THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 22759/12

In the matter between

JOHN KRIEL	**APPLICANT**

And

MASTER OF THE HIGH COURT	**FIRST RESPONDENT**
MARIA WILHELMINA ROBERTS	**SECOND RESPONDENT**
PAUL COLLIS	**THIRD RESPONDENT**
MICHELLE COLLIS	**FOURTH RESPONDENT**
ABSA TRUST LTD	**FIFTH RESPONDENT**

Coram: Rogers J

Heard: 4 June2020

Delivered: 30 June 2020

JUDGMENT

Rogers J

[1] The applicant, Mr John Kriel, seeks orders (a) declaring invalid wills purportedly executed by the late Mrs Carol Richter on 8 April 2018 and 26 April 2018; (b) declaring that the will executed by her on 11 March 2005 is her last will. Mrs Richter died on 16 July 2018. Mr Kriel is her widower. I refer to these wills, in chronological order, as the first, second and third wills. Mr Kriel alleges that the second and third wills are invalid because his wife lacked testamentary capacity at the time of their purported execution.

[2] The second respondent, Mrs Maria Wilhelmina Roberts, is a sister of the late Mrs Richter. Another of Mrs Richter's sisters, Mrs Patricia Collis, died on 11 July 2018, a few days before Mrs Richter. The third and fourth respondents, Paul and Michelle Collis, are the late Mrs Collis' children. The second, third and fourth respondents, to whom I refer collectively as 'the respondents', opposed the application until a very late stage.

[3] The first respondent is the Master of the High Court. The fifth respondent is Absa Trust Ltd ('Absa'). They have not participated in the litigation, though two officials of Absa furnished affidavits for the respondents.

[4] Mr Kriel is 92 years old. Mrs Richter was 71 at the time she purportedly executed the second and third wills. Mrs Roberts is about to turn 80. Mrs Collis was six years younger than Mrs Roberts.

[5] The application was argued on 4 June 2020 by audio-visual link. I reserved judgment. In the course of argument I raised with counsel the question as

to what course I should follow if I found that there were material disputes of fact which precluded me from determining the case on the papers. In particular, I raised for consideration the possibility that if I were to find that there were material disputes of fact, I might require key deponents to present themselves for cross-examination rather than referring the whole case to trial.

[6] The applicant's counsel's primary position was that there were no genuine material disputes of fact and that I could find in the applicants favour on the papers. The respondents' primary position was that there were indeed genuine material disputes of fact and that on this basis I should dismiss the application. Both counsel acknowledged, however, that if I were to be against them on their primary submissions, an order for cross-examination might be appropriate.

[7] In reserving judgment, I asked counsel to submit supplementary notes dealing with the question of oral evidence and the practicalities of organising cross-examination, having regard to the Covid-19 restrictions and the ages of the key witnesses. On 8 June the applicant's counsel duly submitted her note. On 10 June the respondents' counsel notified me that her clients wished to make a settlement proposal to the applicant and that, pending further developments, she would not be submitting a note.

[8] I do not know what settlement discussions, if any, took place. The next development, from the court's perspective, was that on 11 June the respondents delivered a notice withdrawing their opposition and tendering party and party costs. The applicant in his notice of motion had claimed costs on the attorney and own client scale. The applicant's counsel informed me that her client pressed for punitive costs. Although the question of costs had been touched upon during oral argument, I afforded both sides an opportunity to file supplementary notes on costs, and both sides availed themselves of the invitation.

[9] Although during argument I had raised the question of oral evidence, I was acutely aware of the potential hazards of requiring elderly witnesses to be cross-examined during the pandemic. Mr Kriel is 92. Mrs Roberts is about to turn 80. Three other relevant witnesses for the respondents – Ms Nupen, Mr Leibrandt and Mr Clover are 62, 70 and 73 respectively (one can derive their ages from their ID numbers, which appear in documents in the record). Covid-19 poses particular risks for the elderly. On the papers I was strongly disposed in favour of the applicant. If I concluded that there were material disputes of fact, it is most unlikely that I would have dismissed the application; I would have instead required some form of oral evidence. However, I was by no means sure that there were material disputes of fact, and the circumstances seemed to call for a measure of robustness. I thus began to write a judgment in order to test whether I could properly and fairly decide the case on the papers.

[10] I had substantially completed my draft judgment by the time I received the respondent's counsel's notification that her clients were going to make a settlement proposal to the applicant. As it happens, I had come to the conclusion that the applicant was entitled to succeed on the papers and that there was no need for oral evidence.

[11] Since the respondents subsequently withdrew their opposition, little purpose would be served in now delivering the full judgment I prepared. However, because of its bearing on costs, I quote the concluding three paragraphs of that draft:

> '74. Having regard to the above circumstances, and the particulars provided by Mr Kriel and Ms Cater about their interactions with Mrs Richter, I am satisfied on a balance of probability that she lacked the mental capacity, in April 2018, to make a will. In particular, I am satisfied that she was unable to comprehend information of the complexity embodied in the clauses that were read to her from the second and third wills. I am also satisfied that she was unable to remember, or hold in her mind, the various assets she owned and their

approximate value. In order to have had a disposing mind, she needed to have a reasonable grasp of the financial implications for her husband of revoking the first will and replacing it with the second will, and then revoking the second will and replacing it with the third will. I am satisfied that she lacked that capacity.

75. Leaving aside the wills themselves, the evidence about Mrs Richter's cognition and capacity for communication does not go beyond childlike basics. One may charitably accept the evidence of the respondents' witnesses that they genuinely believed that Mrs Richter understood the contents of the wills but I am satisfied on a balance of probabilities that they were genuinely mistaken in that belief.

76. Mr Kriel is thus entitled to the substantive relief he seeks. He seeks costs against the respondents on the attorney and own client scale. His counsel supported a punitive costs order, submitting that Pat *[the late Mrs Collis]* and Maria's *[Mrs Roberts']* conduct warranted a mark of the court's disapproval. I have given careful consideration to that submission but have decided not to accede to it. In disputes about the validity of wills, it is often ordered that both sides' costs be paid from the estate. It will be a sufficient mark of the court's displeasure that the costs in this instance will have to be borne by the respondents personally.

[12] The conduct warranting disapproval is, in the first place, the way in which Mrs Collis and Mrs Roberts kept the applicant in the dark about the 'discussions' they were having with Mrs Richter about changes to her will. He was not even aware, until after his wife's death, that she had signed two new wills, despite the fact that the signing ceremonies took place in the house where he and she lived and which he seldom left. In the second place, there is the allegation that Mrs Collis and Mrs Roberts took advantage of Mrs Richter's enfeebled state to bring about a change in her will which benefited themselves and prejudiced the applicant.

[13] This is the conduct I had in mind when I concluded, in my draft judgment, that the payment of costs by the respondents personally, rather than out of the estate, was a sufficient mark of the court's displeasure (cf *Estate Rehne & others*

Rehne 1930 OPD 80 at 94-95; *Lewin v Lewin* 1949 (4) SA 241 (T) at 282-283; *Naidoo NO & another v Crowhurst NO & others* [2020] 2 All SA 379 (WCC) para 89). I have not been persuaded by the applicant's counsel's supplementary submissions that I should go further.

[14] In *Kirsten & others v Bailey & others* 1976 (4) SA 108 (C), where a will was set aside on grounds of undue influence, the party responsible for the undue influence was ordered to pay the plaintiffs' costs but not on a special scale (113C-D). A similar order was made in similar circumstances in *Executors of Cerfontyn v O'Haire* 1873 Buch 47. In *Westerhuis & another v Westerhuis & others* [2018] ZAWCHC 84 a full court set aside a will, finding that it had not in truth been signed by the testatrix. As a mark of its displeasure at the reprehensible conduct of the appellants (the persons responsible for the bogus will), the full court ordered that the costs of the litigation should not come from the estate but should be paid by them personally. However, the costs were not ordered to be paid on a special scale. I do not wish to suggest that in similar circumstances the penalising of reprehensible conduct should never go beyond an order that the costs be paid by the 'guilty' party personally rather than by the estate, but these cases do reflect that the courts take into account that there is already an element of penalisation when costs have to be paid personally rather than from the estate.

[15] The applicant's counsel submitted that it was only when faced with the prospect of cross-examination that the respondents threw in the towel. This was said to show an absence of a genuine belief in the justice of their case and to justify a conclusion that their opposition was in bad faith and that, by opposing the case on the papers, they were simply 'taking a chance'. While that is one possibility, I cannot discount another possibility, put forward by the respondents' counsel, that the respondents did not want the main deponents (including Mrs

Roberts) to be put through the stressful experience of cross-examination and that they did not want to incur the costs associated with oral evidence.

[16] As para 75 of my draft judgment reflects, I was willing to accept, even if this was somewhat 'charitable', that the respondents and their witnesses genuinely believed that Mrs Richter was able to understand the proposals put to her and that she had approved them when she put her very shaky and illegible signature to the second and third wills. I should mention that the respondents' witnesses, apart from Mrs Roberts, included two officials from Absa Trust (one of whom was Mr Clover), two neighbours (Ms Nupen and Mr Leibrandt) and another gentleman who regularly visited the home as an employee of Paul Collis. These five witnesses did not have a personal interest in the estate. On *Plascon-Evans* principles, I doubt if I could properly conclude that none of these witnesses had an honest belief that Mrs Richter had testamentary capacity. The honesty of their belief is not itself a *factum probandum* in relation to the validity of the will but it has an obvious bearing on costs.

[17] As to the secretive way in which Mrs Collis and Mrs Roberts arranged for the execution of the second and third wills, this may have reflected an appreciation on their part that Mrs Richter, even if she had testamentary capacity, was nevertheless malleable and that engagement between Mrs Richter and her husband on the subject of her will should thus be prevented at all costs. While this conduct was morally reprehensible, the respondents were nevertheless entitled to defend the will if they genuinely believed that Mrs Richter had possessed testamentary capacity. I should add that while Mrs Roberts and the late Mrs Collis may have acted reprehensibly, the evidence does not point to any misconduct by Paul and Michelle Collis in relation to the execution of the second and third wills.

[18] Thus far I have considered the question of costs from the perspective of the court's disapproval of the respondents' conduct. I do not lose sight of the applicant's personal interest in a punitive costs order, namely that he should not be out of pocket in respect of expense caused to him in the litigation. But ultimately this comes down to the same consideration: Have the respondents been guilty of conduct of which the court sufficiently disapproves to meet the applicant's desire to be fully indemnified? My reasons for returning a negative answer have already been explained. The applicant is already shielded to some extent by the fact that the respondents' costs will not come out of the estate, an estate of which he is now the sole beneficiary.

[19] Although I have not found the adjudication of costs easy, I have on balance come to the conclusion that I should not penalise the respondents beyond making them personally liable for costs in accordance with their tender. However, the applicant's case for attorney and client costs had considerable merit, and the additional costs occasioned by supplementary submissions on costs should thus be costs in the cause.

[20] I make the following order:

(a) The will purportedly executed by Carol Richter ('the deceased') on 26 April 2018 is declared invalid.

(b) The will purportedly executed by the deceased on 8 April 2018 is declared invalid.

(c) The will executed by the deceased on 11 March 2005 is declared to be her last will and testament.

(d) The second, third and fourth respondents jointly and severally must pay the applicant's costs, including those reserved on 26 February 2020 and those

occasioned by the preparation of supplementary notes regarding oral evidence and costs.

_____

O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Applicant	M Holderness Instructed by Ashersons Attorneys 34 Plein Street Cape Town
For 2nd, 3rd & 4th Respondents	M Adhikari Instructed by Cliffe Dekker Hofmeyr Inc 8th Floor, 11 Buitengracht Street Cape Town