THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 14155/2014

In the matter between:

ILLONA FRITZSCHE **Plaintiff**

and

WARREN HUGH BOOYSEN **Defendant**

Coram: Bozalek J
Heard: 18, 22 – 25; 29 June 2020; 22 July 2020; 2, 25 - 26 November 2020
Delivered: 5 February 2021

JUDGMENT

BOZALEK J

[1] In this trial action the plaintiff seeks the setting aside of an agreement entered into between herself and the defendant as well as a power of attorney granted in the latter's favour and, pursuant thereto, payment in the amount of R1,843 360.19 together with interest.

[2] The action was initially instituted by the plaintiff in August 2014 and came to trial in June 2020. Evidence was heard over a period of seven days but was then postponed when the plaintiff amended her particulars of claim at a late stage. Further evidence was heard on 2 November 2020 before argument was heard on 25 and 26 November 2020. The defendant was legally represented up until the stage that the further evidence was heard whereafter he represented himself. After argument was delivered in court the defendant submitted further written argument which I considered as well as a reply thereto from the plaintiff's legal representative.

Background

[3] The contract which the plaintiff seeks to set aside ('the agreement' or 'the plot agreement') was concluded between her and the plaintiff on 7 September 2011. In terms thereof the plaintiff undertook to pay the amount of R1 850 000 to the defendant, being her half share of the proceeds of the sale of a property in Namibia, whereupon he would reimburse to her the amount of R740 000 within four days. The power of attorney which the plaintiff seeks to set aside was a general power of attorney concluded by her in favour of the defendant on the authority of which he withdrew the monies in question from the plaintiff's bank account.

[4] The plaintiff and the defendant are related to one another by marriage, the defendant having been married to the plaintiff's late sister, Chantal Patricia Booysen, (whom I shall refer to as *'Chantal'*). In late 2010 the defendant, a businessman with a Namibian background, was appointed as executor to the estate of the late Mr Hartmut Fritzsche (whom I shall refer to as *'Hartmut'*) who was resident in Namibia and who passed away on 30 September 2010. Hartmut was the father of the plaintiff and Chantal

who were beneficiaries under their late father's will. The property in question did not form part of the deceased estate although it was referred to in Hartmut's will. When he died the property was owned by his stepmother Mrs Marga Geiger, now deceased. Following Hartmut's death she sold the property and instructed her attorneys to divide the proceeds equally between the plaintiff and Chantal, her two step-granddaughters.

[5] The plaintiff instituted her claims in the alternative, the first basis being that the contract was concluded under duress, the second being that the defendant misrepresented the facts in relation to the proceeds of the sale of the property thereby inducing the plaintiff to sign the agreement, and thirdly, on the assumption that the agreement was valid, it was pleaded that the defendant had acted contrary to its terms by withdrawing all the money and failing to repay the R740 000 which he was contractually obliged to do.

[6] In the course of the run up to the trial and subsequent thereto the pleadings filed on behalf of both parties were repeatedly amended. At an early stage the plaintiff abandoned her claim based on misrepresentation. At the conclusion of the defendant's case the plaintiff sought and was granted an amendment whereby she pleaded in the alternative to the duress claim that she had been unduly influenced by the defendant to conclude the agreement and that, but for such undue influence, she would not have signed the agreement nor the power of attorney, the conclusion of both of which were prejudicial to her.

[7] In respect of her claim based on duress alternatively undue influence the plaintiff pleaded that the defendant had threatened the plaintiff that if she failed to cooperate with him (by concluding the agreement) he would approach the Namibian police and lay charges against her for theft of certain assets falling within Hartmut's estate. He

furthermore threatened that he would inform Mrs Geiger that the plaintiff had stolen from her stepson's (Hartmut) estate. It was further pleaded that the defendant had a propensity to threaten the plaintiff, had done so previously and that he had informed the plaintiff that he would not proceed with such threats on condition that she agreed to receive only 20% rather than 50% of her proceeds of the sale of the property; the plaintiff, acting under duress alternatively having been unduly influenced by the defendant as above set out, duly signed the agreement and the power of attorney.

[8] In his plea the defendant admitted the conclusion of the agreement with the plaintiff and the power of attorney which allowed him to give effect to its provisions but denied all allegations that the plaintiff had concluded the agreement under duress or having been unduly influenced by him. He further denied that he had issued any threats against the defendant. In his initial plea the defendant pleaded:

i. that the agreement followed an oral agreement between the plaintiff and Chantal in terms of which the proceeds of the sale of the property were to be divided on a 20/80% basis in favour of Chantal;
ii. that the agreement was concluded between him and the plaintiff in their personal capacities and merely to put in writing the terms of the oral agreement reached between the plaintiff and Chantal;
iii. that the withdrawals which he made from the plaintiff's bank account were with her full knowledge and consent;
iv. that an amount of R340 361.23 of the monies so withdrawn were repaid to the plaintiff;
v. that he admitted owing the balance of R399 638.77 to the plaintiff and tendered her payment thereof and,
vi. that he had withheld further payments to plaintiff in the bona fide but mistaken belief that the balance owing to her could be used to compensate for plaintiff's *'misappropriation of assets in the estate of the late Hartmut Fritszche'*.

[9] In addition the defendant raised two special pleas i.e. misjoinder and non-joinder alleging in the first instance that the plaintiff had failed to join the defendant in his capacity as executor of Hartmut's estate. In this regard he alleged that the agreement was concluded by himself in his capacity as executor of Hartmut's estate. In his plea of non-joinder the defendant averred that he administered the funds on the plaintiff's behalf in terms of the power of attorney and that these funds were transferred to Chantal, the defendant's wife (and plaintiff's sister). Accordingly, he alleged, if the Court should find that the agreement was indeed void or voidable as pleaded by the plaintiff that any claim lay against the executor of Chantal's estate.

[10] In his amended plea the defendant pleaded:

i. that of the total proceeds of the sale of the property Chantal arranged directly with the purchasers for advance payments totalling N$800 000 to be paid into her own personal bank account;

ii. that of the N$1, 443,360.19 paid into the defendant's bank account he paid the full amount, save for R10 915.67, to Chantal's Money Market account;

iii. that, regarding threats, he *'may have'* threatened to take certain steps against the plaintiff on occasion in an effort to protect his own private property and/or to motive (sic) them to act in the interest of Hartmut's estate but denied that he ever threatened the plaintiff in order to coerce her into providing a benefit for him or for Chantal to which they were not entitled;

iv. a denial that Mrs Geiger had divided the proceeds of the sale of the property on a 50/50 basis between the plaintiff and Chantal;

The issues

[11] Clearly the primary issue is whether the plaintiff concluded the agreement forfeiting part of her share of the proceeds of the sale of the property under duress or as

the result of undue influence.

[12] Assuming the above question is answered in the favour of the plaintiff the next issue is whether the plaintiff was initially entitled to 50% of the proceeds of the plot. If this question is answered positively the next issue is the extent to which the defendant is liable to the plaintiff for any shortfall in the funds which she received from the proceeds of the sale of the plot.

The evidence

[13] The plaintiff gave evidence and called her step-sister, Ms Tammy Coetzee as a witness. The defendant testified but called no witnesses.

Ms Illona Fritzsche

[14] Plaintiff testified that her highest educational qualification was Grade 9 and that she presently ran a small cleaning company. She had however worked for her father, Hartmut, for many years in his business, BOCO Services. Her father died on 30 September 2010 and she had been living with him on a plot in Brakwater, an area just outside Windhoek. At the time she had been involved in a long term relationship with one, Daleen Vermeulen ('Daleen'). The plot at 32 Brakwater occupied by her father and herself was owned by Mrs Marga Geiger, her step-grandmother who had two sons, Hartmut and Helmut. As mentioned earlier the plaintiff's full sister was Chantal and her half-sister was Tamar (Tammy) Coetzee. In terms of Hartmut's will he bequeathed 50% of his business and holiday home situated at Wlotskasbaken, Swartkopmund to Chantal, 25% to the plaintiff and 25% to Daleen. The remainder of his estate was to be divided in equal shares between the three heiresses.

[15] Plot 32 Brakwater 48, Windhoek ('the property') lies at the heart of the dispute between the parties and was the subject of the following clause in Hartmut's will:

> *'4.1 I hereby bequeath my plot number 32 Brakwater number 48, Windhoek to my daughter Chantal … I hereby place on record that the said property is presently still in the name of Marga Geiger and I have an undertaking that the said property will be transferred by her to me in the event of her death. However, in the event that I should die before Mrs Geiger <u>the understanding</u> is that such property will be transferred to (Chantal) upon Mrs Geiger's death'.* [my underlining]

[16] It is common cause that Hartmut predeceased Mrs Geiger who passed away in 2019 some seven or eight years after she sold the property. The plaintiff was referred to an invoice from attorneys in Windhoek dated 29 November 2011 which indicated that the property was sold for N$3 900 000.00 and that the nett proceeds were N$3 686 720.38. According to this invoice N$800 000.00 was *'paid already before registration of the property to Chantal and Illona'* by the purchaser and that thereafter half portions of the balance were paid to the account of Chantal and Illona in the sums N$ 1 443 360.19, respectively. The plaintiff testified that she did not receive any part of the N$800 000.00 nor, save for some R10 000.00, any part of the N$1 443 360.19.

[17] The plaintiff testified that she was upset from the outset to only receive a 25% share of Hartmut's business and the holiday home as she had devoted 22 years of her life to working in the business and building the house on the property as well as the holiday home. She felt it was unfair that Chantal would receive much more than her.

[18] As previously mentioned the defendant was appointed as executor to Hartmut's estate and he immediately set to work to wind up the estate. Since he and Chantal lived in Cape Town he did this at long distance although it seems he made regular trips to Namibia. From the plaintiff's perspective the process of winding up her late father's estate did not go smoothly. Numerous difficulties arose between her and the defendant. According to her he would withhold information from one or more of the heiresses and have conversations with certain of them without the knowledge of the others. He would also make financial arrangements which in her view favoured Chantal, his wife, and were prejudicial to her. In or about May 2011 the plaintiff called her grandmother, Mrs Geiger, and became aware of the latter's intention to sell the Brakwater property and divide the proceeds equally between herself and Chantal. Up to this stage Chantal's expectation, in accordance with the non-binding provisions of Hartmut's will, was that the property would eventually devolve upon her alone or, presumably, if the plot was sold that she would receive the entire proceeds.

[19] The news that Mrs Geiger intended to split the proceeds between the plaintiff and Chantal was, initially at least, very poorly received by Chantal. On 24 May 2011 the plaintiff emailed her half-sister, Ms Coetzee, and advised her that Chantal was *'livid'* because she, the plaintiff, wanted half of the property's proceeds. The dispute over the property clearly caused the relationship between the two sisters to deteriorate but in July 2011 the plaintiff moved from Namibia to Cape town to reside with Chantal and the defendant. There were a number of reasons for the plaintiff moving and one of them was an attempt on the sisters' part to reconcile with each other following the various disputes which had arisen in relation to Hartmut's estate.

[20] The plaintiff testified that before leaving Namibia she had sold certain scrap metals belonging to the business. Her reasons were two-fold in that she felt hard done by the terms of the will and, furthermore, no longer had any form of income. Furthermore, her relationship with Daleen had ended – the latter having moved to Pretoria and a subsequent relationship with another woman having also ended.

[21] On 7 September 2011 Chantal had invited the plaintiff to go out for breakfast and she had agreed thinking that it would only be the two of them. It transpired, however, that the defendant joined them and they drove together in his car to the Durbanville Spur. There the defendant brought his laptop into the restaurant and in short order informed the plaintiff that Daleen had made an affidavit regarding goods which had been removed from the Hartmut's business by the plaintiff after his death and sold. He stated that Daleen wanted to know the value of the materials or tools which the plaintiff had hidden in containers. This was a reference to precision tools which had not been included in the stocktaking but which the plaintiff had hidden in a container and which were over and above the scrap metal referred to earlier. After being pressed by the defendant the plaintiff eventually gave a value to these tools in an amount of approximately R150 000. After this topic had been discussed the defendant told the plaintiff that he had a proposal for her, namely, that he would give her 20% of the proceeds of the Brakwater property (i.e. instead of 50%) which amounted to N$740 000. He told the plaintiff that if she did not agree to this proposal he would hand her over to the Namibian police for theft of the scrap metal that she had stolen from the property. The defendant added that she would then never be able to go back to Namibia because she would be apprehended by the police and, furthermore, that he would inform Mrs Geiger that she had stolen from the estate which would put her in a bad light with her grandmother.

[22] The plaintiff testified that she had believed the defendant's threats because the defendant and Chantal wanted her money and knew where they had her. She was also flustered. She agreed to everything that the defendant asked. The defendant then immediately went outside to make a phone call and returned saying that they must leave immediately. No breakfast was ordered, the bill for coffee was paid and they left. The defendant then drove to Madelyn Incorporated, a firm of attorneys a two-minute drive away in Durbanville. The defendant told the receptionist that they were there to see Ms Madelyn Kruger for what appears to have been a pre-arranged appointment. In the ensuing consultation the agreement was read to her although the plaintiff testified that she took little notice of what was being read. The parties to the agreement were the plaintiff, referred to as *'the beneficiary'* and the defendant, referred to as *'the executor'*. In it she undertook to pay the amount of R1 850 000.00, being half the proceeds of the sale of plot 32 Brakwater, to the executor into an unspecified bank account. The executor undertook to reimburse the beneficiary with the amount of R740 000.00 and to pay the balance of the proceeds to Chantal. All this was to be done within four days of him receiving the full payment from the beneficiary. Chantal was asked to wait outside while the agreement was read to her and signed by the parties.

[23] The plaintiff testified that she had never previously discussed taking a 20% share of the proceeds of the sale of the property. At no stage had she reached any such oral agreement with Chantal. When she signed the agreement she was still taken aback by what had happened at the Spur. Asked why the defendant was defined as executor her answer was that the defendant *'used that position to his own power, his own discretion'*. After she had signed the agreement the defendant told her he would throw his Mercedes Benz vehicle into the deal. The plaintiff testified that at the same meeting she had signed

a general power of attorney in favour of the defendant. This document had been read to her in full before she signed it but again she had taken little notice of its content. The reason why she had signed the power of attorney was because she understood it was necessary for the defendant in order for him to run her finances for her. Two days after signing the agreement and power of attorney the defendant presented the plaintiff with an agreement entitled 'Agreement pertaining to equalisation between the heirs of the estate late HH Fritszche'. According to the agreement its purpose was to record the transactions pertaining to the advances and contributions to Hartmut's business and the heiresses' debts related to the estate and between the three heiresses. The plaintiff testified that a schedule to the agreement reflected advances made to her by the defendant and also a deduction from her share of R180 500.00 for the scrap metals which she had misappropriated.

[24] By November 2011 the plaintiff had moved out of the defendants' home and was living separately. On 8 November 2011 the defendant picked her up from her home and began driving her to unknown destination. When she asked him he told her that the purpose of the trip was for her to open a special bank account at FNB in Milnerton. She responded stating that she already had an FNB account but he said that it was a special account that had to be opened. He did not explain in what way it was special or why the plaintiff needed the account. At FNB she signed documentation necessary to open the account. She identified one such item of documentation as being a delegation of authority in which she authorised the defendant to operate her account without any restrictions.

[25] The plaintiff later discovered that the account which had been opened in her name was a Money Market account. She testified that she had not been given copies of any of

the documents she signed either at the bank or, two months previously, at the offices of Madelyn Inc.

[26] In April 2012 Chantal suffered an aneurysm and passed away on 17 April. In July 2012 the defendant had approached her out of the blue with what he said were three proposals from Daleen's lawyers. However, she was unable to even explain these proposals in her evidence because, according to her, the defendant was *'all over the show'*. She could recall him telling her that she had to repay R600 000.00 into Hartmut's estate in which event the defendant told her he would then give her R40 000.00 in full and final settlement. All these proposals came to nothing, however. By this time the plaintiff was unemployed and did not know what to do. She made contact with her half-sister, Tammy Coetzee, and explained her situation. Tammy invited her to move in with her and began to try and get to the bottom of where the plaintiff found herself financially. One of the first things that Tammy asked her was where her half share of the proceeds of the sale of the property was and her answer had been that she did not know. Tammy began to make enquiries and to obtain copies of all the documents which she had signed over the past few months. She also arranged for the plaintiff to see an attorney.

[27] The plaintiff was shown a statement from her FNB money market account which reflected that the amount of R1 443 360.19 had been credited to it on 29 November 2011 as being part of the proceeds of the sale of the Brakwater property. On the same day internet withdrawals of R850 000.00 and R6500.00 were made and, on the following day, a further withdrawal of R576 000.00. This had left a balance of just less than R11 000.00. The plaintiff testified that she had not effected these withdrawals and had not even received notifications thereof. She had never received the R740 000.00 she had been

promised by the defendant in terms of the agreement. At some stage the defendant had telephoned her from the airport prior to him, Chantal and the rest of their family departing on a holiday trip to America and had told her to close the money market account and transfer the balance, some R10 000.00, to her own account.

[28] The plaintiff was also shown a schedule drawn up by the defendant entitled 'Advances of Proceeds to agreement by Defendant' which appeared to reflect a record of monies advanced to her between October 2010 to July 2012 in respect of various living expenses which she had incurred totalling R340 361.23. The plaintiff testified that these were indeed advances made to her by either Chantal or the defendant over this period in respect of living expenses. She stated that she understood that these were advances to her out of the R740 000.00 promised to her in terms of the agreement. Under cross examination the plaintiff readily conceded that she had done wrong in selling the scrap and keeping certain tools in a room or a container with a result that they had been overlooked in the estate's stocktaking. It was put to the plaintiff that the existence of the containers had only become known to the plaintiff in about February 2012 but she stated that she recalled speaking about the value of the contents of the containers at the Spur meeting. It was further put to the plaintiff that an agreement between her and Chantal concerning their shares of the plot proceeds had been reached at least a week before the Spur meeting but this was strongly denied by the plaintiff. The plaintiff was also shown an email dated 2 December 2011 where the defendant instructed Madelyn Kruger to change a draft agreement to provide for the plaintiff to receive 20% of the proceeds i.e. R740 000.00. The relevant instruction reads:

> *'1. Please amend the total per 2.1 to 740 (R740 000). Chantal has decided to issue her 20% of the proceeds as Illona is one of five direct descendants*

hence 20% of R3.7mil, leaving her with R740 000 of total proceeds of plot.'

[29] In the same email the defendant made arrangements with the attorney *'to have Chantal, Illona and myself come in and sign all agreements'* on the day before they were in fact signed i.e. 7 September 2011, the day of the meeting at the Spur.

[30] The plaintiff testified that she knew nothing of any share being based on her being one of five direct descendants of the deceased. It was put to the plaintiff that no threats were made to her at the Spur meeting and that even if they were, they were lawful. It was further put that the purpose of the meeting was to give her a share of the proceeds rather than to take anything away from her. It was also put that the defendant had paid all of the advances recorded in the schedule to her and that he admitted owing her the difference between their total and the amount of R740 000. The plaintiff appeared to accept this proposition in that she said she never thought those monies were gifts.

[31] Also put to her was documentation addressed to the Namibian attorney's conveyancing secretary instructing that half of her proceeds be paid into the money market account opened on her behalf by the defendant. The plaintiff explained that many documents had been put in front of her for her signature and she could well have signed the document. She testified that she had put considerable trust in the defendant and that she herself had no financial expertise. She testified also that she had been devastated by what had happened at the Spur meeting. When the defendant had later called on her unexpectedly (after Chantal's' death) and made the proposal that he would pay her a maximum of R40 000 he had said that they were no longer blood related which had made her very angry. In further cross examination it emerged that after some years the defendant had been relieved of his executorship of Hartmut's estate by the Master of the

Namibian High Court and that she, the plaintiff, was eventually appointed as executor. She had instructed attorneys to be her *'agents'* as executor (and at another stage had also appointed a Windhoek Trust company in this regard).

[32] The plaintiff was cross examined at some length about her handling of the estate but little of this is or was directly relevant to the issues in dispute in this matter. By the time her evidence was concluded the estate was still far from being finally wound up.

Ms Tamara Coetzee

[33] Ms Coetzee testified that the plaintiff and Chantal were her half-sisters and all three shared the same mother. Hartmut had been her step-father and the defendant was her brother-in-law. She had been very close to Chantal who had been her *'best friend'*. The witness had not been a beneficiary of Hartmut's will but soon after his death both the plaintiff and Daleen had made her aware that they were unhappy with the way that the defendant was winding up the estate. Daleen had sent her bank statements and she had seen that large amounts were transferred out of the estate bank account by the defendant. She herself had some experience of winding up a deceased estate in that she had singlehandedly wound up her father's estate in 2000 inter alia by obtaining a book explaining the process. After the large withdrawals were drawn to her attention she had told Chantal that she was alarmed by what she had seen because there were creditors to be paid and two beneficiaries and she had suggested to the defendant that he repay the monies to the estate bank account. At a later stage the defendant had given her a copy of his draft liquidation and distribution account. She had noted that the defendant had been apportioning each invoice pro rata to the beneficiaries, making for a very confusing if not incomprehensible account.

[34] In May 2011 the deceased's brother, Helmut, had come to see her and advised that Marga Geiger was not happy with her son's will and in particular the notion that Chantal would get 100% of the property or its proceeds. Instead his mother's plan was to sell the property and split the proceeds between Chantal and the plaintiff. Ms Coetzee had told him that she thought that this was a very good idea because it was a fair and equitable arrangement.

[35] The witness was shown an email to her from the defendant dated 4 July 2011. It reads in full as follows:

> *'Of course your miscalculation was thinking the family would get over it.*
> *Not Melissa, not Kendra, not Chantal, not Terry, not Tiana, not Faith, not Warren* (the defendant) *... Not anyone with principle was ever going to step back and let you piss on a man's dying wish and then miraculously let you back in our lives. We are of better stock, and no it was never about the money ... We don't need it. He was our father, father in law, grandfather and a man we ALL loved and your demons did not belong in that domain ... he did us no wrong.*
> *Am sure this was not your first misjudgement, I just hope it's you(r) last.*
> *For what it's worth ... Good luck Tam.'*

[36] The witness testified that she experienced the email as excommunicating her from the defendant's entire family. Asked what was the *'it'* which she had mistakenly thought the family would get over, Ms Coetzee testified that she understood this to be a reference to Hartmut's will and in particular the treatment of the Brakwater property. She believes that the defendant thought that she, Coetzee, had something to do with Marga Geiger's plan to divide the proceeds of the sale of the property equally between Hartmut's two daughters rather than letting Chantal have the entire proceeds. This had become a bone of contention. After Hartmut's death in 2010 she had visited Chantal who was very excited and had told her that she would get 100% of the plot and 50% of the business and of the

holiday home together with a third of the residue of the estate. She, Coetzee, had been shocked to learn how little the plaintiff was inheriting since the deceased's business was barely limping along. Chantal had also told her that *'they'* had decided to give Illona R500 000.00. She had experienced the email referred to above as a very nasty one. The defendant had warned her to stay away from his family because she was interfering with the winding up of Hartmut's estate. The people referred to in the email were not only the defendant's wife and daughters but his brother Terry and his wife as well as his mother.

[37] Before the dispute arose they had all been on very good terms and had spent much time together. She had *'adored'* Chantal and her children. Coetzee testified that Hartmut had not been a well man for some time before his death and had been trying to sell his business for at least ten years prior thereto but could not find a buyer. From June 2011 when she has been *'excommunicated'* by the email, until mid-April 2012 when Chantal had unexpectedly fallen ill and died, she had nothing to do with the defendant's family.

[38] The plaintiff had made contact with her in early July 2012 and told her that her rent had not been paid, that she had to vacate her flat and that she had no money. She had asked to move in with Tammy and she had agreed to this. She had asked the plaintiff where her share of the proceeds of the Brakwater property sale was but the plaintiff had been unable to tell her and seemed to know very little about the matter. Ms Coetzee had then phoned Helmut and learnt that the property had been sold in September 2011. She obtained details of the transferring attorney and contacted an attorney on behalf of the plaintiff. Through these steps the documentation from the Windhoek transferring attorneys had come to light and details of the bank accounts into which the proceeds of the sale had been paid.

[39] The plaintiff had been unable to account for any monies she had received but recalled that she had signed banking documentation at the behest of the defendant. Ms Coetzee then made enquiries from FNB and learnt that the Milnerton money market account has been closed. She obtained the bank statement referred to earlier and upon further enquiry learnt that the withdrawals had been made by the defendant. She had been given a copy of the delegation of authority signed by the plaintiff in favour of the defendant. Upon further questioning the plaintiff recalled signing documents at the defendant's behest in terms of which she would receive only a reduced portion of the plot's proceeds. Ms Coetzee then learnt that documents had been signed at the offices of Madelyn Incorporated in Durbanville but that the plaintiff had not received any copies thereof. She sent the plaintiff to the law firm to obtain copies but she returned with only a copy of the power of attorney. The plaintiff had clearly not understood the powers that she had given to the defendant in terms of the power of attorney. She sent the plaintiff back to the law firm to obtain a copy of the agreement which she had signed and only after some difficulty had the plaintiff eventually obtained a copy of the disputed agreement. When she read the agreement Ms Coetzee told the plaintiff that she did not understand why she had given R1.1mil of her share away. The plaintiff explained that the defendant had threatened her with the police and reporting her to the Master in Namibia for stealing assets out of the estate. There had been a breakfast meeting at the Spur where she had been told that if she did not agree to take only 20% of the proceeds the defendant would report her to the authorities and would tell her Namibian family that she had stolen from the estate.

[40] Asked for her impression of the plaintiff's personality Ms Coetzee testified that the plaintiff could be outgoing and friendly but had a *'very small heart'* in the sense that

she was intimidated by official processes. She also did not like people to think that she did not know what was going on so she tended to go along with things not knowing or understanding what exactly was going on.

[41] In 2013 Ms Coetzee discovered that the defendant had been removed as executor. This was after the Master had written to the defendant advising that if certain steps were not taken within 30 days he would be removed as executor but had received no response. The witness referred to a lengthy communication from the defendant to the plaintiff's legal representatives in approximately February 2013. Under the heading 'Current position of the executor late estate CP Booysen' he wrote inter alia that unless a meeting was held by a certain date he would instruct his legal representative in Namibia to:

1. disclose all evidence of criminal conduct by the plaintiff to the Master of the High Court of Namibia;
2. report the plaintiff's criminal activity to the Namibian police and have her and others charged with *'asset theft and cash fraud'*;
3. commence civil action against all parties, including Ms Coetzee, for punitive damages as a result of losses suffered by Hartmut's estate which he estimated to be in excess of R2.5mil.

[42] In the same communication and referring to the plot agreement the defendant stated that he *'was not a party'* to such written agreement which had *been 'signed by plaintiff and Chantal'* and witnessed by attorneys. He added *'my only involvement was to administer* (plaintiff's) *share and a power of attorney granted to me by her and the attached analysis reflects such administration. Unfortunately, the claims against the estate as well as the totals withdrawn to date have resulted in an additional debt and the total is accordingly exhausted'*. In the communication he proposed a settlement which, taking account of R740 000 initially owed to the plaintiff in terms of the agreement and

the advances made to her totalling R340 361, would have left the plaintiff owing R23 000 to the *'estate'*.

[43] In another lengthy email written to Ms Coetzee in December 2011 i.e. before Chantal's death the defendant states that the plaintiff and Chantal were currently *'the best of friends'* and added *'Chantal has as per (the deceased's) wishes allotted a material part of the plot proceeds to her and she has granted me power of attorney to administer it'*. In what appears to be an explanation of his earlier *'letter of excommunication'* he wrote *'I simply had to take you out of the mix at the time to ensure the estate could move forward and the truth could come out, after all, you were defending the indefensible and gave no one a forum to debate, creating a stalemate'*. In the same communication of 8 July 2011 the defendant further stated that the Master insisted that the estate claim against all parties to ensure that the only heir who had *'nothing to do with this'*, being Chantal, was sufficiently remunerated her share of R1.4mil of the initial appraised value of the business. When questioned by the Court to how this could have taken place when the estate had not been wound up, Ms Coetzee stated that the defendant had withdrawn all the cash from the estate bank account. Reference was made by the defendant in the email to a Court order which Ms Coetzee was unable to locate in the estate file. A further concern in relation to how the defendant had acted as executor was brought to her attention in an email forwarded to her by Daleen in March 2011 with a subject heading *'Nou word ek gedreig'*. In response to Daleen's request that an offer to purchase the deceased's business be put in writing, the defendant respondent stating that the business would now go on auction and he referred to a vehicle which, if it was not placed *'op 'n blok'*, on the same day that he and Chantal would phone the police.

[44] Ms Coetzee testified that after the defendant's removal as the executor the plaintiff had been appointed as executor to Hartmut's estate in 2014 as there was no one else who could be appointed. Ms Coetzee had tried to get appointment as executor in order to wind up the estate but the Master had wanted N$2mil in surety from her which she was not able to meet. The plaintiff was not required to provide security and upon appointment had instructed a trust firm to wind up the estate which it had commenced doing so in 2014. In 2016 that firm had declined to act any further in the matter due to various threatening letters and emails which they had received from his defendant and his attorneys. As at the date on which Ms Coetzee testified the estate had still not been wound up as the defendant had been recalcitrant in providing bank statements which were needed in order to verify creditor payments made from Chantal's account to the benefit of the estate.

[45] Ms Coetzee expressed the opinion that the manner in which the defendant had administered the deceased estate was incorrect in a number of respects and that the numerous documents and agreements which he had placed before the heiresses had been the start of the confusion and the problems between the parties. She stated that she would not necessarily describe the defendant as dishonest but he often went around threatening people. In Ms Coetzee's view the description of the defendant as the executor in the plot agreement concluded between himself and the plaintiff was calculated to force the plaintiff to sign the agreement in combination with the threats made by him to have the plaintiff charged with theft of assets falling within the estate.

[46] Under cross examination it was put to the witness that the defendant and Chantal had been upset by her criticism of how he handled the estate. It was further put that the defendant was angered because she, Ms Coetzee, had refused to accept the will but her

response was that it was not for her to accept the will or not. It was put to the witness that it was only in January 2012 that the defendant became aware of the plaintiff's theft of equipment from Hartmut's business which equipment had landed up in two containers. Ms Coetzee referred however to the defendant's lengthy email of 8 December 2011 wherein he stated that by July/August of 2011 *'the full picture emerged'* i.e. covering both the scrap and metal and the hidden equipment stored in containers. It was also put on behalf of the defendant that he was contacted by an attorney, one Mr Chris Gouws, of the Windhoek transferring attorney who advised him that although Mrs Geiger had signed the deed of sale he had a problem inasmuch as the deceased's will was incompatible with Mrs Geiger's instructions and he believed that the issue should either be referred to arbitration between the sisters or before the proceeds of the sale were paid out. It was put further that the defendant conveyed this to Chantal and that as a result she and the plaintiff chose to *'sort it out themselves'* and eventually arrived at the 80/20% arrangement, something in which the defendant had not been not involved.

[47] Much cross examination was directed to the handling of the deceased's estate by the plaintiff, with the assistance of the witness, after the defendant was removed as executor. In particular, the issue of how the deceased's holiday home at Wlotskasbaken was disposed of was dealt with at some length. Most if not all of this cross examination is of no direct relevance to the issues in dispute but it did incidentally reveal the defendant's continuing and longstanding dissatisfaction that his late wife or her estate had not received her/its due entitlement from the estate of the late Hartmut Fritzsche.

Warren Hugh Booysen

[48] The defendant described himself as an experienced businessman with a financial

background. He commenced his career with five years of clerkship at a major accounting firm. The defendant conceded, in relation to the plaintiff's alternative claim C, that the amount of R399 638.17 remained owing by him to the plaintiff. He testified that the amount of N$800 000.00 comprised two amounts: N$200 000.00 and N$600 000.00 which were advance payments from the purchaser, Mr NJ Swart, to his late wife Chantal. These amounts had been paid on 14 October and 25 November 2011 and had been arranged directly by Chantal. These payments were deposited directly into Chantal's account. He testified that the plaintiff was not entitled to half of the advance payments of N$800 000.00 since these had gone directly into Chantal's account by virtue of the arrangements she had made. The defendant later conceded, however, that by virtue of these advances and in accordance with Mrs Geiger's wishes the N$800 000.00 advance received by Chantal should have been deducted from her 50% of the proceeds of the sale of the Brakwater plot so that the plaintiff received her full R1.8mil odd. He admitted and had confirmed in his plea that Mrs Geiger's instructions were that half of the proceeds of the sale of the property were to go to the plaintiff and Chantal respectively and that Mrs Geiger had given those instructions when she signed the deed of sale. He stated however that he had got a phone call from the attorney, Gouws, after the deed of sale had been signed when the latter had stated that this instruction had created a problem in that it was at odds with the will and had suggested an arbitration or that the two sisters *'sort out'* the problem themselves. The defendant testified that he immediately told Chantal that she and the plaintiff must sort out the matter and that thereafter he had deliberately stayed out of that matter.

[49] In response to a question from the Court the defendant stated that he was not aware that Mrs Geiger ever learnt that the proceeds were not split equally between the

sisters. He did not tell Mrs Geiger that and to his knowledge neither did Chantal. Referring to the alleged 80/20% plot proceeds agreement the defendant testified that he had no involvement in it and only learnt of it from Chantal. The defendant was informed by Chantal who *'made representations'* to him that she and the plaintiff had agreed on the percentage for sharing the proceeds of the plot sale and it was those terms which were confirmed in the written plot agreement.

[50] The defendant was asked to explain why the agreement reflected him as a party acting in his capacity as executor and his explanation was that the attorney Madelyn Kruger had misunderstood the position to be that the property fell within the estate. He was adamant that she had not done this on his instructions. He confirmed that he had taken a general power of attorney from the plaintiff and later obtained a delegation of authority from her to operate the bank account which she had opened under his directions. According to him it was their common understanding that this would be the case in terms of the power of attorney, in other words, that he would administer the plaintiff's bank account and her funds.

[51] He confirmed that he withdrew all but some R10 000.00 of the R1.443mil paid into that account from the proceeds of the sale of the property and explained this on the basis of his understanding of the disputed agreement that he had to reimburse Chantal so that she obtained her 80% share. He stated that he began to administer the R740 000 which he understood to be due to the plaintiff by administering that part of the R1.4mil and making advances to her from his private account. The defendant was referred to the schedule of advances which he drew up and confirmed this as well as his 'open offer' to pay her the balance of R399 000 which he still owed her.

[52] The defendant admitted that the breakfast meeting at the Spur took place but denied ever threatening the plaintiff. He did state, however, that he had a schedule at that meeting reflecting an agreed amount of the cash sales in respect of the scrap and that he had prepared this prior to the meeting and discussed it at the meeting. His evidence was that he intended to deal with estate matters at the meeting while Chantal was there to discuss the property matter upon which the sisters had agreed to prior to the breakfast meeting. He testified that he had been shocked when in August 2010 shortly before Hartmut's death the latter had advised him that Chantal was to get 100% of the plot and was that he had been *'livid'* at this massive imbalance in favour of his late wife. However, he always knew that Chantal *'wanted to give the plaintiff something'* and that in fact 20% would be higher than the R500 000.00 share for the plaintiff that he had heard of earlier.

[53] Under cross examination the defendant gave an outline of his business history and responsibilities in Namibia. He regarded himself as a business man with a financial background. In 2011 neither he nor Chantal had been employed and they simply enjoyed passive income. Notwithstanding what he stated earlier regarding the share which he always knew Chantal would give the plaintiff of the plot proceeds, the defendant stated it was always his understanding that the plot fell outside the deceased's estate and that Mrs Geiger's late husband had left the property to her to deal with as she saw fit and that she was free to deal with as she wished.

[54] The defendant was aware that Chantal had requested the advances totalling N$800 000.00 as contained in an email of 9 November 2011 to the Windhoek attorney's conveyancing secretary. The defendant appeared to recall that the advances were to

finance a holiday for the family to America. He conceded that the final payment that Chantal received should have been reduced by N$400 000.00 (to reimburse the plaintiff for her half share of the advance payments) and that added to the payment which the plaintiff in fact received in respect of her share of the proceeds.

[55] Referring to the day of the Spur meeting the defendant confirmed that Chantal was requested to leave the attorney's boardroom since she was not required to sign the plot agreement. He further confirmed that five days prior to the meeting he had emailed attorney Kruger to amend the amount due to the plaintiff and confirmed that a draft agreement had previously been sent to him. He had, however, not requested any amendment to remove to what he explained was a mistaken reference to his capacity as being that of the executor. It was put to him that he had been fully involved in the substance of the plot agreement and he denied this stating that he had merely conveyed the amended amount.

[56] When asked by the Court why as the executor he would need a power of attorney to account for any irregularities and the equalisation account his response was that since the plaintiff was receiving money soon from the property sale and the disputed agreement he would be able under the power of attorney to reimburse the estate or other parties for her conduct in that regard. In other words, notwithstanding the fact that the power of attorney was granted to him in his personal capacity he believed that he could use it to reimburse the estate in which he was the executor and also to acknowledge indebtedness on the plaintiff's behalf.

[57] The defendant conceded that at the Spur meeting he had informed the plaintiff that he had a signed affidavit from Daleen relating to the theft of scrap material by the

plaintiff. In fact, in later evidence it transpired that he had flown Daleen from Pretoria to Cape Town for the specific purpose of obtaining that affidavit.

[58] The defendant was asked to explain why he had taken the plaintiff all the way to Milnerton to open the money market account rather than simply going to FNB in Durbanville and his answer was that he would have telephoned FNB to ask where he could open such an account and they would have told him to go to the Milnerton branch. He confirmed that it was he who wanted the plaintiff to open a money market account despite the fact that she had an existing cheque account. He conceded, furthermore, that it was possible that he had arrived unannounced at the plaintiff's residence prior to opening the account and that the first time she had been aware of where they were going was when she asked him this on the way to Milnerton. The defendant could not recall whether the plaintiff read through the documents pertaining to the opening of a bank account but conceded that she would have had a sense of *'Warren is doing the right thing here'*.

[59] Even though the defendant's evidence was that Madelyn Kruger had incorrectly assumed that the plot fell within the deceased's estate he confirmed that in an email to her on 2 December 2011 he referred to the property as a *'plot* (his wife) *inherited in Brakwater …'*. The defendant conceded that the agreement which he signed was sent to him and not to Chantal. He furnished no explanation as to why, if the core agreement was concluded between his wife and the plaintiff, he had instructed Madelyn Kruger to frame it as an agreement between himself and the plaintiff.

[60] He testified further that he had informed Ms Kruger that he did not want Illona to have a bank account where she could *'operate with impunity without my say so'*. When asked whether the plaintiff understood that the defendant would be able to transfer all of

her funds into his private account, he stated that he could not speak to her frame of mind at that time. He conceded that in his lengthy letter to the plaintiff's former attorney his reference to an executor to the estate of his late wife was incorrect as no executor had been appointed even by 2013. He conceded further that in his lengthy email of 8 December to Ms Coetzee, and which he knew she would share with the plaintiff, there had been a lot of embellishment, exaggeration and misrepresentation inter alia in that he had not disclosed anything to the Master, that the Master had not insisted that Chantal be compensated as an innocent party and that there was no court order. He admitted that he had drawn an agreement relating to access to the deceased's holiday house by the three heiresses which heavily favoured his wife and which was at odds with the will itself. He stated that he had drafted the agreement based on Hartmut's dying wishes but conceded that he had no notes or memoranda in this regard. Nonetheless he stated that ethically he did not agree with the terms of that agreement.

[61] The defendant was unable to explain why beneficiaries to Hartmut's estate continuously signed agreements, allegedly with no objection but shortly thereafter became extremely unhappy with the content of the agreements. He denied ever bulldozing parties into signing agreements. As to what was Ms Coetzee's *'misjudgement'* or *'miscalculation'*, as referred to in his ex-communication email on 4 July 2011, the defendant advanced differing explanations. Firstly, he stated that it was Ms Coetzee's refusal to sit around a table with her other two sisters but then when pointed out that this was not possible as the plaintiff was not present in Cape Town he stated that it was in response to a contentious phone conversation he had with Ms Coetzee. When it was put to the defendant that he perceived Ms Coetzee to be standing in the way of his wife receiving 100% of the plot proceeds the defendant ultimately conceded this stating that at

that stage he considered that Ms Coetzee was blocking any negotiation.

[62] He confirmed that his statement to the plaintiffs' erstwhile attorney that he had not been party to the plot agreement was yet a further incorrect proposition. When asked why the plaintiff would only accept 20% of the proceeds of the plot sale when she knew that Mrs Geiger had instructed that she should share equally in the proceeds, the defendant stated that he was unable to speak the plaintiff's frame of mind. Notwithstanding his instructions to Madelyn Kruger regarding the form of the agreement he testified that he had no idea that the plaintiff was agreeing to forfeit 60% of her share of the profit. He testified on more than one occasion that, although aware of the discussions between the sisters he wanted to stay out of them at all cost. The defendant went further and testified that he believed that Chantal's actions regarding the sharing of the plot proceeds were wrong but that he had signed the agreement in order to *'cause and effect'* it. The defendant was unable to explain why, if the equalisation agreement was the main business on 7 September 2011, it was not signed on that day but only two days later.

[63] The defendant was confronted with an affidavit by Mr Chris Gouws, the Windhoek attorney, responding to the plaintiff's evidence that Gouws had advised him of his concern that there was a conflict of interest between the instructions provided by Mrs Geiger and the contents of the deceased's will. In the affidavit Mr Gouws stated that he remembered all the parties to the transaction well, that he would never suggest that parties refer a matter to arbitration and certainly had not done so in that case. He added that he realised that his testimony could not be tested under cross examination but was unable to attend the trial timeously and did not believe that he would be permitted to travel to Cape Town due to the then existing Covid-19 restrictions placed on the borders

of both countries.

[64] The parties' legal representatives agreed that Mr Gouws' affidavit could be received by the Court as evidence with the defendant reserving his right to argue what it probative value should be. The defendant maintained his evidence that the telephone call took place stating that he did not know why Gouws would depose to the contents of the affidavit. The defendant remained adamant that he did not agree with Chantal's handling of the plot proceeds stating *'I don't agree with it, I didn't agree with it then and as sure as hell don't agree with it in my office post Chantal's passing. Just like I contend that the Wlotskas agreement is a disaster I don't agree with what happened here. But I do very clearly agree that Chantal was instructed by me that I am not getting involved in this transaction'*.

[65] He acknowledged that he owed the plaintiff at least R399 000.00 and explained that he had not paid this because he believes there is a *'refund'* due from the money owed to his late wife's estate. He conceded too that ultimately his offer to pay the aforesaid sum to the plaintiff was conditional upon her accepting such sum in full and final settlement of her claims. He testified that the approximately R400 000.00 remaining and which was owed to the plaintiff had been held in his personal account, no separate account having ever been opened. He did not concede that the plaintiff was entitled to interest on the money owing to her and which had been in his possession some nine years.

[66] The defendant agreed that at the relevant time the plaintiff was both legally and financially unsophisticated and was a rather naïve person. He conceded that he never advised her to seek independent legal advice before signing any of the documentation

which he placed before her, whether as executor or otherwise. He also conceded that the reason why the Windhoek attorneys were not instructed to simply pay the R740 000.00 directly into the plaintiff's account, and the remaining balance into Chantal's account, was to ensure that it appeared that the sisters were still receiving their equal half shares and so as not to notify the attorneys and in turn Mrs Geiger that any other arrangement had been concluded. The defendant also acknowledged that, based on his own testimony, he had no direct knowledge of the negotiations between the two sisters and, his wife having passed away, that the plaintiff's evidence that there was no agreement between them could not be contradicted. Asked by the Court *'how do we know that there was an agreement between your late wife and the plaintiff'* his answer was *'I don't think we do'*.

Evaluation of the witnesses

[67] In keeping with her limited informal education the plaintiff came across as an unsophisticated person and unversed in legal and financial matters. She answered questions as best she could but at times it was clear that she failed to comprehend certain questions and proposals which were put to her. The plaintiff was relatively straight-forward in admitting her theft of assets from the estate although at times one gained the impression that she was not entirely forthcoming about these matters. What was clear was that the plaintiff was entirely at sea in dealing with the defendant in matters relating to the estate and the sale of the Brakwater property. She was consistent in all the important elements of her evidence despite hostile cross examination.

[68] As a witness Ms Coetzee stood in sharp contrast to the plaintiff. She was obviously intelligent, financially astute and well informed, if not experienced, in relation to the winding up of deceased estates. She impressed as someone who had no interest in

the subject matter of the dispute between the plaintiff on the one hand and the defendant and his late wife on the other. In fact, it was clear that she felt torn in that she had previously enjoyed a very close relationship with Chantal. Her observations about the plaintiff's personality and why she was so easily influenced appeared to be completely on target.

[69] Ms Coetzee displayed a sure grasp of the voluminous documentation in the form inter alia of agreements and emails. She was clearly not someone who would be overwhelmed by the defendant and was more than capable of forming her own opinion and expressing it and sticking to it. She was even-handed in her evidence and gave no sign of favouring either of her step-sisters. When it came to the question of the plaintiff's dishonesty in stealing assets out of her late father's estate it was clear that this had never been approved of by Ms Coetzee nor discounted by her. Ms Coetzee's evidence was clear, consistent and unshaken in cross examination. I accept her evidence in full.

[70] The defendant presented as an intelligent and articulate person who was very well versed in financial matters and accounting. He was extremely loquacious as manifested not only in his evidence but in the stream of documentation and lengthy emails which were authored by him and found their way into the record. In evidence the defendant came across as a man of some charm who at one and the same time appeared eager to please but was also resolute in some of the unfortunate positions which he adopted. His greatest fault as a witness was his repeated tendency to adapt his evidence to changing circumstances and to avoid answering direct questions, choosing rather to answer in a torrent of words which often did not directly answer the question. There were numerous instances in his evidence where his answers simply lacked credibility and appeared to be

entirely self-serving. A prime example was when he asked what gave rise to the stinging excommunication email which he sent to Ms Coetzee. He would not give any clear explanation despite being repeatedly questioned on this and his ultimate response, namely, that it was a result of Ms Coetzee's failure to come to establish a forum to engage in negotiations about the estate and the Brakwater plot, made little sense. Many of the answers which the defendant gave which were more damaging to his case were in response to questions put to him by the Court. The defendant often oscillated between differing positions on the same issue. For example on the one hand he stated that he wanted nothing to do with the agreement between the sisters relating to the plot proceeds but this answer stood in sharp contrast to his almost complete involvement, to the exclusion of his wife, in the instructions to the attorney to draft the agreement and in its execution. It is also very difficult to square his claimed distaste for the agreement which he had drawn up i.e. the plot agreement and the holiday house agreement, with his actions in drawing the agreement and having them executed. Although the defendant affected to be simply giving effect to Chantal's wishes in having the agreement drawn up, and notwithstanding his claimed distaste for the unequal treatment which the plaintiff was receiving as a beneficiary in the estate, all the evidence points in the opposite direction. There is overwhelming evidence including a plethora of emails from the defendant indicating that he was the driving force behind the disputed plot agreement, all seemingly done to reimburse Chantal for loss she allegedly suffered when the estate was not wound up as lucratively for her as the defendant envisaged. Chantal's role in all this appears to have been very limited, if not negligible, giving the lie to the defendant's claims that he was merely acting on her instructions.

[71] All of the defendant's evidence which was not common cause or at odds with that of the plaintiff and Ms Coetzee has to be critically examined because of his propensity to tailor his answers to suit his version of events. There were a considerable number of occasions in which he was caught out in false testimony, examples being that relating to his sale of a motor vehicle used by the plaintiff as well as false claims and representation made by the defendant in emails and communications to the plaintiff or her legal representatives. The defendant was forced to concede that one such communication was replete with embellishments, exaggerations and untruths. Another deliberate untruth was the defendant's claim that Marta Geiger's attorney, Gouws, was unhappy that the proceeds of the plot's sale were to be shared equally between the sisters and had suggested arbitration or a negotiation. This was flatly denied by Gouws in his affidavit, the contents of which I accept. Many other contradictions and untruths appear from the summary of his evidence above.

[72] Ultimately, I find, the defendant was not a credible witness on key issues. Accordingly, although the main elements of the factual matrix are common cause, where they are not and where the evidence on behalf of the plaintiff is credible, aligns with the probabilities, and in some cases is corroborated by documentation or by the evidence of Ms Coetzee, her version is to be preferred to that of the defendant.

Discussion of the plaintiff's claim

[73] The plaintiff's main claim for the setting aside of the agreement and the payment to her of her half share of the proceeds of the sale of the plot was based in the first instance on duress, principally in the form of the threats which she testified the defendant had made at the Spur meeting to report her to the Namibian police and to expose her

wrongdoings to her family, notably, Mrs Geiger in Namibia. It was only after the conclusion of the defendant's case that the plaintiff applied to amend her particulars of claim by adding an alternative basis to the main claim, namely, that she had been unduly influenced by the defendant in entering into the agreement. This proposed amendment was opposed by the defendant and eventually allowed on the basis that the defendant would be allowed to plead to the amended particulars of claim, seek further discovery and if needs be further cross-examine the plaintiff and lead evidence in response to the amended particulars. After a delay of several months the plaintiff returned to be cross-examined and the defendant testified yet again. Little if anything came of this further cross-examination or evidence, lending support to the initial argument of the plaintiff's counsel that the supplementary basis for the main claim had in effect already been covered by the evidence.

[74] Where a party relies on a contract having been concluded under duress such party may elect to rescind or resile from the agreement and be refunded that which is owed. The agreement, if so concluded, is voidable since a person who is induced by legally significant fear to conclude a contract cannot properly said to have consented. The requirements to prove duress were summarised by Wessels as follows:

> *'In order to set aside a contract on the ground of fear, our law requires the following elements:*
>
> 1. *Actual violence or reasonable fear;*
> 2. *The fear must be caused by the threat of some considerable evil to the party or his family;*
> 3. *It must be the threat of an imminent or inevitable evil;*
> 4. *The threat or intimidation must be contra bonos mores;*
> 5. *The moral pressure used must have caused damage.'*

[75] In my view it is unnecessary to determine whether these requirements, as expressed by Wessels or glossed by subsequent case law, have been met by the plaintiff since the same result in law can be achieved by considering whether the plaintiff established that, in concluding the contract, she was subject to undue influence. In *Patel v Grobbelaar*[1] the Appellate Division set out the requirements for a plaintiff who claims rescission of a contract on the grounds of undue influence in the following terms:

> *'Die onus om hierdie skuldoorsaak te bewys, het klaarblyklik op die respondent gerus en die geleerde Verhoorregter het, na my oordeel, tereg bevind dat die respondent die volgende moet bewys:*
>
> *(i) dat die appellant 'n invloed oor hom gekry het;*
>
> *(ii) dat hierdie invloed sy teenstand vermoë verswak en sy wil ploeibaar gemaak het; en*
>
> *(iii) dat die appellant hierdie invloed op gewetenlose wyse gebruik het om die respondent te ooreed om toe te stem tot 'n transaksie –*
>
> *(a) wat tot sy nadeel strek; en*
>
> *(b) wat by met normale wilsvryheid nie so aangegaan het nie'.*

[76] The undue influence must be exerted in an unconscionable way. In *Gerolomou Constructions v Van Wyk*[2] the Court considered that what acting *'unconscionably'* meant in this context was acting with a *'substantial degree of unscrupulousness, an intention to oppress, or a departure from the values to which right-thinking people subscribe in the relevant context'*.

[77] A party seeking relief cannot succeed unless able to prove that the contract must have been induced by the undue influence. If the plaintiff was not so induced the

[1] 1974 (1) SA 532 (A).
[2] 2011 (4) SA 500 (GNP).

influence is of no importance. See *Katzenellenbogen v Katzenellenbogen and Joseph*[3].

[78] Applying these principles to the present matter it is common cause that the defendant was the plaintiff's brother-in-law and the executor of her late father's estate. In addition he had considerable business experience and acumen and a financial background as opposed to against the plaintiff's very limited formal education and her financial and legal naiveté. The defendant himself conceded that the plaintiff was both legally and financially unsophisticated and vulnerable at the time. The plaintiff appeared, initially at least, to have trusted the defendant. She testified that she did virtually whatever the defendant asked of her including signing documents without reading or properly considering them or taking legal advice. Having observed the defendant at some length during his evidence and in argument it is clear that he is able to present himself as authoritative in matters financial and legal, he is articulate and he would be entirely plausible to someone in the position of the plaintiff.

[79] It is clear, furthermore, that the influence which the defendant enjoyed over the plaintiff weakened her resistance and made her will pliable. It is noteworthy that at the time the plaintiff was a somewhat isolated figure with few resources at her disposal. Her father with whom she had lived and worked over many years had recently died, her relationship with Daleen had ended and she was unemployed and in financial straits. At the time the agreement was concluded the plaintiff was dependent financially on the defendant and his wife and living under their roof.

[80] The further requirement is that the defendant must have used the influence which he had unscrupulously or unconscionably to prevail upon the plaintiff to conclude the

[3] 1947 (2) SA 528 (W) 541.

agreement. In my view, even if one has regard only to the common cause facts, the defendant bulldozed the plaintiff into concluding the agreement. Although the defendant clung to his evidence that the formal agreement was based on an agreement between the plaintiff and Chantal, not only was this not the plaintiff's evidence but the probabilities strongly suggest that this was not the case. In the first place according to his own evidence the defendant had no direct knowledge of any such agreement. Secondly, the defendant's evidence was completely contradictory: on the one hand he stated that he was at pains to distance himself from any discussions or negotiations regarding the plot's proceeds but on the other hand it was clear that he was the driving force in having the *'agreement'* reduced to writing by an attorney and signed by the plaintiff. Madelyn Kruger was the defendant's attorney and he gave her instructions. In all these dealings Chantal appeared to play no role whatsoever, even being excluded from the meeting when the agreement was signed.

[81] No explanation was ever given by the defendant why the agreement was not framed as an agreement between the plaintiff and Chantal. There were many indications in the surrounding documentation, principally emails, that there was no question of any underlying agreement in the true sense. Tellingly, in his last email to the attorney requesting an amendment to the draft agreement the defendant spoke of Chantal's *'decision'* to allocate 20% of the plot sale proceeds to the plaintiff. Needless to say this is hardly the language of an agreement.

[82] A further relevant factor in this regard was the clear evidence that Chantal initially expected that the plot would be bequeathed to her alone or, failing that, that she would obtain the full proceeds from the sale of the plot. Similarly, there was evidence that she

was very unhappy to learn that the proceeds would be divided equally between her and the plaintiff and that this had caused a schism between her and the plaintiff. Yet a further important factor pointing away from any agreement between the sisters was the complete lack of any explanation as to why the plaintiff would forfeit 60% of her share of the proceeds to Chantal when she was, in relation to the latter, already a minor beneficiary in her father's estate and aggrieved by this.

[83] Turning to the circumstances in which the agreement was concluded it is clear that the plaintiff was in effect ambushed by the Spur meeting. She was given no prior indication by the defendant of what would be discussed at the meeting or even that he would be present. Instead she was confronted with an equalisation agreement and an affidavit by Daleen relating to her theft of assets from the estate. Although the defendant denied making any threats, the plaintiff's evidence that he put it to her that she must either accept 20% of the proceeds of the sale or face being reported for theft to the Namibian police and having her theft disclosed to her family in Namibia is entirely credible and in keeping with the probabilities. Nothing else explained why the plaintiff would agree to forfeit such a large part of her entitlement, well in excess of R1mil, to Chantal. Significantly, Tammy Coetzee testified that when, many months later, she tried to ascertain why the plaintiff had concluded the agreement she advanced the self-same reasons as the plaintiff put before Court, namely, that she was in effect overwhelmed by the defendant and fearful that he would carry out his threats. As mentioned earlier the defendant admitted in his plea that he *'may have'* threatened to take *'certain steps'* against the plaintiff to protect his property or in the interests of Hartmut's' estate.

[84] There is considerable evidence that the defendant had a propensity not only to make threats against parties who were not inclined to accept his proposals and dispositions in relation to the estate and to the property, but that his modus operandi was to present proposals and his plans of action to the parties at the last moment. Thus, for example, the plaintiff was drawn into the Spur meeting without prior notification of what would be discussed, and within minutes of *'agreeing'* to the defendant's proposal, found herself being driven to an attorney's office to sign the agreement and a general power of attorney. On the defendant's version at no stage did he offer her any opportunity to consider the agreement or documentation in her own time or to seek advice, let alone independent legal advice. It is also noteworthy that the defendant made the threats of reporting her to the police and exposing her misdeeds to her Namibian family despite the fact that the plaintiff had admitted her wrongdoing and was prepared to sign an agreement compensating all other interested parties for what they may have lost. On a conspectus of all the evidence I accept the plaintiff's evidence of the threats which the defendant made at the Spur meeting if she did not agree to his proposal that she forfeit a large portion of her share of the proceeds of the plot's sale.

[85] The manner in which the defendant had the plaintiff open a money market account over which he had full delegated authority likewise bears testimony to his modus operandi. He picked up the plaintiff at her home without any prior notification of the purpose of the trip to Milnerton. The very fact that the account was opened at a branch removed from where the plaintiff normally banked suggests that the defendant wanted as little independent scrutiny of this transaction as possible.

[86] Taking all these factors into account I can reach no other conclusion other than the defendant used his influence over the plaintiff unscrupulously or unconscionably to prevail upon her to sign the plot sale agreement, afford him a general power of attorney and, for that matter, to open a bank account over which he had complete control and which he thereupon acted.

[87] The requirement that the transaction or agreement which was concluded is prejudicial is clearly satisfied inasmuch as pursuant to the agreement the plaintiff forfeited 40% of her entitlement to the proceeds of the sale of the Brakwater plot, a sum well in excess of R1mil, and handed to the defendant complete control over even the limited monies due to her under the agreement.

[88] The final requirement for the successful invocation of undue influence is that in the exercising of her normal free will the plaintiff would not have entered into the transaction. Although the plaintiff was financially naïve she was certainly astute to how much she was due from the proceeds of the sale of the plot and was intent upon obtaining her share. Given the clear evidence that the plaintiff was already unhappy with the terms of Hartmut's will there is no conceivable reason why she would be prepared to forfeit a large share of her portion of the sale proceeds to Chantal, the major beneficiary to Hartmut's estate. In the circumstances the only conclusion I can reach is that had the plaintiff exercised her free will and had not been unduly influenced by the defendant as described above, she would not have concluded the agreement.

[89] When the evidence is looked at holistically it is clear that the defendant was fixated on winding up the deceased's estate in such a manner as to obtain the maximum possible benefit for his wife, Chantal, the major beneficiary to Hartmut's will (and thus

indirectly himself). In doing so he had his own fixed views of how best to wind up the estate. When his views were not accepted without question or when they were challenged, such as when the minor heiresses expressed reservations about selling the BOCO business on an instalment sale basis, he reacted very badly. So too when Tammy Coetzee questioned the manner in which the defendant drew the liquidation and distribution account, how he apportioned expenses to the heiresses and the withdrawals he made from the estate account this elicited an angry and hostile reaction from him.

[90] The defendant did discover material irregularities in the manner in which the plaintiff misappropriated, sold off or concealed valuable assets in the estate but even after recovering these assets or making the appropriate financial adjustments so that the other heiresses did not suffer financially, the defendant appears to have become fixated about obtaining further redress on behalf of Chantal. In so doing he impermissibly drew the plot sale into the winding up of the deceased estate by using the plaintiff's entitlement to a half share thereof as a fund which, between himself and Chantal, could be used to redistribute the plaintiff's share to Chantal in some form of misguided and misconceived redressing of damage. In so doing the defendant used all his business skills and guile to draw up agreements and documentation giving a legal veneer to what he was doing and bulldozing the plaintiff into parting with more than R1mil of her share of the proceeds. Before he could do so he swept aside any dissenting or critical voices such as Tammy Coetzee, even possibly persuading himself that what he was doing was a proper exercise of his duty as an executor. His plans were carefully thought out and executed and given legal cover through his use of his attorney's services.

[91] It follows then that the plaintiff's main claim must succeed on the alternative basis of undue influence with the result that it is unnecessary to consider whether the agreement and power of attorney can be set aside on the basis of duress. The agreement concluded on 7 September 2011 falls to be set aside and for good measure, the power of attorney.

[92] However, what must still be determined is the sum of money payable by the defendant to the plaintiff pursuant to the setting aside of the agreement. The amount claimed is the sum of R1 843 360.19 which represents 50% of the nett proceeds of the sale after the deductions of various expenses and commission. This appears from the statement of account issued by Mrs Geiger's Windhoek attorneys. However, that self-same account and banking records reveal that prior to the final payments to the plaintiff and Chantal an amount of R800 000.00 (or N$) had already been paid to Chantal by the purchaser. The result was that when the final payments were made to the plaintiff and Chantal on 29 November 2011 each was credited with a sum of R1 443 360.19 and this was the sum of money deposited in the money market account the defendant had her open at FNB Milnerton.

[93] The defendant's evidence was that his wife had arranged the advance payments to herself and received these directly. There are indications that in so doing Chantal gave out to Mrs Geiger's attorneys that this sum was to be split between her and the plaintiff which of course would accord with Mrs Geiger's overall instruction that the proceeds of the sale be split equally between the two sisters. This was not done, however, and the plaintiff received no part of the advance payment at any stage. The defendant's evidence was, furthermore, that these sums were paid directly into Chantal's bank account and this

was confirmed by banking records. In the circumstances, although it may well be that the defendant, as ever, lay behind these machinations this remains unproved and the sum of R800 000.00 must be treated as having gone directly to the late Chantal Booysen.

[94] At an early stage in argument the plaintiff's counsel was asked to justify why the defendant should be ordered to repay the plaintiff her half share of the R800 000.00 and should Chantal Booysen or the defendant in his capacity as executor of his late wife's estate not have been sued for payment of this sum. Various arguments were raised including the fact that for several years, and despite being nominated in his late wife's will as executor, the defendant had not secured a formal appointment as such. This may well have been the case but it did not preclude the plaintiff from pursuing other remedies in regard to this default on the part of the defendant.

[95] In the circumstances it appears to me that the maximum claim which the plaintiff has against the defendant is the sum of R1 443 360.19, being the amount being paid into her FNB money market account opened at the Milnerton branch and over which the defendant had full control. As has been noted earlier the defendant withdrew R1 432 500.00 thereof within two days. From this amount, it appears, must be deducted the so-called advances and payments which he made to the plaintiff between 10 October 2010 and 27 July 2012 and which he recorded in a schedule which features in one of the trial bundles before Court. These amounts total R340 361.23 and were, save for one item, admitted by the plaintiff as having been received by her.

[96] There were some disputes at some stage as to whether these amounts were advanced by the defendant based on the fact that the source was indicated in the schedule as being from CP Booysen. The defendant however explained that this was an incorrect

notation and his evidence that he made these advances to the plaintiff out of the R740 000.00 which he regarded himself as holding on her behalf cannot be seriously disputed. In the result it appears to me that any claim for monies owing by the defendant to the plaintiff must be reduced by these advances irrespective furthermore of the fact that a relatively small portion of these advances were made in the month preceding the conclusion of the agreement. One item which was disputed was an amount of R550.00 described as 'M Kruger fee for land dispute'. The defendant was unable to justify this as being an advance to or on behalf of the plaintiff and it must be deducted from the advances bringing the total down to R339 811.23 with the result that the capital sum payable by the defendant is R1 092 688.77 (R1 432 500.00 less R340 361.23 plus R550.00).

[97] It should go without saying that it is irrelevant what the defendant did with these monies. Whether he paid them to Chantal Booysen or used the funds himself is besides the point. He had control over the monies which were due to and payable to the plaintiff and he wrongfully and unlawfully disbursed or failed to repay them.

[98] This raises, tangentially, the pleas of non-joinder and misjoinder raised by the defendant. These defences appear to have been abandoned by the time that the defendant filed his amended plea on 5 August 2020. In his special plea of misjoinder the defendant alleged that he should have been joined in his capacity as executor given that the agreement between him and the plaintiff was concluded by him in the latter capacity. This disregards the fact that it has at all times been common cause that the agreement was concluded between the parties in their personal capacities notwithstanding the description of the defendant's capacity in the agreement as executor in Hartmut's estate.

[99] In his second special plea the defendant alleged that there had been non-joinder inasmuch as he was not joined in his capacity as executor of his late wife's estate. This special plea only has merit to the extent that any monies should have been claimed from his late wife's estate. As is set out above, in the absence of the defendant having being cited in his capacity as executor of his late wife's estate, no relief can be granted against him in that capacity and none has. In regard to the balance of the monies, as mentioned the fact that the defendant may have transferred the bulk of the money deposited into the plaintiff's money market account to his wife is irrelevant.

[100] It follows also that the defendant is liable for the interest which is claimed on the capital sum. Interest was first claimed from 29 November 2011 being the date on which the withdrawals were made by the defendant.

Costs

[101] The plaintiff sought costs on an attorney and client scale.

[102] A Court may award attorney and client costs against an unsuccessful party where his conduct has been unworthy, reprehensible or blameworthy or where he has been actuated by malice or has been guilty of grave misconduct either in the transaction under enquiry or in the conduct of the case[4]. In the present matter the evidence revealed that the defendant misused his office as executor of his late father-in-law's estate and, for the benefit of his wife and himself, blurred the line between property falling into that estate and that which did not. He used his familial relationship with the plaintiff, his skill, experience and financial expertise and various threats to manipulate the plaintiff into concluding an agreement which was extremely prejudicial to her but favourable to

[4] The Law of Costs, AC Cilliers, Butterworths paragraph 4.50.

defendant's wife and himself. That agreement has now been set aside but even on its own terms he undertook to pay to the plaintiff the sum of R740 000.00 albeit less advances. On his own version some R400 000.00 of the R740 000.00 has been owing to the plaintiff since 27 July 2012. Notwithstanding this fact and prolonged litigation which commenced as long ago as July 2013, the defendant has yet to pay one cent of this amount to the plaintiff. Nor has he at any stage tendered to pay interest on the sum. Instead he has withheld this sum in attempt to force a settlement from the plaintiff of unrelated claims by his late wife's estate, claims which were never formally instituted. The defendant is an experienced businessman with accounting experience and skills. He used these skills to deprive the plaintiff of monies owing to her and which she appeared to be in sore need of over an extended period of time, now approaching nine years. To the last the defendant appeared to take limited responsibility for his conduct focussing instead on shifting blame to any other person involved and, ultimately, on poor legal advice. As I have found, the defendant was not a credible witness but an evasive one who changed his evidence to suit the circumstances in which he found himself.

[103] In my view the defendant's conduct can properly be described as unworthy, reprehensible or blameworthy to the extent where it merits an attorney and client costs order being made against him. I can see no reason why the plaintiff should find herself out of pocket for her legal expenses in circumstances where she has already had to fight a long and arduous legal battle to recover but part of what was due to her. The tender made by the plaintiff at an early stage in the proceedings does not assist him as far as costs are concerned. It was initially an unconditional tender to pay the plaintiff the sum of R399 638.77 but the defendant never gave effect to it. Not long after making that tender it was amended to constitute a conditional tender i.e. in full and final settlement of all of the

plaintiff's claims. The plaintiff has enjoyed success far beyond the amount of the tender and it therefore falls to be disregarded as far as the making of a costs order is concerned.

[104] In the result and for these reasons the following order is made:

1. The agreement concluded between the plaintiff and the defendant on 7 September 2011 is set aside as well as the power of attorney executed by the plaintiff in the defendant's favour on that date;
2. The defendant is ordered to make payment to the plaintiff in the amount of R1 092 688.77 with interest at the prescribed rate from 29 November 2011 to date of payment;
3. The plaintiff is awarded costs on the attorney and client scale.

BOZALEK J

For the Plaintiff	Adv M McChesney
As Instructed by	VGV Attorneys
For the Defendant	Adv A Newton
As Instructed by	Brink De Beer Potgieter
and, later, the defendant in person	