IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

09:54 TO 09:56

Case No: 11130/07

In the matter between:

MICHAEL GILDENHUYS	Plaintiff
and	
FRANCOIS ANTONIE BENJAMIN GILDENHUYS	First Defendant
MARIA ENGELS (gebore GILDENHUYS)	Second Defendant
CHRISTOFFEL DE WITT GILDENHUYS	Third Defendant
GERT APRIL	Fourth Defendant
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA (CAPE OF GOODHOPE PROVINCIAL DIVISION)	Fifth Defendant
JOHAN SMITH SCHEEPERS N.O.	Sixth Defendant

JUDGMENT DELIVERED ON 19 FEBRUARY 2010

YEKISO, J

INTRODUCTION

[1] The late Sara Gildenhuys ("the deceased") died on 30 August 2004 at the age of 80 years. At the time of her death she had executed three sets of wills. The first such will was executed at Heidelberg, Cape on 19 January 1996. In terms of this will, the deceased bequeathed portions of her estate to several beneficiaries, including the plaintiff, first and the second defendants. To Francois Gildenhuys, the first defendant in these proceedings, the deceased bequeathed an amount of R5,000-00 in cash; to Maria Engels, the second defendant, the deceased bequeathed a diamond ring, imbuia kist and an amount of R2,000-00 in cash; to Michael Gildenhuys, the plaintiff, the deceased bequeathed her immovable properties, farm implements, farming tools and other utensils, all flock of sheep and twenty head of cattle of his choice. The bequeathal, in as far as the plaintiff was concerned, was subject thereto that plaintiff pays an amount of R100,000-00 into the estate.

[2] The second will was executed in the Strand on 14 February 2000. In terms of this will, Francois Antonie Benjamin Gildenhuys, Maria Engels

(born Gildenhuys) and Christoffel De Witt Gildenhuys, the first, second and third defendants, respectively, were nominated as beneficiaries and heirs to the deceased's estate. Michael Gildenhuys, the plaintiff, was excluded from inheritance in the will executed on 14 February 2000.

[3] The third will was purportedly executed at Riversdale, Cape on 9 October 2000. In terms of this will, the deceased bequeathed portions of her estate to a number of beneficiaries, the residue of her estate, including her immovable property, having been bequeathed to one Willem Jacobus Wessels. The will of 9 October 2000 was declared invalid and set aside by order of this Court (per Muller AJ) when the testatrix was declared to have lacked the capacity to execute a valid will as at 9 October 2000. This action concerns the validity of the will executed in the Strand on 14 February 2000. The validity of the 14 February 2000 will is attacked on the basis that the deceased lacked the necessary capacity to execute a valid will at the time the said will was executed or, alternatively, that the deceased was unduly influenced into executing the aforementioned will.

[4] **THE PARTIES**

[4.1.] The plaintiff is Michael Gildenhuys, an adult male farmer of the farm Vaalfontein, within the magisterial district of Mossel Bay.

[4.2.] The first defendant is Francois Antonie Benjamin Gildenhuys, an adult male person of 9 Japonika Street, Kuilsriver.

[4.3.] The second defendant is Maria Engels (born Gildenhuys), an adult female person of 72 Muller Street, Kraaifontein.

[4.4.] The third defendant is Christoffel De Witt Gildenhuys, an adult male person of 10 Stöckenstrohm Street, George.

[4.5.] The fourth defendant is Gert April, an adult male person of c/o Mr Trompie Gildenhuys, of the farm Duinerug, Heidelberg, Cape. The fourth defendant has been joined in the action by virtue of his interest in the impugned will, the deceased purportedly having bequeathed to him an amount of R1,000-00 in cash.

[4.6.] The fifth and the sixth defendants are the Master of the High Court (Cape of Goodhope Provincial Division) who has been cited in his or her official capacity and Johan Smith Scheepers, who has been cited in his capacity as the executor in the impugned will.

THE LATE SARA GILDENHUYS

[5] The late Sara Gildenhuys was born on 23 October 1923. She had never been married nor borne any children of her own. She spent most of her life on the family farm, Duinerug, in the magisterial district of Heidelberg, Cape. She was a cousin of the plaintiff's father, one Mike Gildenhuys, who pre-deceased her. She was a lifelong friend of the plaintiff's mother, Monica, who at the time of the hearing of this trial, was 88 years of age. Plaintiff states in his evidence that he knew the deceased since childhood. According to him there developed a close relationship between him and the deceased when, as a young man, he farmed on his father's farm, Dassieklip, which is in close proximity to Duinerug.

[6] After his father's death, plaintiff moved to another farm, Vaalfontein, in the magisterial district of Mossel Bay. According to plaintiff, despite such relocation, he maintained a close bond with the deceased. The two of

them shared many interests especially those relating to farming activities. The relationship between the plaintiff and the deceased was such that plaintiff's wife, Karen Gildenhuys, regarded her as a second mother-in-law or a third mother.

[7] The first, second and third defendants are nephews and a niece, respectively, of the deceased. Their late father, Danie Gildenhuys, who died sometime during 1989, was the deceased only sibling. Frank Gildenhuys was their father. Danie Gildenhuys and the deceased each inherited from their father, the said Frank Gildenhuys, divided portions of the farm Duinerug. Whilst Danie Gildenhuys sold his portion of the farm, the deceased continued farming on the portion bequeathed to her. Although first and second defendants grew up and spent their schoolgoing years on the portion of their father's farm and in Heidelberg, they eventually moved to and established themselves in the Cape Peninsula.

[8] As has already been pointed out, the 9 October 2000 will was set aside by the Cape High Court on 20 November 2006. In terms of this will the deceased purportedly bequeathed the residue of her estate, which included the farm Duinerug, to one Willie Jacobus Wessels. The medical evidence

adduced at that trial showed that, as at 9 October 2000, the deceased was suffering from senile dementia, more accurately described as chronic brain syndrome with Alzheimer's disease; that she suffered from disorientation in respect of place and time; and that she lacked insight and judgment to the extent that she could not take rational decisions. A Dr Becker, a general practitioner who examined the deceased on 28 September 2000, diagnosed her as suffering from senile dementia which, as has already been pointed out, includes chronic brain syndrome accompanied by Alzheimer's disease.

[9] There are two diametrically opposed contentions which emerge from the parties' evidence. Whereas the evidence of the plaintiff, together with his witnesses, tends to show that, as at February 2000, the typical signs and symptoms of an Alzheimer's sufferer had been manifestly present in the deceased over a protracted period of time, the defendants, on the other hand, contend that it was not in fact so. According to the defendants the signs and symptoms that led to the 9 October 2000 will being declared invalid started manifesting from about March 2000, that is shortly after the deceased executed the 14 February 2000 will. Professor Zabow, a specialist psychiatrist, is the only witness who placed medical evidence at

trial. In my view it is appropriate, for the purposes of this judgment, to summarise, analyse and evaluate the evidence of Professor Zabow before the evaluation of the evidence of the lay witnesses. But first, the applicable legal principles.

THE APPLICABLE LEGAL PRINCIPLES

[10] Section 4 of the Wills Act, 7 of 1954, which applies to all wills executed on or after 1 January 1954, provides that every person of 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 such person was mentally incapable at that time rests on the person alleging this. It has been held as far back as the 19th century (see *Executors of Cerfonteyn v O'Haire* 1873 Buchanan Law reports 47 at 74) that where a testator in consequence of his or her state of body and mind, from illness or other causes, does not and cannot exercise that thought, reflection and judgment necessary to form and express his or her real and true desire, the testator's will is invalid.

[11] It has been held in authorities such as *Lewin v Lewin* 1949 (4) SA 241 (T) at 280; *Smith v Strydom* 1953 (2) SA 799 (T) at 802; *Kirsten v Bailey*

1976 (4) SA 108 (C) that in order to show that the testator did not have the necessary mental capacity it must be shown that the testator did not understand the nature of the testamentary act and its consequence or that the testator could not remember what he or she possessed and, therefore, did not know what he or she was disposing of, or that the testator could not differentiate between the claims of persons who would ordinarily have a claim upon his or her bounty.

[12] In *Lewin v Lewin,* supra, at 264-5 the court held that disease may produce changes in the emotions which may affect a testator's judgment but, in such a case, the question would not simply be whether the testator understood the will but whether there was such an alteration of the testator's personality, emotions and affections as to have diminished the testator's power of judgment and discrimination so that the testator could no longer be said to be possessed of a sound disposing mind.

Section 4 of the Wills Act specifically provides that the burden of proving that the testator was mentally incapable of appreciating the nature and effect of his or her act at the time of making the will is on the person alleging same. It therefore follows that plaintiff in these proceedings bears

the onus to prove, on the balance of probabilities, that the deceased, at the time of making the 14 February 2000 will, lacked the necessary mental capacity to execute a valid will.

THE EVIDENCE OF PROFESSOR ZABOW

[13] I have already pointed out that Prof Zabow is the only medical practitioner who placed medical evidence before this court. Prof Zabow is a registered psychiatrist. He holds two post-graduate qualifications and an honorary fellowship from the Royal College of Psychiatrists in the United Kingdom. He has been practising psychiatry since 1973. He has since retired from his university post. He currently is a part-time consultant to the Department of Health of the Provincial Administration of the Western Cape. He currently is in private practice. He is still actively involved in the Society of Psychiatrists of South Africa, the Colleges of Medicine of South Africa, World Psychiatric Association and, from 1996 – 1998, had been a chairman of the International Centre for Health, Law & Ethics and many other positions of visiting professorship and lectureship.

[14] Prof Zabow prepared a report in the form of an opinion dated 19 July 2009. At the time he compiled his report he had a benefit of detailed

medical reports covering the period 29 September 2000 when a Dr Becker diagnosed the deceased as suffering from senile dementia, to 30 July 2004 when, shortly before her death, she was evaluated by a Dr Johan Fourie, a psychiatrist who concluded that the deceased suffered from delirium superimposed on her Alzheimer's dementia. Amongst other reports that Prof Zabow had at his disposal is a report compiled by a Dr André Leonard, a neurologist, dated 18 January 2002. At page 2 of his report, dated as it is 18 January 2002, Dr Leonard makes the following observation:

> "Die 79-jarige mev Gildenhuys (Tannie Pollie) het 'n 5-jaar lange geskiedenis van stadig, progressiewe agteruitgang in kognitiewe en uitvoerende vermoëns. Met ondersoek is die aspekte van kognisie uitgesproke abnormal en daar is geen twyfel dat mev 'n gevorderde demensie onder lede het nie. Klinies is dit mees waarskynlik 'n primêre neuro-degeneratiewe demensie, bv, Alzheimer siekte, maar ander oorsake moet steeds uitgeskakel word."

Of significance, in his report, Dr Leonard points out that, as at 18 January 2002, the deceased had a 5-year long history of slow, progressive rear exit in cognitive executive capabilities.

[15] In paragraph [9] of this judgment I pointed out that there are two diametrically opposed contentions by the parties, with plaintiff and his

witnesses contending that symptoms of an Alzheimer's sufferer had manifested in the deceased over a protracted period, whilst the defendants, on the other hand, contend that such symptoms started manifesting during about March/April 2000. Whilst the plaintiff and his witnesses contend that the deceased's mental state was as a result of the onset of the normal Alzheimer's disease, the defendants, on the other hand, contend that the disease resulted in a rapid onset of mental or cognitive decline, thus relying on the sudden onset theory for their contention that the disease started manifesting during March/April 2000.

[16] In the first instance, Prof Zabow describes Alzheimer's diseases as follows as diagnosed by, amongst others, Drs A Lekas and Leonard:

> "Alzheimer's disease is a progressive organic brain change with variable insidious (gradual) onset rather than acute changes, which would present with sudden onset and rapid progression and a short course. An example would be in a vascular type dementia with cerebral vascular disease "strokes". In this situation there is concomitant arterial disease (arthrosclerosis). The description and longitudinal pattern in this patient is in keeping with dementia group of conditions and compatible with the diagnosis of Alzheimer's type dementia."

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.

[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.

[19] Prof Zabow concludes that had the deceased been involved in any business activities at that time, the deficits of thought processes, memory and executive functioning, difficulties would have been evident to her contacts. She would not have been able to carry through the actions required for the complex sequence of actions required to exercise testamentary capacity. She would not at that stage have had the ability to interpret the nature of the act concerned, exercise disposing memory or to appreciate her actions. By the natural history of the dementing process she was probably not able to manage her own affairs at the time concerned due to clinical dementia. Prof Zabow concludes by stating that he is of the opinion that it is highly likely that the deceased did not have the mental capacity to execute a will or other contractual undertaking in February 2000.

[20] The evidence of Prof Zabow is criticised on the basis that in his report he referred to several medical reports compiled by other medical practitioners, as for an example, Drs Bekker, Lekas and Leonard, none of whom was called to give evidence, the submission being that the observations and findings based on the medical reports by the aforementioned practitioners amount to inadmissible and untested hearsay evidence which cannot be used as facts to support Prof Zabow's opinion.

[21] At the outset I must state that there is no merit in this criticism. I am saying so because of a pre-trial conference the parties held on 29 July 2009. Arising from the conference so held it was agreed between the parties that each party would compile a bundle of documents that might be used at trial; that each such document would be what it purports to be; that the truthfulness of the contents of the documents in the bundle would not necessarily be admitted but, despite that, each one of the parties could, by reasonable notice to the other party, give notice to that other party that a particular document would be placed in dispute whereupon the party receiving such notice would have to prove such document placed in dispute.

[22] In the instance of the opinion of Prof Zabow no notice was given to the plaintiff's legal representations that the contents of the collateral medical reports would be placed in dispute; no objection was raised when Prof Zabow referred to the collateral medical reports in the course of tendering his evidence. It does not assist the defendant to contend that it was not necessary to object to Prof Zabow's evidence but that, nonetheless, the plaintiff was required to prove such collateral material despite no objection having been raised. The defendant cannot now, at an argument stage, start to complain that the collateral medical reports referred to by Prof Zabow constitutes hearsay evidence when no notice was given to the plaintiff that the truthfulness of the contents of such documents would be placed in issue and when no objection was raised to a reference to the collateral medical reports at the time evidence was tendered.

[23] Now that I have summarised the evidence of Prof Zabow, particularly, his view and opinion as regards the deceased's testamentary capacity as at February 2000, it is now appropriate to summarise and, ultimately, to evaluate the evidence of the lay witnesses as regards the deceased's behavioural pattern during the period leading up to the making of the 14 February 2000 will and thereafter. Once again, and I am repeating this for

the third time, it will be recalled that the parties advance diametrically opposed contentions about the deceased's pattern of behaviour, with the plaintiffs contending that the onset of the Alzheimer's disease on the deceased was gradual and progressive leading to a stage where the deceased needed nursing care, whilst the defendants favour a sudden onset theory contending that the disease started manifesting during March/April 2000.

THE EVIDENCE OF MRS ELMIEN KRUGER

[24] Mrs Wilhelmien Kruger was a friend of the deceased's family. She knew both the deceased's parents as well as the deceased. The deceased was a cousin of hers. Their families constantly visited each other over the holidays. She continued visiting the deceased at the farm, Duinerug, even after the deceased's parents had died. The deceased also visited her at her residence in Cape Town on several occasions. The last time she visited the deceased at the farm, according to her recollection, could either have been during December 1997 or January 1998. She was not aware that she is a beneficiary to the deceased's 19 January 1996 will and only became aware of this fact during a consultation in the morning before she gave evidence.

[25] On the occasion of her last visit to the deceased she noticed that the deceased was disorientated and confused. When they had to have dinner in the evening on the occasion of her last visit the deceased could not remember where she kept her cutlery and bedding in the house in which she spent all her life. The following day she could not find her way to the residence of the witness' cousin, one Sonia Rademan, in Witsand despite the fact that, according to the evidence of Gert April, she visited her regularly. Mrs Kruger goes on to state in her evidence that the deceased could not keep a proper conversation.

[26] Shortly after the deceased had died, Mrs Kruger addressed a letter to the plaintiff in which she raised concern about the fact that an outsider in the family, Willie Wessels, was nominated as the heir to the deceased's farm. In this letter she devoted much attention to a description of the deceased's mental deterioration commencing about September 1996. Mrs Kruger's evidence is criticized on the basis that she probably mentioned the incidents concerning the deceased's mental lapses in her correspondence to plaintiff at the specific request of plaintiff which statement the witness, as well as the plaintiff, denied in their evidence. I am finding it extremely difficult to accept the basis of this criticism. A matter of the bequeathal of

the farm, Duinerug, was a matter of concern, not only to the plaintiff and this witness, but also to the entire members of the family who could not accept that the deceased could deliberately have bequeathed a farm, with a long family history, to a complete stranger. Once Mrs Kruger concluded her evidence, Jannie Gildenhuys was called as the next witness to testify in plaintiff's case.

THE EVIDENCE OF JANNIE GILDENHUYS

[27] Jannie Gildenhuys testified that his father, who is since deceased, was a cousin of the deceased. The witness' father and the deceased were close friends from their respective young ages and used to visit one another frequently. He (Jannie Gildenhuys) and his mother used to visit the deceased at Duinerug. They maintained regular contact with the deceased even after their respective parents had died.

[28] Jannie Gildenhuys, together with his mother, Monica, visited the deceased during the September 1999 school holidays. During this visit, they found the deceased in extremely appalling circumstances. The house was dirty; mouldy food could be seen; the deceased's clothes were dirty; she was confused and could not engage in proper conversation; she was

confused and completely disorientated to an extent that she mistook the witness (Jannie Gildenhuys) for her late brother, Danie Gildenhuys who had passed away many years before then. His mother, Monica, a close and dear friend of the deceased, was shocked by what they found. His mother had had to do the deceased's washing. He and his mother thereafter went to Heidelberg in order to see a minister in an effort to have someone take care of the deceased. His mother also contacted plaintiff and informed him about the condition they found the deceased in. The plaintiff confirmed later when he tendered evidence in the proceedings of having been informed of the circumstances and condition in which he (Jannie Gildenhuys) and Monica found the deceased.

[29] The witness saw the deceased again during October 1999 when she visited Cape Town to spend time with his mother. On this occasion the deceased was still confused and said the same thing over and over again. The witness saw the deceased once again in Cape Town during February 2000, at about the same time she made the disputed will. The deceased was still similarly confused and, at times, tearful. The deceased was in a severely disturbed state of mind because she complained that she had signed something at the offices of an attorney in the Strand. It was suggested to this witness in cross-examination that he is mistaken about

the September 1999 visit. It was suggested to the witness that the visit could probably have been sometime late in the year 2000. The witness was adamant that the visit took place in September 1999. The witness refuted a statement put to him under cross-examination that the deceased refused to accompany the witness and his mother to his mother's home. The witness stated that it was in fact the second defendant who wanted to prevent the deceased from accompanying them.

PLAINTIFF AND KARIN GILDENHUYS

[30] The evidence of plaintiff and that of his wife, Karin Gildenhuys, focuses more on the time the deceased spent with them at their holiday home in Vleesbaai during the festive season stretching from December 1998 to January 1999. Their evidence is to the effect that during that time the deceased was clearly disorientated and incoherent in her speech. There were occasions when the deceased could not find the bathroom and, this, in surroundings she was supposed to be familiar with. The deceased at times did not know where her room was. At times she would be seen wondering about, clearly not knowing where she was going. On one occasion the deceased relieved herself outside the toilet bowl.

[31] The plaintiff does confirm having been contacted by Jannie Gildenhuys's mother, Monica, during September 1999 when she informed him about the condition in which they found the deceased and a suggestion by her that arrangements be made for the deceased's personal care. Following this incident, the plaintiff set up a meeting towards the end of January 2000 between himself, the minister, Willie Wessels, the plaintiff's mother and the representatives of the old age home. The purpose of the meeting was to make arrangements to place the deceased in an old age home. It would appear that the plaintiff did have a discussion with the second defendant during the course of this meeting as reflected in plaintiff's itemised cellphone bill. The itemised bill does indicate three calls having been made to the second defendant on 31 January 2000 at 10h23 when plaintiff had a discussion with her of some 3.16 minutes duration; a discussion of a duration of 1.58 minutes at 10h25 and a further discussion of the same duration at 10h30. The second defendant did confirm in her evidence that the plaintiff did discuss with her, telephonically, the issue of placement of the deceased in an old age home on 31 January 2000 and on 1 February 2000. The plaintiff states in his evidence that at the time the meeting was held at the residence of the minister in Heidelberg the deceased no longer could wash herself; that she no longer could cook for

herself and could not make rational decisions. The plaintiff says this because he maintained regular contact with the deceased. It will be recalled that Jannie Gildenhuys, whose evidence corroborates that of plaintiff in material aspects, did mention in his evidence that plaintiff was the deceased's blue-eyed boy and plaintiff, on the other hand, stated it in so many words in his evidence that he was in constant contact with and maintained regular contact the deceased.

THE EVIDENCE OF MARIA ENGELS

[32] The first person called to testify in the defendants' case was Maria Engels (born Gildenhuys). Maria Engels is the second defendant in these proceedings. The first, second and third defendants are the offspring of Danie Gildenhuys, the brother of the deceased who passed away some years before her death. She, together with the second defendant, are also beneficiaries to the 19 January 1996 will, the deceased having bequeathed to the second defendant an amount of R2,000-00 in cash, a diamond ring as well as an imbuia kist. To the first defendant the deceased bequeathed an amount of R5,000-00 in cash.

[33] The second defendant confirmed in her evidence that the deceased was her aunt. She stated in her evidence that she is married and that there is one child born of her marriage, Daniel Paul Engels, born on 26 October 1993; that the deceased's birthday used to be on 23 October, having been born on 23 October 1923; she states that the deceased used to visit her frequently; that the deceased, although very old, was in good health; that the deceased showed no signs of loss of memory as suggested by the plaintiff and his witnesses; that the deceased visited her during October 1999 on the occasion of her son's 6th birthday; that even on the occasion of the October 1999 visit the deceased was in good health and in sound mind.

[34] The next occasion the deceased visited her was during February 2000. The deceased travelled to Cape Town with one Rienie Oosthuizen. The deceased spent about a week with her. A day or two after the deceased had arrived she (the deceased) mentioned to the second defendant that she wanted to make a will and ascertained from her if she knew of an attorney she could contact to draft a will for her. She thereupon arranged an appointment with Hanelie Lombard Attorneys, a firm of attorneys in the Strand. On the day of the appointment she took the deceased through to Lombard Attorneys. They were seen by a Mr

Scheepers who she, as well as the deceased, had never seen before. Mr Scheepers was a complete stranger to her as also the deceased. She mentioned to Mr Scheepers that the deceased wanted to make a will. Mr Scheepers ushered the deceased into his office. The second defendant went to while away time at Pick 'n Pay at a business complex across the road until Mr Scheepers telephoned her after he had consulted with the deceased. On their way to the attorneys' office the deceased mentioned to her that she wanted to bequeath her entire estate to her brother's children. That is all that the deceased only mentioned to her and she did not take the matter further. She did not ask questions and she otherwise was not interested in what was to be contained in the will.

[35] When asked, under cross-examination, whether she spoke to Mr Scheepers in between the time Mr Scheepers had the first consultation with the deceased and the day the deceased was asked to call and sign the will she replied in the negative. When asked under cross-examination, whether she was aware of what the contents of the 14 February 2000 will were and, in particular, the persons the deceased had nominated as heirs in the said will, her response was that on their way to the attorneys' office the deceased only mentioned to her that she (the deceased) wanted to

bequeath her property to her brother's children and she accepted that that is what the deceased did in the will in question.

[36] The second defendant maintained, in her evidence under cross-examination, that she did not speak to attorney Scheepers about the contents of the will in question in between the first draft thereof and when the deceased signed the final draft. It was then suggested to her, under cross-examination, that at another trial, before Muller AJ, she testified that when Mr Scheepers ushered the deceased into his office in order to consult with her, she, in turn, indicated to Mr Scheepers that she would go to Pick 'n Pay at a business complex across the road to while away time and suggested to Mr Scheepers to phone her as soon as he would be through with his consultation; that when back at the office after Mr Scheepers called her, Mr Scheepers asked her to look at the draft will to ensure if her name, as well as the name of the third defendant, were correctly spelt. She then testified, at that trial, that she pointed out to Mr Scheepers that her first name was incorrectly indicated and that her correct first name is Maria, and not *Ia*, as she is commonly called and as indicated in the draft will; that the names of the first defendant were correctly spelt and in a proper sequence, but that the proper sequence of the names of the third defendant is

Christoffel De Witt Gildenhuys and not merely De Witt Gildenhuys as had appeared in the draft will. When this piece of her evidence, at that trial, was pointed out to her she completely change her stance and conceded that she did in fact speak to Mr Scheepers about the correct spelling and the sequence of their names in the draft will. Once the question of the spelling and the proper sequence of their names were rectified, they were told to go home and were told they would be called later when the final draft would be ready for signature.

[37] According to her evidence about two or three days after the initial consultation they were called from the attorneys' office to be told that the final draft was ready for signature. They subsequently called at the attorneys' office when the deceased was caused to sign the final draft of which they were given a copy. They subsequently left the attorneys' office and proceeded to the residence of the first defendant. According to her, she did not know what the contents of the will were save for the statement that the deceased had made on the occasion of their first visit to the attorneys' office that she wished to bequeath her property to her brother's children. It later turned out in her evidence under cross-examination in this trial, that all along she was aware that she, together with the first and the

third defendant, were nominated as beneficiaries in the 14 February 2000 will. This knowledge arises from the fact that she, at the very least, had sight of the stipulation in the initial draft will at the time Mr Scheepers had asked her to confirm the spelling and the correct sequence of their names.

[38] When they were at the residence of the first defendant, according to her evidence, the deceased handed the envelope containing a copy of the will to the first defendant, but that the first defendant refused to take it indicating that the deceased was still alive and, as such, he (the first defendant) did not want to have anything to do with the deceased's personal belongings. The second defendant did not, in her evidence in chief, indicate that she was aware of the stipulation in the 14 February 2000 will except to have merely accepted that the will was drafted to give effect to the wish of the deceased. The evidence of the first defendant, on the other hand, is to the effect that when the deceased handed him the envelope, the deceased made it clear to him that what was contained in the envelope would effectively cause her property to be theirs (the defendants). When the first defendant refused to take the will, the deceased then gave the envelope to the second defendant to keep. According to the evidence of the second defendant she (second defendant) took the envelope, kept it

sealed in her chest of drawers at home and kept it sealed until after the death of the deceased.

[39] What the second defendant failed to disclose in her evidence in chief was the fact that she was contacted by plaintiff at the time a meeting was held in Heidelberg with the minister on 31 January 2000 to discuss the state of the deceased's deterioration in health and her placement in an old age home. Under cross-examination she only admitted speaking to the plaintiff about the need to place the deceased in an old age home and maintained that she had no idea what the other numerous calls the plaintiff made to her, on the same day, 31 January 2000 and on 1 February 2000, were all about.

[40] I do not consider it appropriate and necessary to discuss the evidence of the first defendant in any great detail except to point out that there are numerous contradictions between his evidence and that of the second defendant. I have already referred to some of these contradictions elsewhere in this judgment except to say, and I have no hesitation to say that the evidence of the first and the second defendants, properly analysed, borders on fabrication if not false. No purpose will be served by

summarising the evidence of the first defendant in any great detail as it clearly appears designed to create the impression that the deceased, at all material times, was a person of sound mind who possessed the necessary capacity to make a valid will.

THE EVIDENCE OF ATTORNEY SCHEEPERS

[41] Mr Scheepers is an attorney who consulted with the deceased for purposes of drafting the 14 February 2000 will. He confirmed in his evidence that he initially consulted with the deceased on 9 February 2000; that the second defendant brought the deceased to his office; that when the second defendant brought the deceased to his office he asked her (the second defendant) if she had an interest in the will whereupon the second defendant replied in the affirmative. He thereupon directed the second defendant to wait in the reception area whilst consulting with the deceased. In the process of such a consultation he (Mr Scheepers), on occasions, stepped out of his office to speak to the second defendant to clarify certain aspects of information obtained from the deceased, as for an example, full and a proper sequence of the first defendant's forenames, as the deceased had only given him the name of *Francois*; in the case of the second defendant the deceased had only given him the name of *Ia* and, in the case

of the third defendant the deceased had only given him the name of *De Witt*. There is no mention in his evidence of the second defendant having gone to Pick 'n Pay whilst he was consulting with the deceased.

[42] After the initial consultation with the deceased on 9 February 2000, Mr Scheepers made a fairly lengthy file note which was produced at trial. The file note, which appears at page 24 of the witness bundle, reads as follows:

> "Mej Sara Gildenhuys (ID nr 231023 0060 08 0) besoek my. Ons konsulteer vanaf 14h10 tot en met 16h15.
>
> Kliënt deel my mee dat daar familie en vriende is wat die gerug versprei dat sy besig is om kranksinnig te raak en daarom nie meer bevoeg is om eie besluite te neem nie. Hulle beplan daarom om haar by wyse van aansoek onbevoeg te laat verklaar om haar eie sake te behartig.
>
> Volgens kliënt is die beplande aansoek daarop gerig om 'n kurator aan te stel wat sal kan besluit om die plaas te verkoop en haar sal kan dwing om oue-tehuis toe te gaan.
>
> Sy wil nie van die plaas af weggaan nie!
>
> Sy wil nie oue-tehuis toe gaan nie!
>
> Sy wil die 'rugstekers' wat tans in haar testament bevoordeel word, uitskryf.
>
> Ek moet vir haar 'n nuwe testament opstel en verder doen wat nodig is om te verseker dat die plaas nie verkoop kan word voordat sy sterf nie.

> Kliënt kom, volgens my oordeel, 'skerp' voor, gesels samehangend en weet wat om haar aangaan en wat sy wil hê.
>
> Sy is beslis handelingsbevoeg en in staat om haar testament te wysig. Ek sal persoonlik kan getuig van haar geestestoestand soos op datum van verlyding van 'n nuwe testament."

When the deceased called on 14 February 2000 Mr Scheepers noted the following at the bottom of the file note by way of a *post scriptum:*

> "NS Posisie dieselfde op 14/2/2000 toe testament in my teenwoordigheid verly is."

[43] It appeared on basis of the evidence at trial that the file note referred to in the preceding paragraph was discovered by one of the defendants. Mr Scheepers could not explain in his evidence how the file note landed in the possession of the defendants. He could not explain whether he could either have handed same to the deceased, or the second defendant on the occasion of the signature of the final draft on 14 February 2000. Mr Scheepers could not even produce the original file at trial. All he could say was that the original file could not be found despite diligent search. He was not certain whether the original file could have been destroyed. He could recall that after he had been informed of the death of the deceased,

he forwarded the original will to the Master of the High Court, Cape Town. But his evidence in this regard is contradicted by that of the second defendant who testified that after the death of the deceased, she went to collect the original will from the attorneys' offices and took it to the offices of the Master of the High Court, Cape Town.

[44] It also transpired in the course of evidence at trial that the attorneys' bill for consultation and the drafting of the will was sent to the deceased care of the address of the second defendant. As to who settled the attorneys' bill was not clear both on the basis of the second defendant's evidence and that of Mr Scheepers. It also appears that Mr Scheepers stood much to gain in terms of the will as he had himself appointed as the executor in a very straightforward two-page will which hardly would have required consultation, at the very most, in excess of an hour. This, in a nutshell, constitutes the salient features of the evidence tendered by Mr Scheepers.

GERT APRIL AND EVA SAAIMAN

[45] The evidence of Gert April and Eva Saaiman did not add value to the issues in dispute. As for Gert April, it was clear from his evidence that he

is illiterate, had no perception of time or dates and was at a complete loss to explain when defining moment on which based all that he had said. He gave the impression of having been primed to testify against plaintiff and to sing the praise of the first defendant.

[46] Ms Eva Saaiman testified about the condition and the state of health of the deceased on the occasion of her visit to Cape Town during October 1999. According to her evidence the deceased, during October 1999, was in good health and showed no signs of mental deterioration as the plaintiff sought to allege. But she clearly had no idea of the chronology of events her evidence was supposed to corroborate.

[47] It was evident in her evidence under cross-examination that she was simply at a loss to indicate when the events she referred to in her evidence and the other visits the deceased made to Cape Town were supposed to have occurred.

EVALUATION OF EVIDENCE

[48] It seemed to have been accepted by all the parties concerned at trial that the deceased was suffering from Alzheimer's disease. There is

evidence, which appears to be accepted by all the parties concerned that the deceased was diagnosed by, amongst others, Drs JB Bekker, A Lekas and André Lombard that the deceased suffered from Alzheimer's disease. The principal issue I have to determine, therefore, is whether the deceased's ailment was as a result of a gradual onset of the disease over a protracted period of time or whether the disease was as a result of a rapid onset of mental or cognitive decline, with the symptoms of an Alzheimer's sufferer having started manifesting during March/April 2000 as alleged by the defendants.

[49] On the plaintiff's side there was tendered the evidence of Mrs Elmien Kruger who testified that she constantly visited the deceased on several occasions and that the last time she visited the deceased could either have been during December 1997 or January 1998. She stated that it was on the occasion of her last visit, either during December 1997 or January 1998, when she noticed that the deceased was disorientated and confused to an extent that the deceased could not remember where she kept her cutlery; she could not remember where she kept her bedding; she could not find her way to her cousin, Sonia Rademan and that, generally, the deceased could not keep a proper conversation.

[50] There is further evidence tendered by plaintiff and his wife, Karin Gildenhuys, who both testified that the deceased spent time with them at their holiday home in Vleesbaai during the festive season stretching from December 1998 to January 1999. The main thrust of their evidence is that during that time the deceased was clearly disorientated; was incoherent in her speech; that on occasions the deceased could not find a bathroom; did not know where her room was; and that on another occasion the deceased relieved herself outside the toilet bowl much to the embarrassment of the family.

[51] There also is evidence of Jannie Gildenhuys who testified during the September 1999 school holidays he, together with his mother, Monica, visited the deceased at her farm, Duinerug. According to the evidence of Jannie Gildenhuys, on the occasion of this visit, they found the deceased in extremely appalling conditions. According to his evidence the house in which the deceased lived was dirty; the deceased's clothes were dirty; the deceased was confused and could not engage in proper conversation; the deceased confused the witness with her late brother, Danie Gildenhuys, who died some ten years earlier and that she clearly was confused and completely disorientated. The witness stated that they were so concerned

about the condition in which they found the deceased that they went to see the minister in Heidelberg and pointed out to him that the deceased clearly needed someone to care for her. They also communicated their concern to plaintiff and also pointed out to him that the deceased clearly needed someone to care for her. When Jannie Gildenhuys saw the deceased in Cape Town on the occasion of her visit during October 1999 the deceased's condition had not changed.

[52] The condition of the deceased prompted a meeting at the residence of the minister in Heidelberg on 31 January 2000. There does not appear to be a dispute on the basis of evidence that such a meeting was in fact held. The plaintiff went to the extent of phoning the second defendant on 31 January 2000 to inform her of the meeting itself; the purpose of the meeting and of the need to have the deceased placed in an old age home. It is worth noting that the meeting held at the residence of the minister on 31 January 2000 was held shortly before the deceased executed the disputed will on 14 February 2000.

[53] What emerges from the evidence of Elmien Kruger, the plaintiff, Karin Gildenhuys and Jannie Gildenhuys is that the typical symptoms of an

Alzheimer's sufferer became noticeable on the deceased from as far back as either December 1997 or January 1998. Mrs Elmien Kruger noticed such symptom on the occasion of her visit to the deceased at Duinerug either during December 1997 or January 1998; the plaintiff and Karin Gildenhuys noticed these symptoms over the festive season stretching from December 1998 to January 1999; Jannie Gildenhuys noticed these symptoms during the September 1999 school holidays. The deterioration in the deceased's health condition culminated in an arrangement for a meeting which was held at the residence of the minister in Heidelberg on 31 January 2000, precisely two weeks before the execution of the 14 February 2000 will, specifically to address the state of the deceased's deteriorating mental and health condition and her placement in an old age home. The deceased was placed in an old age home during November 2001. She died at an old age home on 30 August 2004.

[54] The evidence of the witnesses referred to in the preceding paragraph tends to show a slow progressive dementia and memory impairment which clinically became detectible until it reached the level of severity where the deceased clearly forgot names of relatives and, at times, confused one relative with the other, a typical example being that of Jannie Gildenhuys

who the deceased confused with her late brother, Danie Gildenhuys. This clearly accords with Prof Zabow's evidence and the description of the disease as being characterised by an insidious gradual onset, progressive declining cognition. This further accord with Prof Zabow's evidence to the effect that patients with Alzheimer's type dementia usually deteriorate to an end stage when the patient would need full nursing care. Prof Zabow further stated in his evidence that the mean life expectancy of an Alzheimer's sufferer is given as seven (7) years from diagnosis.

[55] The first noticeable symptoms of an Alzheimer's sufferer on the deceased were noticed by Mrs Elmien Kruger as early as either December 1997 or January 1998. A definitive diagnosis of Alzheimer's disease on the part of the deceased was made by Dr AB Bekker on 29 September 2000 and the deceased died some four (4) years later on 30 August 2004. In this regard Prof Zabow is of the firm view that as at February 2000 the deceased's cognitive functions would have deteriorated to an extent that it is highly unlikely that the deceased could have had the mental capacity to execute a valid will or other contractual undertaking. I have no reason not to accept the views and opinions expressed by Prof Zabow, nor do I have any reason to disbelieve the evidence of the lay witnesses who testified in

plaintiff's case whose evidence clearly indicates a pattern of gradual progression of the disease. Based on the evidence at trial, particularly the views and an opinion expressed by Prof Zabow and the evidence of the lay witnesses in the plaintiff's case, I have no hesitation to conclude that, as at 14 February 2000, the deceased did not have the mental capacity to execute a valid will or any other contractual undertaking.

[56] I now turn to the evidence tendered in support of the defendant's case. In as far as the first defendant's evidence is concerned, I have already made some observations about the quality of his evidence in paragraph [40] of this judgment. I may just add that I am in perfect agreement with the submissions of the plaintiff's counsel, *Mr La Grange* SC, that the overall impression created by the first defendant was that of a man determined at all costs to minimise the effect the Alzheimer's disease had on the mental capacity of the deceased even with reference to the period after the deceased was diagnosed as suffering from a severe degree of Alzheimer's disease by Drs AB Bekker and Lekas and even at a stage when a process of having a curator appointed for the deceased was in progress.

[57] In as far as the second defendant is concerned she wants to make us believe, even after Jannie Gildenhuys, whose evidence I have no hesitation to accept, had, during his visit to the deceased's farm during the September 1999 school holidays, had found the deceased in appalling conditions as described in his evidence; that the deceased could have travelled to Cape Town on her own on the occasion of the October 1999 visit; she wants to make us believe that the deceased, at about the time when a meeting was held at the residence of the minister in Heidelberg, almost two weeks before the execution of the 14 February 2000 will, specifically to address concerns arising from what appears to have been a serious deterioration in the deceased's health and state of mental condition, could execute a valid will somewhat fourteen (14) days later on 14 February 2000. The second defendant wants to make us believe that the typical symptoms of an Alzheimer's sufferer started manifesting either during March or April 2000, shortly after the deceased executed the 14 February 2000 will when there is overwhelming evidence that the typical signs and symptoms of an Alzheimer's sufferer started becoming discernible as far back as January 1998.

[58] The second defendant was not impressive as a witness. During the course of her testimony she kept on smiling as if the proceedings themselves at which she was tendering her testimony were a joke. I even went to the extent of asking the second defendant if it was her habit to smile when she speaks. The first and the second defendant were not impressive as witnesses at all. Their evidence very well borders on fabrication such that I have no hesitation to reject both their versions of evidence as being false.

[59] The assertion by the defendants that symptoms of an Alzheimer's sufferer started manifesting on the deceased either during March or April 2000 has no merit and is not supported on the basis of available evidence. The contention that the deceased's condition was caused by some or other incident which brought about a sudden onset of mental incapacity is to be found in the evidence of Dr Lekas presented at an earlier trial before Muller AJ. The evidence of Dr Lekas was based on his examination of the deceased on 29 October 2000 at which examination the deceased was accompanied by the second defendant and, ostensibly, on basis of information furnished to Dr Lekas by the second defendant. Prof Zabow, on being cross-examined on basis of the presence of arteriosclerosis,

which probably could have been the cause of the sudden onset of Alzheimer's disease, stated that at previous examinations by various practitioners no signs of arteriosclerosis were indicated, even in the neurological examination by Dr Leonard, nor was it indicated by an orthopaedic surgeon who saw fit to mention the deceased's psychotic condition. There otherwise is no expert evidence to gainsay the opinion as expressed by Prof Zabow whose opinion, as I have already stated, I have no hesitation to accept.

[60] The less said about attorney Scheepers, the better. Mr Scheepers saw and consulted with the deceased for the first time on 9 February 2000. He consulted with the deceased for a period of slightly longer than two hours, according to a file note he ostensibly made during the course of such a consultation. According to him (Scheepers) in the course of such a consultation the deceased mentioned to him that she wished to disinherit all such persons who plotted to have her removed from her farm and have her placed in an old age home and that one of such persons was "Mike", ostensibly referring to the plaintiff, Michael Gildenhuys. It was apparent on the basis of evidence at trial that the plaintiff had at no stage in his lifetime been referred to by members of his family as "Mike". The person who used

to be referred to as "Mike" used to be the plaintiff's father. If indeed the deceased ever referred to plaintiff as "Mike" in the course of her consultation with attorney Scheepers, it could more have been indicative of delusion on the part of the deceased as the plaintiff maintains she was.

[61] It appears that the question of the deceased's mental condition also came up for discussion in the course of such consultation. According to Scheepers the deceased told him that those members of her family she wished to disinherit asserted that the deceased was mentally deranged; that she was a person worthy of being placed under curatorship as they thought she was incapable of managing her personal affairs and that she had reached a level of having to be placed in an old age home. This is what ostensibly prompted Scheepers to draft the file note referred to in paragraph [42] of this judgment in which Scheepers concludes that, according to him, the deceased appeared "sharp" in her intellect; that the deceased was coherent in her conversation and was completely aware of what was happening around her and what she wanted. Scheepers concludes his file note by stating the deceased had legal competency and was in a position to revoke previous testamentary dispositions. Finally Scheepers concludes that he personally could attest to the deceased's

mental condition and her capacity to make a will. Scheepers said in his evidence that it was specifically because of the deceased's alleged mental disorder that he did not cause the deceased to sign the will on the same day he consulted with her and, instead, required her to call at a later date to attend to the final execution of thereof. When the deceased returned to office on 14 February 2000, Scheepers made a note that as at 14 February 2000 the deceased's mental condition was the same as on 9 February 2000 and that the will was executed in his presence.

[62] It is quite clear that Scheepers, in his file note, expressed an opinion on a field and terrain falling outside his area of expertise and his evidence falls to be rejected on that ground alone.

[63] The evidence of Gert April and Eva Saaiman does not merit any further comment other than the comments made in paragraphs [45] to [47] of this judgment, suffice to say that their evidence did not add any value to the resolution of the issue in dispute.

[64] *Mr Kruger*, who appeared for the first and the second defendant, makes a point in his submissions that one Rienie Oosthuizen, who lived

near the deceased and who, according to the evidence of plaintiff, cared for the deceased, was not called by the plaintiff to give evidence, thereby depriving the court an opportunity to hear evidence from a person who had physically cared for the deceased during the period preceding the making of the 14 February 2000 will and that because of failure to call Rienie Oosthuizen I should draw an adverse inference against the plaintiff as Oosthuizen probably would have exposed facts unfavourable to the plaintiff's case.

[65] It indeed is so that the plaintiff did not call Rienie Oosthuizen for reasons not known to me and for which I cannot venture to speculate. For all I know, and I am hereby not embarking on any measure of speculation, Rienie Oosthuizen may have refused to testify in what clearly appears to be a family dispute; it may well have been that her evidence may not have been of assistance to the plaintiff's case. Even the defendants were well aware of Oosthuizen's proximity to the deceased. After all, according to the evidence of the second defendant, Rienie Oosthuizen brought the deceased to Cape Town on the occasion of her visit during February 2000. The defendants, too, could well have called Rienie Oosthuizen in the same fashion they called Gert April and Eva Saaiman to testify in their case. For

the defendants to suggest that I draw an adverse inference against the plaintiff for failing to call Rienie Oosthuizen is in fact to suggest that I speculate why the plaintiff did not call Rienie Oosthuizen as a witness.

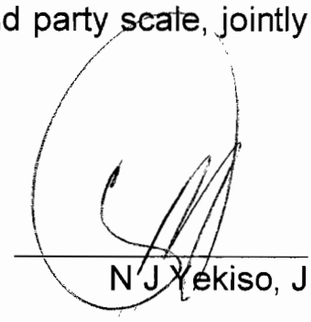
[66] I have, in paragraph [56] of this judgment, already concluded that the deceased was, as at 14 February 2000, incapable of executing a valid will or any contractual undertaking for that matter. In arriving at that conclusion I had carefully considered the comprehensive submissions and argument before me by *Mr Kruger.* Despite such submission, comprehensive as they are, I am not persuaded that the deceased, as at 14 February 2000, was capable of performing a valid act.

[67] In the result I make the following order:

[67.1.] The deceased, Sara Gildenhuys, is declared to have lacked the capacity to execute a valid will as at 14 February 2000;

[67.2.] The will of the deceased, Sara Gildenhuys, dated 14 February 2000, is hereby set aside;

[67.3.] The first and the second defendants are ordered to pay plaintiff's costs, duly taxed or as agreed, on a party and party scale, jointly and severally, the one paying the other to be absolved.



N J Yekiso, J