testatrix was also treated for lung cancer in 2015. About three quarters of her lungs were removed and she went into remission until 2019. On or about 7 February 2022 they obtained scans that showed the cancer has spread to other organs, including her brain.

[9] He contends that the first respondent is fully aware of his mother's limited cognitive state. He draws this conclusion from a letter drafted by a legal representative on the instructions of the first respondent. The letter is dated 4 February 2022. The relevant parts in the letter, *inter alia*, refers to a certain bank

account opened at First National Bank in the name of his mother, which could not have been done lawfully as the patient had been in a state of dementia for a number of years. The letter also states that the legal practitioner had instructions to apply to court for the appointment of a *curator bonis* for the testatrix.

[10] The information about the subsequent will only surfaced after the death of his mother. The second applicant informed him that she accompanied the first respondent and their mother to Bank Windhoek, where the second applicant learned that a subsequent will had been made. The second applicant filed a confirmatory affidavit insofar as the content of the founding affidavit relates to her.

[11] The applicants attached certain documents to the founding affidavit, namely the birth certificate of the first applicant, the death certificates of the deceased parents, the joint and disputed wills, an e-mail from Bank Windhoek, a report by an occupational therapist and the letter authored by the legal practitioner which was referred to earlier. The e-mail was written in Afrikaans and will be disregarded by the court.

#### *Respondents' case*

[12] The respondents opposed the case with an answering affidavit by the first respondent, confirmatory affidavits by the second respondent and their legal practitioner. Their position is that the testatrix executed the subsequent will with the necessary capacity of mind. The first respondent explained how it came about that his mother made a subsequent will. He states that she was contacted by Bank Windhoek during October 2021 and advised to consider making a will in her own name as after the death of their father she was the sole heir of the entire estate. He asserts that she requested him to drive her to the Bank where she conveyed her intentions regarding her bequests to the official, one Mr Lourens.

[13] The first respondent asserts there was no indication of being mentally unfit and that she voluntarily communicated her intentions to the said official, without any pressure. On 09 November 2021 he was present when Mr Lourens discussed the

content of the new will and she signed it there at the Bank in the presence of witnesses. He deposed that she was in her full mental capacity at the time.

[14] He denies the averments that their late mother angered easily or became aggressive. He deposed that she used to walk to the first applicant's house, about 1km away from her house, up until February 2022 when she became physically weaker. She also continued with her normal household activities until March 2022 when she was weakened by cancer. He also denies that their late father informed the first applicant that his mother had dementia, and said that their father did not even know what the term 'dementia' meant.

[15] The first respondent admits that he consulted a legal practitioner to write to COSEC<sup>1</sup> and First National Bank about a bank account in his mother's name and the issuance of a power of attorney to do transactions in his mother's name. He contends that the said bank account was abused by the first applicant and his spouse. Apparently, the latter assisted the testatrix to open the said account after the testatrix inherited the shares in the fishing company

[16] The first respondent explained that he acquired a letter from a general practitioner, dated 1 February 2022. It stated that their late mother had dementia as confirmed by an occupational therapy assessment and a CT scan. It further expressed that her short term memory was severely impaired. According to him, the occupational therapy assessment report does not portray the testatrix's short term memory as 'severely impaired,' nor does it specifically diagnose her as having Alzheimer's disease or dementia.

[17] He maintains that he did not give an instruction to the legal practitioner that his mother had '...been in a state of dementia for a number of years already...' as stated in para 4 of the said letter referred to by the applicants. He also asserts that he did not proceed with the application to appoint a *curator bonis* for his mother.

[18] He contends that his late mother told him that she does not trust the first applicant and his spouse. The first respondent deposed that he discovered the 7

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<sup>1</sup> None of the counsel could enlighten the court as to what the acronym stands for.

percent shares in the fishing company at the reading of the joint will after his father's demise. The first respondent investigated the dividends, but was unable to get answers from one Mr Kambanzera (the son in law of the first applicant who managed the company) or the other siblings. His late mother was upset about the situation and opined that the first applicant, his wife and their son in-law enriched themselves through the shares and abused his late father's identity.

### Submissions

[19] Counsel for the applicant argued that a case has been made out in terms of the law and cited relevant case law. Their principal contention, being that the testatrix suffered from dementia and was incapable of appreciating the nature and effect of the new will.

[20] Counsel argued that although it appears to be a dispute of that, it is not a genuine factual dispute. He highlighted the principle from *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery*<sup>2</sup> that facts, although not formally admitted, cannot be denied and must be regarded as admitted. He submitted that the respondents gave a bare denial to the diagnosis by Dr Janssen made on 26 October 2021 that the testatrix showed signs of Alzheimer's. He contends that she had been in a state of dementia for years as was written in the letter authored by a legal practitioner which also expressed an intention to place the mother under curatorship.

[21] Counsel argued that the court can outright reject the denials by the respondents as they are untenable in view of the instructions given to the legal practitioner. Counsel criticized the respondents for their failure to have referred the matter for oral evidence in respect of their denials. He concluded that the applicants' version that the deceased had suffered from dementia at the time of the conclusion of the will is more probable in the circumstances of the case.

[22] Counsel for the respondents argued contrariwise and poked holes into the allegations about the diagnosis of dementia. Counsel contended that the evidence about the dementia is not satisfactory and that there was not an affidavit by the

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<sup>2</sup> *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty Ltd)* 1957 (4) SA 234 (C) at 235E-G.

general practitioner who made the referral to the occupational therapist. Plus, the occupational therapist did not specifically diagnose the patient with dementia or Alzheimer's disease.

[23] Finally, counsel prayed for a dismissal with cost on a punitive scale, arguing that there is no merit in the application and it should not have been brought in the first place.

### The law

[24] Section 4 of the Wills Act no 7 of 1953 governs testamentary capacity. It provides that every person over the age of 16 years or over may make a will unless at the time of making the will such person is mentally incapable of appreciating the nature and effect of his or her act and the burden of proof that he was mentally incapable at the time shall rest on the person alleging the same.

[25] In respect of testamentary capacity, the general common law test was laid down in the English case of *Banks v Goodfellow*,<sup>3</sup> which has been embraced in our jurisdiction in *Vermeulen and Another v Vermeulen and Others*.<sup>4</sup> In terms of the *Banks* case, a person will have the capacity if he or she:

- a) understands the nature of the act and its effects;
- b) understands the extent of the property which they he is disposing;
- c) comprehends and appreciates the claims to which he ought to give effect; and
- d) does not suffer from any disorder that poisons his affections, pervert his sense of right or prevent the exercise of his natural faculties.

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<sup>3</sup> *Banks v Goodfellow* (1870) LR 5 QB 549

<sup>4</sup> *Vermeulen and Another v Vermeulen and Others* (2) (SA 5 of 2012) [2014] NASC 7 (31 March 2014).



[26] In *Lerf v Nieft NO and Others*<sup>5</sup> J Van Niekerk expounded on the criteria in the following terms:

‘In order to show that the deceased in this matter did not have the necessary mental capacity it must be shown that he failed to appreciate the nature and effect generally of the testamentary act; or that he was at the time unaware of the nature and extent of his possessions; or that he did not appreciate and discriminate between the persons, whom he wished to benefit and those whom he wished to exclude from his bounty; or that his will was inofficious in the sense that it benefited persons to the exclusion of others having higher equitable claims to the estate. (See *Cloete v Marais* 1934 EDL 239 at 250.)’

[27] In the same breath it has to be remembered that the test regarding mental capacity is specific to the task or decision to be carried out by the person. That was reiterated in *Essop v Mustapha and Essop NNO and Others*<sup>6</sup> that the decisive moment for establishing the competence of the testator is the time when the will was made and not, for example, when the deceased had issued instructions for drawing up the will.

[28] It goes without saying that the onus rests on the applicants to prove the reason(s) on which they rely. The court also has to be mindful of the common law presumption that arises once it is clear that a document, on the face of it, is a testament. In terms of the presumption it is assumed that testator/testatrix was of sound mind and competent when he or she executed the will, until the contrary is proven.<sup>7</sup>

[29] A cautionary word was expressed in *Katz & Another v Katz and Another*:<sup>8</sup>

‘Once it is clear that a document is the will of the testator, the person who attacks it on any ground whatever “must prove his case and prove it in the clearest manner”. This onus is not an easy one to discharge, although the measure of proof remains a balance of probabilities. The rationale for this rule, as one common law writer put it is “*cum homini*

<sup>5</sup> *Lerf v Nieft NO and Other* 2004 NR 184 (HC).

<sup>6</sup> *Essop v Mustapha and Essop NNO and Others* 1988 (4) SA 213 (D).

<sup>7</sup> *Kunz v Swart and Others* 1924 AD 618.

<sup>8</sup> *Katz & Another v Katz and Another* [2004] 4 ALL SA 545 (C) para 24.

*mortuo nihil magis debeat, quam ut servetur ejus ultima voluntas*: it being admitted as the will of the deceased there is no greater due to the dead than to uphold his last will.” ‘

### Application

[30] The capacity to execute a will is a factual question specific to the situation before the court. It is not an easy task to assess testamentary capacity, as those who are before court are speaking for someone who is not there do so him or herself. Nevertheless, the court can be assisted through expert evidence about the alleged medical and or cognitive impairment, as applicable. Non expert evidence is equally relevant to shed light on the other criteria that emanated from the Banks case. Ultimately the court has to consider the evidence placed before it and make a decision.

[31] The first applicant put forth certain ‘indicators’ about the testatrix’s mental disposition. His general drift was that she had difficulty to remember things, she angered easily, became aggressive and that his late father said the testatrix has dementia. The first respondent refuted these general observations and said he has not experienced any of these characteristics. For him it was of question that their late father would have uttered words to the effect that their mother had dementia as their late father did not know the meaning of dementia in his lifetime. The first respondent gave an explanation for one occasion wherein the testatrix became angry at the second applicant and accused the second applicant of having meddled with her personal belongings.

[32] The difficulty is that the court was presented with diametrically opposed contentions about the testatrix’s behavior that was, presumably odd, in the circumstances. Even if the respondents did not deny these traits, the critical question is what does evidence of these character traits prove to this court? Merely saying that the late mother was forgetful, angered easily and became aggressive is not necessarily inconsistent with testamentary capacity. Furthermore, the applicants did not specify dates or timelines for some of these traits in the founding affidavit. Such a deficiency is problematic because the message to be portrayed relates back to a specific moment in time, i.e. when the will was executed.

[33] But wait say the applicants: The testatrix had dementia and they point to a letter dated 1 February 2022 by a general practitioner in relation to the testatrix. The first sentence therein states that:

‘This letter is to confirm that the above patient has dementia as confirmed by a formal occupational therapy assessment (Cognitive function and memory) and supported by a CT brain 1/12/2021.’

[34] The letter denotes that the general practitioner refers to an assessment by an occupational therapist. The latter’s report stated, *inter alia*, that the cognitive endurance and flexibility as well as that the executive functioning abilities (attention, memory abilities and constructional abilities) of the patient were not optimal. It also concludes with a recommendation that the patient consult a psychiatrist.

[35] Dementia and Alzheimer’s disease featured prominently in the South African case of *Gildenhuys v Gildenhuys*<sup>9</sup> wherein the testatrix was 80 years at the time of death and had executed 3 wills. In that case the court had the benefit of expert evidence (a registered psychiatrist) who had regard to detailed medical records by a neurologist and psychiatrist, amongst others, who examined the testatrix in her lifetime. As regards to what dementia entails the court explained that:<sup>10</sup>

‘Prof Zabow goes on to state that the term dementia refers to a global determination of the higher mental functioning in clear consciousness that is progressive and irreversible. Dementia is characterised by multiple cognitive deficits that include impairment of memory.

[17] According to Prof Zabow, in advanced stages of dementia, memory impairment becomes clinically detectable and so severe that the person forgets personal details such as previous occupational activities, family members and sometimes even their own name. Prof Zabow goes further and state that individuals with dementia may exhibit *aproxia*, that is, an impaired ability to carry out motor activities such as dressing, thus necessitating assistance in one’s daily activities. The individuals concerned may also exhibit *agnosia*, which is failure to recognise or identify familiar objects or persons.

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<sup>9</sup> *Gildenhuys v Gildenhuys* [2010] ZAWCHC 21.

<sup>10</sup> *Ibid.*

[18] Prof Zabow goes further to state that the cause of dementia of Alzheimer's type tends to be slowly progressive with deterioration evident on successive assessments. Alzheimer's disease is characterised by an insidious (gradual) onset and progressive decline in cognition. Patients with Alzheimer's-type dementia usually deteriorate to an end stage when they need full nursing care. Complications of physical illness are significant in the elderly group. Prof Zabow states that the mean life expectancy of an Alzheimer's sufferer is given as about seven years from diagnosis.'

[36] In my understanding, the applicants regard dementia as the strongest arrow in their bow. Although it is true that some conditions may invalidate a will, the mere presence of mental illness does not automatically render elderly people incompetent to execute a valid will. That much is clear from case law. The English appeal case of *Symon & Byford*<sup>11</sup> involves a case wherein the testatrix had several previous wills and the disputed one made when she was 88 years of age. The court ruled that she had testamentary capacity when she executed the last will, despite her suffering from mild to moderate dementia and old age, at the time of making the will.

[37] Similarly, the South African Appeal court case of *Tregea and Another v Godart and Another*<sup>12</sup> Tindall JA (in the minority judgment) stated that in cases where a testator has impaired intelligence caused by physical infirmity, although the testator's mental powers may be reduced below the ordinary standard, the power to make a will remains, if the testator had sufficient intelligence to understand and appreciate the testamentary act in its different bearings.

[38] In returning to the evidence presented in the case before court, the applicants' factual averments about the dementia left the court wanting. I say that because the applicants came to court without a formal diagnosis or solid supporting evidence on that, nor an affidavit by the professionals on whose opinion they rely to vindicate their claims of incapacity. The purported report on which the applicants rely comprise of a 3-sentence letter. In having regard to the content it leaves no doubt that the general practitioner turns to an assessment by the occupational therapist for a

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<sup>11</sup> *Symon & Byford* [2013] EWHC 1490 (Ch).

<sup>12</sup> *Tregea and Another v Godart and Another* 1939 AD 16.

diagnosis. When the court had regard to the report by the occupational therapist, there was no formal diagnosis of dementia.

[39] The first applicant made mention of a first medical conclusion that the testatrix was showing signs of Alzheimer's / Dementia on 26 October 2021, and his counsel echoed that in their heads of argument. However, no affidavit was filed by the person who made that nor was any document tendered for that. Nor did the applicants provide substantiating documents such as a chart or a scan in respect of his allegation that their late mothers' cancer has spread to her brain.

[40] What the respondents have left in their arsenal is the fact that the first respondent approached a legal practitioner for a curatorship application. While it is indicative thereof that on 4 February 2022 the first respondent has contemplated curatorship proceedings, that alone is not sufficient to invalidate the will made on 9 November 2021.

[41] It is apparent from case law that allegations of medical conditions and or cognitive impairment *per se* do not necessarily conclude in testamentary incapacity. A person can retain legal capacity in spite of old age, or medical and or neurological conditions. The enquiry and onus on a person who allege incapacity is very fact specific. Having considered the matter the applicants tendered scant factual averments about what can be construed as a serious and debilitating neurological disorder. The court was also left in the dark about basic information such as whether the testatrix was living alone or with a carer during the relevant time. What compounded the dilemma for the applicants is that they elected to come to court on motion proceedings. Thus the court did not have the benefit of oral evidence, which may have solidified or clarified the critical allegations regarding dementia.

[42] It is trite law that an applicant must make out a case for the relief so sought and must do so clearly. If the applicant sets out scant material in the founding affidavit, the applicant runs the risk of the application being dismissed. In respect of this aspect in *Nelumbo and Others v Hikumwah and Others*,<sup>13</sup> the Supreme Court stated that since affidavits constitute both the pleadings and the evidence in motion

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<sup>13</sup> *Nelumbo and Others v Hikumwah and Others* 2017 (2) NR 433 (SC) at para 41.

proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit.

[43] At the outset the basic question was whether the applicants have proven, on a balance of probabilities, that the deceased, at the material time, did not possess a sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all its different bearings. It was for the applicants to provide sufficient evidence to displace the common law presumption in respect of the subsequent will and make out a clear case of testamentary incapacity. The court was not persuaded that they did that.

[44] As far as the applicants' third prayer was concerned the issue of invalidity of the joint will of the deceased parents, was not canvassed in the papers. As such the court is unable to deal with that.

[45] The respondents sought cost on a higher scale even though the ordinary rule is that the successful party is awarded costs as between party and party. In general punitive costs orders are not frequently made. Exceptional circumstances must exist before they are warranted and the court does not regard this case as one of those exceptional instances wherein a punitive cost order is warranted.

[46] Accordingly the following order is made:

1. The application is dismissed with costs.
2. The matter is regarded as finalised and removed from the roll.

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C CLAASEN  
Judge

APPEARANCES:

FIRST AND SECOND APPLICANTS:  
Jones

J P Ravenscroft

Instructed by Engling Stritter &  
Partners, Windhoek

FIRST AND SECOND RESPONDENTS:

J Von Wielligh  
Of Janita Von Wielligh  
Law Chambers, Windhoek